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.,
Interveners and Appellants.

First Appellate District, Division Four, Case No. A163655
Alameda County Superior Court, Case No. RG21088725
The Honorable Frank Roesch, Judge

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Court of Appeal's opinion below resolves a facial challenge to Proposition 22, an initiative statute that prescribes a test—applicable only to app-based drivers—to determine whether they are employees or independent contractors. Proposition 22, in addition, sets out an alternative compensatory and regulatory scheme for drivers who are not employees. The court held that the voters' exercise of its constitutional initiative power on this subject matter does not violate article XIV, section 4 of the California Constitution, which states that the Legislature has "plenary" authority to enact a complete system of workers' compensation.

That ruling presents no conflict of decision or unsettled important question of law warranting this Court's further review. (Cal. Rules of Court, rule 8.500(b)(1).) Applying this Court's analysis in *Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, 1032, the Court of Appeal correctly determined that the Legislature's plenary authority to legislate in the realm of workers' compensation is not exclusive of the voters' power to make law in this same space. While the petition contends that Proposition 22 permanently strips the Legislature of its ability to change the benefits and protections available to app-based drivers going forward, in fact, the opinion below expressly disclaims any attempt to delineate the limits of the power of the Legislature to amend Proposition 22 by future statute.

The petition for review should be denied.

BACKGROUND

In 2019, the Legislature enacted Assembly Bill 5 (AB 5) to curb the misclassification of employees as independent contractors. (Assem. Bill. No. 5 (2019-2020 Reg. Sess.) § 1.) The law was designed to "ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave." (*Id.*, subd. (e).) AB 5 codified a generally applicable, three-part test—the "ABC test"—for determining employee status for purposes of the Labor Code, Unemployment Insurance Code, and Wage Orders of the Industrial Welfare Commission, and made the test applicable to most workers (with specified exceptions). (Lab. Code, § 2775, subd. (b)(2), (3).) Under the ABC test, a worker is classified as an employee, rather than as an independent contractor, unless the hiring entity establishes that the worker:

> (A) . . . is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) . . . performs work that is outside the usual course of the hiring entity's business.
>
> (C) . . . is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(Lab. Code, § 2775, subd. (b)(1)(A)-(C).) All three conditions must be met in order for a worker to be classified as an independent contractor.

In response, certain individuals and an organization named Protect App-Based Drivers and Services—intervenors in this matter—proposed a ballot initiative to remove app-based transportation and delivery drivers from the operation of AB 5. After a campaign supported by companies such as Uber Technologies, Inc., Lyft, Inc., and DoorDash, Inc., the voters approved Proposition 22, the "Protect App-Based Drivers and Services Act" (Proposition 22 (Nov. 2020), adding Bus. & Prof. Code, §§ 7448-7467).[1] The stated purpose of Proposition 22 included "protect[ing] [app-based drivers'] freedom to work independently, while also providing these workers new benefits and protections not available under current law." (§ 7449, subd. (f).)

Proposition 22 provides that an app-based driver is an independent contractor with respect to work for a "network company," provided the company does not control the driver in certain specified ways. Specifically:

> (a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform.

[1] All statutory references are to the Business and Professions Code unless otherwise noted.

> (b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.
>
> (c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.
>
> (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.

(§ 7451, subds. (a)-(d).) Network companies must meet all conditions in order to classify app-based drivers as independent contractors.

In addition, Proposition 22 established certain minimum compensation requirements and other "benefits and protections" for app-based drivers. (See § 7449, subd. (f).) These "include a healthcare subsidy consistent with the average contributions required under the Affordable Care Act (ACA); a new minimum earnings guarantee tied to 120 percent of minimum wage with no maximum; compensation for vehicle expenses; occupational accident insurance to cover on-the-job injuries; and protection against discrimination and sexual harassment." (*Ibid*.; see §§ 7453-7462; Opn. 4-5.)

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Proposition 22 was challenged by plaintiffs and respondents, a coalition of labor unions and individuals, advancing a number of state constitutional theories. While the trial court declared

Proposition 22 invalid in its entirety and ordered the director of the Department of Industrial Relations not to enforce any of the initiative's provisions, the Court of Appeal largely rejected plaintiffs' claims.

In a 2-1 opinion authored by Acting Presiding Justice Brown, the court explained the flaws in plaintiffs' arguments for Proposition 22's wholesale invalidity, including their central contention that article XIV, section 4 of the California Constitution *reserves to the Legislature alone* the power to define employee status. That provision states in relevant part that "[t]he Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation . . . ." As the majority explained at length, this Court construed the term "plenary power" in *Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, 1032, a case involving a similarly worded provision about the Legislature's power to confer jurisdiction on the Public Utilities Commission. (Opn. 12-22, 26; Cal. Const., art. XII, § 5.) As the court observed, *"McPherson* teaches that article XIV, section 4's objective was not to give the Legislature *exclusive* authority over workers' compensation laws, but rather to give such authority to the Legislature or the voters . . . ." (Opn. 21.)[2] Further, the Court of

[2] The only aspects of Proposition 22 that the Court of Appeal held invalid—on separation of power grounds—were two severable provisions that purported to define for the Legislature (continued…)

Appeal was clear about the limits of its decision, stating, "We review here a facial challenge to the constitutionality of Proposition 22, and we express no view on claims that might be asserted in specific applications of the initiative." (Opn. 10.)

Justice Streeter, concurring and dissenting, disagreed with the majority's analysis of article XIV, section 4. (Conc. & dis. opn. 1.) In Justice Streeter's view, the case presented an issue left open in *McPherson*—whether a statute enacted by the voters may be challenged on the ground that it "improperly conflicts with the Legislature's exercise of *its* authority" set out in in a constitutional provision conferring on that body "plenary power" to make law in a specified area. (*McPherson*, *supra*, 38 Cal.4th at p. 1044, fn. 9; Conc. & dis. opn. 18.) Justice Streeter would have held that Proposition 22 conflicts with article XIV, section 4, making the initiative invalid in its entirety. (Conc. & dis. opn. 18, 24, 63-64; see Ptn. 8-9, 19-20.)

In response, the majority noted that while the Court in *McPherson* "may have wanted to leave open, as a precedential matter, the possibility that an argument could be made that an initiative statute improperly limited the Legislature's authority in some fashion[,]" the "implications of *McPherson*'s reasoning on this question"—that the Legislature's plenary lawmaking power does not limit the voters' initiative power—should not be "lightly

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and the courts what actions would constitute amendments of Proposition 22. (Opn. 49, 52; § 7465, subd. (c)(3) & (4).)

cast aside." (Opn. 19-20.) It reasoned that there was "no justification for reaching a different interpretation than *McPherson* reached with respect to virtually identical language." (Opn. 20.)

REASONS THIS COURT SHOULD DENY REVIEW

Plaintiffs now seek this Court's further review. Because there is no conflict in the law about the validity of Proposition 22 for this Court to resolve, plaintiffs contend that this Court must settle important questions of law relating to worker benefits and protections, and to the Legislature's power to advance its policy preferences in this space. (Ptn. 10; see generally *id.* 20-38; Cal. Rules of Court, rule 8.500(b)(1).) The State agrees, of course, that the constitutionality of an initiative statute creating an alternative regulatory scheme for California's over 1.3 million app-based drivers is, in a general sense, an important question.[3] And plaintiffs' policy concerns about the effects of Proposition 22 on app-based drivers may well warrant continued public discourse. But the relevant question is whether there is an important, *unsettled legal question* warranting this Court's intervention. There is not.

The Court in *McPherson* already answered the interpretive question that plaintiffs seek to relitigate: "plenary" when used in constitutional provisions describing the Legislature's power to

[3] U.C. Riverside School of Business, *An Analysis of App-Based Drivers in California* (Feb. 2022), p. 3, <https://tinyurl.com/2hsbk6kj> (as of May 10, 2023).

make law related to a specified subject matter does *not* mean "exclusive," thereby precluding the voters' constitutional power to legislate by initiative on that subject. (Opn. 21-22; *McPherson*, *supra*, 38 Cal.4th at pp. 1035, 1040, 1042-1043.)[4] As the majority explained:

> Rather than read article XIV, section 4 as conferring plenary, unlimited power on the Legislature and only the Legislature, *McPherson* requires that we read article XIV, section 4 as though it said, "The Legislature *or the electorate acting through the initiative power are* hereby expressly vested with plenary power, unlimited by any provision of this constitution, to create, and enforce a complete system of workers' compensation . . . ."

(Opn. 14, citing *McPherson*, *supra*, 38 Cal.4th at pp. 1032, 1033, 1042-1043.) The voters are thus as empowered as the Legislature to enact laws addressing workers' compensation. This means that voters can enact laws that remove workers from an existing workers' compensation scheme and place those workers into an alternative scheme, just as subsequent legislative sessions have the power to change or even repeal workers' compensation policies enacted into law by previous legislative sessions.[5]

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[4] See *McPherson*, *supra*, 38 Cal.4th at p. 1043 ("[L]ong-standing California decisions establish[] that references in the California Constitution to the authority of the Legislature to enact specified legislation generally are interpreted to include the people's reserved right to legislate through the initiative power.").

[5] Justice Streeter opined that neither the Legislature nor the electorate is empowered to change any of the basic features of the pre-1918 workers' compensation system. (Conc. & dis. opn. (continued…)

"Notably, even plaintiffs agree that . . . the Legislature could have excluded app-based drivers from workers' compensation coverage." (Opn. 17, fn. 8.)[6]

The petition further contends that this Court should step in because "Proposition 22 permanently withdraws the Legislature's *future* authority to provide these workers with the protections of the complete workers' compensation system." (Ptn. 26; see also *id.* 8, 25-26, 38.) This concern was shared by Justice Streeter. (Conc. & dis. opn. 4, 24 [asserting that Proposition 22 "permanently" withdraws the Legislature's authority to restore protections to app-based drivers].)[7] But the Court of Appeal did

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6.) The majority rejected that view as unsupported. (Opn. 16, fn. 8.) "Nothing . . . suggests that article XIV, section 4 prevents the Legislature from changing workers' compensation in any ways it sees fit, which is unsurprising given its grant of plenary authority to create a system requiring '*any or* all persons to compensate *any or* all of their workers.'" (Opn. 17, fn. 8, quoting Cal. Const., art. XIV, § 4.)

[6] This case does not squarely implicate the Legislature-voter "conflict" situation noted in footnote 9 of *McPherson* (*supra*, 38 Cal.4th at p. 1044, fn. 9) because Proposition 22 is not a workers' compensation law. Rather, it is a worker classification law that at most only indirectly affects the Legislature's workers' compensation scheme.

[7] Plaintiffs' contention is at the very least an overstatement. While not required to do so, the voters included in Proposition 22 an amendment provision, which allows the Legislature to amend the law by a seven-eighths majority vote of both houses, provided any amendment is "consistent with, and furthers the purpose of," the Act. (§ 7465, subd. (a).) Notably, the purposes of the Act are quite broad, and by their terms, are

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not purport to delineate the limits of the Legislature's power to amend Proposition 22 by future statute. (See Opn. 10 [noting that case was "a facial challenge to the constitutionality of Proposition 22" and court would not consider "'possible interpretive or analytical problems' that might arise from the measure in the future[,]'" citing *Briggs v. Brown* (2017) 3 Cal.5th 808, 827].) The court did not address, for example, the constitutionality under article XIV, section 4 of the seven-eighths majority amendment requirement as applied to a future statute enacted by the Legislature addressing workers' compensation. (§ 7465, subd. (a).) And the court had no occasion to consider whether article XIV, section 4 overrides the normal rule that the Legislature may not amend an initiative statute without voter approval. (See *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 568 [voter approval required unless the initiative itself permits amendment, and then only in a manner that is consistent with initiative's conditions].) Accordingly, any important questions of law concerning hypothetical future legislation are properly reserved for another day.

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intended to be protective of app-based drivers. (See §§ 7449, 7450.) Moreover, the Legislature may amend or repeal any initiative statute by another statute, provided it is submitted to and approved by the voters. (Cal. Const., art. II, § 10, subd. (c).)

CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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May 10, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER TO PETITION FOR REVIEW** uses a 13-point Century Schoolbook font and contains 2,373 words.

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May 10, 2023