No. S279622

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HECTOR CASTELLANOS, ET AL.,

Plaintiffs and Respondents,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants and Appellants,

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

Intervenors and Appellants.

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

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF CALIFORNIA CONSTITUTION SCHOLARS SUPPORTING DEFENDANTS AND APPELLANTS STATE OF CALIFORNIA

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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

Amicus are California constitution scholars who seek to aid this Court in resolving the constitutional interpretation issue here; we are academics affiliated with the California Constitution Center, a nonpartisan academic research center at the University of California, Berkeley, School of Law. The University of California is not party to this brief.

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

Amicus is interested in this case because it raises an important issue of California constitutional law. The electorate's initiative lawmaking power is a core element of California's popular-sovereignty-based government. The Court of Appeal correctly held that neither this subject nor any other is withheld from the voters, who share with the legislature plenary power to act on this subject. This is because all political power resides in California's people, and the initiative empowers the voters to override the legislature on any public policy matter. Accordingly, *amicus* argues for a ruling that validates the initiative power and affirms the Court of Appeal's decision.

Respectfully submitted,

Dated: April 2, 2024

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AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

California's legislature and electorate share coextensive law making power, and any law the legislature can enact, the voters can too. The electorate adopted Proposition 22, a law that would have passed muster had the legislature adopted it. That law therefore was also within the electorate's coextensive law making power. Thus, Proposition 22 does not conflict with article 14, section 4, which only confirms the state's power to adopt certain laws. A plenary constitutional power is comprehensive but not exclusive, and the legislature and the electorate share the state's law making power, so if the legislature can regulate workers compensation, then the voters can too.

The specific historical context here illustrates those general structural truisms. Statements from the time are unanimous: article 14, section 4 was meant only to confirm to a skeptical *Lochner*-era judiciary that working conditions could be set by statute. The legislature already had that power, but it needed emphasizing to reluctant courts. The voters also already had that same power, but it required no action and so the amendment left that matter alone. Thus, the amendment operated only to remove judicial impediments to the legislative power — it had no effect on the electorate's equivalent power.

There is no historical evidence of any intent to carve out this one subject from the initiative. Indeed, it would have sounded bizarre to the Progressive generation that created direct democracy to suggest that working conditions were the one thing

their new powers could not touch. So holding would upend this Court's decisions that no subject is excluded from the initiative power. And it would be perverse to quash a law with a provision that was intended to *prevent* judicial abrogation.

This case only requires applying the Court's usual approach when the legislature and the voters enact differing laws on the same subject: if harmony fails, then the voters prevail. These two actors share the same ability to enact laws, but when they disagree article 2, section 10(c) makes the electorate's preference paramount. As always, the voters have the final word.

ARGUMENT

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

The California constitution is a limitation on the otherwise-complete legislating power of a sovereign state government; unlike the federal constitution, state constitutions do not grant limited powers.[1] California's constitution vests the "legislative power of this State" in the state legislature.[2] That legislative power is plenary except as specifically limited by the California constitution.[3] Because the legislature already has plenary law making power, specifying a plenary power to make certain laws grants nothing extra.[4] The legislature can legislate on any subject

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[1] *Marine Forests Soc'y v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 29; *City & Cty. of San Francisco v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 103, 113.
[2] Cal. Const., art. IV, § 1; *Howard Jarvis Taxpayers Ass'n v. Padilla* (2016) 62 Cal.4th 486, 497–98.
[3] *Cal. Redev. Ass'n v. Matosantos* (2011) 53 Cal.4th 231, 254; *Marine Forests Soc'y*, 36 Cal.4th at 31; *MacMillan Co. v. Clarke* (1920) 184 Cal. 491.
[4] Cal. Const., art. IV, § 1.

even if the state constitution is silent on it — subject, of course, to any constitutional limits.[5]

The initiative is one such express constitutional withdrawal of power from the legislature.[6] Only where the state constitution expressly withdraws legislative power will courts find a want of authority.[7] Just so, the initiative withdraws power from the legislature: it reserves an equal measure of the state's legislating powers to the electorate. "Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them."[8] By adopting the initiative and referendum the voters "have simply withdrawn from the legislative body, and reserved to themselves the right to exercise a part of their inherent legislative power."[9]

But there is no reciprocal withdrawal of the initiative power. The initiative is also plenary.[10] It is "coextensive" with the legislature's law making power.[11] Even

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[5] *Cal. Redev. Ass'n*, 53 Cal.4th at 254.
[6] Cal. Const., art. IV, § 1.
[7] *Cal. Redev. Ass'n,* 53 Cal.4th at 254.
[8] *Associated Home Builders*, 18 Cal.3d at 591.
[9] *Dwyer v. City Council of Berkeley* (1927) 200 Cal. 505, 513.
[10] *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691; accord *Pac. Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180; *City & Cty. of San Francisco*, 22 Cal.3d at 113.
[11] *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 942, citing *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1042; *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1032; *Manduley v. Superior Court* (2002) 27 Cal.4th 887, 552; *Santa Clara County Local Transportation Auth. v. Guardino* (1995) 11 Cal.4th 220, 253 (by approving

specific constitutional grants of authority for the legislature to pass laws on a subject do "not in any way limit the plenary power of referendum and initiative which has been reserved to the people."[12] The legislature can pass laws to facilitate the initiative's operation, "but in no way limiting or restricting" them.[13]

The initiative power also restricts the legislature because the electorate can bar legislative amendment to initiatives.[14] The legislature may amend an initiative statute only with voter approval, "and then only upon whatever conditions the voters attached to the Legislature's amendatory powers."[15] "This reservation of power by the people is, in the sense that it gives them the final legislative word, a limitation upon the power of the Legislature."[16] The ban on amending initiative statutes absent permission is intended to restrict the legislature's powers and instead "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent."[17] So although the lawmaking

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Proposition 62 the electorate "adopted a statute that the Legislature itself could have enacted"), citing *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775; *Strauss v. Horton* (2009) 46 Cal.4th 364, 453 (no distinction between constitutional amendments that may be proposed through the initiative compared with those that the legislature may propose).

[12] *Rossi v. Brown* (1995) 9 Cal.4th 688, 704, citing *Carlson v. Cory* (1983) 139 Cal.App.3d 724, 729 (legislature's constitutional authority to pass taxation-of-property laws did not limit the electorate's plenary power of initiative).

[13] *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 821.

[14] Cal. Const., art. II, § 10.

[15] *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568.

[16] *Carlson,* 139 Cal.App.3d at 728.

[17] *People v. Rojas* (2023) 15 Cal.5th 561, 568 (quotation and citation omitted); *People v. Kelly* (2010) 47 Cal.4th 1008, 1025; *Prof'l Engineers*, 40 Cal.4th at 1046 n.10; *Howard Jarvis*, 62 Cal.4th at 515. The electorate is unrestricted in amending its own measures. *Brown v. Superior Court* (2016) 63 Cal.4th 335, 354.

powers of the legislature and the electorate are often described as "coextensive," when they conflict the electorate's power prevails.[18] This fulfills the "primary purpose of the initiative," which was "to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt."[19]

These principles — the initiative is coextensive, it restricts the legislature, and it is final — resolve the apparent conflict here. No constitutional conflict exists because both actors hold coextensive plenary powers, and the electorate may make the final policy decision. The legislature may exercise its powers in the workers' compensation arena unless the voters also act on that subject.[20] As a legislative body, the electorate may modify or abolish the acts passed by itself or its predecessors.[21] The voters can rewrite existing legislative statutes.[22] And when the electorate acts, that is the end.

Both the coextensive and the superior nature of the initiative apply here to make Proposition 22 a proper exercise of the electorate's power. Coextensive in this context means that if the legislature has the constitutional power to act on a subject, so does the electorate. But anywhere the legislature may legislate, it is always

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[18] *Legislature v. Deukmejian*, 34 Cal.3d at 675 ("the power of the people [to enact statutes] through the statutory initiative is coextensive with the power of the Legislature."); *Carlson*, 139 Cal.App.3d at 728 (initiative limits the legislature's power by giving the voters the final legislative word).
[19] *Perry v. Brown* (2011) 52 Cal.4th 1116, 1140.
[20] *Methodist Hosp. of Sacramento*, 5 Cal.3d at 691.
[21] *Cal. Redev. Ass'n*, 53 Cal.4th at 255.
[22] *Blotter v. Farrell* (1954) 42 Cal.2d 804, 810–11.

limited by the initiative, so if the policy choices by the legislature and the electorate conflict, the electorate prevails because the initiative is superior. The result is that the electorate's limiting power applies to workers' compensation just as it does to every other legislative subject — and when an electorate act conflicts with a legislative act on that subject, the electorate wins. The legislature's general law making power (and its specific power here) may both be plenary; so too is the electorate's lawmaking power, and it can always override the legislature.

Having coextensive law-making power does not make these two actors twins in every sense.[23] Each has some distinct non-lawmaking abilities, and in a general sense the legislature's power is broader.[24] For example, only the legislature can ratify amendments to the U.S. Constitution.[25] The legislature has an appointment power that the electorate lacks.[26] The legislature can investigate; the electorate cannot.[27] The legislature can override a gubernatorial veto; the initiative cannot be used to override a veto (and there is no veto for initiative acts).[28] And the legislature and the electorate have distinct procedural rules.[29]

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[23] *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 708.
[24] *Howard Jarvis*, 62 Cal.4th at 516, citing *Am. Fed'n of Labor v. Eu*, 36 Cal.3d at 708.
[25] *Barlotti v. Lyons* (1920) 182 Cal. 575, 583.
[26] *Am. Fed'n of Labor v. Eu*, 36 Cal.3d at 694 and 697.
[27] *Howard Jarvis*, 62 Cal.4th at 516.
[28] *Perry v. Brown*, 52 Cal.4th at 11126; *Taxpayers To Limit Campaign Spending v. Fair Pol. Practices Com*. (1990) 51 Cal.3d 744, 766.
[29] *Cal. Cannabis Coal.*, 3 Cal.5th at 942; *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 588; *Barlotti*, 182 Cal. at 578.

But when it comes to lawmaking anything one can do the other can too.[30] Courts subject acts by the electorate and legislature to the same substantive constitutional limits and the same rules of construction.[31] Both can do anything that can be done with the law making power. Both can enact statutes and propose amendments.[32] Both can create new state government entities.[33]

The shared legislative power and the initiative's finality exist because the initiative was meant to empower the voters to police the legislature.[34] The initiative needs no legislative permission.[35] When acting through its initiative power the

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[30] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042 (if the legislature has plenary authority to regulate something, "then so, too, does the electorate.").

[31] *People v. Rojas* (2023) 15 Cal.5th 561, 568; *Legislature v. Deukmejian*, 34 Cal.3d at 675; *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.

[32] *Howard Jarvis*, 62 Cal.4th at 498.

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

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

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

electorate is "a constitutionally empowered legislative entity."[36] Its actions are those of the state itself.[37] The electorate can use the initiative to declare state policy.[38] Indeed, substituting the electorate's will for the legislature's is the initiative's purpose.[39]

Nor is there any complaint about the initiative reducing the legislature's powers, because it retains full capacity to legislate on the matter both outside and as permitted by the initiative.[40] So this Court concluded in *Legislature v. Eu*, that nothing about Proposition 140's term and budgetary limits diminished any foundational legislative powers.[41] So this Court held in *Professional Engineers v. Kempton*, that Proposition 35 did not usurp the legislature's plenary authority to regulate private contracting by public agencies.[42] So this Court unanimously held in *Amador Valley v. State Bd. of Equalization*, upholding Proposition 13 although it

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[36] *Prof'l Engineers in Cal. Gov't*, 40 Cal.4th at 1045.
[37] *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 542 ("When the electorate assumes to exercise the law-making function, then the electorate is as much a state agency as any of its elected officials.").
[38] *Am. Fed'n of Labor v. Eu*, 36 Cal.3d at 714; *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 330.
[39] *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035 (initiatives are a "legislative battering ram" because they can "tear through the exasperating tangle" of the legislative process and "strike directly toward the desired end"); *Barlotti*, 182 Cal. at 579; Key & Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA (University of California Press 1939) at 442–43 (Progressive reformers' "immediate objective was to break the monopoly of lawmaking authority held by the representative body" and initiatives would be considered "by the ultimate sovereign, the electorate.").
[40] *Pearson*, 48 Cal.4th at 568 and 571.
[41] *Legislature v. Eu* (1991) 54 Cal.3d 492, 509.
[42] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1047.

placed "significant limits on the taxing power of local and state governments."[43] Thus, even if an initiative limits the legislature's power on a matter, it must still be given the effect the voters intended it to have.[44]

Here, Proposition 22 affects the legislature's power no more than any initiative act does. It is an express override of a particular legislative act (2019 Assembly Bill 5), which the electorate may do either affirmatively with an initiative or by vetoing a legislative act by referendum.[45] The voters can even negate a governor's action by referendum.[46] And the voters sometimes overrule judicial decisions.[47] Overruling the other branches, especially the legislature, is the initiative's purpose.

To bar the electorate from substituting its policy judgment for the legislature's on worker classification is to say that the legislature has exclusive power over that subject, which would establish a subject matter exclusion from the initiative. That would be error: there are no express constitutional subject-matter

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[43] (1978) 22 Cal.3d 208; *State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 562 n.3

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

[45] See *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1111.

[46] See, e.g., *Stand Up for California! v. State* (2021) 64 Cal.App.5th 197, 214 (a referendum can annul a governor's concurrence).

[47] In 2008 Proposition 8 overruled this Court's decision invalidating a statutory ban on same sex marriage. See *In re Marriage Cases* (2008) 43 Cal.4th 757. In 1972 Proposition 17 overruled this Court's decision declaring the death penalty unconstitutional. See *People v. Anderson* (1972) 6 Cal.3d 628 and *People v. Frierson* (1979) 25 Cal.3d 142. And in 1979 Proposition 1 overruled this Court's decision requiring busing to alleviate school segregation. See *Crawford v. Bd. of Educ.* (1976) 17 Cal.3d 280.

carve-outs for the initiative; the intent evidence discussed below is to the contrary; and no court has ever barred the voters from legislating on a subject.

Instead, California courts consistently describe the initiative power as "broad."[48] The initiative can only be used to make law.[49] But the initiative can make *any* law: there are precious few constitutional limits on the initiative, and the California constitution places "no subject-matter limitation on the initiative process."[50] The proponents "are captains of the ship when it comes to deciding which provisions to take on board."[51] Even a "plenary" power constitutionally assigned to the legislature is not exempt.[52] The plenary legislative power at issue here is no different: it is shared with the electorate.

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

The term *plenary* here was intended only to remove judicial doubts about the constitutionality of the workers' compensation system; its drafters were unconcerned with the initiative. There was no expressed voter intent to change the

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

[49] *Am. Fed'n of Labor v. Eu*, 36 Cal.3d at 694–695 (the initiative is the power to "to enact laws" and "a method of enacting legislation" so a "resolution" "is not an exercise of legislative power reserved to the people" and should not be on the ballot).

[50] *Strauss*, 46 Cal.4th at 456 and n.33 and 469; *Rossi*, 9 Cal.4th at 695 (the only express constitutional limitations on the initiative are those in sections 8 and 12 of article II).

[51] *Brown v. Superior Court*, 63 Cal.4th at 351.

[52] *Indep. Energy Producers Ass'n*, 38 Cal.4th at 1043 (California constitution references to the legislature's authority to enact specified legislation generally are interpreted to include the electorate's reserved power to legislate through the initiative).

initiative power, and constitutional language must be read according to its expressed rather than its possible intended meaning.[53] Accordingly, this Court gave article 14, section 4 a narrow meaning: "the ballot arguments supporting this constitutional provision when the measure was adopted in 1918 make it clear that the purpose of the provision was simply to remove any doubt as to the constitutionality of the existing workers' compensation legislation, and not to erect any new restrictions on the exercise of legislative power."[54] Neither was the measure intended to impose any new restrictions on the initiative power. The historical evidence discussed below shows a tight focus on avoiding judicial invalidation, and provides no support for cabining the initiative power.

A. The history explains the bare text.

The historical context here shows that the electorate's specific intent for clarifying constitutional authority for workers' compensation laws was to prevent courts from using the *Lochner* doctrine to overturn those laws.[55] When interpreting voter initiatives California courts apply the same principles that govern statutory construction: voter intent governs, and to determine that intent courts first examine

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

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

[55] *O.G. v. Super. Ct.* (2021) 11 Cal.5th 82, 91 (evidence of purpose may be drawn from many sources, including an amendment's historical context and the ballot arguments); see *Lochner v. New York* (1905) 198 U.S. 45.

the text's ordinary meaning.[56] Where, as here, a term is neither self-explanatory nor defined in the text, courts examine the legislative history and ballot pamphlet arguments for decisive evidence of the electorate's intent.[57] Indeed, when considering the ballot arguments for the 1911 Proposition 10 at issue here, this Court held: "It is to be assumed that the [ballot] arguments prepared by the author of the amendment state fairly and with reasonable fullness the meaning of the amendment and the effect it is expected to produce."[58]

That historical evidence proves that (as this Court held) the voters intended only to remove any doubt in the courts about the constitutionality of the existing workers' compensation legislation.[59] And the historical context explains the anomaly of a *grant* of legislative power in a document that primarily *limits* powers.[60] Given that the legislature may do all things not constitutionally prohibited, it seems odd that such a doubt could exist — "[e]ven without such specific authorization, the Legislature possesses the authority . . . to adopt appropriate legislative measures for

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[56] *People v. Raybon* (2021) 11 Cal.5th 1056, 1065; *Delaney v. Super. Ct.* (1990) 50 Cal.3d 785, 798.
[57] *People v. Raybon*, 11 Cal.5th at 1065 (courts may refer to indicia of voter intent "particularly the analyses and arguments contained in the official ballot pamphlet"); *Legislature v. Eu* 54 Cal.3d at 504; *White v. Davis* (1975) 13 Cal.3d 757, 775; *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 16–18.
[58] *Yosemite Lumber Co. v. Industrial Acc. Commission of Cal*. (1922) 187 Cal. 774, 781–82.
[59] *City and Cty. of San Francisco*, 22 Cal.3d at 113–114. The same is true for 1918 Proposition 23: it "was intended to remove all doubts as to the constitutionality of then existing workmen's compensation laws." *Mathews*, 6 Cal.3d at 733.
[60] *Fitts v. Super. Ct.* (1936) 6 Cal.2d 230, 234; *People v. Coleman* (1854) 4 Cal. 46, 49.

the protection of employees and their dependents."[61]

That doubt existed because courts at the time often used the *Lochner* economic due process doctrine to invalidate attempts to regulate working conditions.[62] The sole aim of Proposition 10 in 1911 was to prevent a court from exploiting the absence of express authorization to overturn the workers' compensation legislation — "to remove any doubt as to" its constitutionality.[63] There was no intent to limit the initiative power by excluding voter action.

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

Workers' compensation in California arose in the 1910s, a period characterized by two competing dynamics: Progressive politics and the *Lochner* doctrine. Governor Hiram Johnson was the Progressive political movement avatar in California.[64] Johnson wanted to empower the legislature to enact a system of industrial accident compensation.[65] He and his allies did this in a series of three legislatively proposed constitutional amendments in 1911, 1914, and 1918. Johnson and the Progressives felt that instituting this new policy required constitutional changes because they feared that without them courts would strike down the new industrial accident system.

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[61] *City & Cty. of San Francisco*, 22 Cal.3d at 114.
[62] See *Bixby v. Pierno* (1971) 4 Cal.3d 130, 142 (explaining the judicial evolution away from 1930s *Lochner*-style economic due process doctrine).
[63] *Ibid*.
[64] Melendy & Gilbert, THE GOVERNORS OF CALIFORNIA FROM PETER H. BURNETT TO EDMUND G. BROWN (Talisman Press 1965) at 308–309.
[65] Franklin Hirchborn, STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE

That concern existed because the 1910s was in the *Lochner* era, when courts used theories of economic due process, property rights, and liberty of contract to strike down many workplace reforms.[66] Johnson and the Progressives saw this in cases concerning compensation systems in other states, and feared that California courts would also exploit the absence of any express state constitutional authority to strike down a compensation system.[67] That concern was well-founded: in this period California courts invalidated a number of working condition reforms on economic due process grounds.[68] The Progressives sought to evade that rule.

Their strategy succeeded partly due to the fact that the U.S. Supreme Court later abandoned *Lochner*.[69] California courts followed suit, and the modern rule

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OF 1911 (James H. Barry Company 1911) at 42–43 n.55 and 239 n.271.

[66] *Lochner v. New York* (1905) 198 U.S. 45, 53 & 57.

[67] THE PROGRESSIVE ERA: MAJOR ISSUES OF INTERPRETATION, Arthur Mann, ed. (Dryden Press 1975) at 121 (even after prominent politicians publicly endorsed workmen's compensation, "there was a residue of conservative opposition to such 'radical' social legislation. This was expressed in the courts, which at that time trailed behind the leaders of the large corporations and those politicians close to them, who were developing the new liberal, or progressive, ideology of the welfare state.").

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

[69] The core doctrine in *Lochner* was abandoned in a series of decisions: *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379; *Day-Brite Lighting Inc. v. State of Mo*.

instead facilitates regulatory action to address societal problems.[70] Thus, the Progressive strategy of preempting judicial invalidation was an affirmative defense against a doctrine that is now extinct.

But that strategy was not meant to undercut the new initiative power. Governor Johnson himself explained that the new compensation scheme both arose from and would be supervised by popular power:

> We have learned in California that there is one way in which [economic and industrial reforms] may be accomplished, and that is by way of the people themselves; and it is because we believe industrial and economic reform must be wrought through political reform first, that we have created in this state a direct primary presidential preference law, the initiative, the referendum and the recall. But after all these are means. They are weapons placed in the hands of the people. The real work must be done ultimately by the strict enforcement of these laws and by a number of other means I might mention.
>
> The first step in doing anything to secure economic reforms, from the standpoint of the Progressive, is to have political reform that will enable the people, if their representatives misrepresent them, to do what those representatives ought to do. We went on in California to provide those reforms to the end that the real economic reforms might be worked out and might be accomplished by your servants or by you yourselves, if your servants did not do that work. That was the purpose of our campaign upon the constitutional amendments and the reason that we provided those great popular weapons by which the people can rule themselves in just such a manner as they see fit.[71]

(1952) 342 U.S. 421; and *Ferguson v. Skrupa* (1963) 372 U.S. 726.

[70] *Bixby*, 4 Cal.3d at 142 ("to permit the Legislature and the executive branch to resolve the economic and social dilemmas of the day, the courts have given less emphasis to outmoded rights of property and to shibboleths of freedom of contract"); *Cal. Drive-In Restaurant Ass'n v. Clark* (1943) 22 Cal.2d 287, 295 (rejecting freedom-of-contract argument).

[71] Exhibit 35, Hiram W. Johnson, "Shall the People Really Rule?" The California Outlook, Saturday March 16, 1912.

C. Workers' compensation evolved to combat judicial reluctance.

California's workers' compensation system evolved in several steps in the 1910s. In 1911 the legislature established the first system with the Roseberry Act; it was seen as flawed because it made providing coverage voluntary for employers. Later in 1911 the voters adopted the legislature's Proposition 10 to replace the voluntary system with a compulsory system.[72] In 1913 the legislature codified that compulsory system with the Boynton Act. In 1914 Proposition 44 set a minimum wage. And in 1917 Proposition 23 and the Workman's Compensation Insurance and Safety Act replaced the Boynton Act and created the current system.[73] Nowhere in the process of enacting these amendments were the voters advised that these acts might affect their own initiative power.

The remainder of this section details the historical evidence showing that these acts were intended only to remove doubts regarding the constitutionality of the workers' compensation laws. Indeed, the legislature and the voters have repeated this strategy of aiming specific amendments at resolving judicial objections to workers' compensation laws. After this Court invalidated workers' compensation statutes in 1919[74] and in 1930,[75] to remedy their defects the voters adopted

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[72] Franklin Hirchborn, STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1911 (James H. Barry Company 1911) at 244.
[73] Stats.1917, ch. 586, §§ 9(b)2(1), 12(a), pp. 836–837, 842–843.
[74] *Yosemite Lumber Co*., 187 Cal. at 783.
[75] *Commercial Cas. Ins. Co.*, 211 Cal. at 216 (article 14, section 4 was intended to *limit* the power of the legislature in enacting a Workmen's Compensation Act); see also *People v. Standard Oil Co. of Cal*. (1933) 132 Cal.App. 563, 571 (former article

Proposition 13 in 1972, a specific amendment that endorsed legislative power to enact such a statute.[76] That was the legislature asking the voters for express constitutional authority to satisfy the courts.[77] Same strategy, same intent, same result: to overcome judicial objections that legislative power was lacking. All by *using* the initiative, not limiting it.

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

The first workers compensation provision proposed as a 1911 constitutional amendment was meant to fix an anemic existing system. Before the 1911 election, the legislature established California's first compensation system with the Roseberry Act. But complying with the Roseberry Act was optional, so "relatively few employers chose to become subject to its provision."[78] Proposition 10 in 1911 was intended to allow the legislature to improve that voluntary system by authorizing it to enact a compulsory system, and to forestall judicial concerns about the legislature's constitutional authority to do that. Nothing in the contemporary record indicates any intent to affect the new initiative power, which was part of Hiram Johnson's slate of reform proposals in the same October 10, 1911 election as Proposition 10. On the contrary, the ballot argument and contemporary news

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20, section 21 "not only does not grant the power in question but expressly limits the same").

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

[77] *Six Flags, Inc.*, 145 Cal.App.4th at 98.

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

commentary are clear that avoiding the *Lochner* problem was the sole purpose.

The ballot argument in favor (there was no opposing argument) said that the measure was "intended to empower the legislature to pass laws for the settlement of accident cases on a compulsory compensation scheme . . . ."[79] That authority was necessary because the "present law prohibits any compulsory scheme for compensation for accidents." The argument explains that fears about a mandatory scheme being "construed by courts to be a taking of property 'without due process of law'" based on *Lochner* resulted in the existing law being optional "to avoid this constitutional problem."

Proposition 10 was "intended to remove this constitutional prohibition" and to "empower the legislature to enact a compensation law that may be compulsory on all employers." That action, which would nullify judicial objections on *Lochner* economic due process grounds, "is the sole object of the proposed amendment." The point about preventing judicial objection on *Lochner* grounds was made a third time: "This part obviates all objections with respect to due process of law and the taking away of the property of one person for the benefit of another person . . . it will be permissible for the legislature to enact compulsory compensation laws, and administer them without the interference of the courts . . . ." That ballot argument is concerned only with addressing judicial questions about legislative authority, which has nothing to do with the initiative.

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

We searched contemporary news accounts for commentary on Proposition 10 and found nothing that suggested any intent to implicate the initiative. Instead, the relevant publications uniformly reflect a narrow focus on solving the *Lochner* problem. These are listed in date order:

- Describing a contemporary New York law invalidated on *Lochner* grounds: "The workmen's compulsory compensation law . . . was declared unconstitutional by the Court of Appeals today. [¶] The court holds that the act deprives the employer of his property without due process of law."[80]
- Proposition 10 "provides, if passed, that the California Legislature can pass a Compulsory Workmen's Compensation Act. Under our present Constitution, it is impossible to make any workmen's compensation act compulsory."[81]
- Proposition 10 would "provide that the legislature may create and enforce a liability on the part of all employers to compensate their employees for injury and provide for the settlement of any disputes arising under such contemplated legislation by arbitration, by an industrial accident board or by the courts."[82]
- Describing the existing compensation law: "This voluntary feature of the law saves it from many constitutional objections that are held or presumed to invalidate compulsory compensation laws enacted or proposed in other States."[83]

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[80] Exhibit 1, *Liability Law Void*, Press Democrat March 24, 1911.
[81] Exhibit 2, *Nolan Submits Report*, Organized Labor April 8, 1911. A similar description appears in Exhibit 3, *Report On Labor Measures*, Organized Labor April 29, 1911.
[82] Exhibit 4, San Francisco Call May 15, 1911.
[83] Exhibit 5, *Liability And Compensation Law*, Organized Labor June 24, 1911.

- Proposition 10 "confers authority upon the legislature to regulate compensation of employees for injuries received in their employment, and is intended to constitutionalize the new employers' liability law and such other legislation amendatory of or germane thereto as may hereafter be enacted."[84]
- "No. 10 on the ballot will allow the passage of laws creating and enforcing liability of employers for compensation of workers for injuries incurred in their employment, irrespective of fault of either party, and also for arbitration. This will enable the people to enact a real employers liability law—to get the genuine article instead of a gold brick."[85]
- "This amendment allows the State to provide for compulsory arbitration, or other remedy, for accidents to workers . . . . It is designed on the theory that society as a whole should bear the burden of accident rather than the poor workman or his wife and children."[86]
- "This amendment empowers the Legislature to create and enforce a liability against all employers to compensate employees for injury received in the course of their employment, regardless of the fault of either party. It also permits the Legislature to provide for the settlement of such cases by arbitration or an industrial board."[87]
- "Compensation to workmen for injuries received in their employment, regardless of the fault of either party, may be provided by an act of the Legislature under this amendment."[88]

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[84] Exhibit 6, *Roseberry's Bill Approved*, Morning Press September 19, 1911.
[85] Exhibit 7, *Socialists and the Amendments*, San Bernardino Sun September 24, 1911.
[86] Exhibit 8, Chico Record October 5, 1911.
[87] Exhibit 9, *The 23 Amendments To Be Voted On October 10*, San Jose Mercury News October 5, 1911.
[88] Exhibit 10, *Each Voter Should Perform His Duty*, Feather River Bulletin October 5, 1911.

- "The present law prohibits any compulsory scheme for compensation for accidents out of court by arbitration, industrial accident boards, etc., as it is construed by courts to be a taking of property 'without due process of law.' The recent employers' liability act was made elective to avoid this constitutional objection. The proposed amendment is intended to remove this constitutional prohibition and will empower the legislature to enact a compensation law that may be compulsory on all employers. This is the sole object of the proposed amendment."[89]

- Arguing against Proposition 10: "While its purpose is highly laudable, so far as providing for the compensation of employees who are injured during the course of employment, it will not remedy matters to confiscate the property of the employer and bestow it upon the employe[e], regardless of the question of fault. I have very grave doubt whether the amendment itself, if adopted, would stand the test of constitutionality."[90]

- "No. 10. Gives the legislature power to enact a law that will allow workmen to recover compensation for damages on account of personal injuries, without regard to the fact that either themselves or the employers may have been at fault."[91]

- Proposition 10: "Authorizing a compulsory workmen's compensation law. This allows the state to provide compulsory arbitration; seems to be good for the men who work and we are going to take a chance and . . . VOTE YES."[92]

- Describing Proposition 10: "relating to compensation for industrial

[89] Exhibit 11, Santa Barbara Morning Press October 5, 1911 (quoting Senator Roseberry).
[90] Exhibit 12, *How M'Kisick Would Mark The Ballot*, Sacramento Daily Union, October 7, 1911.
[91] Exhibit 13, Press Democrat October 8, 1911.
[92] Exhibit 14, *Here's the Way We're Going to Vote*, Santa Cruz Evening News October 9, 1911.

accidents, being intended to constitutionalize the Roseberry liability act."[93]

- "Constitutional amendment No. 10 . . . does not now in any way affect the Roseberry liability law as it stands on the statute books. It merely gave the legislature power to make such a law compulsory at some future time . . . ."[94]

These contemporary descriptions identify only the need for constitutional authorization to avoid judicial economic due process objections. We found no references to any intended affect on the initiative.

Following Proposition 10's adoption, the legislature enacted the Workmen's Compensation, Insurance and Safety Act of 1913 (the Boynton Act). This Court considered a constitutional challenge to the Boynton Act in *Western Indemnity Co. v. Pillsbury*. As the Progressives feared, the court framed the issue in *Lochner* economic due process terms — but it rejected that argument based on the express constitutional authorization provided by Proposition 10.[95] Describing Proposition 10 as a "grant of power," the court viewed that measure's intent in the same terms as the ballot argument and contemporary commentary: it "was adopted for the purpose of establishing the right of the Legislature to pass laws on the particular subject."[96] A dissenting justice similarly framed the case in *Lochner*

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[93] Exhibit 15, Santa Barbara Morning Press October 11, 1911.
[94] Exhibit 16, *The Roseberry Liability Law At Extra Session of Legislature*, Hanford Sentinel December 14, 1911.
[95] *W. Indem. Co. v. Pillsbury* (1915) 170 Cal. 686, 692 (referencing the Fourteenth Amendment's "due process of law" and "the equal protection of the laws") and 701 ("we are satisfied that the statute is not obnoxious to the provisions of the fourteenth amendment.").
[96] *Id.* at 701–702.

terms: "it is violative of the fourteenth amendment of the Constitution of the United States, and therefore void," and noted that Proposition 10 had eliminated "the difficulties with the law arising under the state Constitution . . . by making the law, in effect, a part of the Constitution."[97] Another justice used the *Lochner* frame on rehearing: "this is nothing else than the taking of the employer's property from him without compensation, without consideration, and without process of law, and giving it to another for his private use."[98]

This Court's other contemporaneous statements on Proposition 10's intent are the same. In *Western Metal Supply Co. v. Pillsbury*, the Court again concluded: "That the constitutional amendment was designed to authorize the establishment of the new system cannot be doubted,"[99] because "as is perfectly apparent from its terms" Proposition 10 "was designed to establish the authority of the Legislature to pass laws making the relation of employer and employé subject to a system of rights and liabilities different from those prevailing at common law."[100]

This Court reviewed the ballot arguments for Proposition 10 on an unrelated issue in *Yosemite Lumber Co. v. Indus. Acc. Comm'n of Cal.*[101] Consistent with our argument here, the court refused to add something to the statutory scheme that was not mentioned in the ballot argument: "It cannot be supposed that the author of the

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[97] *Id.* at 712, 722 (Henshaw, J., dissenting).
[98] *Id.* at 732 (Shaw, J., dubitante).
[99] *Western Metal Supply Co. v. Pillsbury* (1916) 172 Cal. 407, 415.
[100] *Id.* at 414.
[101] (1922) 187 Cal. 774.

amendment, or the Legislature that proposed it, intended to provide for such a scheme as that contained in the act of 1919 by language so illy adapted to suggest the idea as that contained in this section and that the voters should be inveigled into voting for it by an argument presented to them with the ballot which does not even mention it."[102]

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

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

In 1914 the voters adopted Proposition 44, which permitted the legislature to establish a minimum wage. As with Proposition 10, the text expressed an intent to forestall judicial objection ("[n]o provision of this constitution shall be construed as a limitation on the authority of the legislature"), as did the ballot argument in favor ("this is done to make sure that after the commission's work is done its findings and rulings can not be assailed and made useless by the state courts declaring this act unconstitutional"). It closed by noting that a similar Oregon law was being challenged in court, and again tied the voters' intent to the threat of judicial interference: "To be sure that nothing in our state constitution will prevent this great act of justice and mercy being done to protect the women of this state, vote 'Yes' on Assembly Constitutional Amendment No. 90."[103]

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[102] *Id.* at 782.
[103] Ballot Pamphlet, 1914 general election, argument for Proposition 44.

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

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

In 1917, the legislature passed the Workmen's Compensation Insurance and Safety Act, which substantially revised existing law to address problems that had arisen under the Boynton Act. That same month the legislature advanced Proposition 23, an amendment to article 20, section 21 that "duplicated in large measure section 1 of the 1917 act."[104] As with Proposition 10 in 1911, Proposition 23 "was intended to remove all doubts as to the constitutionality of then existing workmen's compensation laws."[105] The voters approved the amendment in the November 1918 election, and the constitutional provision has remained substantively unchanged for over a century.[106]

Proposition 23 was motivated by the same concern as Proposition 10 in 1911 and Proposition 44 in 1914: the ballot arguments and contemporary newspaper commentary in 1918 again focus on a fear that *Lochner*-era courts would use economic due process to invalidate the workers compensation scheme because the state constitution did not expressly authorize some of the legislature's enactments. In 1911, the question was whether courts might invalidate legislative actions as

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[104] *Mathews*, 6 Cal.3d at 733.
[105] *Ibid*.
[106] It moved to its current location in Cal. Const, art. XIV, § 4 in 1976 with no substantive changes relevant here. *Mathews*, 6 Cal.3d at 734; see also *Six Flags, Inc.*, 145 Cal.App.4th at 95.

lacking constitutional authorization. In 1917, the concern was whether the Industrial Accident Commission was vulnerable to the same attack, so the 1917 legislature proposed Proposition 23 to forestall any judicial doubt about the commission's constitutional authority.

The ballot arguments show that Proposition 23 was intended only to clarify that the legislature could do certain things, not to bar the electorate from taking action on the same subject. Nothing in the contemporary record evidences any intent to affect the initiative. Just like Propositions 10 and 44 before it, Proposition 23 was unconcerned with the initiative. The first ballot argument in favor begins by referencing the problems with implementing the Boynton Act after the 1911 amendment, and states an intent to remedy those problems:

> This amendment is a necessary amplification and definition of the constitutional authority vested in the legislature by the amendment to the Constitution adopted October 10, 1911, to enable the enactment of a complete plan of workmen's compensation, which amendment failed to express sanction for the requisite scope of the enactment to make a complete and workable plan.[107]

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

The second argument in favor likewise focused on addressing shortfalls in

[107] Ballot Pamphlet, 1918 general election, argument for Proposition 23.

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

Those were the only two ballot arguments. Both arguments focus on fears of judicial objections and the need to preempt them with express constitutional authority. Neither mentions the initiative. This shows that the relevant text of Proposition 23 ("The legislature is hereby expressly vested with plenary power, unlimited by any provision of this constitution") was aimed only at courts looking for a *Lochner* excuse to invalidate the compensation system. There was no intent to inhibit the initiative.

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

- "The purpose the Industrial Accident Commission has in mind is to make sure that the important departments of compensation, insurance and safety shall have full constitutional authority. Absolutely no additional power will be given to the commission by the adoption of this amendment, beyond that already given by the state legislature. The supreme court decided the Workmen's Compensation [Act] constitutional on an appeal from a compensation award, but no opinion has been given on the safety and insurance parts of the act."[108]

- "In 1911 a constitutional amendment was adopted which it was then thought was broad enough to give the legislature all the power necessary for the enactment of the Workmen's Compensation [system] . . . . [¶] But there are still some doubts entertained in certain quarters as to the constitutionality of some of the things that have been incorporated in this act, and it was for the purpose of validating what the legislature has done . . . and so put their powers and obligations beyond the realm of controversy, that this proposed amendment was submitted. [¶] No new grants of power beyond those already exercised and given by the Act have been included in this Amendment, but it is important that the law shall not be subject to further attack upon technical grounds . . . ."[109]

- [Referring to Proposition 23] "A government that possesses in any respect 'plenary' power or power unrestrained by any constitutional limitation is pro tanto an autocratic government, and this in the full and complete significance

[108] Exhibit 17, *Urge Vote for Amendment 30, Industrial Accident Commission Would Have Workmen's Compensation Act Departments Given Constitutional Authority*, Hanford Sentinel October 24, 1918 (letter from H.L. White, secretary of the Industrial Accident Commission).
[109] Exhibit 18, *Senate Constitutional Amendment No. 30 (No. 23 on the Ballot)*, Hanford Sentinel October 24, 1918; the same article also appears in Exhibit 19, Los Angeles Herald October 30, 1918.

of the term 'autocratic.' . . . [¶] Three of the proposed amendments directly propose, in regard to certain matters, to free the legislative branch from all constitutional limitations and restrictions whatever."[110]

- "[Several amendments including Proposition 23] seek to subvert the fundamental principles of free government by removing or nullifying the most important safeguards of our constitution, and vesting plenary powers in the legislature which would convert a democratic government into an autocracy. . . . [¶] [T]hese amendments, by conferring absolute and plenary power upon the legislature, revokes the constitution itself, and with the avowed purpose of avoiding all question of the constitutionality of the proposed laws. . . . [¶] If these amendments carry, the California state legislature will exercise all the power of a Prussia-controlled bundesrath. Even the courts will be barred from the right to traverse these legislative enactments, and the constitution will be only 'a scrap of paper.'"[111]

- "The supreme court of this state has determined that the industrial accident commission has jurisdiction in the matter of making awards for compensation, but has never passed on the authority of the industrial accident commission under the provisions of section 21, article 20, of the constitution to administer the state insurance fund or the safety department [¶] . . . Under these circumstances it would be a great misfortune to this state if it should be found that the legislature exceeded its authority in investing the industrial accident commission with these functions. The purpose of the proposed

[110] Exhibit 20, *Sounds Warning Note on Proposed Measure, Unlimited Power Would Be Given Legislature of State If Health Insurance Amendment Is Ratified by Voters at Coming Election, Writer Declares*, San Diego Union and Daily Bee October 27, 1918. This letter from Allen E. Rogers primarily concerns 1918 Proposition 20, a "health insurance" measure that would have authorized the legislature to establish a health insurance system for certain persons; it was rejected.
[111] Exhibit 21, San Diego Union and Daily Bee October 28, 1918, responding to the October 27 Allen E. Rogers letter in Exhibit 20.

amendment . . . is to give the legislature ample power in this regard and remove any doubt as to the constitutionality of the present workmen's compensation law."[112]

- "Empowers legislature to establish [workmen's compensation] system . . . . Declares Industrial Accident Commission and State Compensation Insurance Fund unaffected hereby, confirming functions vested therein."[113]

- "So-Called Workmen's Compensation. This is a law which would make it dangerous for any person to employ another for any purpose whatever. . . . Nobody is exempt from its drastic provisions. The very language is full of the spirit of intolerance and meddling, and altogether is calculated to cause immediate flight from the state of all who are unable themselves to do everything which they wish done. Vote no and defeat this outrage."[114]

- "This is an amendment to the workmen's compensation laws. This act is for the purpose of correcting defects in the old law."[115]

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

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[112] Exhibit 22, San Diego Union and Daily Bee October 30, 1918, letter from Dewey J. Bischoff, Industrial Accident Commission referee.
[113] Exhibit 23, Hanford Sentinel October 31, 1918; the same also appears in Mariposa Gazette October 12 (Exhibit 24), October 19 (Exhibit 25), October 26 (Exhibit 26), and November 2, 1918 (Exhibit 27) and San Bernardino Sun, October 18, 1918 (Exhibit 28).
[114] Exhibit 29, *More Laws for Voters of California to Consider*, Merced Sun-Star October 31, 1918.
[115] Exhibit 30, *What You Are to Vote On, Digest of Constitutional Amendments and Initiative Propositions on the Ballot at the Coming Election*, Los Angeles Herald November 1, 1918.

approval of labor bodies and representative employers, the commission states."[116]

- "This amendment improves and clarifies some uncertain features of the present or the original provision. Naturally, that ought to commend it. Vote YES."[117]

- "The workmen's compensation Amendment No. 23 on the ballot, was drafted by the Industrial Accident commission. The purpose the commission had in mind is to make sure of constitutional authorization to operate the state compensation insurance fund and the safety department . . . . [¶] While the proposed amendment amplifies the workmen's compensation constitutional amendment adopted by a majority of 82, 312 voters on October 10, 1911, it specifically provides for compensation, medical treatment, insurance, safety and methods of adjusting disputes. No ulterior motive can be fairly read into its provisions. The fact is that the present workmen's compensation, insurance and safety act gives the commission exactly the same powers proposed in No. 23."[118]

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

Progressive concerns about judicial resistance to workplace reforms proved

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[116] Exhibit 31, *Industrial Board Urges Adoption of New Law*, San Francisco Call November 2, 1918.
[117] Exhibit 32, *Suggestions as to How to Vote on State and Charter Amendments on Ballot at Tuesday's Election*, San Bernardino Sun November 3, 1918.
[118] Exhibit 33, *Amending Workmen's Compensation Act*, Stockton Independent November 5, 1911.

correct when this Court's first decision after Proposition 23's adoption invalidated an award "as being without constitutional sanction."[119] Yet that was *Lochner*'s last gasp: this Court's later decisions interpreting Proposition 23 all state our position that "the ballot arguments supporting this constitutional provision when the measure was adopted in 1918 make it clear that the purpose of the provision was simply to remove any doubt as to the constitutionality of the existing workers' compensation legislation, and not to erect any new restrictions on the exercise of legislative power."[120]

Thus, this Court has long recognized Proposition 23's narrow purpose: to authorize, not to limit, and otherwise make no changes. The 1917 act and Proposition 23 were parts of a plan: the legislature proposed the amendment to article 20, section 21 in same month that it adopted the 1917 act, and the proposed amendment "duplicated in large measure section 1 of the 1917 act."[121] Accordingly, this Court held that Proposition 23 "was intended to remove all doubts as to the constitutionality of then existing workmen's compensation laws."[122]

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[119] *Worswick Street Paving Co. v. Indus. Accident Comm'n* (1919) 181 Cal. 550, 561–62 (rejecting arguments that legislative power "had been enlarged in this respect by the addition of section 17 1/2, art. 20, to the Constitution, by an amendment adopted November 3, 1914," and the "amendment of section 21, art. 20, of the Constitution, adopted in November, 1918").
[120] *City & Cty. of San Francisco*, 22 Cal.3d at 113–14.
[121] *Mathews*, 6 Cal.3d at 733; see *Bautista v. State of Cal.* (2011) 201 Cal.App.4th 716, 732 ("The *Mathews* court's reference to then-existing workers' compensation laws confirmed that existing laws were not subject to a constitutional attack for lack of implementing authority.").
[122] *Mathews*, 6 Cal.3d at 733.

Court of Appeal decisions sound the same note: "As the legislative history reveals, article XIV, section 4 ratified the Legislature's plenary power to enact a complete system of workers' compensation and removed all doubts regarding the Legislature's authority to act."[123] "The purpose of Article XIV, section 4 was to remove any doubt about the constitutionality of the workers' compensation legislation, not to limit the Legislature's authority to enact additional appropriate legislation to protect employees."[124] And although the electorate granted this power to the legislature, they control it by placing "their own limitation upon the power, police or otherwise, which may be used in the particular matter involved."[125] The constitutional authority here comes from the voters, who have sole power to define and limit the legislature's authority on this subject.

Finally, in *Hustedt v. Workers' Comp. Appeals Bd.* this Court rejected the idea that article 14, section 4 necessarily reduced other branch powers.[126] The pro tanto repeal effect of the original article 20, section 21 applies only to impediments

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

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

[125] *People v. Standard Oil Co. of Cal*., 132 Cal.App. at 571.

[126] *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 343–44. See also *Subsequent Injuries Fund v. Indus. Accident Comm'n* (1952) 39 Cal.2d 83, 88.

to legislative action — it does not broadly revise the constitutional powers of other branches.[127] Nor could it apply to the initiative power, because both were enacted simultaneously in 1911. Proposition 23's objectives were specific (enacting a complete package of workers' compensation legislation),[128] so the repeal operates only "insofar as necessary" against any restrictions on that matter.[129] The initiative power has only modified that system (as the legislature itself did with AB5). Preventing electorate action on this subject is unnecessary and inconsistent with the electorate's express intent to remove *Lochner* objections based on constitutional silence. That is all the voters meant by removing constitutional limitations.

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

A. The reasonable interpretation here upholds the initiative power.

The reasonable interpretation of this historical record, so focused on resolving *Lochner* issues, is that the voters only intended to preempt economic due process objections by making constitutional authorization express. To the extent any ambiguity exists, this Court's role is "to ascertain the most reasonable interpretation."[130] Three constitutional amendments in an eight-year period all sprang from fear of judicial resistance to compensation reforms. None of the

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[127] *Pac. Coast Cas. Co. v. Pillsbury* (1915) 171 Cal. 319, 322 (no power to create another state tribunal and vest it with judicial power).
[128] *Subsequent Injuries Fund*, 39 Cal.2d at 88.
[129] *Hustedt*, 30 Cal.3d at 343; see also *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1038 n.8.
[130] *People v. Canty* (2004) 32 Cal.4th 1266, 1277.

contemporary intent evidence — ballot arguments, commentary, or judicial construction — ever refers to any intended impact on the initiative. Instead, the evidence all shows that the legislature and the voters were laser-focused on evading *Lochner*. That is the sole reason for including the language at issue here: "anything in this constitution to the contrary notwithstanding" referred to the due process, property, and impairment-of-contracts provisions.

The reasonable interpretation is that the voters intended only to authorize legislative action, and had no intent to affect their own initiative powers.[131] Determining the electorate's intent when it adopts an initiative is a matter of statutory interpretation.[132] Courts first consider the initiative's language, giving the words their ordinary meaning and construing the language in context.[133] If the language is not ambiguous, courts presume the voters intended the apparent meaning; if the language is ambiguous, "courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure."[134] There is no evidence in the text, ballot arguments, or history that the same voters who authorized legislative action on workers' compensation also meant to prevent themselves from acting on that issue. Indeed, the repeated initiative constitutional amendments to the compensation provisions belie that claim.

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[131] See *City & Cty. of San Francisco*, 22 Cal.3d at 103, 113–14; *Mathews,* 6 Cal.3d at 719, 733; Civ. Code § 3542 (interpretation must be reasonable).
[132] *Pearson*, 48 Cal.4th at 571.
[133] *Ibid*.
[134] *Ibid.*; *People v. Rizo* (2000) 22 Cal.4th 681, 685.

Courts assume that voters do not intend to restrict their own powers absent clear evidence of such an intent.[135] The text and history of all three amendments are silent on carving out the initiative, providing no basis for finding clear intent to restrict the initiative. Partially repealing the initiative immediately after the same voters created it would be a major act, and the voters "do not hide elephants in mouseholes."[136] Accordingly, this Court has read other plenary powers to not exclude initiative acts.[137] The same conclusion applies here: there is no evidence *at all* that the voters intended to diminish their initiative powers, and instead all the secondary intent evidence focuses on an unrelated issue.

This Court need not, and should not, frame this case as a conflict between the electorate and the legislature, because doing so violates the principle that courts should not pass on questions of constitutionality unless those questions are unavoidable.[138] This rule requires courts to avoid interpretations that create conflict. Rather than a false binary choice between the electorate and the legislature, the better frame is that the legislature and the electorate share power over worker classifications. Between the two possible interpretations here (the voters may or may not legislate on this subject) a holding that permits voter action is preferable because it avoids the constitutional issue, while the other conclusion requires

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[135] *Cal. Cannabis Coal.*, 3 Cal.5th at 945–46; *Hodges v. Super. Ct.* (1999) 21 Cal.4th 109, 114 ("the voters should get what they enacted, not more and not less").
[136] *Cal. Cannabis Coal.*, 3 Cal.5th at 940, citing *Whitman v. American Trucking Ass'ns, Inc*. (2001) 531 U.S. 457, 468.
[137] *Indep. Energy Producers Ass'n*, 38 Cal.4th at 1043.
[138] *Spector Motor Serv., Inc. v. McLaughlin* (1944) 323 U.S. 101, 105.

grappling with the constitutional question and barring voter action.[139] Resolving this case in the electorate's favor is consistent with judicial restraint,[140] with the presumption of constitutionality,[141] and with respect for the electorate's powers.[142]

This frame of shared voter and legislative power promotes harmony, which requires reading the initiative provisions and workers' compensation provisions together, giving both maximum effect.[143] The constitutional provisions that secure legislative and voter power can be harmonized by permitting both actors to regulate this policy issue. This Court has held that constitutional impediments to legislative action on the workers compensation system were implicitly removed only as necessary to ensure the system's effectiveness.[144] Excluding the initiative runs counter to that interpretation because voter action (making hard policy choices that might stymie the legislature) facilitates a more effective system.

Courts also must construe initiatives to avoid doubts as to their constitutionality whenever reasonably possible.[145] So even if the constitutional question is unavoidable, the presumption of constitutionality requires upholding

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[139] *Santa Clara County*, 11 Cal.4th at 230.
[140] *Lyng v. Nw. Indian Cemetery Prot. Ass'n* (1988) 485 U.S. 439, 445.
[141] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042 (initiative statutes are presumed to be valid).
[142] *Cal. Cannabis Coal.*, 3 Cal.5th at 946 (courts are obliged to protect and liberally construe the initiative power and to safeguard its exercise).
[143] *Bd. of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868–69; *Fuentes v. Workers' Comp. Appeals Bd*. (1976) 16 Cal.3d 1, 7.
[144] *Hustedt*, 30 Cal.3d at 343; *Greener*, 6 Cal.4th at 1038 n.8.
[145] *People v. Smith* (1983) 34 Cal.3d 251, 259.

Proposition 22.[146] Recognizing the electorate's power here is reasonable because an interpretation that gives an enactment effect is preferred to one which makes void.[147] Striking down the proposition partially invalidates the initiative power, which would violate the judicial duty to safeguard the initiative power and to liberally construe its use.[148] The best read here is that both the electorate and the legislature can regulate workers' compensation. The voters who enacted Proposition 22 didn't think it was beyond their power. Nor should this Court.

B. Plenary does not mean exclusive.

Plenary means *full* or *complete*, not *exclusive*. "Plenary authority and exclusive authority are not synonymous concepts."[149] The legislature cannot have exclusive power over workers' compensation because "the Legislature is not the exclusive source of legislative power."[150] Outside the specific intended meaning of avoiding *Lochner*, the term *plenary* in article 14, section 4 is redundant because the legislature's powers are always plenary unless the state constitution limits them.[151] When construing *plenary* in the constitutional provision at issue here, this Court

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[146] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042, citing *Legislature v. Eu*, 54 Cal.3d at 501 (all presumptions favor initiative validity; mere doubts are insufficient; initiatives must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears).
[147] Civ. Code § 3541.
[148] *Cal. Cannabis Coal.*, 3 Cal.5th at 946.
[149] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042, citing *Independent Energy Producers Ass'n*, 38 Cal.4th at 1035–1037.
[150] *Ibid.* This Court has even described the legislature and the governor as having a "shared legislative power to enact laws." *Legislature v. Reinecke* (1972) 6 Cal.3d 595, 598; see also *Lukens v. Nye* (1909) 156 Cal. 498, 501.
[151] *Howard Jarvis Taxpayers Ass'n*, 62 Cal.4th at 498.

called it meaningless: "Nothing is added to the force of the provision by the use of the word 'plenary.' If the Legislature has power to do a certain thing, its power to do it is always plenary. It is merely surplus verbiage."[152] Thus, article 14, section 4 should not be construed to exclude the initiative.

No authority defines plenary as *exclusive*.[153] Not the U.S. Supreme Court, which consistently uses plenary and exclusive as distinct concepts, as when it describes *only* Congress having *total* power over Indian tribes, or the fact that the President has *complete* and *sole* power over foreign affairs.[154] For example, when describing the "exclusive and plenary nature" of a federal commission's authority: "[W]e have in the past concluded that the authority of the Commission to regulate abandonments is exclusive. The Commission's authority over abandonments is also plenary."[155] Every married person understands this distinction: both spouses have

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

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

[154] See, e.g., *U.S. v. Lara* (2004) 541 U.S. 193, 194 ("the Constitution, through the Indian Commerce and Treaty Clauses, grants Congress "plenary and exclusive" powers to legislate in respect to Indian tribes"); *District of Columbia v. John R. Thompson Co*. (1953) 346 U.S. 100, 109 (the word "exclusive" was employed to eliminate any possibility of "concurrent" power); *U.S. v. Curtiss-Wright Export Corporation* (1936) 299 U.S. 304, 320 (the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); *Bd. of Trs. of Univ. of Illinois v. U.S.* (1933) 289 U.S. 48, 56–57 ("It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action.").

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

plenary spending power, but neither has sole authority.

Instead, both the legislature and the electorate have plenary legislating power over every subject. This Court has already rejected the argument that constitutional references to plenary legislative power "unlimited by any other provision" in the state constitution exclude the initiative: "Particularly in light of the numerous past California authorities holding that constitutional references to the Legislature's authority to take specified action generally are not interpreted to limit the initiative power, [that text] cannot reasonably be interpreted only as having the effect of precluding the people's exercise of their reserved initiative power."[156] Therefore, if the legislature has plenary authority to regulate something, "then so, too, does the electorate."[157]

The initiative itself is plenary, and it is coextensive with the legislative power, so saying that the legislature has plenary power also means that the electorate has plenary power. If plenary did mean exclusive here, all other plenary constitutional powers also should exclude the initiative.[158] Not so: constitutional provisions that recognize a legislative power do not limit the electorate's own plenary powers.[159] For example, article 16, section 11 gives the legislature a plenary

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[156] *Indep. Energy Producers Ass'n*, 38 Cal.4th at 1036.
[157] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042.
[158] For example, the legislature has "plenary power to set the conditions under which its political subdivisions are created" and "plenary power to set the conditions under which its political subdivisions are abolished." *Cal. Redev. Ass'n*, 53 Cal.4th at 255.
[159] *Carlson*, 139 Cal.App.3d at 729 (constitutional legislative power "does not in any way limit the plenary power of referendum and initiative which has been reserved to the people in article II, sections 8 and 9").

power that includes "the people by initiative" — and, as here, that provision was designed to overcome expected judicial objection to the stated power.[160]

Powers expressly assigned to the legislature are not excluded from the initiative: just as "the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms," an express statement of legislative power is not to exclude the electorate's parallel power.[161] Indeed, this Court's past decisions have viewed plenary assignments of power to the legislature as meaning only that any constitutional barriers to legislative action on the subject are removed.[162] This Court has never held that such plenary powers bar the state's other legislative actor, the electorate, from also legislating on that subject — on the contrary, the court rejected that argument in *Indep. Energy Producers Ass'n v. McPherson*.[163]

Instead, courts have held that restrictions on the legislature and other implicit constitutional limits do not apply to the initiative.[164] The initiative must embrace all subjects, because in California's constitutional system "the Legislature is not the exclusive source of legislative power"[165] and the electorate's legislative power is

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[160] *City of Los Angeles v. Post War Public Works Rev. Bd*. (1945) 26 Cal.2d 101, 113, citing Cal. Const., art. XVI, § 11.
[161] *Dean v. Kuchel* (1951) 37 Cal.2d 97, 100; *MacMillan Co. v. Clarke* (1920) 184 Cal. 491, 498.
[162] *Cty. of Sonoma v. State Energy Resources Conservation Com.* (1985) 40 Cal.3d 361, 369; *Pickens v. Johnson* (1954) 42 Cal.2d 399, 404.
[163] 38 Cal.4th at 1042.
[164] See, e.g., *Cal. Cannabis Coalition*, 3 Cal.5th at 942.
[165] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042; *Rossi*, 9 Cal.4th at 699–702 (rejecting argument that some subjects are excluded from the initiative).

"generally coextensive with" the legislature's power to enact statutes.[166] Initiative statutes are presumed to be valid, just as legislative enactments.[167] Thus, if the legislature has plenary authority to regulate something, "then so, too, does the electorate."[168]

By enacting Proposition 22 the electorate has exercised its lawmaking authority, and consequently this Court's role "is to simply ascertain and give effect to the electorate's intent guided by the same well-settled principles" that apply to legislative enactments.[169] Proposition 22 does not usurp the legislature's authority to regulate workers' compensation. The legislature itself could have enacted such a statute. But instead it was done by the other constitutionally empowered legislative authority: the electorate. This is not a case where the legislature has been stripped of authority to regulate something, but rather one in which permissible legislative action has occurred.

Finally, even if *plenary* here is fairly read as *exclusive*, the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers.[170] Because the history discussed above shows that the voters

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[166] *Santa Clara Cty.*, 11 Cal.4th at 253; *Cal. Cannabis Coalition*, 3 Cal.5th at 935 (initiative power "is at least as broad as the legislative power wielded by the Legislature").
[167] *Legislature v. Eu*, 54 Cal.3d at 501.
[168] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1042 ("If . . . the Legislature has plenary authority to regulate private contracting by public agencies, then so, too, does the electorate.").
[169] *Id.* at 1042–1043.
[170] *Amador Valley*, 22 Cal.3d at 245.

had a specific intent with the relevant amendments, even if the literal meaning were *exclusive* it should disregarded to avoid the absurd result of holding that a power capable of great acts cannot achieve this one small thing.[171] Carving this subject (or any other) from the initiative contravenes the initiative's original purpose of overriding the legislature.[172] And creating exclusive zones of legislative authority would violate the judicial duty to narrowly construe provisions that would burden or limit the initiative's exercise.[173] Any subject exempted from the initiative becomes a ripe target for corruption. That's why none are exempted.

C. Implied repeals are disfavored.

There is no express exclusion anywhere in the California constitution of workers' compensation from the initiative. Thus, to hold that the legislature has exclusive power over workers compensation requires finding that one of the three amendments in 1911, 1914, and 1918 was an implied partial repeal of the initiative power. Yet implied repeals are strongly disfavored.[174] "There is a strong presumption against repeal by implication."[175] The drafters of legislation do not "hide elephants in mouseholes," so if the Progressive-era voters had intended to strip themselves of power over workers' compensation, "it stands to reason they

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[171] *Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 979 (a literal construction of an enactment will not control when such a construction would frustrate the manifest purpose of the enactment as a whole); Civ. Code § 3536.
[172] *See Perry*, 52 Cal.4th at 1140–1141.
[173] *Cal. Cannabis Coal.*, 3 Cal.5th at 946.
[174] *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310; *Lonergan*, 27 Cal.3d at 868.
[175] *Tuolumne Jobs*, 59 Cal.4th at 1039.

would have said so expressly."[176] Instead, we find silence.

The standard for finding a repeal by implication is the same for constitutional amendments and statutes: text first, then extrinsic evidence.[177] Because the power to legislate is shared by the legislature and the electorate,[178] the principles governing legislative repeals by implication should also apply to initiatives.[179] That standard, applied here, counsels against finding an implied repeal. When two acts seemingly conflict, courts must first attempt to reconcile them and avoid interpretations that require invalidating one act; only if that cannot be done will the last act govern.[180] For a subsequent act to repeal a former, "it should appear from the last act that it was intended to take the place of or repeal the former, or that the two acts are so inconsistent that force and effect cannot be given to both."[181] To overcome the presumption the two acts "must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation."[182] That is not so here: the initiative can be reconciled with all three amendments by acknowledging that the plenary legislative power is shared.

This Court has rejected implied partial repeals of the initiative power. In *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, the court considered article

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[176] *Cal. Redev. Ass'n*, 53 Cal.4th at 260–261.
[177] *Barratt Am., Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 817; see *Martello v. Super. Ct.* (1927) 202 Cal. 400, 404.
[178] Cal. Const., art. IV, § 1.
[179] *Prof'l Eng'rs in Cal. Gov't*, 40 Cal.4th at 1038–39.
[180] *Fuentes*, 16 Cal.3d at 7.
[181] *Ibid.*
[182] *Ibid*.

13A, section 3, which required any changes in state taxes to be passed by two-thirds of the legislature. Although the plain text seemed to make the matter exclusive to the legislature, the court rejected the argument that this section implicitly repealed the electorate's initiative power to raise taxes. Because the provision did "not even mention the initiative power, let alone purport to restrict it," because "the law shuns repeals by implication," because the initiative power is "one of the most precious rights of our democratic process," and because courts "must resolve any reasonable doubts in favor of the exercise of this precious right," the court held that for the voters to have limited their power in this manner "would also have made no sense."[183] The same reasoning applies here.

So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, "for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first."[184] The three compensation amendments are no substitute for the initiative. And even if the initiative power conflicts with article 14, section 4, those provisions can and must be harmonized to give both their maximum effect.[185] Harmony here means permitting both the legislature and the electorate to share this power — to do otherwise would wrongly reduce either power.

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[183] *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249–51.
[184] *Penziner v. W. Am. Finance Co*. (1937) 10 Cal.2d 160, 176.
[185] *Lonergan*, 27 Cal.3d at 868–69.

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

The initiative's purpose is to override the legislature. There is no contemporary evidence in 1911 of an intent to exempt workers' compensation from the initiative. The 1911 ballot measures that established both the initiative and workers' compensation were part of a package of Progressive reforms.[186] So it is nonsensical to assume that the Progressives intended to exempt workers' compensation from the initiative — the same moneyed interests that opposed one opposed the other.[187] Although it is theoretically possible for the electorate to narrow its own powers by initiative amendment, there is no evidence that the amendments here were so intended. This Court requires clear evidence of voter intent to limit their powers,[188] and the intent evidence discussed above proves the opposite.

Finally, permitting a subject matter carve-out here will open the door to

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

[187] Bowler & Donovan, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY (University of Michigan Press 2000) at 4 ("The advocates of direct legislation viewed the legislatures of the period as corrupted by well-financed interests . . . [and] held that the highly unprofessional state legislatures (as well as the major parties) were beholden to 'trusts' and 'moneyed interests.'"); Key & Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA (University of California Press 1939) at 423–41 (describing the Southern Pacific Railroad's opposition to Progressive reforms); John M. Allswang, THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 1898–1998 (Stanford University Press 2000) at 12–18 (same); Exhibit 34, *Senatorial Fight in Thirty-Sixth Dist.*, Highland Park News August 17, 1918 ("It will be remembered that the Workmen's Compensation law was opposed by capital").

[188] *Cal. Cannabis Coal.*, 3 Cal.5th at 945–46.

others, and pose a grave risk of diluting the initiative power. Invalidating Proposition 22 on the ground that the electorate lacks initiative power on this subject would be a radical departure from longstanding principles that require courts to safeguard the initiative. Indeed, in over a century of California direct democracy no court has ever imposed a subject matter limit on the initiative.[189] To infer an intentional decision to reduce the initiative power from article 14, section 4's silence on the initiative is to embrace a presumption against the initiative power, rather than in favor of it. Instead, the judicial obligation to jealously guard the initiative power compels a presumption favoring the initiative.[190]

CONCLUSION

Excluding workers' compensation (or any subject) would partly invalidate the electorate's lawmaking power by creating a new subject matter exemption from the initiative. That would be error, because in California all political power is inherent in the people,[191] the initiative power is "one of the most precious rights of our democratic process," and courts must "resolve any reasonable doubts in favor of the exercise of this precious right."[192] Even if a court has concerns about the

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[189] *Id.* at 935 (initiative power is "at least as broad as the legislative power wielded by the Legislature" and when voters exercise the initiative power "they do so subject to precious few limits on that power").
[190] *Id.* at 938–939.
[191] Cal. Const., art. II, § 1; *McClatchy Newspapers v. Super. Ct.* (1988) 44 Cal.3d 1162, 1184; *Associated Home Builders*, 18 Cal.3d at 591.
[192] *Kennedy Wholesale*, 53 Cal.3d at 249–250; *Associated Home Builders*, 18 Cal.3d at 591; *Perry v. Jordan* (1949) 34 Cal.2d 87, 90–91 ("The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.").

electorate's policy choices, it must not "pass upon the wisdom, expediency, or policy of enactments by the voters."[193] It would be anomalous to hold only workers' compensation apart from a power that can alter and reform every other aspect of California government and substantive law. On this and any other policy matter, the voters are supreme.

Respectfully submitted,

Dated: April 2, 2024

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

CERTIFICATE OF COMPLIANCE

I certify that the attached brief uses a 13-point Times New Roman font and contains 13,514 words as counted by the Microsoft Word software program used to prepare this brief.

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CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will e-mail everyone requiring notice.

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