No. A163655

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

HECTOR CASTELLANOS, ET AL.,

Petitioners and Respondents,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants and Respondents,

PROTECT APP-BASED DRIVERS AND SERVICES, ET AL.,

Intervenors and Appellants.

On Appeal from the Superior Court of Alameda County
Case No. RG21088725
The Honorable Frank Roesch, Judge

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF CALIFORNIA CONSTITUTION CENTER SUPPORTING DEFENDANTS AND RESPONDENTS

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Under California Rules of Court rule 8.520(f), California Constitution Center requests leave to file the attached *amicus curiae* brief in support of defendants and respondents State of California, et al. *Amicus* certifies under Rule of Court 8.520(f)(4) that no party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief.

Amicus California Constitution Center is a nonpartisan academic research center wholly owned and operated by the University of California, Berkeley, School of Law. It is the first and only center at any law school devoted exclusively to studying California's constitution and high court.

The proposed brief will assist the Court by detailing the historical evolution of the workers' compensation system in California; the proposed brief does so by presenting original research into the contemporary commentary on that evolution. That research provides evidence for the interpretation argument advanced by *amicus* here: the constitutional amendments at issue on this appeal were intended only to prevent courts from using the *Lochner* doctrine to invalidate the industrial insurance system. The constitutional assignment of plenary legislative power on a subject includes, or at least does not exclude, the electorate's power to enact laws on that subject with its initiative powers.

Amicus is interested in this case because it raises an important issue of California constitutional law. The electorate's initiative lawmaking power is a core

element of California's popular-sovereignty-based government. Here, for perhaps the first time, a court has ruled that a subject matter is withheld from the voters, and that the legislature has sole power to act on that subject. That ruling conflicts with the fundamental concept that all political power resides in California's people, and it is contrary to the initiative's purpose as a means for the voters to enact their own laws and override the legislature when they wish. In California's initiative system no subject matter is off-limits to the voters. Accordingly, *amicus* argues for a ruling that validates the initiative power and reverses the trial court's erroneous decision.

Respectfully submitted,

Dated: June 1, 2022

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AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

California's electorate and legislature have coextensive plenary legislating power. The initiative amendments that created and modified the workers' compensation system were not intended to remove that subject from the initiative. Instead, the historical evidence shows that those measures served one specific purpose: preventing the *Lochner*-era courts from invalidating the new industrial insurance system by providing express constitutional permission for industrial accident legislation. Assigning *plenary* legislative power was not intended as *exclusive*, and because the initiative and legislative powers remain coextensive both the legislature and the electorate may act on this subject.

That conclusion is consistent with the foundational principle of California's government that all political power is inherent in the people.[1] Excluding workers' compensation (or any subject) would partly invalidate the electorate's lawmaking power by creating a new subject matter exemption from the initiative. That would be error: no California court has ever excluded a subject from the initiative.[2] It is anomalous to hold only workers' compensation apart from a power that can alter

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[1] Cal. Const., art. II, § 1; *McClatchy Newspapers v. Super. Ct.* (1988) 44 Cal.3d 1162, 1184; *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.

[2] "The only limitations on the use of the initiative are that an initiative measure may not embrace more than one subject, name any individual to office or appoint any private corporation to perform any function or have any power or duty." *Carlson v. Cory* (1983) 139 Cal.App.3d 724, 730.

and reform every other aspect of California government and substantive law.

ARGUMENT

I. The electorate and the legislature share plenary lawmaking power.

The California constitution is a limitation on the otherwise-complete legislating power of a sovereign state government; unlike the federal constitution, state constitutions do not grant limited powers.[3] California's constitution vests "[t]he legislative power of this State . . . in the California Legislature which consists of the Senate and Assembly . . . ."[4] The legislative power vested by the state constitution is plenary.[5] Consequently, "it is well established that the California Legislature possesses plenary legislative authority except as specifically limited by the California Constitution."[6]

From that principle two conclusions follow. One is that any grants of plenary power to the legislature are superfluous — the legislature can legislate on any subject even if the state constitution is silent on it.[7] The other conclusion is that the

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[3] *Marine Forests Soc'y v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 29; *City & Cty. of San Francisco v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 103, 113 (courts do not look to the state constitution to determine whether the legislature is authorized to act, but only to see if it is prohibited, so unless restrained by constitutional provision the legislature is vested with the state's whole legislative power).

[4] Cal. Const. art. IV, § 1; *Howard Jarvis Taxpayers Ass'n v. Padilla* (2016) 62 Cal.4th 486, 497–498.

[5] *Cal. Redev. Ass'n v. Matosantos* (2011) 53 Cal.4th 231, 254.

[6] *Marine Forests Soc'y*, 36 Cal.4th at 31.

[7] *Cal. Redev. Ass'n*, 53 Cal.4th at 254 (in exercising its core power to enact laws the legislature may "pass any act it pleases" subject only to the limits elsewhere in the

initiative is one such constitutional limit on the legislature's power. The entire law-making authority of the state is vested in the legislature — except for the electorate's initiative and referendum powers.[8] That is so because the initiative power is both a limit on the legislature's power, and a means for imposing new limits on the legislature.

The initiative power restricts the legislature because it reserves a measure of the state's legislating powers to the electorate — powers that otherwise would reside in the legislature.[9] "Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them."[10] By adopting the initiative and referendum the voters "have simply withdrawn from the legislative body, and reserved to themselves the right to exercise a part of their inherent legislative power."[11]

And the initiative power was intended to be (and is often used to) restrict the

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state or federal constitutions).

[8] *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691 ("the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature"); accord *Pac. Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180; *City & Cty. of San Francisco*, 22 Cal.3d at 113.

[9] Cal. Const., art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.").

[10] *Associated Home Builders*, 18 Cal.3d at 591.

[11] *Dwyer v. City Council of Berkeley* (1927) 200 Cal. 505, 513.

legislature's powers to act on particular subjects because thereafter the legislature must ask for voter approval to modify the electorate's acts.[12] So although the lawmaking powers of the legislature and the electorate are often described as "coextensive," when they conflict the electorate's power prevails.[13]

These conclusions — that the initiative restricts the legislature and the electorate's word is final — resolve the apparent conflict here between the legislature's power and the initiative. The solution lies in their coextensiveness: no constitutional conflict exists because both actors hold equivalent plenary powers, and the electorate may make the final policy decision. The legislature may exercise its powers in the workers compensation arena, unless the voters also act on that subject.[14] As a legislative body, the electorate may modify or abolish the acts passed

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[12] Cal. Const. art. II, § 10, subd. (c); *Prof. Engineers in Cal. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1046 n.10 (as part of their initiative power voters determine whether the legislature can amend or repeal a particular initiative statute); *Howard Jarvis Taxpayers Ass'n*, 62 Cal.4th at 515 (provision permitting legislative amendments to initiatives only after securing electorate approval is not a grant of authority but a limitation on legislative power "where otherwise it would have been at liberty to act without voter input."). By contrast, the legislature has express constitutional power to amend or repeal a referendum statute. Cal. Const., art. II, § 10(c); *Cty. of Kern v. Alta Sierra Holistic Exchange Service* (2020) 46 Cal.App.5th 82, 91.

[13] *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675 ("the power of the people [to enact statutes] through the statutory initiative is coextensive with the power of the Legislature."); *Carlson*, 139 Cal.App.3d at 728 (this reservation of power by the electorate is, "in the sense that it gives them the final legislative word, a limitation upon the power of the Legislature.").

[14] *Methodist Hosp. of Sacramento*, 5 Cal.3d at 691.

by itself or its predecessors.[15] So when the electorate acts, that is the final word.

Both the coextensive and the superior nature of the initiative apply here to make Proposition 22 a proper exercise of the electorate's power. Coextensive in this context means that anything the legislature can do, so can the electorate. The state's legislative power is shared by two actors: the legislature and the electorate. Thus, if the legislature has the constitutional power to act on a subject, so does the electorate. But if the policy choices by the legislature and the electorate conflict, the electorate prevails because the initiative is superior. This means that anywhere the legislature may legislate, it is always limited by the initiative. The result is that the electorate's limiting power applies to workers' compensation just as it does to every other legislative lawmaking power — and when an electorate act conflicts with a legislative act on that subject, the electorate wins. The legislature's general lawmaking power (and its specific power here) may both be plenary; so too is the electorate's lawmaking power, and it can always override the legislature.

The overlap between the respective powers of the legislature and the electorate is not exact. Each has some distinct non-lawmaking abilities. For example, the legislature has an appointment power that the electorate lacks because its initiative power can only be used to enact laws.[16] The legislature can investigate;

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[15] *Cal. Redev. Ass'n*, 53 Cal.4th at 255 (a corollary of the legislative power to make new laws is the power to abrogate existing ones).

[16] *Am. Fed'n of Labor v. Eu* (1984) 36 Cal.3d 687, 694.

the electorate cannot.[17] The legislature has express constitutional power to override a gubernatorial veto; the initiative cannot be used to override a veto, and in any event there is no veto for initiative acts.[18] And because the initiative has its own procedural rules, procedural constraints on the legislature are presumed not to apply to the electorate.[19]

But when it comes to lawmaking anything one can do the other can too. Both can do anything that can be done with the lawmaking power. Both can enact statutes and propose amendments. Both can create new state government entities.[20] The shared lawmaking power exists because the initiative was meant to empower the voters to police the legislature.[21] When acting through its initiative power the

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[17] *Howard Jarvis*, 62 Cal.4th at 516.

[18] *Perry v. Brown* (2011) 52 Cal.4th 1116, 11126; see *Taxpayers To Limit Campaign Spending v. Fair Pol. Practices Com*. (1990) 51 Cal.3d 744, 766 (noting that 1911 ballot argument said that "No initiative measure is subject to the governor's veto").

[19] *Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 942.

[20] For example, the legislature created the California Law Revision Commission. Government Code § 8280. The voters created the Coastal Commission in 1972 with initiative constitutional amendment Proposition 20. See *Marine Forests Soc'y*, 36 Cal.4th at 18. The voters created a redistricting commission with two initiative measures: 2008 Proposition 11 and 2010 Proposition 20. See *Vandermost v. Bowen* (2012) 53 Cal.4th 421.

[21] Thomas E. Cronin, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (Harvard University Press 1999) at 1 ("the initiative, referendum, and recall [were] a reaction to corrupt and unresponsive state legislatures throughout the country"); CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES (Ohio State University Press 1998, Bowler, Donovan & Tolbert eds.) at 2 ("In California, Progressives launched the direct democracy movement to break Southern Pacific Railroad's hold on the state legislature . . . ."). See, e.g., *Vandermost*, 53 Cal.4th at 438 (discussing the electorate's acts with 2008 Proposition 11 and 2010 Proposition 20 to remove the

electorate is "a constitutionally empowered legislative entity."[22] The initiative power was originally self-executing by its own terms, and it remains so today even in the absence of facilitating legislation.[23] Consequently, when the electorate overrides some legislative act, there is no argument that this unconstitutionally invades the legislature's powers — substituting the electorate's will for the legislature's is the initiative's purpose.[24]

Nor is there any complaint about the initiative reducing the legislature's powers, because it retains full powers to legislate on the matter both outside and as permitted by the initiative.[25] Even if an initiative limits the legislature's power on a matter, it must still be given the effect the voters intended it to have.[26] Here, Proposition 22 affects the legislature's power no more than any initiative act does. It is an express override of a particular legislative act (2019 Assembly Bill 5), which

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power of redistricting from the legislature and give it to the newly created Citizens Redistricting Commission).

[22] *Prof'l Engineers in Cal. Gov't*, 40 Cal.4th at 1045.

[23] *Geiger v. Bd. of Supervisors* (1957) 48 Cal.2d 832, 837; *Bauer–Schweitzer Malting Co. v. City & Cty. of San Francisco* (1973) 8 Cal.3d 942, 946; *Rose v. State of Cal.* (1942) 19 Cal.2d 713, 720.

[24] Key & Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA (University of California Press 1939) at 442–43 (Progressive reformers' "immediate objective was to break the monopoly of lawmaking authority held by the representative body" and initiatives would be considered "by the ultimate sovereign, the electorate.").

[25] *People v. Super. Ct. (Pearson)* (2010) 48 Cal.4th 564, 568 & 571 (legislature remains free to touch on the same subject matter as an initiative, to address a related but distinct area, a matter that an initiative measure does not specifically authorize or prohibit, or even to augment an initiative's provisions).

[26] *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1255–56.

the electorate may do either affirmatively with an initiative or by vetoing a legislative act by referendum.[27] The voters can even negate a governor's action by referendum.[28] And the voters sometimes overrule judicial decisions.[29]

To bar the electorate from substituting its policy judgment for the legislature's on worker classification is to say that the legislature has exclusive power over that subject, which would establish a subject matter exclusion from the initiative. That would be error — there are no express constitutional subject-matter carve-outs for the initiative; the intent evidence discussed below is to the contrary; and no court has ever barred the voters from legislating on a subject.

Instead, California courts consistently describe the initiative power as

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[27] See *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1111 (explaining that the initiative power allows voters to propose new measures, while the referendum power allows voters to weigh in on laws that have already been passed by their elected representatives). For a referendum example, in the November 2020 general election the "no" vote on Proposition 25 (Replace Cash Bail with Risk Assessments Referendum) prevailed and repealed Senate Bill 10.

[28] See, e.g., *Stand Up for California! v. State* (2021) 64 Cal.App.5th 197, 214, review denied (Sept. 1, 2021) (discussing 2014 Proposition 48, holding that a referendum is an appropriate mechanism for annulling a governor's concurrence).

[29] Proposition 8 (2008) amended the state constitution to restrict marriage to a man and a woman and overruled the California Supreme Court's decision that invalidated a statutory ban on same sex marriage under the state constitution. See *In re Marriage Cases* (2008) 43 Cal.4th 757. In 1972 Proposition 17 reinstated capital punishment after the state high court declared the death penalty unconstitutional under the state constitution. See *People v. Anderson* (1972) 6 Cal.3d 628 and *People v. Frierson* (1979) 25 Cal.3d 142. And in 1979 Proposition 1 barred court-ordered busing except when required by federal law, overturning the state high court's decision that the state constitution required busing to alleviate school segregation. See *Crawford v. Bd. of Educ.* (1976) 17 Cal.3d 280.

"broad."[30] Other than the ban on sinecures in article II, section 12, the initiative applies to everything.[31] The proponents "are captains of the ship when it comes to deciding which provisions to take on board."[32] The California Supreme Court searched in vain for something that exempted any section of the state constitution from the initiative process.[33] Even a "plenary" power constitutionally assigned to the legislature is not exempt.[34] The plenary legislative power at issue here should be no different: it is shared with the electorate.

II. The electorate intended to avoid *Lochner*, not to limit its own powers.

The term *plenary* here was intended only to remove doubts about the constitutionality of the workers' compensation system; its drafters were unconcerned with the initiative. Article XIV, section 4 begins:

> The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce

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[30] *Eu*, 54 Cal.3d at 501; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241.

[31] "The only limitations on the use of the initiative are that an initiative measure may not embrace more than one subject, name any individual to office or appoint any private corporation to perform any function or have any power or duty." *Carlson*, 139 Cal.App.3d at 730.

[32] *Brown v. Super. Ct.* (2016) 63 Cal.4th 335, 351.

[33] *Strauss v. Horton* (2009) 46 Cal.4th 364, 469 ("When we examine the entirety of the California Constitution, however, we find nothing that exempts article I, section 1—or any other section of the Constitution—from the amendment process set forth in article XVIII.") (abrogated by *Obergefell v. Hodges* (2015) 576 U.S. 644).

[34] *Indep. Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020, 1043 (referencing the long-standing California decisions establishing that references in the California constitution to the legislature's authority to enact specified legislation generally are interpreted to include the electorate's reserved right to legislate through the initiative power).

> a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability . . . incurred or sustained by . . . said workers in the course of their employment, irrespective of the fault of any party.

There was no expressed voter intent to change the initiative power, and constitutional language must be read according to its expressed rather than its possible intended meaning.[35] Accordingly, the California Supreme Court gave that provision a narrow meaning: "the ballot arguments supporting this constitutional provision when the measure was adopted in 1918 make it clear that the purpose of the provision was simply to remove any doubt as to the constitutionality of the existing workers' compensation legislation, and not to erect any new restrictions on the exercise of legislative power."[36] Neither was the measure intended to impose any new restrictions on the initiative power. The historical evidence discussed below shows a tight focus on avoiding judicial invalidation, and provides no support for cabining the initiative power.

A. The history explains the bare text.

The historical context here shows that the electorate's specific intent for granting express constitutional authority for workers' compensation laws was to

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[35] *Los Angeles Metro. Transit Auth. v. Pub. Util. Comm'n* (1963) 59 Cal.2d 863, 869.

[36] *City & Cty. of San Francisco v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 103, 113–114; accord *Mathews v. Workmen's Comp. Appeals Bd*. (1972) 6 Cal.3d 719, 733 (1918 Proposition 23 "was intended to remove all doubts as to the constitutionality of then existing workmen's compensation laws").

prevent courts from using the *Lochner* doctrine to overturn those laws.[37] When interpreting voter initiatives California courts apply the same principles that govern statutory construction: voter intent governs, and to determine that intent courts first examine the text's ordinary meaning.[38] Where, as here, an initiative term is neither self-explanatory nor defined in the text, courts examine the legislative history and ballot pamphlet arguments for decisive evidence of the electorate's intent.[39] Indeed, when considering the ballot arguments for the 1911 Proposition 10 at issue here, the California Supreme Court held that "It is to be assumed that the [ballot] arguments prepared by the author of the amendment state fairly and with reasonable fullness the meaning of the amendment and the effect it is expected to produce."[40]

That historical evidence shows that "the purpose of the provision was simply to remove any doubt as to the constitutionality of the existing workers'

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[37] *O.G. v. Super. Ct.* (2021) 11 Cal.5th 82, 91 (evidence of purpose may be drawn from many sources, including the historical context of the amendment and the ballot arguments favoring the measure).

[38] *People v. Raybon* (2021) 11 Cal.5th 1056, 1065; *Delaney v. Super. Ct.* (1990) 50 Cal.3d 785, 798 ("In the case of a constitutional provision enacted by the voters, their intent governs") (citations and quotations omitted).

[39] *Raybon*, 11 Cal.5th at 1065 (courts may refer to indicia of voter intent "particularly the analyses and arguments contained in the official ballot pamphlet"); *Eu*, 54 Cal.3d at 504; *Avila v. Citrus Cmty. Coll. Dist*. (2006) 38 Cal.4th 148, 160 (paramount goal of statutory interpretation is to ascertain the drafter's intent so as to effectuate the law's purpose); *White v. Davis* (1975) 13 Cal.3d 757, 775 (the ballot statement "represents, in essence, the only 'legislative history' of the constitutional amendment available to us."); *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 16–18.

[40] *Yosemite Lumber Co. v. Industrial Acc. Commission of Cal*. (1922) 187 Cal. 774, 781–82.

compensation legislation . . . ."[41] And the historical context explains the anomaly of a *grant* of legislative power in a document that primarily *limits* powers.[42] Given that the legislature may do all things not constitutionally prohibited, it seems odd that such a doubt could exist — "[e]ven without such specific authorization, the Legislature possesses the authority . . . to adopt appropriate legislative measures for the protection of employees and their dependents."[43]

That doubt existed because courts at the time often used the *Lochner* economic due process doctrine to invalidate attempts to regulate working conditions.[44] The sole aim of Proposition 10 in 1911 was to prevent a court from using the absence of express authorization to overturn the workers' compensation legislation — "to remove any doubt as to" its constitutionality.[45] There was no intent to limit the initiative power by excluding voter action.

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[41] *City and Cty. of San Francisco v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 103, 113–114. The same is true for 1918 Proposition 23: it "was intended to remove all doubts as to the constitutionality of then existing workmen's compensation laws." *Mathews v. Workmen's Comp. Appeals Bd*. (1972) 6 Cal.3d 719, 733.

[42] *Fitts v. Super. Ct.* (1936) 6 Cal.2d 230, 234 (California courts do not look to the state constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited); *People v. Coleman* (1854) 4 Cal. 46, 49 (California constitution is not viewed as a grant of power, but rather as a restriction on the legislature's powers, so the legislature can exercise all powers not forbidden).

[43] *City & Cty. of San Francisco*, 22 Cal.3d at 114.

[44] See *Bixby v. Pierno* (1971) 4 Cal.3d 130, 142 (explaining the judicial evolution away from 1930s *Lochner*-style economic due process doctrine).

[45] *Ibid*.

B. The historical context shows the threat *Lochner* posed to workers' compensation reforms.

Workers' compensation in California arose in the 1910s, a period characterized by two competing dynamics: Progressive politics and the *Lochner* doctrine. Governor Hiram Johnson was the Progressive political movement avatar in California.[46] Johnson wanted to empower the legislature to enact a system of industrial accident compensation.[47] He and his allies did this in a series of three legislatively proposed constitutional amendments in 1911, 1914, and 1918. Johnson and the Progressives felt that instituting this new policy required constitutional changes because they feared that without them courts would strike down a workers compensation system.

That concern existed because the 1910s was in the *Lochner* era, when courts used theories of economic due process, property rights, and liberty of contract to strike down many workplace reforms.[48] Johnson and the Progressives saw this in

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[46] Melendy & Gilbert, THE GOVERNORS OF CALIFORNIA FROM PETER H. BURNETT TO EDMUND G. BROWN (Talisman Press 1965) at 308–309.

[47] Franklin Hirchborn, STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1911 (James H. Barry Company 1911) at 42–43 n.55 and 239 n.271.

[48] *Lochner v. New York* (1905) 198 U.S. 45, 53 & 57, holding that a state law barring bakers from working more than 60 hours per week "necessarily interferes with the right of contract between the employer and employees" because the "right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution" and the "right to purchase or to sell labor is part of the liberty protected by this amendment," concluding that there was "no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."

cases concerning compensation systems in other states, and feared that California courts would also exploit the absence of any express state constitutional authority to strike down a compensation system. That concern was well-founded: in this period California courts invalidated a number of working condition reforms on economic due process grounds.[49] The proponents wanted to ensure that the courts could not hold that the legislature lacked constitutional authority to regulate working conditions.

That strategy succeeded partly due to the fact that the U.S. Supreme Court later abandoned *Lochner*.[50] California courts followed suit, and the modern rule instead facilitates regulatory action to address societal problems.[51] Thus, the

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[49] See, e.g., *Ex parte Farb* (1918) 178 Cal. 592, 600 (invalidating on due process grounds statute prohibiting employer from entering into a contract requiring employees to surrender to the employer all tips received for services rendered); *Ex parte Whitwell* (1893) 98 Cal. 73, 85 (invalidating ordinance as unreasonable restriction on constitutional right to engage in a business or occupation). The battle continued after 1918, when in 1919 and 1929 the legislature acted to include the state as a third beneficiary of workers' compensation benefits. In *Yosemite Lumber Co. v. Indus. Accident Comm'n* (1922) 187 Cal. 774, and *Commercial Cas. Ins. Co. v. Indus. Accident Comm'n* (1930) 211 Cal. 210 the California Supreme Court declared the statutes unconstitutional. See *Six Flags, Inc. v. Workers' Comp. Appeals Bd*. (2006) 145 Cal.App.4th 91, 93–94.

[50] The core doctrine in *Lochner* was abandoned in a series of decisions: *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379; *Day-Brite Lighting Inc. v. State of Mo*. (1952) 342 U.S. 421; and *Ferguson v. Skrupa* (1963) 372 U.S. 726.

[51] *Bixby v. Pierno* (1971) 4 Cal.3d 130, 142 ("to permit the Legislature and the executive branch to resolve the economic and social dilemmas of the day, the courts have given less emphasis to outmoded rights of property and to shibboleths of freedom of contract."). Freedom of contract arguments were still being made decades after the Progressive movement ended. See, e.g., *Cal. Drive-In Restaurant Ass'n v. Clark* (1943) 22 Cal.2d 287, 295 (rejecting argument that statute was invalid because it unconstitutionally interfered with the freedom of contract between

Progressive strategy of preempting judicial invalidation with an express clarification of legislative power was an affirmative defense against a doctrine that is now extinct. And the electorate's sole intent was to prevent the courts from invalidating legislative reforms — the voters wanted to *enable* compensation reforms, and it would pervert that intent to bar further reforms by initiative.

C. Workers' compensation evolved to combat judicial reluctance.

California's workers' compensation system evolved in several steps in the 1910s. In 1911 the legislature established the first system with the Roseberry Act; it was seen as flawed because it made providing coverage voluntary for employers. Thus, later in 1911 the voters adopted the legislature's Proposition 10 to replace the voluntary system with a compulsory system.[52] In 1913 the legislature condified that compulsory system with the Boynton Act, which also established the State Compensation Insurance Fund. In 1914 Proposition 44 set a minimum wage. And in 1917 Proposition 23 and the Workman's Compensation Insurance and Safety Act replaced the Boynton Act and created the current system.[53] Nowhere in the process of enacting these amendments were the voters advised that these acts might affect their own initiative power.

This section details the historical evidence showing that these amendments

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employer and employee).

[52] Franklin Hirchborn, STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1911 (James H. Barry Company 1911) at 244.

[53] Stats.1917, ch. 586, §§ 9(b)2(1), 12(a), pp. 836–837, 842–843.

were intended only to remove doubts regarding the constitutionality of the workers' compensation laws. Indeed, the legislature and the voters used the same strategy of aiming amendments at resolving judicial objections with another workers' compensation provision. After the California Supreme Court invalidated a 1919 workers' compensation statute,[54] the voters adopted Proposition 13 in 1972, a legislative constitutional amendment that endorsed legislative power to enact such a statute.[55] The reviewing court held that the 1972 constitutional amendment showed that the legislature recognized that it lacked constitutional authority to legislate on the matter, and so "the Legislature asked the people to amend the California Constitution to designate the state as a beneficiary of workers' compensation benefits."[56] Same strategy, same intent, same result: to overcome judicial objections that legislative power was lacking.

1. The first step: 1911 SCA 32 Proposition 10.

The first workers compensation provision proposed as a 1911 constitutional amendment was meant to fix an anemic existing system. Before the 1911 election, the legislature established California's first compensation system with the Roseberry Act. But complying with the Roseberry Act was optional, so "relatively

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[54] *Yosemite Lumber Co*., 187 Cal. at 783.

[55] *Travelers Ins. Co. v. Workers' Comp. Appeals Bd*. (1982) 138 Cal.App.3d 244, 248.

[56] *Six Flags, Inc. v. Workers' Comp. Appeals Bd*. (2006) 145 Cal.App.4th 91, 98.

few employers chose to become subject to its provision."[57] Proposition 10 in 1911 was intended to allow the legislature to improve that voluntary compensation system by authorizing it to enact a compulsory compensation system, and to forestall judicial concerns about the legislature's constitutional authority to do that. Nothing in the contemporary record indicates any intent to affect the initiative power — which was part of Hiram Johnson's slate of reform proposals in the same October 10, 1911 election as Proposition 10. On the contrary, the ballot argument and contemporary news commentary are clear that avoiding the *Lochner* problem was the sole purpose.

The ballot argument in favor (there was no opposing argument) said that the measure was "intended to empower the legislature to pass laws for the settlement of accident cases on a compulsory compensation scheme . . . ."[58] That authority was necessary because the "present law prohibits any compulsory scheme for compensation for accidents." The argument explains that fears about a mandatory scheme being "construed by courts to be a taking of property 'without due process of law'" based on *Lochner* resulted in the existing law being optional "to avoid this constitutional problem."

Proposition 10 was "intended to remove this constitutional prohibition" and

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[57] Hanna, Cal. Law of Emp. Injuries and Workers' Compensation, Ch. 1, § 1.01[3][b].

[58] These quotations are all from Ballot Pamphlet, 1910 general election, argument for Proposition 10.

to "empower the legislature to enact a compensation law that may be compulsory on all employers." That action, which would nullify judicial objections on *Lochner* economic due process grounds, "is the sole object of the proposed amendment." The point about preventing judicial objection on *Lochner* grounds was made a third time: "This part obviates all objections with respect to due process of law and the taking away of the property of one person for the benefit of another person . . . it will be permissible for the legislature to enact compulsory compensation laws, and administer them without the interference of the courts . . . ." The ballot argument explains that Proposition 10 aimed to preempt judicial questions about legislative authority to correct the defect in the existing law by making it mandatory.

We searched contemporary news accounts for commentary on Proposition 10 and found nothing that suggested any any intent to implicate the initiative power. Instead, the relevant publications uniformly reflect a narrow focus on permitting the state to create a compulsory compensation system. These are listed in date order:

- Describing a contemporary New York law invalidated on *Lochner* grounds: "The workmen's compulsory compensation law . . . was declared unconstitutional by the Court of Appeals today. [¶] The court holds that the act deprives the employer of his property without due process of law."[59]
- Proposition 10 "provides, if passed, that the California Legislature can pass a Compulsory Workmen's Compensation Act. Under our present

[59] Exhibit 1, *Liability Law Void*, Press Democrat March 24, 1911.

Constitution, it is impossible to make any workmen's compensation act compulsory."[60]

- Proposition 10 would "provide that the legislature may create and enforce a liability on the part of all employers to compensate their employees for injury and provide for the settlement of any disputes arising under such contemplated legislation by arbitration, by an industrial accident board or by the courts."[61]

- Describing the existing compensation law: "This voluntary feature of the law saves it from many constitutional objections that are held or presumed to invalidate compulsory compensation laws enacted or proposed in other States."[62]

- Proposition 10 "confers authority upon the legislature to regulate compensation of employees for injuries received in their employment, and is intended to constitutionalize the new employers' liability law and such other legislation amendatory of or germane thereto as may hereafter be enacted."[63]

- "No. 10 on the ballot will allow the passage of laws creating and enforcing liability of employers for compensation of workers for injuries incurred in their employment, irrespective of fault of either party, and also for arbitration. This will enable the people to enact a real employers liability law—to get the genuine article instead of a gold brick."[64]

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[60] Exhibit 2, *Nolan Submits Report*, Organized Labor April 8, 1911. A similar description appears in Exhibit 3, *Report On Labor Measures*, Organized Labor April 29, 1911.

[61] Exhibit 4, San Francisco Call May 15, 1911.

[62] Exhibit 5, *Liability And Compensation Law*, Organized Labor June 24, 1911.

[63] Exhibit 6, *Roseberry's Bill Approved*, Morning Press September 19, 1911.

[64] Exhibit 7, *Socialists and the Amendments*, San Bernardino Sun September 24,

- "This amendment allows the State to provide for compulsory arbitration, or other remedy, for accidents to workers . . . . It is designed on the theory that society as a whole should bear the burden of accident rather than the poor workman or his wife and children."[65]
- "This amendment empowers the Legislature to create and enforce a liability against all employers to compensate employees for injury received in the course of their employment, regardless of the fault of either party. It also permits the Legislature to provide for the settlement of such cases by arbitration or an industrial board."[66]
- "Compensation to workmen for injuries received in their employment, regardless of the fault of either party, may be provided by an act of the Legislature under this amendment."[67]
- "The present law prohibits any compulsory scheme for compensation for accidents out of court by arbitration, industrial accident boards, etc., as it is construed by courts to be a taking of property 'without due process of law.' The recent employers' liability act was made elective to avoid this constitutional objection. The proposed amendment is intended to remove this constitutional prohibition and will empower the legislature to enact a compensation law that may be compulsory on all employers. This is the sole object of the proposed amendment."[68]

1911.

[65] Exhibit 8, Chico Record October 5, 1911.

[66] Exhibit 9, *The 23 Amendments To Be Voted On October 10*, San Jose Mercury News October 5, 1911.

[67] Exhibit 10, Feather River Bulletin October 5, 1911.

[68] Exhibit 11, Santa Barbara Morning Press October 5, 1911 (quoting Senator Roseberry).

- Arguing against Proposition 10: "While its purpose is highly laudable, so far as providing for the compensation of employees who are injured during the course of employment, it will not remedy matters to confiscate the property of the employer and bestow it upon the employe[e], regardless of the question of fault. I have very grave doubt whether the amendment itself, if adopted, would stand the test of constitutionality."[69]

- "No. 10. Gives the legislature power to enact a law that will allow workmen to recover compensation for damages on account of personal injuries, without regard to the fact that either themselves or the employers may have been at fault."[70]

- Proposition 10: "Authorizing a compulsory workmen's compensation law. This allows the state to provide compulsory arbitration; seems to be good for the men who work and we are going to take a chance and . . . VOTE YES."[71]

- Describing Proposition 10: "relating to compensation for industrial accidents, being intended to constitutionalize the Roseberry liability act."[72]

- "Constitutional amendment No. 10 . . . does not now in any way affect the Roseberry liability law as it stands on the statute books. It merely gave the legislature power to make such a law compulsory at some future time . . . ."[73]

These contemporary descriptions identify only the need for constitutional

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[69] Exhibit 12, *How M'Kisick Would Mark The Ballot*, Sacramento Daily Union, October 7, 1911.

[70] Exhibit 13, Press Democrat October 8, 1911.

[71] Exhibit 14, *Here's the Way We're Going to Vote*, Santa Cruz Evening News October 9, 1911.

[72] Exhibit 15, Santa Barbara Morning Press October 11, 1911.

[73] Exhibit 16, *The Roseberry Liability Law At Extra Session of Legislature*, Hanford Sentinel December 14, 1911.

authorization to avoid judicial economic due process objections. We found no references to any intended affect on the initiative power.

Following Proposition 10's adoption the legislature enacted the Workmen's Compensation, Insurance and Safety Act of 1913 (the Boynton Act). The California Supreme Court considered a constitutional challenge to the Boynton Act in *Western Indemnity Co. v. Pillsbury*. As the Progressives feared, the court framed the issue in *Lochner* economic due process terms — but it rejected that argument based on the express constitutional authorization provided by Proposition 10.[74] Describing Proposition 10 as a "grant of power," the court viewed that measure's intent in the same terms as the ballot argument and contemporary commentary: it "was adopted for the purpose of establishing the right of the Legislature to pass laws on the particular subject."[75] A dissenting justice similarly framed the case in *Lochner* terms: "it is violative of the fourteenth amendment of the Constitution of the United States, and therefore void," and noted that Proposition 10 had eliminated "the difficulties with the law arising under the state Constitution . . . by making the law, in effect, a part of the Constitution."[76] Another justice used the *Lochner* frame on

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[74] *W. Indem. Co. v. Pillsbury* (1915) 170 Cal. 686, 692 ("The clauses of the fourteenth amendment guaranteeing 'due process of law' and 'the equal protection of the laws' are, it is alleged, violated by the scheme of legislation embodied in the Boynton Act.") and 701 ("we are satisfied that the statute is not obnoxious to the provisions of the fourteenth amendment.").

[75] *Id.* at 701–702.

[76] *Id.* at 712, 722 (Henshaw, J., dissenting).

rehearing: "this is nothing else than the taking of the employer's property from him without compensation, without consideration, and without process of law, and giving it to another for his private use."[77]

The California Supreme Court's other contemporaneous statements on Proposition 10's intent are the same. In *Western Metal Supply Co. v. Pillsbury* the court again concluded: "That the constitutional amendment was designed to authorize the establishment of the new system cannot be doubted,"[78] because "as is perfectly apparent from its terms" Proposition 10 "was designed to establish the authority of the Legislature to pass laws making the relation of employer and employé subject to a system of rights and liabilities different from those prevailing at common law."[79]

The court again reviewed the ballot arguments for Proposition 10 on an unrelated issue in *Yosemite Lumber Co. v. Indus. Acc. Comm'n of Cal.*[80] Consistent with our argument here, the court refused to add something to the statutory scheme that was not mentioned in the ballot argument: "It cannot be supposed that the author of the amendment, or the Legislature that proposed it, intended to provide for such a scheme as that contained in the act of 1919 by language so illy adapted to suggest the idea as that contained in this section and that the voters should be inveigled into

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[77] *Id.* at 732 (Shaw, J., dubitante).

[78] (1916) 172 Cal. 407, 415.

[79] *Id.* at 414.

[80] (1922) 187 Cal. 774.

voting for it by an argument presented to them with the ballot which does not even mention it."[81]

The ballot argument, contemporary commentary, and subsequent judicial construction of Proposition 10 all refer only to the *Lochner* doctrine. None mentioned any intent to affect the initiative power.

2. The second step: 1914 ACA 90 Proposition 44.

In 1914 the voters adopted Proposition 44, which permitted the legislature to establish a minimum wage: "The legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors . . . . No provision of this constitution shall be construed as a limitation on the authority of the legislature to confer upon any commission now or hereafter created, such power and authority as the legislature may deem requisite to carry out the provisions of this section."

The ballot argument in favor explained that the proposal followed the 1913 creation of the Industrial Welfare Commission, which was investigating whether to set a minimum wage. The argument stated that "this is done to make sure that after the commission's work is done its findings and rulings can not be assailed and made useless by the state courts declaring this act unconstitutional." It closed by noting that a similar Oregon law was being challenged in court, and again tied the voters' intent to the threat of judicial interference: "To be sure that nothing in our state

[81] *Id.* at 782.

constitution will prevent this great act of justice and mercy being done to protect the women of this state, vote 'Yes' on Assembly Constitutional Amendment No. 90."

Neither the argument for, nor the argument against, mentioned the initiative.

3. The third step: 1918 SCA 30 Proposition 23.

In 1917, the legislature passed the Workmen's Compensation Insurance and Safety Act, which substantially revised existing law to address problems that had arisen under the Boynton Act. That same month the legislature advanced Proposition 23, an amendment to article XX section 21 that "duplicated in large measure section 1 of the 1917 act."[82] As with Proposition 10 in 1911, Proposition 23 "was intended to remove all doubts as to the constitutionality of then existing workmen's compensation laws."[83] The voters approved the amendment in the November 1918 election, and the constitutional provision has remained substantively unchanged for over a century.[84]

Proposition 23 was motivated by the same concern as Proposition 10 in 1911

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[82] *Mathews*, 6 Cal.3d at 733.

[83] *Ibid*.

[84] It moved to its current location in article XIV, § 4 in 1976 with no substantive changes relevant here. *Mathews*, 6 Cal.3d at 734. The legislative analysis in the ballot pamphlet for 1976 Proposition 14 (which renumbered article XX, § 21 to its present home in article XIV, § 4) noted that "The meaning of the Constitution will not be affected by either the passage or the rejection of this proposition." "The constitutional enabling provision establishing the workers' compensation scheme has remained the same since 1918 with two exceptions: (1) a 1972 amendment adding the State of California as a beneficiary entitled to workers' compensation benefits in some cases; and (2) a 1974 amendment making the provision gender neutral, changing 'workmen' to 'workers.'" *Six Flags, Inc.*, 145 Cal.App.4th at 95.

and Proposition 44 in 1914: the ballot arguments and contemporary newspaper commentary in 1918 again focus on a fear that *Lochner*-era courts would use economic due process to invalidate the workers compensation scheme because the state constitution did not expressly authorize some of the legislature's enactments. In 1911, the question was whether courts might invalidate legislative actions as lacking constitutional authorization. In 1917, the concern was whether the Industrial Accident Commission was vulnerable to the same attack. So the 1917 legislature proposed Proposition 23 to forestall any judicial doubt about the commission's constitutional authority.

The ballot arguments show that Proposition 23 was intended only to clarify that the legislature could do certain things, not to bar the electorate from taking action on the same subject. Nothing in the contemporary record evidences any intent to limit the initiative power. Just like Propositions 10 and 44 before it, Proposition 23 was unconcerned with the initiative.

The first ballot argument in favor begins by referencing the problems with implementing the Boynton Act after the 1911 amendment, and states an intent to remedy those problems:

> This amendment is a necessary amplification and definition of the constitutional authority vested in the legislature by the amendment to the Constitution adopted October 10, 1911, to enable the enactment of a complete plan of workmen's compensation, which amendment failed to express sanction for the requisite scope of the enactment to make a complete and workable plan.

This shows an intent to make clear that the legislature could take action, if that was

not already clear enough. That intent was later repeated and referenced the continuing fear of judicial invalidation: "The proposed amendment is designed to express full authority for legislation; to sanction, establish and protect the full plan in all essentials where the courts have not already passed on it."

The second argument in favor likewise focused on addressing shortfalls in the 1911 amendment and repeated the need for express authorization for legislative action: "This amendment enlarges the scope of the previous amendment to the constitution, which furnished the authority for our present workmen's compensation act. . . . The amendment of 1911, while providing for compensation, did not give the full and complete sanction for safety legislation or the creation of a state insurance fund." It closed with a third reference to the need for express authorization and fear of judicial invalidation: "Our workmen's compensation act . . . should be put upon a firm constitutional basis, beyond the possibility of being attached on technical grounds or by reason of any questioned want of constitutional authority. [Proposition 23] places beyond any doubt the constitutional authority for a complete workmen's compensation system."

Those were the only two ballot arguments. Both arguments focus on fears of judicial objections and the need to preempt them with express constitutional authority. Neither mentions the initiative or an intent to preclude voter action. This shows that the relevant text of Proposition 23 ("The legislature is hereby expressly vested with plenary power, unlimited by any provision of this constitution") was aimed only at courts looking for a *Lochner* excuse to invalidate the compensation

system. There was no intent to inhibit the initiative power.

The contemporary news commentary all points in this same direction: it shows a narrow concern about authorizing the legislature to establish a workers' compensation system and to shield it from judicial invalidation. These are listed in date order:

- "The purpose the Industrial Accident Commission has in mind is to make sure that the important departments of compensation, insurance and safety shall have full constitutional authority. Absolutely no additional power will be given to the commission by the adoption of this amendment, beyond that already given by the state legislature. The supreme court decided the Workmen's Compensation [Act] constitutional on an appeal from a compensation award, but no opinion has been given on the safety and insurance parts of the act."[85]
- "In 1911 a constitutional amendment was adopted which it was then thought was broad enough to give the legislature all the power necessary for the enactment of the Workmen's Compensation [system] . . . . [¶] But there are still some doubts entertained in certain quarters as to the constitutionality of some of the things that have been incorporated in this act, and it was for the purpose of validating what the legislature has done . . . and so put their powers and obligations beyond the realm of controversy, that this proposed amendment was submitted. [¶] No new grants of power beyond those already exercised and given by the Act have been included in this Amendment, but it is important that the law shall not be subject to further attack upon technical

[85] Exhibit 17, *Urge Vote for Amendment 30, Industrial Accident Commission Would Have Workmen's Compensation Act Departments Given Constitutional Authority*, Hanford Sentinel October 24, 1918 (letter from H.L. White, secretary of the Industrial Accident Commission).

grounds . . . ."[86]

- [Referring to Proposition 23] "A government that possesses in any respect 'plenary' power or power unrestrained by any constitutional limitation is pro tanto an autocratic government, and this in the full and complete significance of the term 'autocratic.' . . . [¶] Three of the proposed amendments directly propose, in regard to certain matters, to free the legislative branch from all constitutional limitations and restrictions whatever."[87]

- [Several amendments including Proposition 23] seek to subvert the fundamental principles of free government by removing or nullifying the most important safeguards of our constitution, and vesting plenary powers in the legislature which would convert a democratic government into an autocracy. . . . [¶] [T]hese amendments, by conferring absolute and plenary power upon the legislature, revokes the constitution itself, and with the avowed purpose of avoiding all question of the constitutionality of the proposed laws. . . . [¶] If these amendments carry, the California state legislature will exercise all the power of a Prussia-controlled bundesrath. Even the courts will be barred from the right to traverse these legislative enactments, and the constitution will be only 'a scrap of paper.'"[88]

- "The supreme court of this state has determined that the industrial accident

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[86] Exhibit 18, *Senate Constitutional Amendment No. 30 (No. 23 on the Ballot)*, Hanford Sentinel October 24, 1918; the same article also appears in Exhibit 19, Los Angeles Herald October 30, 1918.

[87] Exhibit 20, *Sounds Warning Note on Proposed Measure, Unlimited Power Would Be Given Legislature of State If Health Insurance Amendment Is Ratified by Voters at Coming Election, Writer Declares*, San Diego Union and Daily Bee October 27, 1918. This letter from Allen E. Rogers primarily concerns 1918 Proposition 20, a "health insurance" measure that would have authorized the legislature to establish a health insurance system for certain persons; it was rejected.

[88] Exhibit 21, San Diego Union and Daily Bee October 28, 1918, responding to the October 27 Allen E. Rogers letter in Exhibit 20.

commission has jurisdiction in the matter of making awards for compensation, but has never passed on the authority of the industrial accident commission under the provisions of section 21, article 20, of the constitution to administer the state insurance fund or the safety department [¶] . . . Under these circumstances it would be a great misfortune to this state if it should be found that the legislature exceeded its authority in investing the industrial accident commission with these functions. The purpose of the proposed amendment . . . is to give the legislature ample power in this regard and remove any doubt as to the constitutionality of the present workmen's compensation law."[89]

- "Empowers legislature to establish [workmen's compensation] system . . . . Declares Industrial Accident Commission and State Compensation Insurance Fund unaffected hereby, confirming functions vested therein."[90]
- "So-Called Workmen's Compensation. This is a law which would make it dangerous for any person to employ another for any purpose whatever. . . . Nobody is exempt from its drastic provisions. The very language is full of the spirit of intolerance and meddling, and altogether is calculated to cause immediate flight from the state of all who are unable themselves to do everything which they wish done. Vote no and defeat this outrage."[91]
- "This is an amendment to the workmen's compensation laws. This act is for

[89] Exhibit 22, San Diego Union and Daily Bee October 30, 1918, letter from Dewey J. Bischoff, Industrial Accident Commission referee.

[90] Exhibit 23, Hanford Sentinel October 31, 1918; the same also appears in Mariposa Gazette October 12 (Exhibit 24), October 19 (Exhibit 25), October 26 (Exhibit 26), and November 2, 1918 (Exhibit 27) and San Bernardino Sun, October 18, 1918 (Exhibit 28).

[91] Exhibit 29, *More Laws for Voters of California to Consider*, Merced Sun-Star October 31, 1918.

the purpose of correcting defects in the old law."[92]

- "The Industrial Accident Commission issued a statement today urging the adoption of the workmen's compensation amendment No. 23 on the ballot. The measure would remove any doubt of the commission's constitutional authority to operate the state compensation insurance fund and the safety department. It amplifies the amendment adopted in 1911 and has the approval of labor bodies and representative employers, the commission states."[93]

- "This amendment improves and clarifies some uncertain features of the present or the original provision. Naturally, that ought to commend it. Vote YES."[94]

- "The workmen's compensation Amendment No. 23 on the ballot, was drafted by the Industrial Accident commission. The purpose the commission had in mind is to make sure of constitutional authorization to operate the state compensation insurance fund and the safety department . . . . [¶] While the proposed amendment amplifies the workmen's compensation constitutional amendment adopted by a majority of 82, 312 voters on October 10, 1911, it specifically provides for compensation, medical treatment, insurance, safety and methods of adjusting disputes. No ulterior motive can be fairly read into its provisions. The fact is that the present workmen's compensation, insurance and safety act gives the commission exactly the same powers

[92] Exhibit 30, *What You Are to Vote On, Digest of Constitutional Amendments and Initiative Propositions on the Ballot at the Coming Election*, Los Angeles Herald November 1, 1918.

[93] Exhibit 31, *Industrial Board Urges Adoption of New Law*, San Francisco Call November 2, 1918.

[94] Exhibit 32, *Suggestions as to How to Vote on State and Charter Amendments on Ballot at Tuesday's Election*, San Bernardino Sun November 3, 1918.

proposed in No. 23."[95]

These contemporary descriptions all refer to the need for constitutional authorization to counter *Lochner* concerns. We found no references to any intended effect on the initiative power. (We discount the two letters that worried about Prussian autocracy.)

Progressive concerns about judicial resistance to workplace reforms proved correct when the first California Supreme Court decision after Proposition 23's adoption invalidated an award "as being without constitutional sanction."[96] Yet that was *Lochner*'s last gasp: later California Supreme Court decisions interpreting Proposition 23 all hold that "the ballot arguments supporting this constitutional provision when the measure was adopted in 1918 make it clear that the purpose of the provision was simply to remove any doubt as to the constitutionality of the existing workers' compensation legislation, and not to erect any new restrictions on the exercise of legislative power."[97] This shows that the court recognized Proposition 23's narrow purpose: to authorize, not to limit, and otherwise make no

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[95] Exhibit 33, *Amending Workmen's Compensation Act*, Stockton Independent November 5, 1911.

[96] *Worswick Street Paving Co. v. Indus. Accident Comm'n* (1919) 181 Cal. 550, 561–62. The court reviewed and rejected arguments based on "the act of 1917," "section 21, art. 20, of the Constitution, as amended in October, 1911," "whether the legislative power in this regard had been enlarged in this respect by the addition of section 17 1/2, art. 20, to the Constitution, by an amendment adopted November 3, 1914," and the "amendment of section 21, art. 20, of the Constitution, adopted in November, 1918."

[97] *City & Cty. of San Francisco*, 22 Cal.3d at 113–14.

changes. The court noted that the 1917 act and Proposition 23 were parts of a plan: the legislature proposed the amendment to article XX, section 21 in same month that it adopted the 1917 act, and the proposed amendment "duplicated in large measure section 1 of the 1917 act."[98] Accordingly, the court held that Proposition 23 "was intended to remove all doubts as to the constitutionality of then existing workmen's compensation laws."[99]

Court of Appeal decisions sound the same note: "As the legislative history reveals, article XIV, section 4 ratified the Legislature's plenary power to enact a complete system of workers' compensation and removed all doubts regarding the Legislature's authority to act."[100] "The purpose of Article XIV, section 4 was to remove any doubt about the constitutionality of the workers' compensation legislation, not to limit the Legislature's authority to enact additional appropriate

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[98] *Mathews*, 6 Cal.3d at 733; see *Bautista v. State of Cal.* (2011) 201 Cal.App.4th 716, 732 ("The *Mathews* court's reference to then-existing workers' compensation laws confirmed that existing laws were not subject to a constitutional attack for lack of implementing authority.").

[99] *Mathews*, 6 Cal.3d at 733.

[100] *Bautista*, 201 Cal.App.4th at 725. The decision later says that "only the Legislature has constitutional authority to create and enact the workers' compensation system," *id.* at 728, but this is dicta because the case did not concern a voter initiative. The decision restated its core holding twice: "the constitutional amendment intended to remove all doubts as to the constitutionality of the Legislature's authority to enact a workers' compensation system," and "the theme of [Proposition 23] was to ratify the exercise of the Legislature's existing implementing authority and to expand the scope of its implementing authority to include enacting safety legislation." *Id.* at 732.

legislation to protect employees."[101] And although the electorate granted this power to the legislature, in defining its terms the voters also "have thus placed their own limitation upon the power, police or otherwise, which may be used in the particular matter involved."[102] This shows that the appellate courts understand that the constitutional authority here comes from the voters, who have sole power to define and limit the legislature's authority on this subject.

Finally, the California Supreme Court has rejected the idea that article XIV, section 4 necessarily reduced other branch powers. In *Hustedt v. Workers' Comp. Appeals Bd.* the court observed that the original article XX, section 21effected a pro tanto repeal of any preexisting conflicting state constitutional provisions.[103] But that could not apply to the initiative power because it was enacted simultaneously with article XX, section 21 in 1911. That aside, the pro tanto repeal applies only to impediments to legislative action — it does not broadly revise the constitutional powers of other branches.[104] This is because that provision's objectives were clear

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[101] *Costa v. Workers' Comp. Appeals Bd*. (1998) 65 Cal.App.4th 1177, 1185, citing *City & Cty. of San Francisco*, 22 Cal.3d at 113–14.

[102] *People v. Standard Oil Co. of Cal*. (1933) 132 Cal.App. 563, 571.

[103] (1981) 30 Cal.3d 329, 343. See also *Subsequent Injuries Fund v. Indus. Accident Comm'n* (1952) 39 Cal.2d 83, 88 (adopting the constitutional provision concerning workers' compensation effected a repeal pro tanto of state constitutional provisions in conflict therewith and enabled the legislature, so far as not limited by article XX, § 21 itself, to provide a complete, workable scheme unhampered by limitations contained in other provisions of the state constitution).

[104] *Subsequent Injuries Fund*, 39 Cal.2d at 88 (rejecting gift of public money argument); *Pac. Coast Cas. Co. v. Pillsbury* (1915) 171 Cal. 319, 322 (limiting state board power to only disputes arising from the newly-to-be-created liability of

and limited: enacting a complete package of workers' compensation legislation.[105] And even if a pro tanto repeal of conflicting state constitutional provisions operates here, it does so only "insofar as necessary" against any restrictions on the legislature that would bar it from enacting a complete package of workers' compensation legislation.[106] The legislature has done so (enacting a complete system), and the initiative power has only modified that system (as the legislature itself did with AB5). Preventing electorate action on this subject is unnecessary and inconsistent with the electorate's express intent to remove *Lochner* objections based on constitutional silence.

II. The text's plain meaning is consistent with shared legislative and electorate power.

A. The reasonable interpretation here upholds the initiative power.

The only reasonable interpretation of this historical record, so focused on resolving *Lochner* issues, is that the voters intended to preempt economic due process objections by making constitutional authorization express. To the extent any ambiguity exists, in resolving that ambiguity a court's role is "to ascertain the most

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employer to employee for injuries in the course of employment); *W. Indem. Co.*, 170 Cal. at 695 (rejecting right of trial by jury argument).

[105] *Ibid*.

[106] *Hustedt*, 30 Cal.3d at 343; see also *Greener v. Workers' Comp. Appeals Bd*. (1993) 6 Cal.4th 1028, 1038 n.8, citing *Hustedt* (legislative attempt to exempt board from article III, § 3.5 "would be a permissible exercise of the Legislature's plenary power over workers' compensation only if it were necessary to the effectiveness of the system of workers' compensation.").

reasonable interpretation."[107] Three constitutional amendments in an eight-year period all sprang from fear of judicial resistance to compensation reforms. None of the contemporary intent evidence — ballot arguments, commentary, and judicial construction — ever refers to any intended impact on the initiative power. Instead, the evidence at all three points on this path shows that the legislature and the voters were laser-focused on evading *Lochner*. That is the sole reason for including the language at issue here: "anything in this constitution to the contrary notwithstanding" referred to the due process, property, and impairment-of-contracts provisions. The most reasonable interpretation here is that the voters had no intent to affect their initiative powers.

It is reasonable to find voter intent confined to authorizing legislative action on the subject of workers' compensation.[108] Determining the electorate's intent when it adopts an initiative is a matter of statutory interpretation.[109] Courts first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole.[110] If the language is not ambiguous, courts presume the voters intended the apparent meaning; if the language is ambiguous, "courts may consider ballot summaries and

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[107] *People v. Canty* (2004) 32 Cal.4th 1266, 1277.

[108] See *City & Cty. of San Francisco*, *v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d at 103, 113–14; *Mathews*, *v. Workmen's Comp. Appeals Bd*. (1972) 6 Cal.3d at 719, 733. And interpretation must be reasonable. Civ. Code § 3542.

[109] *Pearson*, 48 Cal.4th at 571.

[110] *Ibid*.

arguments in determining the voters' intent and understanding of a ballot measure."[111] There is no evidence in the text, ballot arguments, or history that the same voters who authorized legislative action on workers' compensation also meant to prevent themselves from acting in this sphere.

Courts assume that voters do not intend to restrict their own powers absent clear evidence of such an intent.[112] The text and history of all three amendments are silent on carving out the initiative. Partially repealing the initiative immediately after the same voters created it would be a major act, and the voters do not hide elephants in mouseholes.[113] This is why the California Supreme Court has read other plenary powers to not exclude initiative acts.[114] The same conclusion applies here because there is no clear evidence that the voters intended to diminish their initiative powers. All the secondary intent evidence focuses on an issue unrelated to the initiative, and there is zero evidence of any intent to alter the initiative power.

This Court need not, and should not, frame this case as a conflict between

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[111] *Ibid.*; *People v. Rizo* (2000) 22 Cal.4th 681, 685.

[112] *Cal. Cannabis Coalition*, 3 Cal.5th at 945–46 (adopting a clear statement rule that absent an unambiguous indication of a purpose to constrain the initiative power court will not construe it to impose such limitations, due to the centrality of direct democracy in the California constitution and the presumption liberally construing the initiative power as a paramount structural constitutional element); *Hodges v. Super. Ct.* (1999) 21 Cal.4th 109, 114 ("the voters should get what they enacted, not more and not less").

[113] *Cal. Cannabis Coalition*, 3 Cal.5th at 940, citing *Whitman v. American Trucking Ass'ns, Inc*. (2001) 531 U.S. 457, 468 (enactors do not "hide elephants in mouseholes").

[114] *Indep. Energy Producers Ass'n*, 38 Cal.4th at 1043.

the electorate and the legislature, because doing so violates the fundamental constitutional interpretation principle that courts should not pass on questions of constitutionality unless those questions are unavoidable.[115] This doctrine of constitutional avoidance requires courts to avoid interpretations that create conflict. The trial court viewed the matter as a false binary choice between the electorate and the legislature, and framed the issue as a direct conflict between them. That was error.

The better frame here, which avoids the constitutional conflict and averts the need for invalidation, is that the legislature and the electorate share power over worker classifications. Between the two possible interpretations here (the voters may or may not legislate on this subject) a holding that permits voter action is preferable because it avoids the constitutional issue, while the other holding requires grappling with the constitutional question and barring voter action.[116] Resolving the issue here in the voters' favor is consistent with judicial restraint,[117] with the presumption of constitutionality,[118] and with respect for the electorate's powers.[119]

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[115] *Spector Motor Serv., Inc. v. McLaughlin* (1944) 323 U.S. 101, 105.

[116] *Santa Clara Cty. Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 230.

[117] *Lyng v. Nw. Indian Cemetery Prot. Ass'n* (1988) 485 U.S. 439, 445 (this doctrine promotes judicial restraint and minimizes the potential for friction between the judiciary and the political branches).

[118] *Prof'l Eng'rs in Cal. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1042 (initiative statutes are presumed to be valid).

[119] *Cal. Cannabis Coalition*, 3 Cal.5th at 946 (courts have an obligation to protect and liberally construe the initiative power and to safeguard its exercise).

This frame of shared voter and legislative power promotes harmony, which requires reading the initiative provisions and workers' compensation provisions together, giving both maximum effect.[120] The constitutional provisions that secure legislative and voter power can be harmonized by permitting both actors to regulate this policy issue. The California Supreme Court held that constitutional impediments to legislative action on the workers compensation system were implicitly removed only as necessary to ensure its effectiveness.[121] Excluding the initiative runs counter to that interpretation. Instead, voter action facilitates a more effective system because the voters can make hard policy choices that might stymie the legislature.

An equally fundamental principle of construction is that courts must construe constitutional provisions and initiative statutes to avoid doubts as to their constitutionality whenever it is reasonably possible to do so.[122] So even if the constitutional question is unavoidable, the presumption of constitutionality requires upholding Proposition 22.[123] Recognizing the electorate's power here is reasonable

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[120] *Lonergan*, 27 Cal.3d at 868–69; *Fuentes v. Workers' Comp. Appeals Bd*. (1976) 16 Cal.3d 1, 7.

[121] *Hustedt*, 30 Cal.3d at 343; *Greener*, 6 Cal.4th at 1038 n.8.

[122] *People v. Smith* (1983) 34 Cal.3d 251, 259.

[123] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042 (initiative statutes are presumed to be valid), citing *Eu*, 54 Cal.3d at 501 (all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears).

because an interpretation that gives an enactment effect is preferred to one which makes void.[124] Striking down the proposition partially invalidates the initiative power, which would violate the judicial duty to safeguard the initiative power and to liberally construe its use.[125] The best read here is that both the electorate and the legislature can regulate workers compensation. The voters who enacted Proposition 22 didn't think it was beyond their power. Nor should this Court.

B. Plenary does not mean exclusive.

Plenary means *full* or *complete*, not *exclusive*. "Plenary authority and exclusive authority are not synonymous concepts."[126] The legislature cannot have exclusive power over workers' compensation because "the Legislature is not the exclusive source of legislative power."[127] Outside the specific intended meaning of avoiding *Lochner*, the term *plenary* in article XIV, section 4 is redundant because the legislature's powers are always plenary unless the state constitution limits them.[128] When construing *plenary* in the constitutional provision at issue here, the California Supreme Court called it meaningless: "Nothing is added to the force of the provision by the use of the word 'plenary.' If the Legislature has power to do a

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[124] Civ. Code § 3541.

[125] *Cal. Cannabis Coalition*, 3 Cal.5th at 946.

[126] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042.

[127] *Ibid*.

[128] *Howard Jarvis Taxpayers Ass'n*, 62 Cal.4th at 498 ("it is well established that the California Legislature possesses plenary legislative authority except as specifically limited by the California Constitution") (citation omitted).

certain thing, its power to do it is always plenary. It is merely surplus verbiage."[129] Thus, article XIV, section 4 should not be construed to exclude the initiative.

No authority defines plenary as *exclusive*.[130] Not the U.S. Supreme Court, which consistently uses plenary and exclusive as separate concepts, as when it describes *only* Congress having *total* power over Indian tribes, or the fact that the President has *complete* and *sole* power over foreign affairs.[131] For example, when describing the "exclusive and plenary nature" of a federal commission's authority: "[W]e have in the past concluded that the authority of the Commission to regulate abandonments is exclusive. The Commission's authority over abandonments is also

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[129] *Yosemite Lumber Co.*, 187 Cal. at 780.

[130] Not Black's Law Dictionary: "Full; complete; entire <plenary authority>." Neither Garner's Modern English Usage nor Garner's Dictionary of Legal Usage: "FORMAL WORD for *full*, *complete*, or *entire*."

[131] See, e.g., *U.S. v. Lara* (2004) 541 U.S. 193, 194 ("the Constitution, through the Indian Commerce and Treaty Clauses, grants Congress "plenary and exclusive" powers to legislate in respect to Indian tribes"); *District of Columbia v. John R. Thompson Co*. (1953) 346 U.S. 100, 109 (regarding constitutional provision for "exclusive" congressional power over District of Columbia, "it is clear from the history of the provision that the word 'exclusive' was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states."); *U.S. v. Curtiss-Wright Export Corporation* (1936) 299 U.S. 304, 320 ("the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). Discussing congressional authority to regulate foreign commerce as both exclusive and plenary: "No sort of trade can be carried on between this country and any other, to which this power does not extend. It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action." *Bd. of Trs. of Univ. of Illinois v. U.S.* (1933) 289 U.S. 48, 56–57 (citation and quotation omitted).

plenary."[132] Every married person understands this distinction: both spouses have plenary spending power, but neither has sole authority.

Instead, both the legislature and the electorate have plenary legislating power over every subject. The California Supreme Court has already rejected the argument that constitutional references to plenary legislative power "unlimited by any other provision" in the state constitution exclude the initiative: "Particularly in light of the numerous past California authorities holding that constitutional references to the Legislature's authority to take specified action generally are not interpreted to limit the initiative power, [that text] cannot reasonably be interpreted only as having the effect of precluding the people's exercise of their reserved initiative power."[133] Therefore, if the legislature has plenary authority to regulate something, "then so, too, does the electorate."[134]

The initiative itself is plenary, and it is coextensive with the legislative power, so saying that the legislature has plenary power also means that the electorate has plenary power. If plenary did mean exclusive here, all other constitutional plenary powers also should exclude the initiative.[135] Not so: constitutional

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[132] *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co*. (1981) 450 U.S. 311, 320 (citations omitted).

[133] *Indep. Energy Producers Ass'n*, 38 Cal.4th at 1036.

[134] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042.

[135] For example, the legislature has "plenary power to set the conditions under which its political subdivisions are created" and "plenary power to set the conditions under which its political subdivisions are abolished." *Cal. Redev. Ass'n*, 53 Cal.4th at 255.

provisions that recognize a legislative power do not limit the plenary initiative and referendum powers that are reserved to the electorate.[136] Indeed, past California Supreme Court decisions have viewed plenary assignments of power to the legislature as meaning only that any constitutional barriers to legislative action on the subject are removed.[137] Our state high court has never held that such plenary powers bar the state's other legislative actor, the electorate, from also legislating on that subject — on the contrary, the court rejected that argument in *Indep. Energy Producers Ass'n v. McPherson*.[138]

Instead, courts have held that in general restrictions on the legislature and

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[136] *Carlson*, 139 Cal.App.3d at 729 (holding that article XIII, § 33 merely empowers the legislature to pass laws regarding property taxation — "it does not in any way limit the plenary power of referendum and initiative which has been reserved to the people in article II, sections 8 and 9.").

[137] *Cty. of Sonoma v. State Energy Resources Conservation Com.* (1985) 40 Cal.3d 361, 369 (constitutional assignment of plenary legislative power authorizes laws on those subjects unconstrained by other general constitutional provisions and general laws); *Pickens v. Johnson* (1954) 42 Cal.2d 399, 404 (legislation enacted under authority granted for Public Utilities Commission and Industrial Accident Commission is controlling "as to the subjects properly legislated upon, over other general provisions of the constitution and general laws.").

[138] 38 Cal.4th at 1042 ("it appears most improbable that—at the same election in which the voters overwhelmingly approved a far-reaching measure incorporating a broad initiative power as part of the California Constitution—they intended, without any direct or explicit statement to this effect, to limit the use of the initiative power . . . it defies reason to suggest that those who drafted and those who voted to adopt the constitutional language in question intended to single out the jurisdiction and authority of the Railroad Commission as the one subject area in which the people's reserved right to initiate legislation could not be exercised, even if the need should arise.").

other implicit constitutional limits do not apply to the initiative.[139] The initiative must embrace all subjects, because in California's constitutional system "the Legislature is not the exclusive source of legislative power"[140] and the electorate's legislative power is "generally coextensive with" the legislature's power to enact statutes.[141] Initiative statutes are presumed to be valid, just as legislative enactments.[142] Thus, if the legislature has plenary authority to regulate something, "then so, too, does the electorate."[143]

By enacting Proposition 22 the electorate has exercised its lawmaking authority, and consequently this Court's role "is to simply ascertain and give effect to the electorate's intent guided by the same well-settled principles" that apply to legislative enactments.[144] Proposition 22 does not usurp the legislature's authority to regulate workers' compensation. The legislature itself could have enacted such a

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[139] See, e.g., *Cal. Cannabis Coalition*, 3 Cal.5th at 942 (procedural requirements imposed on the legislature are presumed not to the initiative power); *Rossi v. Brown* (1995) 9 Cal.4th 688, 699–702 (reviewing arguments that some subjects are excluded from the initiative and rejecting argument that taxation was exempt from initiative power).

[140] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042.

[141] *Santa Clara Cty. Local Transp. Auth*., 11 Cal.4th at 253; *Cal. Cannabis Coalition*, 3 Cal.5th at 935 (initiative power "is at least as broad as the legislative power wielded by the Legislature").

[142] *Eu*, 54 Cal.3d at 501.

[143] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042 ("If . . . the Legislature has plenary authority to regulate private contracting by public agencies, then so, too, does the electorate.").

[144] *Id.* at 1042–1043.

statute. But instead it was done by the other constitutionally empowered legislative authority — the electorate. Therefore, this is not a case where the legislature has been stripped of authority to regulate something, but rather a case in which permissible legislative action has occurred.

Finally, even if *plenary* here is fairly read as *exclusive*, the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers.[145] Because the history discussed above shows that the voters had a specific intent with the relevant amendments, even if the literal meaning were *exclusive* it should disregarded to avoid the absurd result of holding that a power capable of great acts cannot achieve this one small thing.[146] Carving this subject (or any other) from the initiative undercuts and is contrary to the initiative's original purpose of overriding the legislature.[147] And creating exclusive zones of legislative authority would violate the judicial duty to narrowly construe provisions that would burden or limit the initiative's exercise.[148] Any subject exempted from the initiative

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[145] *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.

[146] *Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 979 (a literal construction of an enactment will not control when such a construction would frustrate the manifest purpose of the enactment as a whole); Civ. Code § 3536.

[147] *Perry v. Brown* (2011) 52 Cal.4th 1116, 1140–1141 (the Progressive movement grew out of dissatisfaction with governing public officials and a widespread belief that the people had lost control of the political process; the initiative was viewed as one means of restoring the people's rightful control over their government; the initiative's primary purpose was to adopt laws that their elected public officials had refused or declined to adopt).

[148] *Cal. Cannabis Coalition*, 3 Cal.5th at 946.

becomes a ripe target for corruption — that's why none are exempted.

C. Implied repeals are disfavored.

To hold that the legislature has exclusive power over workers compensation requires finding that one of the three amendments in 1911, 1914, and 1918 was an implied partial repeal of the initiative power. The standard for finding a repeal by implication is the same for constitutional amendments and statutes: text first, then extrinsic evidence.[149] Because the power to legislate is shared by the legislature and the electorate,[150] the principles governing legislative repeals by implication should also apply to initiatives.[151] That standard, applied here, counsels against finding an implied repeal.

The three amendments here did not implicitly repeal the initiative. Implied repeals are strongly disfavored.[152] When two acts seemingly conflict, courts must first attempt to reconcile them and avoid interpretations that require invalidating one act; only if that cannot be done will the last act govern.[153] For a subsequent act to repeal a former, "it should appear from the last act that it was intended to take the place of or repeal the former, or that the two acts are so inconsistent that force and

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[149] *Barratt Am., Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 817; see *Martello v. Super. Ct.* (1927) 202 Cal. 400, 404.

[150] Cal. Const., art. IV, § 1.

[151] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1038–39.

[152] *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310; *Bd. of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868.

[153] *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7.

effect cannot be given to both."[154] To overcome the presumption the two acts "must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation."[155] That is not the case here: the initiative can be reconciled with all three amendments by acknowledging that the plenary legislative power is shared.

The California Supreme Court has rejected implied partial repeals of the initiative power. In *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, the court considered article XIII A, section 3, which required any changes in state taxes to be passed by two-thirds of the legislature. Although the plain text seemed to make the matter exclusive to the legislature, the court rejected the argument that this section implicitly repealed the electorate's initiative power to raise taxes. Because the provision did "not even mention the initiative power, let alone purport to restrict it," because "the law shuns repeals by implication," because the initiative power is "one of the most precious rights of our democratic process," and because courts "must resolve any reasonable doubts in favor of the exercise of this precious right," the court held that for the voters to have limited their power in this manner "would also have made no sense."[156]

So strong is the presumption against implied repeals that when a new

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[154] *Ibid.*

[155] *Ibid*.

[156] (1991) 53 Cal.3d 245, 249–51.

enactment conflicts with an existing provision, "for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first."[157] The three compensation amendments are no substitute for the initiative system. And even if the initiative power conflicts with article XIV, section 4, those provisions can and must be harmonized to give both their maximum effect.[158] Harmony here means permitting both the legislature and the electorate to share this power — to do otherwise would wrongly reduce either power.

III. A contrary ruling would defeat the initiative's purpose.

The initiative's purpose is to override the legislature. There is no contemporary evidence in 1911 of an intent to exempt workers' compensation from the initiative. The 1911 ballot measures that established both the initiative and workers' compensation were part of a package of Progressive reforms.[159] So it is nonsensical to assume that the Progressives intended to exempt workers compensation from the initiative — the same moneyed interests that opposed one opposed the other.[160] Although it is theoretically possible for the electorate to

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[157] *Penziner v. W. Am. Finance Co*. (1937) 10 Cal.2d 160, 176.

[158] *Lonergan*, 27 Cal.3d at 868–69 (to avoid repeals by implication courts "are bound to harmonize . . . constitutional provisions" that are claimed to stand in conflict).

[159] Kenneth P. Miller, DIRECT DEMOCRACY AND THE COURTS (Cambridge University Press 2009) at 22.

[160] Bowler & Donovan, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY (University of Michigan Press 2000) at 4 ("The advocates of direct legislation viewed the legislatures of the period as corrupted by well-

narrow its own powers by initiative amendment, there is no evidence that the amendments here were so intended. The California Supreme Court requires clear evidence of voter intent to limit their powers,[161] and the intent evidence discussed above proves the opposite..

Finally, permitting a subject matter carve-out here will open the door to others, and pose a grave risk of diluting the initiative power. Invalidating Proposition 22 on the ground that the electorate lacks initiative power on this subject would be a radical departure from longstanding principles that require court to safeguard the initiative. Indeed, in over a century of California direct democracy no court has ever imposed a subject matter limit on the initiative.[162] To infer an intentional decision to reduce the initiative power from article XIV, section 4's silence on the initiative is to embrace a presumption against the initiative power, rather than in favor of it. Instead, the judicial obligation to jealously guard the

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financed interests . . . [and] held that the highly unprofessional state legislatures (as well as the major parties) were beholden to 'trusts' and 'moneyed interests.'"); Key & Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA (University of California Press 1939) at 423–41 (describing the Southern Pacific Railroad's opposition to Progressive reforms); John M. Allswang, THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 1898–1998 (Stanford University Press 2000) at 12–18 (same); Exhibit 34, *Senatorial Fight in Thirty-Sixth Dist.*, Highland Park News August 17, 1918 ("It will be remembered that the Workmen's Compensation law was opposed by capital").

[161] *Cal. Cannabis Coalition*, 3 Cal.5th at 945–46.

[162] *Id.* at 935 (initiative power is "at least as broad as the legislative power wielded by the Legislature" and when voters exercise the initiative power "they do so subject to precious few limits on that power").

initiative power compels a presumption favoring the initiative.[163]

CONCLUSION

Courts should resist arguments for limiting the initiative power because it is "one of the most precious rights of our democratic process" and courts must "resolve any reasonable doubts in favor of the exercise of this precious right."[164] Even if a court has concerns about the electorate's policy choices, it "do[es] not, of course, pass upon the wisdom, expediency, or policy of enactments by the voters."[165] The legislature cannot abridge a self-executing grant of constitutional power such as the initiative.[166] Those principles all compel finding that the voters had the power to adopt Proposition 22.

Respectfully submitted,

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[163] *Id.* at 938–939.

[164] *Kennedy Wholesale, Inc.*, 53 Cal.3d 245, 249–250; *Associated Home Builders*, 18 Cal.3d at 591.

[165] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1043 (quotations omitted).

[166] *W. Ass'n etc. R.R. v. Railroad Comm*. (1916) 173 Cal. 802, 804.

CERTIFICATE OF COMPLIANCE

I certify that the attached brief uses a 13-point Times New Roman font and contains 13,943 words as counted by the Microsoft Word software program used to prepare this brief.

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