No. A163655

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

HECTOR CASTELLANOS, et al.,
Petitioners and Respondents,

vs.

STATE OF CALIFORNIA, et al.,
Defendants and Appellants.

PROTECT APP-BASED DRIVERS AND SERVICES, et al.,
Intervenors and Appellants.

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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
and
[PROPOSED] AMICUS CURIAE BRIEF OF CALIFORNIA ELECTION LAW PROFESSORS

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.200(c), amicus **California Election Law Professors** respectfully requests permission to file the attached amicus curiae brief in support of respondents Hector Castellanos et al.

Amicus consists of California law professors who study, research, write, and teach in the area of election law in California law schools. Each joins this amicus brief in a personal capacity; institutional affiliations are for identification purposes only.

Joseph Fishkin is a Professor of Law at UCLA School of Law, where he teaches and writes about election law, including direct democracy, as well as other subjects including employment discrimination law and constitutional law. He is the author or co-author of two books and numerous scholarly articles that have appeared in journals including the *Columbia Law Review*, *Supreme Court Review*, and *Yale Law Journal*. Before joining the UCLA law faculty in 2021, he taught for a decade at the University of Texas School of Law, where he was the Marrs McLean Professor in Law; he was also a visiting professor at Yale Law School.

Richard L. Hasen is Chancellor's Professor of Law and Political Science at University of California, Irvine. Hasen is a nationally recognized expert in election law and campaign finance regulation, writing as well in the areas of legislation and statutory interpretation, remedies, and torts. He is co-author of leading casebooks in election law and remedies.

From 2001-2010, he served (with Dan Lowenstein) as founding co-editor of the quarterly peer-reviewed publication, *Election Law Journal*. He is the author of over 100 articles on election law issues, published in numerous journals including the *Harvard Law Review*, *Stanford Law Review* and *Supreme Court Review*. He was elected to The American Law Institute in 2009 and serves as Co-Reporter (with Professor Douglas Laycock) on the ALI's law reform project: Restatement (Third) of Torts: Remedies. Beginning in July 2022 he will serve as a Professor of Law at UCLA School of Law.

Franita Tolson is the George T. and Harriet E. Pfleger Professor of Law and Vice Dean for Faculty and Academic Affairs at University of Southern California Gould School of Law, where she also holds a courtesy appointment in the Political Science and International Relations Department. Her scholarship and teaching focus on the areas of election law, constitutional law, and legal history. She has written on a wide range of topics including partisan gerrymandering, political parties, the Elections Clause, the Voting Rights Act of 1965, and the Fourteenth and Fifteenth Amendments. Her research has appeared or will appear in leading law reviews including the *Yale Law Journal*, *Harvard Law Review*, *Stanford Law Review*, *California Law Review*, *University of Pennsylvania Law Review*, and *Vanderbilt Law Review*. Vice Dean Tolson is one of the coauthors of a leading election law casebook, *The Law of Democracy* (Foundation Press, 6th ed., forthcoming 2022). Her forthcoming book, *In Congress We Trust?: Enforcing Voting*

Rights from the Founding to the Jim Crow Era, will be published in 2023 by Cambridge University Press.

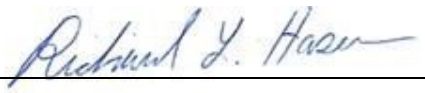
As a nationally recognized expert in election law, Vice Dean Tolson has written for or appeared as a commentator for various mass media outlets including *The New York Times*, *The Los Angeles Times*, *The Wall Street Journal*, *Reuters*, and *Bloomberg Law*. She has testified before Congress on voting rights issues several times. She has authored a legal analysis for an amendment to the U.S. Constitution, introduced by Senators Elizabeth Warren and Richard Durbin, that would explicitly protect the right to vote. During the fall of 2020, Vice Dean Tolson worked as an election law analyst for CNN. She also co-hosted an election-themed podcast, Free and Fair with Franita and Foley, with Ned Foley of The Ohio State University Moritz College of Law.

No party or any counsel to a party in the pending appeal, or any other person other than amicus and its counsel, authored this proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief.

Amicus believes that the collective scholarly expertise and teaching experience of this group in the field of election law gives Amicus perspective and knowledge that may aid this court in its resolution of the complex issues in this case.

Accordingly, Amicus California Election Law Professors respectfully requests that this court accept and file the attached amicus curiae brief.

May 25, 2022 **RICHARD L. HASEN**

By: 

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AMICUS CURIAE BRIEF

INTRODUCTION

Amicus California Election Law Professors has reviewed the parties' briefing and writes to address a single issue on which the parties disagree: whether a voter initiative legislating on one subject may constitutionally hamstring the ability of the California Legislature to pass legislation on a different but related subject.[1]

If this court approves the "amendment" limitation on the Legislature's lawmaking power contained in Proposition 22—a limitation that appears to be *unprecedented* in the history of California initiatives—it will work mischief and provide a roadmap for future initiatives to upset the delicate balance between legislative powers given to the People of the State of California and those given to the Legislature. It would allow a bait and switch in which voters pass an initiative on Subject *A* but the fine print will unconstitutionally prevent or limit the Legislature's ability to legislate on Subject *B*. It will allow the trampling of political and civil rights without recourse to otherwise-permissible legislation.

Thus, if this Court approves the structure of this initiative, we can expect something like an initiative cutting certain insurance rates but containing a limitation on "amendments" making it nearly impossible for the Legislature to impose penalties for unfair insurance practices, or an initiative creating

[1] This brief does not address the question whether Proposition 22 interferes with the "plenary" power of the state Legislature to enact workers' compensation laws.

affordable housing opportunities but containing a limitation on "amendments" preventing the Legislature from overriding zoning rules in California cities.

In Proposition 22, California voters were told that initiative approval meant treating "gig workers" such as Uber drivers as independent contractors rather than employees for purposes such as workers' compensation laws. But the substance of the initiative was silent on whether gig workers could have someone represent them collectively to do things like bargaining over working conditions. No provisions in the initiative limit collective bargaining and the initiative's statement of purposes says absolutely nothing about collective bargaining rights. And yet deep in Proposition 22's fine print (on the bottom of page 8 to the top of page 9 of a 10-page measure),[2] in the guise of providing limitations on "amendments," the measure bars the Legislature from enacting any law governing the collective bargaining rights of gig workers unless seven-eighths of the Legislature agrees, a nearly insurmountable margin for any controversial measure.

If Proposition 22's proponents wanted to bar entities from assisting gig workers in collective bargaining, they should have included a provision doing so in the substantive provisions of the initiative. Perhaps the proponents did not do so because a proposal to prevent collective action by gig workers could have been politically unpopular, making the measure less likely to pass.

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[2] See Appellants' Appendix (AA) 39–40.

So proponents—leading ride-share and app companies[3] who benefit financially from a non-organized workforce—tried instead to achieve the same aims indirectly by hamstringing the Legislature from passing collective bargaining legislation related to gig workers. They styled separate legislation on the topic of gig workers' collective bargaining rights as an "amendment" to Proposition 22, and then subjected such an "amendment" to an onerous seven-eighths supermajority requirement. Such a structure in a voter initiative appears unprecedented among California initiatives.

As explained below, the structure of Proposition 22 violates the separation of powers contained in the California Constitution. Although Article II, section 10(c) of the Constitution gives initiative proponents the ability to say that the Legislature may not offer amendments (or must meet supermajority requirements to offer amendments) on the *same subject* as that of the initiative—a requirement necessary to ensure that the Legislature does not pass laws nullifying provisions in voter-approved initiatives—the Constitution does not give initiative proponents the ability to say that the Legislature may not offer legislation (or must meet supermajority requirements to offer legislation) on *a different but potentially related subject.*

This Court should hold that the portion of Proposition 22 requiring seven-eighths legislative approval for laws regulating the collective bargaining rights of gig workers is unconstitutional. Because the drafters of Proposition 22

[3] See State-Appellants' Opening Brief (S-AOB) 16.

engaged deliberately in a manipulation of the initiative process, this Court should hold invalid all of Proposition 22 despite its severability clause. Without such a strong remedy, there will be no penalty for trying this gambit again; the worst that will happen is that the offending "amendment" will be excised from the measure. At the very least, this Court should declare the portion of the measure limiting legislative power unconstitutional and unenforceable.

A ruling against the "amendment" gambit contained in Proposition 22 will ensure that initiative proponents cannot limit legislative power through the back door. It will confirm that legislatures retain the authority to pass legislation on topics that are related to, but distinct from, those an initiative actually covers. In that way, it will maintain the proper balance between the People and the Legislature in passing legislation.

ARGUMENT

I. PROPOSITION 22 USURPS THE POWER OF THE STATE LEGISLATURE TO LEGISLATE ON SUBJECTS DIFFERENT FROM ONES LEGISLATED UPON IN A VOTER INITIATIVE.

A. The California Constitution divides power for passing legislation between the People and the Legislature. It allows voter initiatives to limit legislative amendments on the same subject as the initiative, but not on a different subject. Allowing an initiative to limit legislation on a different subject violates the Legislature's power to pass legislation on those subjects.

Statutes may become part of California law in one of two ways. (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"].) First, the Legislature may pass a statute, which requires both houses of the state legislature to agree to a bill's language and either the governor's signature on the bill or legislative override of the governor's veto. (Cal. Const., art. IV, § 10.) Alternatively, the People, acting through the initiative process, may pass statutes on most subjects[4] by a majority vote. (Cal. Const., art. II, § 10(a).) Legislation is equally valid whether passed by the Legislature or by initiative; the powers are generally "coextensive."[5]

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[4] Some subjects are impermissible. (See, e.g., Cal. Const., art. II, §12, [providing in pertinent part that "no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect"]). There are also some limitations on the reach of initiatives. (See, e.g., Cal. Const., art. II, § 8(e) ["An initiative measure may not include or exclude any political subdivision of the State from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of that political subdivision"].)

[5] *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 253 (the power of the electorate "is generally coextensive with the power of the Legislature to enact statutes"); *People v. Prado* (2020) 49 Cal.App.5th 480, 491 (disagreeing categorically with the prosecution's statement that "'the power of the people via initiative has supreme authority over that of the Legislature,'" and further stating that "the prosecution overstates the initiative authority of the electorate, relative to the legislative authority of the Legislature. *One is not 'supreme' over the other*, each has the authority to enact statutes" [Italics added]); *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1042; see also *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 485, 520; *People v. Weaver* (2012)

Drafters of the California Constitution recognized that there could be conflicts between the People passing legislation by initiative and the Legislature passing legislation by statute because both bodies have the potential to draft legislation on the same subjects. Article II, section 10(c) of the California Constitution deals with one such conflict, providing in pertinent part that "[t]he Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval."

Without such a provision, the Legislature could simply repeal legislation passed by the voters by majority vote. See *People v. Kelly* (2010) 47 Cal.4th 1008, 1025 ("'[T]he purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent"'").

The latter part of section 10(c), allowing initiative drafters to permit legislative amendment with voter approval under certain conditions, has proven popular. As explained below in Part I.C, it is not unusual for an initiative to allow legislative

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53 Cal.4th 1056, 1093 ("'[T]he power to legislate is shared by the Legislature and the electorate . . . .'"); *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673 (the initiative power to propose and enact statutes is a form of legislative power which would "otherwise reside in the Legislature." Thus, "[i]t has heretofore been considered to be ***no greater*** *with respect to the nature and attributes of the statutes that may be enacted than that of the Legislature*" [Italics added, boldface added]).

amendment under certain conditions consistent with the initiative's purposes.

Section 10(c)'s limit on the Legislature's ability to "amend" or "repeal" an initiative statute without voter approval has no effect on the Legislature's ability to pass other legislation. As the California Supreme Court explained in *People v. Kelly, supra*, 47 Cal.4th 1008, 1025–1026, "despite the strict bar on the Legislature's authority to amend initiative statutes, judicial decisions have observed that this body is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The Legislature remains '"free to address a related but distinct area"' . . . or a matter that an initiative measure 'does not specifically authorize *or* prohibit.'" (Citations omitted.)

In other words, an amendment is only that which "affects the application of the original statute or impliedly modifies its provisions." (See *Huening v. Eu* (1991) 231 Cal.App.3d 766, 777.) Legislation "in a related but distinct area" is not an amendment of a statute created by initiative. (*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 43 (hereafter *Mobilepark*).)

Thus, suppose an initiative regulates automobile safety and it contains no provision allowing for legislative amendment or repeal. Under section 10(c), the Legislature may not pass new statutes regulating automobile safety inconsistent with the initiative. But the Legislature would not violate section 10(c) by passing legislation regulating the safety of boats, bicycles, or airplanes. Even though regulation of all such modes of

transportation could potentially be included in a single initiative, an initiative including a provision limiting the Legislature's ability to pass a statute on boat, bicycle, or airplane safety would not "amend" a statute regulating a different but related subject, automobile safety. This is an uncontroversial proposition upon which all parties in this lawsuit would likely agree. See *People v. Lippert* (2020) 53 Cal.App.4th 304, 311 (in determining whether a Legislature has attempted to "amend" an initiative, the question whether the statute "'prohibits what the initiative authorizes, or authorizes what the initiative prohibits'").

Putting these two points together, initiative drafters lack the power to write an initiative that both (1) regulates automobile safety and that (2) limits the ability of the Legislature to regulate the safety of boats, bicycles, or airplanes. If such drafting were allowed, initiative drafters would be taking too much power from the Legislature—they would take a subject that is not part of the initiative off the table from the Legislature's consideration, or at least making passage of such legislation much harder.

Just as section 10(c) tells the Legislature to stay in its lane in the passage of legislation, this corollary to section 10(c) implied by section 10(c) itself keeps the People in their lane too. See *Wallace v. Zinman* (1927) 254 Cal. 585, 593 ("We do not recognize an initiative measure as having any greater strength or dignity than attaches to any other legislation . . . It is only another system added to our plan of state government by a permissive amendment to the constitution, but it was at no time

intended that such permissive legislation by direct vote should override the other safeguards of the constitution . . . We have a state government with three departments, each to check upon the others, and it would be subversive of the very foundation purposes of our government to permit an initiative act of any type to throw out of gear our entire legal mechanism. Our common sense makes us rebel at the suggestion".)

Initiative drafters should not be able to propose legislation on one subject but then bar legislation (styled as a limitation on "amendment") on a different subject, even if somewhat related. Without such a limitation, voter initiatives could unconstitutionally usurp the power of the Legislature to pass legislation on subjects not substantively addressed by the People in an initiative. It would allow initiatives to function as stalking horses where the real purpose (or one of the main purposes) is to stymie legislative action in a separate but related area. Thus, consider the examples in the introduction on potential initiatives really aimed at stopping future legislative action on unfair insurance practices or preemption of local housing and zoning rules.

This limitation on the initiative power meaningfully protects civil and political rights. Without it, well-funded constituencies such as landlords, banks, insurance companies, or employers, who choose to fund anti-tenant, children, consumer, or worker ballot initiatives could block the Legislature from enacting future laws protecting these groups simply by burying broad language in anti-amendment sections separate from the initiatives' main operative text.

This understanding of the scope of the initiative power does not impose meaningful limitation on the People's right to pass regulation by initiative. If the People wish to pass a law regulating the safety of automobiles, boats, bicycles, and airplanes in a single initiative, the People may do so, so long as the measure complies with the single-subject rule.[6] But it violates the Legislature's constitutionally-protected equal power to pass legislation for an initiative to regulate on Subject *A* but bar the Legislature from regulating on Subject *B*.

Of course, it may be that an initiative regulating automobile safety is politically popular but that inclusion within the measure of a provision prohibiting safety regulation of boats, bicycles, and airplanes is not. In that case, the combined measure may fail to earn popular support. An initiative proponent wishing to bar safety regulation of boats, bicycles, and airplanes should have to expressly get voter approval for doing so, and the proponent should not be able to sneak a provision blocking the Legislature's action on such regulation through the back door via an initiative covering automobile safety. Courts should not countenance this form of mischief that usurps the Legislature's power.

B. Proposition 22 purports to limit legislative amendments on collective bargaining, a subject different from that of the rest of the initiative. This limitation, whether styled as an "amendment" or not, usurps the Legislature's constitutional power.

Part I.A established that an initiative violates the California Constitution when it regulates on Subject *A* but bars

[6] On the single-subject rule, see Part I.D below.

or limits legislative amendment on Subject *B*. Part I.B shows that Proposition 22 fits this pattern and is therefore unconstitutional.

1. The structure of Proposition 22, and its sole "oblique" reference to collective bargaining.

The text of Proposition 22 covers 10 pages. (Appellants' Appendix (AA), *supra*, at pp. 32–41.) It begins with "Findings and Declarations" (Section 7449) about the purported benefits of gig workers being treated as independent contractors rather than employees. (*Id.* at p. 32.) It also provides that both California law and app-based companies "should protect the safety of both drivers and consumers without affecting the right of app-based rideshare and delivery drivers to work as independent contractors." (*Ibid.*) It then includes Proposition 22's four purposes (in Section 7450): (1) protecting gig workers' rights to work as independent contractors; (2) giving such workers flexibility about when, where, and how they work; (3) requiring rideshare and delivery network companies to offer certain protections and benefits for app-based rideshare and delivery drivers; and (4) improving public safety related to app-based services and deliveries. (*Id.* at pp. 32–33; see also *id.* at pp. 895–896 [trial court order describing the initiative's purposes].)

There is *no mention* in Proposition 22's Findings and Declarations or in its statement of purposes concerning collective bargaining rights or the appointment of entities to engage in collective bargaining for gig workers.

The heart of the ballot measure is Section 7451, which sets forth conditions under which gig workers must be treated as independent contractors rather than employees under state law. (AA, *supra*, at p. 33.) This provision is so central to this industry-backed initiative that Section 7465(c)(2) provides that "Any statute that amends Section 7451 does not further the purposes of this chapter" and therefore may not be amended by the Legislature even with a seven-eighths supermajority vote. (See *id.* at p. 39.) Proposition 22 even provides that although parts of the initiative are generally severable if stricken by a court, the entire initiative must fail if a court strikes down Section 7451. (*Id.* at p. 40, section 7467(b).)

Despite its centrality, section 7451 mentions nothing about collective bargaining rights of gig workers or entities that might be organized to help these workers. Nor is there any mention of this topic *anywhere else* in Proposition 22's substantive provisions. The single mention appears in the initiative's sections on amendments. (See also AA, *supra*, at p. 896 [trial court order concluding that "No other part of Proposition 22 deals with collective bargaining rights . . . "].)

Section 7465 (entitled "Article 9. Amendment") runs from the bottom of the eighth page to the top of the ninth page of the ten-page measure. (AA, *supra*, at pp. 39–40.) Section 7465, subsection (a) allows legislative amendment of Proposition 22 only under strict conditions: such an amendment must be consistent with and further the purposes of the initiative; it must pass by an onerous seven-eighths vote of both houses of the Legislature; and the final version of the

Legislature's proposed amendatory language must have been posted on the Internet for at least 12 days before the measure's passage. (*Id.* at p. 39.)[7]

Section 7465, subsection (c) then provides three further limitations on amendments of Proposition 22.

First, as noted above (see *ante*, pp. 22–23), the Legislature may not amend Section 7451, the section barring state law from treating most gig workers as employees. (AA, *supra*, at p. 39.)

Second, any proposed law imposing unequal regulatory burdens on app-based drivers based on their employment status must meet the onerous requirements for amendment set forth earlier in the section. (AA, *supra*, at p. 39.)

Third, and at issue here, Section 7465, subsection (c)(4), provides that "Any statute that 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, constitutes an amendment of this chapter and must be enacted in compliance with the procedures governing amendments consistent with the purposes of this chapter as set forth in subdivisions (a) and (b)." (AA, *supra*, at pp. 39–40.) The trial court aptly described this provision as only "obliquely and indirectly" dealing with collective bargaining rights. (*Id.* at p. 896.)

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[7] Subsection (b) deals with legislative amendments passed after October 29, 2019 but before the effective date of Proposition 22. (AA, *supra*, at p. 39.)

Section 7465 concludes by providing that the Legislature by simple majority vote (and without regard to the purposes of Proposition 22) may enact any criminal penalty providing "greater protection against criminal activity for app-based drivers and individuals using rideshare services or delivery services." (AA, *supra*, at p. 40.)

2. Proposition 22 unconstitutionally usurps the legislature's power by barring an amendment on a different subject.

Examining Proposition 22 as a whole confirms that its structure is unconstitutional. The measure legislates about Subject *A*—the treatment of gig workers under state law as independent contractors—but limits the Legislature from legislating about Subject *B*—whether entities may represent gig workers "in connection with drivers' contractual relationships with network companies, or drivers' compensation, benefits, or working conditions . . . ." (AA, *supra*, at p. 39.)

A law requiring the treatment of gig workers as independent contractors does not necessarily imply anything about whether entities may help such workers band together for collective action to advocate for better working conditions. As the trial court put it, "the most maximal state law covered only by Subdivision (c)(4) would create a guild through which independent contractors would bargain collectively their contract terms and working conditions. This may alter their bargaining power vis-à-vis the network companies they contract with, but the Court cannot find that it would diminish their 'independence' or transmute them into employees." (AA,

supra, at p. 895.) Proposition 22 would make it nearly impossible for the Legislature to pass a law facilitating this collective bargaining by gig workers, thereby impinging on the Legislature's powers.

One need not look further than the words and structure of Proposition 22 to see that the initiative does not treat gig workers' status as independent contractors and their collective bargaining rights as the same subject. The drafters of the initiative would have had no reason to expressly limit legislative enactments on collective bargaining in Section 7565(c)(4) if such limitations were already excluded implicitly by the provisions of Proposition 22 treating gig workers as independent contractors. If independent contractor status and collective bargaining rights were already in conflict, then Section 7465(a), limiting legislative amendments to only those consistent with the statute's purposes, would have given initiative drafters all the necessary protection they desired against such legislation.

As the trial court correctly concluded, the limitation on the Legislature's ability to authorize entities to bargain on behalf of gig workers "is utterly unrelated to [Proposition 22's] stated common purpose." (AA, *supra*, at p. 896.) The limitation "appears only to protect the economic interests of the network companies in having a divided, ununionized workforce, which is not a stated goal of the legislation." (*Ibid.*)

To put it another way, a statute passed by the Legislature authorizing entities to engage in collective bargaining for gig workers would neither authorize anything prohibited by the

substance of Proposition 22 nor prohibit anything authorized by the substance of Proposition 22. (See *People v. Lippert*, *supra*, 53 Cal.App.4th at p. 311.) It is legislation "in a related but distinct area." (*Mobilepark*, *supra*, 35 Cal.App.4th at p. 43.)

For this reason, the claims of the Intervenors and of the State on appeal ring hollow. First, the Intervenors pretend that Section 7465(c)(4) is not a real statute, but merely a *suggestion* of what courts should do if the Legislature passed a collective bargaining statute. (Intervenors-Appellants' Opening Brief (I-AOB) 49 [the provision is "a non-binding expression of the voters' views on potential amendments to Proposition 22"]; *id.* at p. 54; Intervenors-Appellants' Reply Brief 10 ("precatory"); *id.* at p. 30 ("precatory").)[8]

But Section 7465(c)(4) is a statutory provision that expressly limits the Legislature's powers. It is not a "precatory" statement of voters' views, as Intervenors suggest. (I-AOB, *supra*, at pp. 52, 53.) Unlike a declaration of an existing statute's meaning which does not have the force of law (see *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244 ["[A] legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute"]; I-AOB, *supra*, at p. 52), Section 7465(c)(4) of Proposition 22 has real force, and severely limits the Legislature's power.

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[8] When Intervenors say that the drafters of Proposition 22 could have barred *all* amendments to Proposition 22 under Article II, section 10(c) of the Constitution (I-AOB, *supra*, at p. 50), that is certainly true only as to *amendments* to Proposition 22. But it is *not* true as to prohibitions on laws that do not amend Proposition 22.

The State does not argue that a duly-enacted statute contained in an initiative is a mere precatory suggestion or expression of voters' views. But it does make the bolder—and incorrect—claim that under Proposition 22 gig workers "are not permitted to collectively bargain." (S-AOB, *supra*, at p. 46; see also State Reply Brief 21 ["independent contractors[,] as a matter of law, cannot collectively bargain"].)

This bare statement has no support in the language of the statute and, as the trial court explained, such a claim is based upon "a contested construction of certain antitrust laws as barring independent contractors from bargaining collectively." (AA, *supra*, at p. 896.) As the Respondents' Brief (RB) at pages 50–53 explains, there is no necessary conflict between granting gig workers independent contractor status and a state giving such workers the rights to engage in collective bargaining.

In fact, the Ninth Circuit made clear in *Chamber of Commerce of the USA v. City of Seattle* (2018) 890 F.3d 769 (hereafter *Chamber of Commerce*) that states have the power to grant immunity from antitrust laws for independent contractors to engage in collective bargaining. The court in *Chamber of Commerce* held that the City of Seattle's ordinance did not meet the test for state-action immunity from antitrust laws to allow gig workers to collectively bargain. But the court recognized that a state could indeed give workers such authority if it met the two-prongs of what has come to be known as the *Midcal* test.[9]

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[9] See *Chamber of Commerce*, *supra*, 890 F.3d at pp. 781–782 ("The Supreme Court uses a two-part test, sometimes referred

Under *Chamber of Commerce*, the California Legislature would have the clear power to pass a statute giving gig workers an opportunity to engage in collective bargaining. Such a statute would not amend Proposition 22 and would not conflict with Proposition 22's protection of gig workers as independent contractors—but for the separate, unconstitutional limitation on the Legislature's powers set forth in Section 7465(c)(4), which reaches out to sweep up such legislation and unconstitutionally declare it an "amendment" to Proposition 22.[10]

The State also suggests that the "collective bargaining provisions further the initiative's broad purpose of preserving driver independence." (S-AOB, *supra*, at p. 26.) But the "independence" protected by the initiative is not independence from labor unions or from a guild of fellow workers, but an independence from *state* regulation of gig workers as employees.

The State similarly claims that Proposition 22 allows gig workers to be "free from any number of obligations or limits on

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to as the *Midcal* test, to 'determin[e] whether the anticompetitive acts of private parties are entitled to immunity' *Id.* First, 'the challenged restraint [must] be one clearly articulated and affirmatively expressed as state policy,' and second, 'the policy [must] be actively supervised by the State.' *Id.* (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980))").

[10] And even aside from that statutory authorization, when employees and independent contractors such as actors and musicians compete in the same profession, antitrust law does not bar collective bargaining by such contractors. See *American Fed. of Mus. of U. S. & Can. v. Carroll* (1968) 391 U.S. 99, 106.

self-representation." (S-AOB, *supra*, at p. 27.) But collective bargaining is something that gig workers would voluntarily opt into if they so choose; far from limiting self-representation, collective bargaining can enhance it if gig workers so choose.

In short, the state's claim that a ban on collective bargaining is necessarily implied by Proposition 22 treating gig workers as independent contractors is incorrect and contrary to an understanding of both election law and labor law.

C. Proposition 22's structure usurping legislative power is unprecedented.

Amicus has examined California statewide voter initiatives passed over the last decade and has identified 14 initiatives that explicitly mention rules for their amendment. No initiative other than Proposition 22 has the structure of legislating on Subject *A* but barring the Legislature from legislating on Subject *B*.[11]

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[11] Ballot Pamp., Gen. Elec. (Nov. 6, 2012), text of Prop. 35, § 15, p. 105, at <https://perma.cc/9B97-LSPS> (hereafter Prop. 35); Ballot Pamp., Gen. Elec. (Nov. 6, 2012), text of Prop. 36, § 11, p. 110, at <https://perma.cc/9B97-LSPS>; Ballot Pamp., Gen. Elec. (Nov. 4, 2014), text of Prop. 47, § 15, p. 74, at <https://perma.cc/ES9E-Y9CE>; Ballot Pamp., Gen. Elec. (Nov. 8, 2016), text of Prop. 52, § 3.5, pp. 122–123, at <https://perma.cc/2TAT-DFS2>; Ballot Pamp., Gen. Elec. (Nov. 8, 2016), text of Prop. 54, § 9, p. 128, at <https://perma.cc/2TAT-DFS2>; Ballot Pamp., Gen. Elec. (Nov. 8, 2016), text of Prop. 56, § 9, p. 141, at <https://perma.cc/2TAT-DFS2>; Ballot Pamp., Gen. Elec. (Nov. 8, 2016), text of Prop. 57, § 5, p. 145, at <https://perma.cc/2TAT-DFS2>; Ballot Pamp., Gen. Elec. (Nov. 8, 2016), text of Prop. 63, § 13, p. 178, at <https://perma.cc/2TAT-DFS2>; Ballot Pamp., Gen. Elec. (Nov. 8, 2016), text of Prop. 64, § 10, p. 210, at

Many initiatives over the last decade do allow legislative amendment consistent with the initiative's purposes. For example, Proposition 35 on human trafficking, passed in 2012, provides that "This act may be amended by a statute in furtherance of its objectives passed in each house of the Legislature by rollcall vote entered in the journal, a majority of the membership of each house concurring."[12]

Some measures even include supermajority requirements for legislative amendment, although none as high as Proposition 22's seven-eighths requirement. For example, Proposition 11 on ambulance employees, passed in 2018, provides that "The Legislature may amend this chapter by a statute passed in each house of the Legislature by rollcall vote entered in the journal, four-fifths of the membership concurring, provided that the statute is consistent with, and furthers the purpose of, this chapter."[13]

Some measures even explain when particular legislation on the same subject as an initiative should be considered as

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<https://perma.cc/2TAT-DFS2> (hereafter Prop. 64); Ballot Pamp., Gen. Elec. (Nov. 8, 2016), text of Prop. 66, § 20, p. 218, at <https://perma.cc/2TAT-DFS2>; Ballot Pamp., Gen. Elec. (Nov. 6, 2018), text of Prop. 11, § 1, art. 5, p. 86, at <https://perma.cc/2JRU-NSX6> (hereafter Prop. 11); Ballot Pamp., Gen. Elec. (Nov. 6, 2018), text of Prop. 12, § 8, p. 90, at <https://perma.cc/2JRU-NSX6>; Ballot Pamp., Gen. Elec. (Nov. 3, 2020), text of Prop. 14, § 26, p. 108, at <https://perma.cc/T2KM-7QCZ>; Ballot Pamp., Gen. Elec. (Nov. 3, 2020), text of Prop. 24, § 25, pp. 74–75, <https://perma.cc/25WG-FGSX>.

[12] Prop. 35, *supra*, at p. 105.

[13] Prop. 11, *supra*, at p. 86. Like Proposition 22, Proposition 11 provides for legislation proposed to amend the measure to be available for at least 12 business days on the Internet. See *ibid.*

consistent with the initiative's purposes. For example, Proposition 64 on marijuana legalization, passed in 2016, provides that "Amendments to this act that enact protections for employees and other workers of licensees under Section 6 . . . of this act that are in addition to the protections provided for in this act or that otherwise expand the legal rights of such employees or workers of licensees under Section 6 . . . of this act shall be deemed to be consistent with and further the purposes and intent of this act."[14]

But, other than Proposition 22, *no* amendments that Amicus has identified have the form of purporting to limit amendments on a subject not otherwise regulated or discussed within the rest of the amendment. This is something new, and dangerous, in California.

D. Proposition 22's structure usurps legislative power even if the single-subject rule would not have barred inclusion of a ban on collective bargaining within the initiative.

The challengers to Proposition 22 raise as a separate argument the claim that the measure violates the single subject rule contained in the California Constitution on grounds that collective bargaining rights and independent contractor status for gig workers are separate subjects.[15] (RB, *supra*, at p. 61.)

Whether or not Proposition 22 violates the single-subject rule—a question on which Amicus does not opine—does not control the question whether the structure of Proposition 22

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[14] Prop. 64, *supra*, at p. 210.

[15] Article II, section 8(d) of the California Constitution states that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

usurps the Legislature's power in violation of the California Constitution.

The single-subject inquiry asks whether a provision limiting the ability of the Legislature to authorize an entity to represent gig workers in negotiations with app-based companies is "reasonably germane"[16] to the rest of Proposition 22 treating gig workers as independent contractors rather than employees. In contrast, the legislative power inquiry described in Parts I.A–I.B of this brief asks whether it unconstitutionally usurps the Legislature's power to include a provision limiting the ability of the Legislature to authorize an entity to represent gig workers in negotiations with app-based companies within a law dealing *only* with independent contractor status for gig workers.

In other words, even if one treats a ban on allowing entities to engage in collective bargaining for gig workers and independent contractor status for gig workers as germane enough to each other that they *could* be included in the same initiative without violating the single-subject rule, that does not answer the question whether an initiative could legislate on only *one* of these subjects but prohibit the Legislature from legislating on the *other*. As explained above, this latter structure unconstitutionally usurps the Legislature's power.

E. The challenge to Proposition 22 is ripe.

[16] See *Brown v. Superior Court* (2016) 63 Cal.4th 335, 350; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 575; *Fair Political Practices Com'n v. Superior Court* (1979) 25 Cal.3d 33, 39.

Both Intervenors and the State argue that this challenge is not ripe until the Legislature passes legislation related to collective bargaining for gig workers. (I-AOB, *supra*, at 47–49; S-AOB, *supra*, at 40–43.)

This argument ignores how the legislative process works. Legislators are busy and the legislative calendar is crowded. Why would any Legislator attempt to pass such a law knowing it could be struck down by a court as in conflict with the provisions of the "amendment"? It is hard enough to pass legislation, especially given fierce opposition by a powerful industry, without the uncertainty and chill that comes from Section 7465(c)(4): Would such legislation meet a seven-eighths requirement in both houses? Would a court find it inconsistent with the remainder of Proposition 22?

This chill alone makes a challenge ripe today.

II. THIS COURT SHOULD DECLARE ALL OF PROPOSITION 22 UNCONSTIUTIONAL; AT THE VERY LEAST IT SHOULD HOLD SECTION 7465(C)(4) UNCONSTITUTIONAL.

Part I of this brief demonstrates that section 7465(c)(4) of Proposition 22 violates the California Constitution and should be declared unenforceable.

Section 7467(a) of the initiative contains a severability clause providing that if any portion of Proposition 22 is declared unenforceable (aside from Section 7451[17]), the rest of the

[17] Section 7467(b) provides that if Section 7451 is declared unenforceable, the remainder of Proposition 22 should *not* be severed but should be declared unenforceable as well. (AA, *supra*, at p. 40.)

measure should stand. (AA, *supra*, at p. 40.) If that severability clause is enforceable, then this court's decision to invalidate section 7465(c)(4) would not affect the enforceability of the remainder of the statute.

However, in these circumstances, this court should hold all of Proposition 22 unenforceable. Proposition 22's proponents tried to have their cake and eat it too, by not squarely presenting the question of gig workers' collective bargaining rights to voters for consideration but effectively barring such legislation through a law improperly styled as an "amendment" that usurped the Legislature's power to regulate in this area. This Court should strike the entire measure to deter other initiative proponents from similar drafting strategies. Otherwise, there will be no penalty for continuing to try this gambit in future initiatives.

This situation is reminiscent of the Legislature's overreach in *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735 (*McPherson*). There, the Legislature responded to the qualification of an initiative, Proposition 62, establishing a nonpartisan primary for certain candidate elections, by placing a competing legislatively-proposed constitutional amendment requiring partisan primaries on the ballot in Proposition 60. But Proposition 60 also included an unrelated measure involving the sale of surplus property owned by the State, which was perhaps a sweetener to get voters to vote for the measure. Both the California Court of Appeal and Supreme Court agreed that Proposition 60 violated a part of the state constitution (Article XVIII, section 1) requiring that each

constitutional amendment put by the Legislature for a vote by the people be subject to a "separate vote," a requirement that is much like the single-subject rule. *Id.* at 777.

Acting on an emergency basis in a challenge brought by Proposition 62 proponents to remove Proposition 60 from the ballot, the Court of Appeal declined to remove the measure. Instead, it split the two amendments contained in Proposition 62 into two propositions, Proposition 62A and 62B, and let voters vote separately on each.

The California Supreme Court declined to intervene before the election to reverse the Court of Appeal's emergency remedial order. But after the election, the Supreme Court held that this bifurcation remedy was impermissible because it would encourage further gaming of the system by the Legislature:

"We conclude that the Court of Appeal erred in bifurcating the two measures. Nothing in the language or history of article XVIII generally, or of the separate-vote provision in particular, suggests that a violation of the provision should be remedied by bifurcation of proposed amendments and the presentation of those matters to the electorate in separate measures. Nor do we discern in our case law, or in that of any other jurisdiction, any suggestion that bifurcation is an appropriate remedy in such a circumstance. Finally, we find it instructive that the analogous initiative single subject provision (Cal. Const., art. II, § 8, subd. (d)) precludes the related remedy of severance. (See *Jones*, *supra*, 21 Cal.4th at p. 1168, [90 Cal.Rptr.2d 810, 988 P.2d 1089] ["when an initiative measure violates the single-subject rule, severance is not an available

remedy"]; see also *California Trial Lawyers Assn. v. Eu* (1988) 200 Cal.App.3d 351, 361–362, [245 Cal.Rptr. 916] [concluding the same].)"

"Indeed, allowing bifurcation of a measure that violates the separate-vote provision would permit—if not encourage—logrolling-type manipulations that in turn would frustrate one purpose of the separate-vote provision. If, for example, it were known in advance that bifurcation was a potential and permissible remedy, factions within the Legislature, none of which on its own could garner a two-thirds vote for a particular amendment, might join forces by agreeing to present disparate proposed amendments in a single measure, knowing that a court likely would find a separate-vote violation but thereafter could order the provisions bifurcated and presented separately to the electorate as discrete amendments. In this manner, legislators constituting less than two-thirds of each house could place such measures before the voters in violation of the rule set forth in the first sentence of article XVIII, section 1. Our conclusion that bifurcation is not a remedy for violation of the separate-vote provision avoids creating such incentives or facilitating such manipulations." (*McPherson*, *supra*, 38 Cal.4th 735, at p. 781–782, fn. omitted.)[18]

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[18] In *McPherson*, the California Supreme Court declined after the election to declare Propositions 62A and 62B unenforceable: "[W]e conclude that under the unusual circumstances of this case, it would be inappropriate to invalidate the two approved measures, each of which, as noted, subsequently was separately approved by the voters after this court, in the face of the then impending election, declined to stay the Court of Appeal's bifurcation order." (*McPherson*, *supra*, 38 Cal.4th at p. 782.) This case, unlike *McPherson*, did

Just as the court in *McPherson* said that bifurcation was an insufficient remedy to deter mischief by the Legislature in shoving two amendments into a single measure presented to voters, severance is an insufficient remedy in this case to deter a different but parallel type of mischief: burying major limitations on legislative power in "amendment" limitations separate from the main operative sections of the initiative. If the remedy for this conduct is nothing more than severing the offending section, this pernicious drafting practice will become commonplace. This Court should hold all of Proposition 22 unenforceable.

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not involve a rejected request to the state Supreme Court to stay any order before the election. And in this case, unlike *McPherson*, "manipulation of the process" (*ibid.*) by the drafters of Proposition 22 is evident.

CONCLUSION

For the foregoing reasons, this Court should declare Proposition 22 unenforceable to deter such unconstitutional drafting tactics in the future. At the very least, this Court should declare section 7465(c)(4) of Proposition 22 unconstitutional.

May 25, 2022 **RICHARD L. HASEN**

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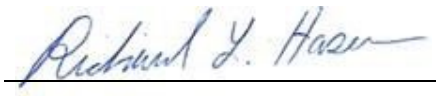
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 6,839 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

May 25, 2022 **RICHARD L. HASEN**

By: 

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 610 S. Ardmore Avenue, Los Angeles, CA 90005.

On May 25, 2022, I served via electronic service on the parties the following document(s) described as on the interested parties in this action as follows: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and [PROPOSED] AMICUS CURIAE BRIEF OF CALIFORNIA ELECTION LAW PROFESSORS**

BY ELECTRONIC SERVICE: I served the document(s) on the person or people listed in the Service List by submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 25, 2021 at Los Angeles, California.

By: Rocio Garcia

Rocio Garcia