No. A163655

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

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

v.

STATE OF CALIFORNIA; KATIE HAGEN, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Defendants and Appellants,
PROTECT APP-BASED DRIVERS AND SERVICES; DAVIS WHITE; KEITH YANDELL,
Intervenors and Appellants.

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

BRIEF OF AMICUS CURIAE CALIFORNIA POLICY CENTER IN SUPPORT OF APPELLANTS

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**pro hac vice motions pending*

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The California Policy Center ("CPC") is a nonprofit think tank organized under Section 501(c)(3) of the Internal Revenue Code and headquartered in Tustin, California. CPC conducts public-education campaigns to enhance prosperity for all Californians by eliminating public-sector barriers to individual freedom and educates the public about the impact of various public policies.[1]

Amicus Curiae adheres to the principle that the government's legitimacy derives solely from the consent of the people that it governs. This is true as a matter of our Nation's foundational history, as well as California's. Amicus offer the following analysis to explain the historical underpinnings of California's statutory-initiative process and to remind the Court that any challenge to an enacted statutory initiative, including the challenge to Proposition 22 that gave rise to this case, should be analyzed in the light of that history.

[1] Cal. Policy Ctr., *About Us*, https://californiapolicycenter.org/about/.

POINTS TO BE ARGUED BY AMICUS

Our Nation's founders wisely provided avenues to ensure that the populace had ways to amend the Country's charter if and when the times and circumstances demanded an alteration. California has gone one step further by providing in the State's charter a mechanism by which the people may create, rescind, or alter the State's laws if their elected representatives fail to represent them appropriately. It follows, then, that citizen-initiative statutory changes should receive precedence over the preferences of the California legislature.

The trial court's order is irreconcilable with these principles. In fact, it turns the foundational idea of representative government (i.e., that legislatures are not the sovereign, but only represent the sovereign) entirely on its head. Amicus Curiae argue these points in support of the Appellants.

INTRODUCTION

California's statutory initiative emanates from a philosophical tradition that extends to John Locke and the Nation's Founders. This tradition reflects an understanding of government that roots all legislative power, ultimately, in the hands of the people. Although the people in every State have delegated a measure of that legislative power to the representatives who act on their behalf, the people nonetheless retain the last word. For that reason, almost half of all States employ some mechanism that allows the people to overrule institutional legislatures when those bodies act in ways contrary to the ends that the people prescribe.

California's initiative process sprung from this tradition. In striking down Proposition 22, the trial court misconstrued that heritage and ignored the principle that governmental legitimacy derives solely from the consent of the governed. Put more bluntly, the court below took the calibration of power between the people and their representatives and turned it around. This foundational error warrants reversal.

ARGUMENT

I. THE POPULAR REVISION OF LAW ENJOYS A LENGTHY AMERICAN PEDIGREE.

No American law, once enacted, is eternally set in stone. Every law, from our Nation's charter to the municipal ordinances of its smallest town, are subject to amendment and occasional revision. Indeed, the U.S Constitution devotes an entire article to the processes by which the people can amend it. *See* U.S. Const. art. V.

The federal amendment process reflects a fundamental truth: Sometimes older laws must be amended so that the law will more effectively respond to contemporary problems.[2] California's initiative process, like those of at least twenty-four other States,[3] expand on that premise by recognizing that s state legislature's vested interests sometimes make it resistant to necessary changes and unresponsive to public sentiment. When that occurs, additional avenues for implementing change become necessary. One such avenue is the initiative process, which functions as a democratic bypass when the legislative process becomes sclerotic.

This observation is as well-established as it is uncontroversial. In 1788, Alexander Hamilton remarked that we should "never expect to see a perfect work from imperfect man." THE FEDERALIST NO. 85, at 429 (Alexander Hamilton) (Dover Thrift ed., 2014). This imperfection is not eliminated by aggregating a representative cross-section of humanity into the form of a legislature. Rather, all legislative bodies contain "the errors and prejudices as [well as] the good sense and wisdom of the individuals of whom they are composed." *Id.* And although group decision-making might lead to better outcomes than decisions made by a single individual acting alone, it does not

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[2] *See, e.g.*, U.S. Const. amend. XIII (banning slavery); U.S. Const. amend. XV (extending suffrage to formerly enslaved persons); U.S. Const. amend. XIX (extending suffrage to women); U.S. Const. amend. XXVI (extending suffrage to all U.S. citizens over the age of eighteen).

[3] *See* David A. Carillo et al., *California Constitutional Law: Direct Democracy*, 92 S. Cal. L. Rev. 557, 560-61 (2019).

lend elected lawmakers clairvoyance. Unanticipated problems constantly arise that demand legislative solutions, and laws themselves often have unintended consequences.

The ability to amend laws also aids legislative efficiency. Without an allowance for incremental change, the lawmaking process would ossify. In contrast, allowing issues to be worked out in the fullness of time greases the lawmaking skids.

The Founders knew this. In Federalist 85, Alexander Hamilton explained why it is often advisable for governments to act first, then revise later:

> To balance a large state or society . . . whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labor; TIME must bring it to perfection, and the FEELING of inconveniences must correct the mistakes which they *inevitably* fall into in their first trials and experiments.

Id. at 431 (emphasis in original). In other words, it is certain—not just likely—that legislators will sometimes make poor policy choices, and that changing circumstances will render even wise policies obsolete. For that reason, legislatures are typically equipped to respond quickly to emerging problems, secure in the knowledge that they can always return to the drawing board if necessary.

But what if the legislature refuses to return to the drawing board and revise a law that desperately clamors for a change? In those circumstances, the virtue of direct democracy becomes manifest. At its core, an initiative process, like the one enshrined

in the California Constitution at Article II, Section 8, allows the governed to exercise their paramount legislative power.

Initiatives are constitutionally permissible because *the people themselves* are ultimately "the font of governmental power," and they delegate—but do not relinquish—that power when they create an institutional legislative body. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 819 (2015). A state legislature possesses "only a Fiduciary Power to act for certain ends," but "there remains still in the People a Supre[me] Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them." *Id.* at 820 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 149, p. 385 (P. Laslett ed. 1964)). If a policy desired by an electorate "is manifestly neglected, or opposed" by a legislature, the people naturally lose trust that their representatives will act as they have tried to direct them, and the legislative power "devolve[s] into the hands of those that gave it, who may place it anew where they shall think best for their safety and security." *Id.* at 820 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 149, p. 385 (P. Laslett ed. 1964)). In this sense, the initiative process functions as a steam valve that releases pent-up pressure within the political system and redirects it towards constructive ends.

Another virtue of the initiative process is that it funnels popular passions towards targeted change. An initiative poses a discrete question to the electorate, which is then definitively answered. The people are thus empowered to revise one

problematic policy without revoking *all* the legislative power they have delegated to the legislature, a drastic solution that would upend governmental structures entirely. Our Founders saw the benefit of this calibration; although Hamilton in The Federalist Papers spoke exclusively of the federal amendment process, his analysis applies with equal force to California's statutory-initiative process when he observed that "every amendment to the Constitution . . . would be a single proposition, and must be brought forward singly." THE FEDERALIST NO. 85, at 430 (Alexander Hamilton).

Under this system, the logrolling inherent in the legislative process disappears entirely. Rather, "[t]here would . . . be no necessity for management or compromise in relation to any other point—no giving or taking. The will of the requisite number would at once bring the matter to a decisive issue." *Id.* In other words, the steam valve has a safety switch.

Successful initiatives are often characterized by their opponents as a "revolt" against the system. Not so. Instead, they represent a method of heading off more extraordinary change that could remake the entire system from bottom to top.[4] Even a failed initiative serves a beneficial purpose—it teaches a disgruntled minority that their policy preferences are not as widely shared as they may have assumed.

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[4] Lou Cannon, *1978: The Year the States Cut Taxes*, Wash. Post (Apr. 17, 1978), https://www.washingtonpost.com/archive/politics/1978/04/17/1978-the-year-the-states-cut-taxes/dffd9e9d-30a8-4df2-ad24-342bcaa50f3e/ (characterizing the groundswell of support for Proposition 13 as a "tax revolt" and a "revolution").

Hence, the initiative process is a modern iteration of an old idea: Legislative power flows from and is retained by the people, and the people may wield that power directly to achieve legal change whenever their representatives in government have failed to perform in accordance with their will. The initiative process, then, is democracy in action.

II. THE CALIFORNIA CONSTITUTION ENSHRINES THE RIGHT OF THE STATE'S CITIZENRY TO REVISE THE LAW ON ITS OWN.

Although the federal constitutional amendment process and California's statutory initiative procedure differ in many respects, the same democratic impulse inspired them both. Each mechanism allows the people to exercise influence over the lawmaking process.

For instance, all U.S. Constitutional amendments must originate within an institutional legislative body. Specifically, they may either be proposed by two-thirds of each house of Congress, or by two-thirds of all state legislatures. *See* U.S. Const. art. V. Even though Article V does not contemplate a direct vote at any point, the will of the people is nevertheless mediated through their representatives in the Congress or their state's legislature.

California's statutory-initiative process harnesses that same democratic spirit and connects its inhabitants even more directly to their lawmaking prerogative. Under Article II, Section 10(a) of the California Constitution, Californians may bypass the state legislature entirely to adopt a new statute by simple majority vote. Cal. Const. art. II § 10(a). The process for placing

an initiative question on the general election ballot is straightforward, reflecting California's decision to encourage direct lawmaking. Specifically, a statutory initiative's proponent need only collect signatures "equal in number to 5 percent . . . of the votes for all candidates for Governor at the last gubernatorial election." Cal. Const. art. II § 8(b). For Proposition 22, the statutory initiative at the heart of this case, this number amounted to a requirement of only 623,212 petition signatures—a drop in the bucket in a State encompassing nearly 40 million people.

California's ongoing experiment with direct democracy can be traced back to the completion of the transcontinental railroad in 1869. The railroad, then known as the Central Pacific, was the State's lifeblood: It could not only "bring people out west," but it also "carr[ied] the products of California's farms and factories back east."[5] In short order, Central Pacific quickly became "California's biggest employer and biggest private landowner," and the economic growth that the railroad delivered gave it a dominant hand in state affairs. *Id.* ¶ 3. Because the Central Pacific was the only game in town, it had the necessary market power to charge Californians "some of the highest, most complicated, and least predictable railroad rates in the world" in the late nineteenth and early twentieth centuries, fostering

[5] Glen Gendzel, *The People Versus the Octopus: California Progressives and the Origins of Direct Democracy* ¶ 2, https://journals.openedition.org/siecles/1109?lang=en#bodyftn4 (citing John Hoyt Williams, *A Great and Shining Road: The Epic Story of the Transcontinental Railroad* (New York: Times Books, 1988)).

widespread public dissatisfaction. *Id.* As if that were not enough, the railroad also "routinely blackmailed California towns and cities into handing over taxpayer subsidies and land grants in exchange for the privilege of a rail connection." *Id.* (citing Joseph O'Flaherty, *An End and a Beginning: The South Coast and Los Angeles, 1850-1887* (New York: Exposition Press, 1972)). And no matter which politicians California voters elected to address these problems, nothing seemed to change; the railroad was sufficiently dominant to sway all elected officials towards its preferred policies. *Id.* ¶ 4.

Everything changed in 1911. A wave of populist anger carried a set of progressive Republicans into state office in the 1910 elections, led by the firebrand attorney Hiram Johnson. *Id.* ¶ 5. Johnson had made his name in state politics as the lead prosecutor in the San Francisco graft trials of 1906 to 1909, directly combatting the corruption fostered by the Central Pacific's cozy relationship with state and local officials that so angered California voters. *Id.* The newly elected state legislature rapidly enacted a slew of progressive policies, but feared that railroad-backed candidates could easily repeal those laws when the political tides turned. *Id.* ¶ 6. Hence, the progressives simultaneously advanced an insurance policy that would ensure the people retained a voice in state government affairs long after that generation of politicians had left office: The initiative power.

"How can we best arm the people to protect themselves hereafter?" Governor Johnson asked in his 1911 inaugural

address.[6] He offered his own answer: The State must "give to the people the means by which they may accomplish such other reforms as they desire, the means as well by which they may prevent the misuse of the power *temporarily centralized in the Legislature*, and an admonitory and precautionary measure which will ever be present before weak officials." *Id.* (emphasis added). Governor Johnson and his compatriots were under no illusions that the initiative would be a "panacea for all our political ills," but they sincerely believed that it would "give to the electorate the power of action when desired, and [] place in the hands of the people the means by which they may protect themselves." *Id.* The statutory initiative process was enacted into law later that year and has been enshrined in the state constitution ever since. *See Strauss v. Horton*, 46 Cal. 4th 364, 420 (2009).

The creation of the initiative and referendum represented a "rebalanc[ing]" of the State's "value-set choices" towards greater popular participation in government. It also marked a shift away from empowerment of the moneyed interests like the railroad who appeared to have the ability to influence the legislative process behind closed doors. Carrillo et al., *California Constitutional Law: Direct Democracy*, 92 S. Cal. L. Rev. at 562. And for its part, the California Supreme Court has long interpreted the initiative process in accordance with this history, recognizing that it was "[d]rafted in light of the theory that all

[6] The Governor's Gallery, *Hiram Johnson: First Inaugural Address*, https://governors.library.ca.gov/addresses/23-hjohnson01.html.

power of government ultimately resides in the people" and reifies the fundamental principle of American government that the power to collectively legislate on important questions is "not [] a right granted [to] the people, but [] a power reserved by them." *Assoc. Home Builders, Inc v. City of Livermore*, 18 Cal. 3d 582, 591 (1976).

Since its 1911 conception, both the California state judiciary and the legislature have developed institutional mechanisms to buttress the initiative process's legitimacy. Because "[t]he exercise of initiative and referendum is one of the most precious rights of our democratic process," California courts have routinely applied "a liberal construction to this power wherever it is challenged so the right be not improperly annulled." *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563 (Cal. Ct. App. 1961); *Gayle v. Hamm*, 25 Cal. App. 3d 250, 258 (Cal. Ct. App. 1972). Even when the constitutionality of an initiative is called into question, the State's courts "will preserve it" so long as any such "doubts can be fairly resolved in favor of the use of this reserve power." *Mervynne*, 189 Cal. App. 2d at 563-64; *Gayle*, 25 Cal. App. 3d at 258. The guardrails shielding successful statutory initiatives from attempts at revision by the legislature are even more concrete: The legislature is prohibited from amending an enacted initiative statute unless the statute expressly grants it the power to amend or the people affirmatively vote to approve a proposed legislative amendment in a popular referendum. Cal. Const. art. II, § 10(c). Either way, the people are guaranteed a say in any changes to a law directly adopted via initiative.

Despite the ever-growing popularity of the California initiative process as a mechanism for implementing political change,[7] the process has been heavily criticized in recent years.[8] One such admonishment is "that the public's distrust of government [i]s a kind of electoral rocket fuel that could carry almost any payload into orbit," which, according to some, benefits conservative interests. Myers, *supra* note 4. Any such party split, however, likely results more from the State's prevailing partisan dynamics than any flaw inherent in the initiative system. Because the Democratic Party currently dominates the California legislature, the Republican Party is more likely to utilize this alternative route of participation in the State's lawmaking process. The initiative process itself has no partisan valence, and that the minority political party seeks it out more often than the

[7] Indeed, beginning in the mid-1970s, the State has experienced a massive uptick in proposed initiatives. Cal. Sec'y of State, *Initiative Totals by Summary Year 1912-2020*, https://elections.cdn.sos.ca.gov//ballot-measures/pdf/initiative-totals-summary-year.pdf (depicting a permanent increase in the number of proposed initiatives beginning around 1974).

[8] *See, e.g.*, John Myers, Powerful, *Wealthy Interest Groups Keep a Tight Grip on California Proposition System*, L.A. TIMES (Nov. 5, 2020), https://www.latimes.com/california/story/2020-11-05/analysis-ballot-initiatives-system-california-spending (quoting a Democratic strategist who claimed that California's system allows wealthy interests to "pay for a law if you don't like something that's going on"); Kelsey Piper, *California's Ballot Initiative System Isn't Working. How Do We Fix It?*, Vox (Nov. 6, 2020), https://www.vox.com/future-perfect/2020/11/6/21549654/california-ballot-initiative-proposition-direct-democracy.

dominant political party demonstrates only that the steam valve is functioning as intended.

Indeed, the initiative process is the *only* mechanism available for divorcing discrete policy issues from the backdrop of partisanship. When a voter casts a ballot for a single candidate in a winner-take-all election, there is no way for them to differentiate between different aspects of that candidate's platform. In other words, the voter cannot easily inform a candidate that the voter agrees with their position on Policy X but disagrees with their stance on Policy Y. Instead, a vote for a candidate functions as an implied endorsement of an entire suite of policies. A ballot initiative, in contrast, presents voters with a yes-or-no question: Should the proposed law be adopted or not? By allowing voters to dispassionately review a proposed policy (or even a suite of closely related policies) without tying that proposal to an entire party platform, the initiative empowers voters to make reasoned decisions about the most beneficial state policy at least partially liberated from the encumbrances of partisanship.

Take the recent example of Proposition 16. In 1996, California voters enacted Proposition 209 to prohibit the State from granting preferential treatment on the basis of race in public employment, public education, or public contracting.[9] More

[9] For the text of Proposition 209, *see* Cal. Sec'y of State, *Proposition 209: Text of Proposed Law*, https://vigarchive.sos.ca.gov/1996/general/pamphlet/209text.htm#:~:text=Proposition%20209%3A%20Text%20of%20Proposed%20Law&text=SEC.,public%20education%2C%20or%20public%20contracting.

than two decades later, Proposition 16 asked California voters whether Proposition 209 should be repealed.[10] Voting against Proposition 16 (and, therefore, for maintaining the existing state constitutional ban on affirmative action) could reasonably be seen as a conservative policy outcome. But California voters defeated Proposition 16 by a margin of 57-to-43 percent on the same day they elected Joe Biden President by a lopsided 64-to-34 percent margin.[11] In other words, more than one-in-five California voters both supported Biden *and* opposed Proposition 16.

If one understood the initiative through a purely partisan lens, these outcomes could not be explained. Californians have proven themselves capable of assessing the merits of individual ballot initiatives without being distracted by background political noise. Nor has the initiative process ever been a one-way ratchet—what the people giveth the people can taketh away, and a statutory initiative can be repealed via the same simple-majority vote by which it was enacted. Witness again Proposition 16, which, despite its failure at the polls, presented Californians with a clear opportunity to change their minds on an important question. *See supra* note 10.

Thus, the California statutory initiative reflects humility and promotes efficiency. The Founding generation recognized

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[10] Cal. Legislative Analyst's Office, *Proposition 16*, https://lao.ca.gov/BallotAnalysis/Proposition?number=16&year=2020 (explaining that "[i]f approved, the measure would repeal Proposition 209").

[11] *California Election Results*, N.Y. Times, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-california.html.

that they did not possess perfect wisdom and that a change of circumstances (or a shift in public opinion in response to changing circumstances) may warrant the revision of existing laws. So they devised a governmental system that allowed for such incremental legal change. THE FEDERALIST NO. 85, at 431 (Alexander Hamilton) (Dover Thrift ed., 2014). Similarly, early-twentieth-century Californians, frustrated by sluggish governmental responses to the pressing problems of their day and a perception of institutional capture by powerful monopolies, created the statutory initiative to bypass the special interests that too often blocked desired reforms. *Strauss*, 46 Cal. 4th at 420-21.

These ideas are not radical. Quite the contrary. As demonstrated, popular control of government is *fundamental* to the American understanding that the people are the source of all legitimate governmental authority. *Ariz. State Legislature*, 576 U.S. at 819. Statutory initiatives allow an unheard majority to enact its preferences into law without a wholesale revision of governmental structures. In this way, by allowing a dissatisfied electorate to directly enact its discrete preferences into law, the statutory initiative preserves California's overarching governmental system by releasing pent-up popular pressure that might otherwise be directed towards more radical institutional change.

III. THE DECISION ON REVIEW CANNOT BE SQUARED WITH THESE PRINCIPLES.

In 2020, a frustrated California electorate acted consistent with the foregoing principles when it enacted Proposition 22. The

precipitating event was the California Legislature's 2019 enactment of AB5, a bill that imposed a new test for determining which workers are "employees" and which are "independent contractors" for the purposes of state law.[12] Enacted with the stated purpose of protecting workers, AB5 had an immediate—and counterproductive—effect on employment statewide.[13] Employers that may have otherwise retained workers in independent-contractor relationships let go of freelance workers to avoid the imposition of the substantial new costs imposed by AB5.[14] In other words, AB5 was a paradigm of a policy that ripe for popular override: A law enacted by an institutional legislature that was intended to extend additional benefits to citizens, but instead had unintended, yet deleterious, consequences.

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[12] *See* Cal. Legis.*, Assembly Bill No. 5: An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor,* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.

[13] Celine McNicholas & Margaret Poydock, *How California's AB5 Protects Workers From Misclassification*, Econ. Policy Inst. (Nov. 14, 2019), https://www.epi.org/publication/how-californias-ab5-protects-workers-from-misclassification/ (arguing that AB5 guaranteed workers "access to basic labor and employment protections and benefits denied independent contractors").

[14] Allana Akhtar, *'It Feels Cold and Heartless': Hundreds of California Freelancers Have Been Fired Before the Holidays Over a State Law Meant to Help Uber and Lyft Drivers,* Business Insider (Dec. 18, 2019), https://www.businessinsider.com/california-ab5-bill-left-freelancers-out-of-work-2019-12.

Faced with these ramifications, California voters proposed a targeted change: An exemption from the restrictions imposed by AB5 for app-based drivers who work for rideshare companies like Uber and Lyft. Proposition 22 did not repeal AB5 completely; even post-enactment, the new regulations remain in place for most California workers. But, for the narrow category of Californians who work as app-based driver, Proposition 22 ensured that they could maintain the flexible independent contractor working arrangements under which they had previously operated.[15] Like other statutory initiatives that came before it, Proposition 22 was a surgical fix to a flawed policy.

Of course, the question of whether AB5 was a desirable policy change on the merits is not the question before this court. The short history above is presented solely to demonstrate that the adoption of Proposition 22 fits within the well-worn path trodden by previous generations of political reformers, beginning with a growing recognition that a given state policy is not having its intended effect and ending with the popular enactment of a different policy specifically geared towards addressing those concerns. By invalidating the entire proposition, the trial court misconstrued the foundational premises that confirm the authority of the people to legislate through the statutory initiative process. In the court's view, Proposition 22 violated preexisting provisions of the California Constitution that articulate legislative plenary power over workers' compensation

[15] Legis. Analyst's Office, *Proposition 22* (Nov. 3, 2020), https://lao.ca.gov/BallotAnalysis/Proposition?number=22&year=2020.

law. Order Granting Pet. for Writ of Mandamus, *Castellanos et al. v. California et al.*, No. RG21088725 at 4 (Aug. 20, 2021). The analysis discussed above demonstrates that the trial court erred by so concluding.

The people of California are the primary font of governmental authority. For that reason, they rightly possess the power to enact desired statutes via the initiative process to override measures adopted by the institutional state legislature. This premise tracks both the U.S. Supreme Court's and the California Supreme Court's understandings of the source of legislative power.[16] This background principle underlies the entire edifice of direct democracy in California. And it is the principle through which discrete attempts at legislating via statutory initiative must be understood.

At times, the trial court seemed to acknowledge the reserved power of the people to legislate by statutory initiative. The court correctly explained that "Proposition 22 is not an improper exercise by the people of a power entrusted only to the Legislature" because "[t]he term 'legislature' in" the state constitution's workers' compensation provision "includes the people acting through the initiative power." Order, *Castellanos et*

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[16] *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 819 (holding that even if "[t]he Framers may not have imagined the modern initiative process," nevertheless "the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power"); *Assoc. Home Builders, Inc v. City of Livermore*, 18 Cal. 3d at 591 (holding that the power to legislate via initiative is "not [] a right granted [to] the people, but [] a power reserved by them").

al., No. RG21088725 at 3. Quite so—if the people hold legislative power in reserve (and they do), it follows that they have the authority "to create[] and enforce a complete system of workers' compensation." Cal. Const. art. XIV, § 4; *see also id.* art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.").

The state constitution must be interpreted to mean what it says. And here, it provides that "[t]he Legislature" (a term the trial court correctly interpreted as encompassing the reserved legislative power of the people) "is hereby expressly vested with *plenary power*, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation[.]" Cal. Const. art. XIV, § 4. Plenary power is, by its very nature, unlimited. If the people have plenary power to legislate in a particular area, then they necessarily have the authority to *withdraw* discrete categories of employees from the coverage of the State's workers' compensation system on top of extending workers' compensation to new categories of employees. Plenary power that may only be exercised to achieve one predetermined outcome is not plenary at all.

Despite acknowledging the reserved legislative power of the people, the trial court went astray when it claimed that Prop 22 "limits a power vested in the state legislature by the Constitution." Order, *Castellanos et al.*, No. RG21088725 at 3. This claim flops for two reasons. First, by using the phrase "state

legislature," the court appears to reference only the *institutional* state legislature, even though the people, acting through the initiative process, also constitute a legislature constitutionally empowered to enact legislation.

The court's more significant error, however, was its conclusion that Proposition 22 "limits" a constitutionally vested legislative power. Nothing could be further from the truth. Proposition 22 was a valid *exercise* of the people's reserved legislative power, in which a substantial majority of Californians—*i.e.*, "the font of governmental power" from which all legitimate authority exercised by the institutional legislature is derived—collectively decided to classify app-based drivers as independent contractors rather than employees subject to the state's workers' compensation laws. *Ariz. State Legislature*, 576 U.S. at 819. The trial court seemed to operate under the mistaken assumption that the power to regulate workers' compensation could only be exercised toward *greater* regulation, but a decision *not* to regulate a particular group of workers is a constitutionally valid exercise of that plenary power as well.

The trial court's confusion on this point led it to discern an internal constitutional conflict where none actually exists. Specifically, the court determined that Article XIV, Section 4 (which protects the Legislature's plenary power over workers' compensation) and Article II, Section 10 (which prohibits the Legislature from acting to amend or repeal an initiative statute without a subsequent vote of the people) could not be squared. Understanding that the people acting through the initiative

process operate as a reservoir of legislative power solves this puzzle.

In other words, Article I, Section 4 of the California Constitution enshrines the traditional understanding of legislative power by expressly noting that "the people reserve to themselves the power of initiative and referendum." Article II, Section 10 does not change this as it requires the institutional legislature to seek popular approval whenever it seeks to amend or repeal an initiative statute. Rather, Article II, Section 10 is merely a mechanism for confirming that an amendment proposed by the institutional legislature comports with the people's understanding of the statute they adopted. It is a real-world manifestation of Locke's philosophy, accepted by the Founders, and adopted by California in the early 1900s, that legislative power is delegated by the people to an institutional legislature to attain particular ends, and to the extent the institutional legislature acts in contravention of those ends, it relinquishes that delegated authority back to the people. *See Ariz. State Legislature*, 576 U.S. at 820 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT §149, p. 385 (P. Laslett ed. 1964)). A state legislature cannot exercise "plenary power" that it was never delegated.

The trial court explained that, under its interpretation of the law, the people "must first [adopt an] initiative constitutional amendment, not [an] initiative statute" like Proposition 22, if they intend to restrict the Legislature's plenary power over workers' compensation. Order, *Castellanos et al.*, No.

RG21088725 at 4. But Proposition 22 did not "restrict or qualify" the Legislature's plenary power over workers' compensation law. Instead, the people exercised their reserved legislative power by exempting a particular class of workers from workers' compensation coverage. This policy choice was predicated on the people's legitimate authority to legislate via initiative statute.

Proposition 22 should not have been invalidated. The trial court's decision to do so was based on a flawed, ahistorical understanding of the people's reserved power to legislate via initiative. In the trial court's mistaken view, when the people act directly and collectively to legislate as the source of all legislative power, they have less latitude than do their representatives in the institutional state legislature when exercising delegated legislative power. Because this view is profoundly incorrect, this Court should reverse.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that the Court reverse.

Dated: June 1, 2022

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certified that the Proposed Amicus's Brief contains 5,321 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce the brief.

Dated: June 1, 2022

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CERTIFICATE OF SERVICE

I am employed in Washington, DC. I am over the age of eighteen years and not a party to the within action; my business address is 2300 N Street NW, Suite 643A, Washington, DC 20037. I am a member in good standing of the California Bar and my bar number is 190437.

On June 1, 2022, I served via electronic service on the parties the following document(s) described on the interested parties in this action as follows: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and [PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA POLICY CENTER.**

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

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

Dated: June 1, 2022

/s/ Alex Vogel
Alex Vogel

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