Case No. S279622

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

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

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

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Does Business and Professions Code section 7451, which was enacted by Proposition 22 (the "Protect App-Based Drivers and Services Act"), conflict with article XIV, section 4 of the California Constitution and therefore require that Proposition 22, by its own terms, be deemed invalid in its entirety?

INTRODUCTION

Workers' compensation legislation was the result of a long struggle to hold businesses responsible for occupational injuries and deaths. (See Prosser, Law of Torts (4th ed. 1971), § 80, pp. 530–531 (hereafter Prosser).) In 1918, California voters approved a constitutional amendment, now codified at article XIV, section 4, providing that "[t]he Legislature is … expressly vested with *plenary power, unlimited by any provision of this Constitution*, to create, and enforce a complete system of workers' compensation" to protect "any or all … workers." (Cal. Const., art. XIV, § 4, emphasis added.)

Article XIV, section 4 defines a complete system of workers' compensation to include "full provision" for medical care and financial support for injured workers or their dependents, "full provision for securing safety in places of employment," and the vesting of power in an administrative body "to determine any dispute … expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) Article XIV, section 4 "expressly declare[s]" a complete workers' compensation system "to be the social public policy of this State." (*Ibid.*)

Proposition 22, adopted in 2020, is an initiative statute sponsored by app-based companies that rely on drivers' labor to

transport passengers and deliver food, groceries, and other goods. Proposition 22 includes a statutory provision, Business and Professions Code section 7451,[1] that strips employment protections from these workers. Among other things, section 7451 absolves app-based companies of their responsibilities to these workers under California statutes governing workers' compensation and occupational safety. Under Proposition 22, the app-based companies need only make available limited private accident insurance for these workers. Such accident insurance is not even arguably a complete system of workers' compensation.

By preventing the Legislature from exercising its plenary power to protect app-based drivers with a complete workers' compensation system, section 7451 impermissibly conflicts with article XIV, section 4. Because the Legislature's article XIV power, granted by the 1918 constitutional amendment, is "unlimited by any provision of th[e] Constitution," that power is not constrained by pre-1918 constitutional provisions that authorize initiative statutes. An initiative statute like Proposition 22 cannot remove workers from the workers' compensation system, or force future Legislatures to obtain voter approval before including workers within the workers' compensation system, because article XIV provides the Legislature with "plenary" and expressly "unlimited" power to provide a workers' compensation system to protect "any or all" workers.

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

App-based companies are free to ask voters to partially repeal article XIV, section 4, but they must do so by initiative constitutional amendment, not by initiative statute. Because Proposition 22 includes a non-severability provision that applies to section 7451, the initiative, by its own terms, is invalid in its entirety.

STATEMENT OF THE CASE

1. Article XIV, Section 4

"Under the common law system, by far the greater proportion of industrial accidents remained uncompensated, and the burden fell upon the workman, who was least able to support it." (Prosser, *supra*, p. 530.) Even where injured workers or their dependents theoretically could overcome the "three wicked sisters" of employer tort defenses—contributory negligence, assumption of risk, and the fellow servant rule—the delay and expense of tort litigation placed "pressure on the injured man to settle his claim in order to live." (*Id.* at pp. 530–531.) Increasing agitation for change, fueled by poor "working conditions … which the employer was under no particular incentive to improve," eventually led almost every state to adopt workers' compensation legislation between 1910 and 1920. (*Id*. at p. 530.)

In California, our Legislature adopted a voluntary workers' compensation system in 1911. (Stats. 1911, pp. 796–806.) The same year, California voters approved a constitutional amendment to grant the Legislature authority to adopt a compulsory workers' compensation system. (*Id.* at pp. 2179–2180; *Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 730 (*Mathews*).) The constitutional amendment authorizing

initiative statutes and initiative constitutional amendments was adopted at the same 1911 election. (See *Taxpayers To Limit Campaign Spending v. Fair Pol. Practices Comm'n* (1990) 51 Cal.3d 744, 766.)

The Legislature exercised its authority to create a compulsory workers' compensation system by adopting the Boynton Act in 1913. (Stats. 1913, pp. 279–320; *Mathews, supra,* 6 Cal.3d at p. 730.) This Court recognized that the compulsory workers' compensation legislation was "radical, not to say revolutionary," but upheld the Boynton Act against constitutional challenges. (*W. Indem. Co. v. Pillsbury* (1915) 170 Cal. 686, 692.) In 1917, the Legislature significantly revised and expanded the Boynton Act by adopting the "workmen's compensation, insurance and safety act of 1917" (the 1917 Act), which "represented the full evolution of the workmen's compensation system." (Stats. 1917, pp. 831–879; *Mathews*, 6 Cal.3d at p. 731.)

In 1918, the Legislature placed on the ballot, and the voters enacted, a new constitutional amendment that gave the Legislature unfettered authority to protect any or all workers with a complete workers' compensation system that includes all the key elements of the 1917 Act. (Stats. 1917, pp. 1953–1954; *Mathews*, *supra,* 6 Cal.3d at p. 733.) The 1918 constitutional amendment, now codified in article XIV, provides:

> The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation ….

(Cal. Const., art. XIV, § 4.) Article XIV further provides that the Legislature's plenary and unlimited power extends to "any or all … workers." (*Ibid.*)

Article XIV defines a "complete system of workers' compensation" by tracking the language of the 1917 Act. (See Stats. 1917, pp. 832–833.) A complete system includes, among other things, adequate financial support to relieve workers and their dependents "from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party" and "full provision" for "medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of … injury." (Cal. Const., art. XIV, § 4.) A complete system includes "full provision" for "securing the payment of compensation," including by "vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute" so as to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (*Ibid.*) A complete system also includes "full provision" for "securing safety in places of employment," i.e., occupational safety and health protections. (*Ibid.*)

Finally, article XIV, section 4 "expressly declare[s]" the provision of all elements of a complete workers' compensation system "to be the social public policy of this State, binding upon all departments of the state government." (Cal. Const., art. XIV, § 4*;* see also Stats. 1917, p. 833 [same language in 1917 Act].)

2. The ABC Test

In 2018, this Court issued a unanimous decision in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), which adopted a three-part test for determining a worker's classification under Industrial Welfare Commission (IWC) wage orders. That test—known as the "ABC" test—presumes that workers are employees unless the hiring entity can demonstrate that the workers are (A) free from the hiring entity's control; (B) performing work outside the usual course of the employer's business; and (C) independently established in a trade or business to perform the type of work provided. (*Id.* at pp. 956–957.)

In *Dynamex*, this Court recognized that the classification of workers "has considerable significance for workers, businesses, and the public generally." (*Dynamex*, *supra*, 4 Cal.5th at p. 912.) Workers who are properly classified as employees "obtain[] the protection of [various] labor laws and regulations," with their employers appropriately bearing the "costs or responsibilities" of those protections. (*Id.* at p. 913.) Independent contractors, on the other hand, "obtain[] none of the numerous labor law benefits" tied to employee status, and "the public may be required … to assume additional financial burdens with respect to such workers and their families." (*Ibid.*) "[T]he misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled." (*Ibid.*) Further,

businesses that misclassify their workers may thereby obtain an "unfair competitive advantage … over competitors that properly classify similar workers as employees." (*Ibid.*)

Soon after *Dynamex*, the Legislature acted "to codify the decision" and to "clarify the decision's application in state law." (Stats. 2019, ch. 296, § 1, subd. (d).) Thus, in 2019 the Legislature passed Assembly Bill 5 (AB 5), which confirms that the ABC test generally applies not only under IWC wage orders, but also for purposes of the Labor Code—including workers' compensation coverage—and the Unemployment Insurance Code. (See *id.*, § 2.)

In so doing, the Legislature reprised this Court's findings regarding "the harm to misclassified workers who lose significant workplace protections, the unfairness to employers who must compete with companies that misclassify, and the loss to the state of needed revenue from companies that use misclassification to avoid [financial] obligations." (Stats. 2019, ch. 296, § 1, subd. (b).) By codifying the ABC test, the Legislature sought "to ensure workers who are currently exploited by being misclassified as independent contractors … have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation … , unemployment insurance, paid sick leave, and paid family leave." (*Id.*, subd. (e).)

3. Proposition 22

In response to AB 5, several companies whose app-based business models require the labor of drivers—including Uber, Lyft, and DoorDash—sought to change state law in order to allow them to classify their drivers as independent contractors. Those

companies thus placed Proposition 22, an initiative statute, on the November 3, 2020 general election ballot. After the companies spent more than $200 million to promote Proposition 22, the most expensive campaign to support a ballot proposition in United States history,[2] the electorate voted to approve the measure.

Among the statutory provisions adopted by Proposition 22 is section 7451, which establishes that app-based drivers who satisfy certain criteria are independent contractors rather than employees for purposes of the Labor Code. Section 7451 thereby excuses app-based companies from any obligations to these workers under the workers' compensation system and under occupational safety and health statutes. Proposition 22 provides that app-based companies need only "make[] available" private accident insurance for these workers. (§ 7455.)

Proposition 22 also set forth several unusual restrictions in a provision entitled "Amendment." (§ 7465.) That provision precludes the Legislature from amending Proposition 22 unless the amendment is approved by a near-impossible seven-eighths majority of both houses of the Legislature and is "consistent with, and furthers the purpose of" the initiative. (*Id.*, subd. (a).) The provision states that "any statute that amends Section 7451"—i.e., the section establishing the independent-contractor status of app-based drivers—"does not further the purposes of" the

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[2] Note, The Unstoppable App Campaign: The Dangers of First Amendment Protection for In-App Political Campaigning (2022) 110 Cal. L. Rev. 1659, 1661.

initiative. (*Id.*, subd. (c)(2).) And it states that any statute that "imposes unequal regulatory burdens upon app-based drivers based on their classification status" (*id.*, subd. (c)(3)), or "authorizes any entity or organization to represent the interests of app-based drivers in connection with drivers' contractual relationships with network companies, or drivers' compensation, benefits, or working conditions" (*id.*, subd. (c)(4)), constitutes an amendment to Proposition 22. The latter provision would effectively prevent the Legislature from authorizing app-based drivers to organize and engage in collective bargaining.

Additionally, Proposition 22 provides that its various provisions are severable, with one notable exception: "if any portion … or application of Section 7451 … is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision shall apply to the entirety of the remaining provisions of [the initiative], and no provision [of the initiative] shall be deemed valid or given force of law." (§ 7467, subd. (b).)

4. Proceedings Below

On February 11, 2021, Plaintiffs filed a petition for writ of mandate (Petition), alleging that Proposition 22 violates the California Constitution and is therefore invalid.[3] (AA 14–41.) The

[3] Plaintiffs initially filed an emergency mandamus petition directly in this Court. (See *Castellanos v. State of California* (petn. denied Feb. 3, 2021, S266551).) This Court denied the petition "without prejudice to refiling in an appropriate court." (*Ibid.*) At least two justices voted to hear the petition. (*Ibid.*) Shortly thereafter, Plaintiffs refiled their petition in Alameda Superior Court. (AA 42.)

Petition named the State of California and a state official (collectively, the State) as respondents. The parties stipulated to allow proponents of Proposition 22 and executives of Uber and DoorDash (collectively, Intervenors) to intervene. (AA 196–202.)

On August 20, 2021, the trial court granted the Petition. (AA 886–897.) The trial court concluded that Proposition 22 imposes "an unconstitutional continuing limitation on the Legislature's power to exercise its plenary power to determine what workers must be covered or not covered by the workers' compensation system." (AA 889.) And it determined that "[t]he plain meaning of Article XIV, Section 4's plenary-and-unlimited clause governs over the more general limitation on [the Legislature's ability to amend initiative statutes] in Article II Section 10." (AA 889; see also *ibid.* [the Legislature's "authority is not 'plenary' or 'unlimited by any provision of [the] Constitution' " if it is "limited by an initiative statute"].) The trial court further held that, because the initiative expressly states that the unlawful provision regarding independent-contractor status for purposes of workers' compensation is not severable, "the whole Act should be stricken." (AA 889–890, citing §§ 7451, 7467, subd. (b).)

The trial court also concluded that Proposition 22's restriction on collective bargaining "unconstitutionally purports to limit the Legislature's ability to pass future legislation that does not constitute an 'amendment' under Article II, Section 10, Subdivision (c)," and so that provision is invalid. (AA 895.) Finally, the trial court concluded that the inclusion of the

amendment provision in Proposition 22 violates the California Constitution's single-subject rule. (AA 895–896.)

The trial court thus entered judgment for Plaintiffs, declaring Proposition 22 "invalid in its entirety." (AA 899.)

The Court of Appeal affirmed in part and reversed in part. The Court of Appeal unanimously agreed that parts of Proposition 22's amendment provision are unconstitutional because they intrude upon the authority of both the legislative and judicial branches. (Maj. opn., at pp. 48–52.)[4] And the Court of Appeal unanimously rejected the trial court's conclusion that the unconstitutional provision also is a single-subject violation. (*Id.* at pp. 29–38.) But the Court of Appeal divided two to one on the question whether Proposition 22 conflicts with article XIV, section 4 of the Constitution and is therefore invalid in toto.

The Court of Appeal majority concluded that an initiative statute can limit the Legislature's power to create and enforce a complete workers' compensation system. (Maj. opn., at pp. 10–28.) The majority acknowledged that article XIV, section 4 provides that this legislative authority over workers' compensation is "unlimited" by any other provision of the Constitution, but the majority reasoned that it is ambiguous as to *which* provisions of the Constitution apply and which do not. (*Id.* at pp. 15–16.) And because article XIV, section 4 contains no "direct or explicit statement" that the Legislature's power over

[4] Citations to the Court of Appeal majority opinion (maj. opn.) and dissenting opinion (dis. opn.) are to pages in the slip opinion appended as Attachment A to the Petition for Review.

the state workers' compensation system must prevail over the voters' initiative power, the majority would not construe article XIV to preclude Proposition 22. (*Id.* at pp. 17–18.)

Justice Streeter dissented, concluding that Proposition 22 conflicts with article XIV, section 4 and, therefore, that Proposition 22 must be invalidated in toto. (Dis. opn., at pp. 62–64.) Justice Streeter reasoned that article XIV adopts certain substantive requirements of a "complete system of workers' compensation," whereas Proposition 22 impermissibly "removes app-based drivers from th[at] constitutionally mandated workers' compensation system and substitutes a private accident insurance mandate" lacking those basic features. (*Id.* at pp. 2–3.) Justice Streeter further reasoned that because the Constitution grants the Legislature unlimited power to "create" and "enforce" a workers' compensation system, the voters could not, through an initiative statute, "reserve all statutory lawmaking power for themselves." (*Id.* at p. 24.) The history of the 1911 and 1918 constitutional amendments, as well as statutory workers' compensation enactments and judicial decisions during that era, also demonstrated that voters intended that article XIV, section 4 "be given priority over other provisions in the Constitution in the event of conflict." (*Id.* at p. 37.)

This Court granted review and issued an order limiting the issue for consideration to whether section 7451 conflicts with article XIV, section 4.

ARGUMENT

I. Section 7451 Conflicts With Article XIV, Section 4 of the California Constitution.

A. Section 7451 impermissibly restrains the Legislature from exercising its unlimited power to enforce a complete workers' compensation system for any or all workers.

As adopted by constitutional amendment in 1918, article XIV, section 4 vests the Legislature with "plenary power, unlimited by any provision of th[e] Constitution," to create and enforce a complete system of workers' compensation to protect "any and all workers and those dependent upon them." The amendment thus "enable[s] the Legislature … to provide a complete, workable scheme unhampered by limitations contained in other provisions of the state Constitution." (*Subsequent Injs. Fund v. Indus. Acc. Comm'n* (1952) 39 Cal.2d 83, 88.) Even "[t]he jurisdictional provisions of article VI," which address the judicial power, are "inapplicable to the extent that the Legislature has exercised the powers granted it under section 4 of article XIV." (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1037; see also *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 343 [recognizing that article XIV, section 4 operates as a " 'repeal *pro tanto*' of *any* state constitutional provisions" that "would prohibit the realization of the objectives of the new article" (emphasis added)].)

In *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 (*County of Los Angeles*), this Court narrowly construed an initiative constitutional amendment to avoid a conflict with article XIV, section 4. The issue in *County of Los Angeles* was

"whether legislation … increasing certain workers' compensation benefit payments [was] subject to the command of article XIII B … that local government costs mandated by the state must be funded by the state." (*Id.* at p. 49.) If article XIII B applied to workers' compensation legislation, the Legislature would need to either "exclude employees of local governmental agencies" from changes to the workers' compensation system or pass those changes by "supermajority vote." (*Id*. at p. 60.) This Court reasoned that a supermajority vote requirement for implementing changes to the workers' compensation system applicable to local government employees would conflict with article XIV by "curtail[ing] the power of a majority [of the Legislature] to enact substantive changes" to the workers' compensation system. (*Ibid.*)

In this case, section 7451 conflicts with article XIV by curtailing the power of the Legislature to provide workers' compensation and occupational safety protections to a different subset of workers, i.e. California's more than 1.3 million app-based drivers. (See State's Answer to Petition for Review, at p. 11 [providing estimate of number of app-based drivers].) The Legislature has exercised its article XIV power by adopting a complete system of workers' compensation, including occupational safety protections. (See Lab. Code, §§ 3200 et seq., 6300 et seq.) Even before the Legislature's adoption of AB 5, that system covered app-based drivers (see *post*, at p. 32), and the adoption of AB 5 leaves no doubt on that issue. Meanwhile, section 7451 provides that app-based drivers are excluded from

the complete workers' compensation system. Proposition 22 provides instead that app-based companies need only make private accident insurance available for these workers. (§ 7455, subd. (a).)

Proposition 22's private insurance mandate contains no safety and health provisions, no provisions for vocational training if a driver cannot return to work, no compensation for permanent disability, a cap on benefits, and no provision for an administrative body to resolve disputes. (See § 7455, subd. (a).) It is not a complete system of workers' compensation as defined in article XIV or in any sense of the term. (See *ante*, at p. 9 [listing various elements of complete workers' compensation system].)

Moreover, the adoption of section 7451 constrains the Legislature's future authority to provide these 1.3 million workers with the protections of a complete workers' compensation system. Under article II, section 10 of the California Constitution, the Legislature cannot amend an initiative statute "unless the initiative statute permits amendment or repeal without the electors' approval." (Cal. Const., art. II, § 10, subd. (c).) Proposition 22 allows legislative amendments, even by seven-eighths vote of both houses of the Legislature, only to "further[] the purpose of [Proposition 22]." (§ 7465, subd. (a).) And Proposition 22 provides that "[a]ny statute that amends Section 7451"—the provision that removes app-based drivers from the workers' compensation system—"does not further the purposes of" Proposition 22. (*Id.*, subd. (c)(2).) As such, after Proposition

22, the Legislature is powerless to include app-based drivers in the compete workers' compensation system.

The effect of Proposition 22 is to "place workers' compensation legislation [for app-based drivers] in a special classification of substantive legislation" that cannot be implemented without voter approval and thereby to "restrict the power of the Legislature over workers' compensation." (*County of Los Angeles*, *supra*, 43 Cal.3d at p. 60.) The conflict between section 7451 "and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent." (*Id*. at 59.) As the trial court recognized, if article II, section 10 of the Constitution limits the Legislature from including app-based drivers in a complete workers' compensation system, then the Legislature's power is not "unlimited by any provision of [t]he Constitution." (AA 889.)

Under the terms of Proposition 22, the conflict between section 7451 and article XIV requires that the initiative statute be invalidated in toto. (See § 7467, subd. (b).)

B. This Court's decision in *McPherson* supports the conclusion that Proposition 22 is unconstitutional.

As the courts below recognized, this Court addressed an issue related to the issue presented here in *Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020 (*McPherson*). *McPherson* supports the trial court's holding that Proposition 22 impermissibly conflicts with article XIV.

McPherson addressed article XII, section 5 of the California Constitution, which grants the Legislature "plenary power, unlimited by the other provisions of this constitution … to confer

additional authority and jurisdiction" upon the Public Utilities Commission (PUC).[5] *McPherson* considered the constitutionality of an initiative statute that *expanded* the PUC's regulatory authority over independent electric service providers. (*McPherson*, *supra*, 38 Cal.4th at p. 1026.) The Court concluded that "plenary" authority need not be "exclusive" authority, and that the article XII grant of authority to the Legislature did "not preclude the people, through their exercise of the initiative process, from conferring additional powers or authority upon the PUC." (*Id.* at pp. 1043–1044.)

But the *McPherson* Court "emphasize[d]" that its "holding [was] limited to a determination that the provisions of article XII, section 5 do not preclude the use of the initiative process to enact statutes conferring *additional* authority upon the PUC" and that the Court had "no occasion … to consider whether an initiative measure … may be challenged on the ground that it improperly *limits* the PUC's authority or improperly conflicts with the Legislature's exercise of *its* authority to expand the PUC's jurisdiction or authority." (*McPherson*, *supra*, 38 Cal.4th at p. 1044, fn. 9, first emphasis added, other emphases in original.) This Court instructed that "[s]hould these or other issues arise in the future, they may be resolved through application of the relevant constitutional provision or provisions to the terms of the specific legislation at issue." (*Ibid.*)

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[5] Article XII, section 5 is the only provision of the California Constitution other than article XIV, section 4 that vests the Legislature with plenary power unlimited by the other provisions of the Constitution. (See *post,* at pp. 37–38.)

Proposition 22 presents the issue that *McPherson* anticipated might arise. Proposition 22 restrains "the Legislature's exercise of *its* authority" (*McPherson, supra*, 38 Cal.4th at p. 1044, fn. 9) to provide a complete workers' compensation system by removing app-based drivers from the workers' compensation system and by prohibiting the Legislature from ever including app-based drivers in the workers' compensation system without voter approval. (See *ante*, at pp. 18–20.) The courts must therefore, as *McPherson* instructs, "appl[y] … the relevant constitutional provision … to the terms of the specific legislation at issue" in order to resolve the alleged conflict. (*McPherson*, *supra*, 38 Cal.4th at p. 1044, fn. 9.)

Here the "relevant constitutional provision" (article XIV, section 4) states that the Legislature has "plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation." This authority is necessarily broader than that at issue in *McPherson*, where the Legislature's authority was limited to enlarging the jurisdiction of the PUC. Under article XIV, section 4, the Legislature has plenary authority to "create and enforce" an entire system of workers' compensation for "any or all" workers, the provision of which the Constitution declares "to be the social public policy of this State."

By contrast, the "specific legislation" at issue (section 7451) restrains the Legislature from exercising its plenary power to provide a complete system of workers' compensation to app-based drivers. Not only that, the legislation directly conflicts with

existing law that makes those drivers eligible for such benefits and vests authority in the Workers' Compensation Appeals Board to resolve disputes. Additionally, Proposition 22's substitute of private accident insurance is not even arguably a complete workers' compensation system, such that the initiative could be viewed as achieving the same ends by different means.

Thus, the analysis required by *McPherson* demonstrates that Proposition 22 is invalid. The effect of Proposition 22 is to partially repeal article XIV's grant of plenary power to the Legislature and to leave app-based drivers without a complete system of workers' compensation notwithstanding the Legislature's actions. Because the Legislature's article XIV power is "unlimited by *any* provision of th[e] Constitution" (emphasis added), including the initiative provision in article II, section 10, there is a direct conflict, and Proposition 22 must yield.

C. The Court of Appeal majority misread this Court's decision in *McPherson*.

The Court of Appeal majority stated that the "implications of *McPherson's* reasoning" dictate the conclusion that Proposition 22 is constitutional. (Maj. opn., at p. 20.) The majority began its analysis from the premise that "*McPherson* requires that we read article XIV, section 4 *as though it said*: "The Legislature *or the electorate acting through the initiative power are* hereby expressly vested with plenary power, unlimited by any provision of this constitution, to create, and enforce a complete system of workers' compensation." (*Id.* at p. 14, first emphasis added.)

McPherson did *not* hold that the voters who adopted the 1911 constitutional amendment there at issue intended the words

"[t]he Legislature" to refer to the initiative power such that the Constitution must be read "as though it said" (maj. opn., at p. 14) something different than it says. Such reasoning would have made no sense because the voters are deemed to have been aware that the Constitution defines the "Legislature" to mean "the Senate and Assembly." (Cal. Const., art. IV, § 1.) As this Court explained in *Barlotti v. Lyons* (1920) 182 Cal. 575, 578–579:

> It certainly is not in consonance with the ordinary acceptation of the term 'legislature' to take it as meaning otherwise than a representative body selected by the people of a state …. Our own constitution, notwithstanding its provisions in regard to the initiative and referendum, could not be more explicit than it is in its use of the term as meaning such a representative body, and while, in view of the initiative and referendum provisions, the people of the state may constitute a part of the lawmaking power of the state, they certainly are not a part of 'the legislature' within the meaning of that term as used in our Constitution.

Moreover, reading *McPherson* to hold that the words "the Legislature" mean something else is completely incompatible with footnote 9 of the *McPherson* decision. There would have been no need for this Court to "emphasize" as it did in footnote 9 that it had no occasion to consider whether a statutory initiative conflicts "with the Legislature's exercise of *its* authority" (*McPherson*, *supra*, 38 Cal.4th at p. 1044, fn. 9, emphasis in original), if the Court meant to conflate the Legislature's power with that of the initiative.[6]

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[6] The cases cited in *McPherson* for the proposition that references to the authority of the Legislature in the Constitution generally

McPherson reasoned only that it was possible to harmonize the Constitution's grant of plenary and unlimited authority to the Legislature to vest additional jurisdiction in the PUC with the people's exercise of their reserved power of statutory initiative to *also* grant additional jurisdiction to the PUC. (*McPherson*, *supra*, 38 Cal.4th at pp. 1042–1043.) That is, the authorities can exist concurrently. So too here: An initiative statute that did not prevent the Legislature from providing app-based drivers with a complete system of workers' compensation could be harmonized with article XIV. But Proposition 22's private accident insurance mandate is not even arguably a complete workers' compensation system.

The Court of Appeal majority also read *McPherson* to mean that the phrase "unlimited by the other provisions of this constitution" (Cal. Const., art. XII, § 5) is ambiguous because "applying the 'unlimited' language literally would mean that the Legislature could enact a law without having to comply with provisions of the Constitution like the one that gives the Governor the right to veto legislation." (Maj. opn., at pp. 15–16,

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do not preclude the exercise of the same power by an initiative statute are not based on the meaning of the term "Legislature," but on harmonizing such grants of authority with the reserved power of initiative. (See, e.g., *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249–251 (*Kennedy Wholesale*) [constitutional provision requiring two-thirds vote of Legislature to raise taxes did not implicitly prohibit adoption of taxes by voter initiative].) None of those cases involved constitutional provisions that expressly grant the Legislature power that is "unlimited by the other provisions of th[e] Constitution."

citing *McPherson*, *supra*, 38 Cal.4th at p. 1036.) That misreads *McPherson*.

In the passage at issue, this Court was summarizing an argument made by the real parties in interest in that case. (*McPherson*, *supra*, 38 Cal.4th at p. 1036.) This Court did not decide whether the phrase "unlimited by the other provisions of this constitution" in article XII, section 5 precluded the adoption of conflicting statutory initiatives because in *McPherson* there was no conflict. Indeed, the Court emphasized in footnote 9 that it was *not* deciding that issue.

Moreover, the potential ambiguity about the veto power in *McPherson* arose only because the constitutional provision at issue there did not specify how the Legislature could exercise its "unlimited" authority. (Cal. Const., art. XII, § 5.) Here, by contrast, article XIV *does* specify that the Legislature's "unlimited" authority may be exercised "by appropriate legislation." (*Id.*, art. XIV, § 4.) Given the absence of the "by appropriate legislation" language in the amendment at issue in *McPherson,* the real parties in interest could question whether a literal reading of "unlimited" would conflict with the Governor's veto power. (*McPherson*, *supra*, 38 Cal.4th at pp. 1036–1037.)

There is no such issue here with a literal reading of article XIV. Legislation is adopted only when a bill is "bicamerally enacted and presented to the head of the executive branch for approval or veto." (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 298, citing Cal. Const., art. IV, §§ 1, 8, subd. (b), 10, subd. (a).) No one could seriously dispute that the

veto power applies to the adoption of workers' compensation "legislation." Language is not ambiguous unless it is "susceptible to more than one reasonable interpretation." (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 509.) As Justice Streeter recognized in his dissent below, the majority's argument about the veto power is "a strawman." (Dis. opn., at pp. 29–30.)

Contrary to the Court of Appeal's reasoning, the words "plenary" and "unlimited" and the phrase "any provision of this Constitution" are *not* ambiguous with respect to the issue here: whether there is a provision of the Constitution that can prevent the Legislature from providing workers with a complete system of workers' compensation. (See, e.g., *In re Marriage of Cutler* (2000) 79 Cal.App.4th 460, 475 ["any other provision of law" is "clear and unambiguous" and "comprehensive"].) If, as the Court of Appeal majority's opinion allows, an initiative statute can remove entire classes of workers from the complete workers' compensation system established by the Legislature and subject future legislation to a voter-approval requirement, then the Legislature's plenary power is not "unlimited."

In fact, taken to its logical conclusion, the majority's opinion would allow a provision in an initiative statute to excuse *all* businesses from providing workers' compensation benefits and require the Legislature to seek voter approval to provide *any* workers with the protections of a complete workers' compensation system. Yet that would entirely nullify the 1918 constitutional amendment and overturn the people's decision to make the provision of a complete workers' compensation system the "social

public policy of this State." (Cal. Const., art. XIV, § 4.) Such a result cannot be squared with a constitutional structure that makes statutes, including those adopted by initiative, subordinate to the Constitution.

D. Article XIV's history supports the conclusion that Proposition 22 conflicts with the Constitution.

The constitutional provisions that authorize statutory initiatives were added to the Constitution in 1911. (*McPherson, supra*, 38 Cal.4th at pp. 1040–1041.) Thus, when the voters approved the 1918 constitutional amendment to vest the Legislature with power "unlimited by any provision of this Constitution" to implement a workers' compensation system, the initiative provisions were necessarily encompassed within the phrase "any provision of this Constitution."[7]

Nevertheless, the Court of Appeal majority reasoned that "any provision of [the] Constitution" should not be interpreted to include the initiative provisions because the official ballot arguments that accompanied the 1918 constitutional amendment are silent about the initiative power. (Maj. opn., at pp. 16–18; *see also Mathews*, *supra,* 6 Cal.3d at p. 733, fn. 11 [quoting the ballot arguments].) But those ballot arguments do not refer to *any*

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[7] *McPherson* observed that the 1911 constitutional amendment at issue was adopted at the same election that added the initiative provisions. As such, there arguably was ambiguity about whether "unlimited by the other provisions of this constitution" (Cal. Const., art. XII, § 5), referred to provisions that did not already exist. By contrast, the 1918 constitutional amendment was adopted *seven years after* the initiative provisions, so "any provision of this Constitution" (*id.*, art. XIV, § 4), necessarily includes those provisions.

specific provisions of the Constitution, so they can provide no basis for limiting the reach of the 1918 amendment to constitutional provisions referenced in the ballot arguments. The official ballot arguments also are entirely consistent with the broad and unqualified language of article XIV, section 4. They state that the "proposed [constitutional] amendment is designed to express full authority for legislation" and would "place[] beyond any doubt the constitutional authority for a complete workmen's compensation system." (*Mathews*, *supra,* 6 Cal.3d at p. 733, fn. 11 [quoting the ballot arguments].)

Even if the 1918 voters did not have the initiative power in mind, the operative language ("any provision of this Constitution") is broad and comprehensive. When an enactment has "general terms, the particular impetus for the enactment does not limit its scope." (*Los Angeles Unified Sch. Dist. v. Garcia* (2013) 58 Cal. 4th 175, 192; see, e.g., *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 79 ["[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."]; *People v. Montiel* (2019) 35 Cal.App.5th 312, 323–324 ["[T]he specific impetus for a bill does not limit its scope when its text speaks to its subject more broadly," and "when the Legislature has made a deliberate choice by selecting broad and unambiguous statutory language,

'it is unimportant that the particular application may not have been contemplated.' "].)[8]

The Court of Appeal also drew the wrong lesson from this Court's statement in *Mathews* that the 1918 amendment was adopted "for the sole purpose of removing all doubts as to the constitutionality of the then existing workmen's compensation statutes.'" (*Mathews*, *supra*, 6 Cal.3d at pp. 734–735; see maj. opn., at p. 16.) The issue in *Mathews* was whether the 1918 amendment precluded the Legislature "from conditioning the right to [workers'] compensation upon the absence of willful misconduct or other intentional wrongdoing." (*Mathews*, 6 Cal.3d at pp. 724–725.) This Court reasoned that, because a similar

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[8] See also *Bostock v. Clayton County* (2020) 140 S.Ct. 1731, 1737 ["the limits of the drafters' imagination supply no reason to ignore the law's demands"]; *Pennsylvania Dept. of Corrections v. Yeskey* (1998) 524 U.S. 206, 212 ["[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' "]; *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 51 ["when the Legislature has made a deliberate choice by selecting broad and unambiguous statutory language, 'it is unimportant that the particular application may not have been contemplated.' "]; *Souza v. Lauppe* (1997) 59 Cal.App.4th 865, 874 ["Even if, as plaintiffs suggest, the Legislature did not have such an application in mind when it enacted section 3482.5, a different construction is not required because our interpretation of the statute is compelled by the plain meaning of its words, does not frustrate its apparent purpose, and does not result in absurd consequences."]; cf. *Barr v. United States* (1945) 324 U.S. 83, 90 [where the Legislature "has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated"].

exclusion was contained in the 1917 Act (and its 1911 and 1913 predecessors), and the 1918 constitutional amendment was intended to provide the Legislature with full constitutional authority to adopt a workers' compensation system with the same elements as the 1917 Act, the 1918 amendment "cannot be read as invalidating basic features of [the workers' compensation] laws as they have existed since 1911." (*Id.* at pp. 734–735.)

By contrast, the question in this case is whether the Legislature has the unlimited power to protect app-based drivers with a complete workers' compensation system that has the same "basic features" as the 1917 Act. That question is answered by the language of the 1918 amendment, which vests the Legislature with unlimited power to provide such a system for "any or all" workers.

E. The "social public policy" declared by article XIV is applicable to app-based drivers.

The 1918 constitutional amendment not only vested the Legislature with plenary and unlimited authority to provide a complete system of workers' compensation for "any or all" workers, but also "expressly declared" the provision of all the elements of a complete system "to be the social public policy of this State." (Cal. Const., art. XIV, § 4.) The "remedial and humanitarian purposes" of this system (*Pac. Emp'rs Ins. Co. v. Indus. Acc. Comm'n* (1945) 26 Cal.2d 286, 288–289 (*Pac. Emp'rs Ins. Co.*)), are fully applicable to app-based drivers, which further supports the conclusion that the Legislature cannot be constrained from including app-based drivers in the workers' compensation system without another constitutional amendment.

This Court has long recognized that, because of the public purposes served by the workers' compensation system, "employee" status for purposes of workers' compensation must be construed broadly. In *Drillon v. Industrial Accident Commission* (1941) 17 Cal.2d 346, 350–356 (*Drillon*), the Court held that a jockey engaged for a single horserace, with the amount of compensation depending on the race results—the quintessential "gig" worker—was an employee for purposes of workers' compensation. In *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 352–353 (*Borello*), this Court held that workers' compensation "employee" status "cannot be decided absent consideration of the remedial statutory purpose" and that sharefarmers who set their own hours and were compensated solely from the crops they sold were employees entitled to compensation coverage. Under the *Borello* test, taxicab drivers who paid the taxicab company to lease vehicles and received compensation solely from riders were held to be the company's employees for purposes of workers' compensation. (*Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1297–1300.) Thus, even before AB 5, app-based drivers would have qualified as "employees" for purposes of workers' compensation benefits. (See, e.g., *Berwick v. Uber Technologies, Inc.* (CA. Dept. Lab. June 3, 2015) 2015 WL 4153765 [Labor Commissioner decision concluding that Uber driver was an "employee" under the *Borello* test].)

In any event, regardless of whether the app-based companies could dispute coverage prior to AB 5, the social public

policy served by a workers' compensation system applies in full to app-based drivers. App-based drivers perform work that exposes them to the risk of fatal and non-fatal on-the-job injuries. Because they drive vehicles, they are at risk of accidents, crashes, and ergonomic harm. Because they transport passengers they do not know, make deliveries to customers they do not know, and visit destinations they do not choose, they are targets for criminal activity. A complete workers' compensation system protects app-based drivers and their dependents in the same manner as it protects other workers and their dependents. Moreover, nothing about the workers' compensation system precludes the scheduling flexibility that provides the stated rationale for Proposition 22. (See § 7450, subd. (b).) The jockey in *Drillon* was retained for a single race lasting a few minutes.

As such, insofar as Proposition 22 removes app-based drivers from the workers' compensation system, the statutory initiative frustrates the social public policy that the voters adopted in the 1918 constitutional amendment and vested the Legislature with unlimited power to pursue. "By the [1918] constitutional amendment … the legislation of 1917 was given the stamp of approval as the social public policy of the state." (*Pac. Emp'rs Ins. Co.*, *supra*, 26 Cal.2d at pp. 288–289.) The 1917 Act contained the basic elements necessary to protect workers and their families, including full provision for medical and rehabilitation benefits and financial support in the event of injury or death, requirements that employers provide safe workplaces, and an administrative agency to resolve disputes

fairly and expeditiously. (Stats. 1917, pp. 831–879.) Proposition 22's private accident insurance lacks those basic elements.

The constitutional structure requires that the voters be asked again—through another constitutional amendment—whether they wish to withdraw, in whole or in part, the Legislature's unlimited power to pursue the social public policy they made part of the Constitution in 1918. (Cf. *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 322 (*People's Advocate*) [The court is "not presented with a conflict between the voice of the people expressed directly and through their elected representatives, but between two conflicting directives from the electorate: the Act and the California Constitution," and "the people have made statutes … even initiative statutes … subordinate to the Constitution."].)

F. The Court's "clear statement" cases address a different issue than the issue presented here.

The conclusion that section 7451 conflicts with article XIV is entirely consistent with the line of cases holding that constitutional provisions will not be interpreted as a limitation on the initiative power absent an "unambiguous indication." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 945–946 (*California Cannabis Coalition*).) These "clear statement" cases address a different issue from the one presented here. They address whether procedural constraints on how a legislative body may exercise its authority (e.g., a constitutional provision permitting a legislative body to raise taxes only by two-

thirds vote) also implicitly apply to or foreclose voter initiatives.[9] In those circumstances, a clear statement rule makes sense because, among other things, "the electorate does not generally follow 'legislative' procedures when exercising the initiative power." (*Kennedy Wholesale*, *supra*, 53 Cal.3d at p. 252, fn. 5.)

Article XIV is not a procedural constraint on the Legislature or a general reference to the Legislature's power. Rather, it is an affirmative and specific grant to the Legislature of plenary and unlimited power to protect workers with a complete system of workers' compensation. Thus, article XIV does contain an "unambiguous indication" that the power to provide a complete workers' compensation system ultimately belongs to the Legislature, because the power is "unlimited by *any* provision of th[e] Constitution." (Emphasis added.) This Court has never held that the phrase "unlimited by any provision of th[e] Constitution" is not clear enough, such that the Constitution must go on to identify every individual provision that does not limit the Legislature's power. The voters who adopted the 1918 constitutional amendment certainly would have been unaware of such a strange rule, so applying it retroactively would fail to give the decision of *those voters* the respect it deserves.

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[9] See, e.g., *Kennedy Wholesale, supra*, 53 Cal.3d at pp. 249–251 [constitutional provision requiring two-thirds vote of Legislature to raise taxes did not implicitly prohibit adoption of taxes by voter initiative]; *California Cannabis Coalition*, *supra*, 3 Cal.5th at p. 948 [requirement that local governments submit special taxes to vote at general election did not implicitly preclude tax initiative's enactment at special election].

While many cases do observe that, as a general matter, the initiative power may be co-extensive with the Legislature's power, *McPherson* recognized that "the right of the people through the initiative process to exercise similar legislative authority" as the Legislature does not decide the issue presented here: whether an initiative statute may "improperly conflict[] with the Legislature's exercise of its [constitutional] authority" where the Constitution provides that the Legislature's authority is plenary and unlimited. (*McPherson*, *supra*, 38 Cal.4th at pp. 1033, 1044, fn. 9, emphasis omitted.) And although this Court recognized in *McPherson* and other cases that the word "plenary" need not mean "exclusive,"[10] whatever ambiguity there may be in the word "plenary," the word "unlimited" cannot reasonably be interpreted to mean "limited."

Equally to the point, because the adoption of section 7451 restricts the Legislature's *future* authority, Proposition 22 does not simply do what the Legislature itself also could have done. A "legislative body cannot limit or restrict its own power." (*In re Collie* (1952) 38 Cal.2d 396, 398.) After Proposition 22, the Legislature must obtain voter approval to implement legislation that includes app-based drivers in a complete workers' compensation system. That constraint on the Legislature's power cannot be reconciled with article XIV's grant of unlimited power

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[10] See *McPherson, supra*, 38 Cal.4th at pp. 1043–44; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1042; *Consulting Engineers & Land Surveyors of California, Inc. v. Professional Engineers in California Government* (2007) 42 Cal.4th 578, 587-588.

to the Legislature. (See *County of Los Angeles*, *supra,* 43 Cal.3d at p. 60 [recognizing that an initiative constitutional amendment would conflict with article XIV if it precluded the Legislature from changing the workers' compensation system by majority vote].) The general rule that initiative statutes can constrain the Legislature's future authority cannot apply where the Constitution's language and structure dictate a contrary conclusion. (See, e.g., *People's Advocate, supra,* 181 Cal.App.3d at pp. 328–329 [holding that an initiative statute could not limit the constitutional authority of future Legislatures to adopt annual budget bills].)

II. The Invalidation of Proposition 22 Would Not Have Broader Implications for the Initiative Power.

This Court has recognized its "duty to jealously guard the precious initiative power." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 827.) Thus, it is important to understand that a decision invalidating Proposition 22 will not have implications for the initiative power more generally.

Only two provisions of the California Constitution vest the Legislature with plenary power unlimited by other provisions of the Constitution: article XII, section 5 (the provision in *McPherson*), and article XIV, section 4 (the provision here). These grants of plenary and unlimited power are narrowly focused. The Legislature has unlimited power "to confer additional authority … upon the [Public Utilities Commission]" and "to create, and enforce a complete system of workers' compensation." (Cal. Const., art. XII, § 5; art. XIV, § 4.)

The Constitution also differentiates between two types of voter initiatives. "The initiative is the power of the electors to propose statutes *and* amendments to the Constitution." (Cal. Const., art. II, § 8, subd. (a), emphasis added.) If the voters wish, they could withdraw the Legislature's unlimited article XIV power by another constitutional amendment, the same means by which it was granted. (See *id.*, subd. (b) [setting out different requirements for constitutional and statutory initiatives].)

CONCLUSION

The Court of Appeal decision should be reversed in part. This Court should hold that section 7451 conflicts with article XIV, section 4 and, therefore, that Proposition 22, by its own terms, is invalid in its entirety.

Dated: September 11, 2023

Respectfully submitted,

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