

California Initiative Review



2020 EDITION

UNIVERSITY OF THE
PACIFIC
McGeorge School of Law

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Proposition 14:
The California Stem Cell Research, Treatments,
And Cures Initiative Of 2020

Bond Act

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I. EXECUTIVE SUMMARY

Proposition 14 authorizes the state to sell \$5.5 billion in general obligation bonds to support stem cell and other medical research, updating and renewing the program approved by voters in 2004. The research is aimed at developing treatments and cures for serious diseases and conditions like diabetes, cancer, HIV/AIDs, heart disease, paralysis, blindness, kidney disease, respiratory illnesses, and many more. Of the \$5.5 billion, \$1.5 billion will be dedicated to the support of research and the development of treatments for diseases and conditions of the brain and central nervous system, such as Alzheimer's disease, Parkinson's disease, stroke, dementia, epilepsy, depression, brain cancer, schizophrenia, autism, and other diseases and conditions of the brain. If the proposition passes, the estimated cost to taxpayers over time will be \$7.8 billion.¹

II. THE LAW

A. Existing Law

In 2004, California voters approved Proposition 71, which added a provision to the State Constitution affirming the right of researchers in California to conduct stem cell research.² Proposition 71 also created the California Institute for Regenerative Medicine (CIRM) to provide grants to universities and other entities in California to support stem cell research, development of new treatments, clinical trials, new research facilities, and other related activities.³ The measure also established a governing board to adopt CIRM policies and allocate funds, three advisory working groups to help guide the governing board, and an independent oversight committee to review CIRM's finances.⁴

These grants were funded by \$3 billion through the sale of public bonds; and the interest, another \$3 billion, was payable from the state's General Fund.⁵ As of June 2020, around \$30 million remains available for grants.⁶ In the event that Proposition 14 does not pass, CIRM has been decreasing staff and plans to maintain only those needed to manage remaining projects until they are completed.⁷

¹ *Proposition 14*, LEGISLATIVE ANALYST'S OFFICE, <https://lao.ca.gov/BallotAnalysis/Proposition?number=14&year=2020> (last visited Sept. 15, 2020).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *California Proposition 71, Stem Cell Research Bond Initiative (2004)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_71,_Stem_Cell_Research_Initiative_\(2004\)](https://ballotpedia.org/California_Proposition_71,_Stem_Cell_Research_Initiative_(2004)) (last visited Oct. 7, 2020).

⁶ LEGISLATIVE ANALYST'S OFFICE, *supra* note 1.

⁷ *Id.*

B. Relevant Peripheral Legislation

1. California State Law

California state law permits research on human embryonic stem cells, human embryonic germ cells, and human adult stem cells including somatic cell nuclear transplantation, that has been reviewed by a stem cell research oversight committee.⁸ This research is subject to the laws relating to the donation of tissue and the storage of embryos.⁹ California state law prohibits human reproductive cloning, however human reproductive cloning is not the same as embryonic stem cell research.¹⁰ Human reproductive cloning requires placing the embryos back into a uterine environment while embryonic stem cells are studied in a laboratory environment.¹¹

2. Federal Law

On March 9, 2009, President Obama issued an executive order, “Removing Barriers to Responsible Scientific Research Involving Human Stem Cells.”¹² This executive order removed limitations placed on research involving human embryonic stem cells created by President G.W. Bush in August 2001.¹³

On June 5, 2019, the Trump administration announced that it will no longer allow government scientists working for the National Institutes of Health (NIH) to conduct studies that use fetal tissue, and university scientists seeking NIH funding for such studies must now have each proposal examined by an ethics advisory board.¹⁴ The board would be made up of 14 to 20 people from various backgrounds, including at least one theologian, one ethicist, one physician, and one attorney.¹⁵ No more than half of the panel members can be scientists.¹⁶ Even though this is not directly related to stem cell research, it provides a glimpse into possible future restrictions that may arise if this administration remains in office.

⁸ CAL. HEALTH & SAFETY CODE § 125300.

⁹ CAL. HEALTH & SAFETY CODE §§ 125300–125320

¹⁰ CAL. HEALTH & SAFETY CODE §§ 24185–24187; CAL. BUS. & PROF. CODE §§ 16004, 16105.

¹¹ *What is cloning, and what does it have to do with stem cell research*, EUROSTEMCELL, <https://www.eurostemcell.org/what-cloning-and-what-does-it-have-do-stem-cell-research> (last visited Sept. 22, 2020)..

¹² Exec. Order No. 13505, 74 Fed. Reg. 10667 (Mar. 9, 2009).

¹³ *Id.*

¹⁴ Meredith Wadman, *Trump Administration Restricts Fetal Tissue Research*, SCIENCE (June 5, 2019, 2:26PM), <https://www.sciencemag.org/news/2019/06/trump-administration-restricts-fetal-tissue-research> (last visited Sept. 22, 2020).

¹⁵ *Id.*

¹⁶ *Id.*

3. Other States

Nearly a dozen states have launched initiatives for funding stem cell research, though they have not contributed as much money as California.¹⁷ Like California, some states allocated funding to support stem cell research in response to the restrictions on federal funding by the Bush administration, including Maryland and New York.¹⁸ In 2006, Maryland passed the Maryland Stem Cell Act of 2006 and to date has awarded \$165 million to promote state funded stem cell research through the Maryland Stem Cell Research Fund.¹⁹ Similarly, in 2007, New York launched the New York State Stem Cell Science program (NYSTEM) to support stem cell research across the state of New York.²⁰ To date, NYSTEM has awarded \$396 million to New York institutions.²¹

C. Current Funding and Revenue

1. Funding

A variety of sources fund stem cell research in California. These sources include: the federal government's National Institutes of Health, private investors, and CIRM, each having different goals and abilities.²²

Private sector investment generally occurs during the testing and development phase, rather than the initial basic research.²³ Scientists have referred to the stage right before industry becomes interested in the research as the "Valley of Death."²⁴ It is an area where promising therapies often languish, because there is not enough federal funding to push the projects through to the later stages.²⁵ CIRM has focused on funding the early research that leads to therapy ideas and fund projects that are in the Valley of Death stage, helping to keep good projects on track toward clinical therapies.²⁶

¹⁷ David Gorn, *Will Voters Continue to Pour Money Into Stem Cell Research*, HEALTH SHOTS NPR (Jan. 25, 2018), <https://www.npr.org/sections/health-shots/2018/01/25/579727683/will-state-voters-continue-to-pour-money-into-stem-cell-research> (last visited Oct. 7, 2020).

¹⁸ Hillary B. Alberta et al., *Assessing State Stem Cell Programs in the United States: How Has State Funding Affected Publication Trends?*, 16 Cell Stem Cell 115-118, (2016).
<https://www.sciencedirect.com/science/article/pii/S1934590915000089> (last visited Oct. 7, 2020).

¹⁹ *About Us*, MSCRF MARYLAND STEM CELL RESEARCH FUND, <https://www.msccrf.org/about-us> (last visited Oct. 7, 2020).

²⁰ *About Us*, NYSTEM NEW YORK STATE STEM CELL SCIENCE, <https://stemcell.ny.gov/about-us-0#:~:text=History,research%20across%20New%20York%20State> (last visited Oct. 7, 2020).

²¹ *Id.*

²² *FAQ*, CIRM CALIFORNIA'S STEM CELL AGENCY, <https://www.cirm.ca.gov/about-cirm/cirm-faq#funding> (last visited Sept. 22, 2020).

²³ *How Stem Cell Research Is Funded*, AMERICANS FOR CURES, <https://americansforcures.org/stem-cells/how-stem-cell-research-is-funded/> (last visited Sept. 17, 2020).

²⁴ CIRM CALIFORNIA'S STEM CELL AGENCY, *supra* note 22.

²⁵ *Id.*

²⁶ *Id.*

CIRM has spent nearly all of its available funds.²⁷ The bonds issued under Proposition 71 comprised nearly all of CIRM's funding, with a relatively small amount of funding from investment income, private donations, or other sources.²⁸ As of June 2020, CIRM had \$30 million remaining for grants, and it has decreased its staff from a peak of 50 full-time staff to 35 full-time staff, planning to maintain some staff while the remaining projects are completed.²⁹

On the federal level, NIH awards grants to fund research nationwide and has a budget of \$40.3 billion for medical research in 2020.³⁰ More than 80% of NIH's funding is dispersed through competitive grants to research institutions across the nation and \$2.1 billion will go towards stem cell research in 2020.³¹

2. Revenue

Economists at the University of Southern California conducted an economic impact study of CIRM in October 2019.³² This study estimated that CIRM has added \$15.4 billion into the U.S. economy over 14 years.³³ The estimates are based on economic stimulus created by CIRM grants; co-funding; partnership funding; leverage funding of Alpha Stem Cell Clinics, follow-on funding, and CIRM operating expenditures.³⁴ This study was funded by CIRM.

a) Estimated Economic Impacts on California Economy

CIRM-funded activities added to the California economy \$10.7 billion in scientific research and development services, real estate, construction, hospitals, food manufacturing, wholesale trade, professional and health care services, and rental and leasing services.³⁵ These activities increased state and local tax revenues by \$434.1 million between 2005 and 2018.³⁶ Even if Proposition 14 does not pass, CIRM is still estimated to increase state and

²⁷ *Stem Cell Research*, LEGISLATIVE ANALYST'S OFFICE, as of 12/2/2019 available at <https://lao.ca.gov/ballot/2019/190611.pdf>.

²⁸ *Id.*

²⁹ LEGISLATIVE ANALYST'S OFFICE, *supra* note 1.

³⁰ *Budget*, NATIONAL INSTITUTES OF HEALTH, <https://www.nih.gov/about-nih/what-we-do/budget> (last visited Sept. 22, 2020).

³¹ *Funding*, NATIONAL INSTITUTES OF HEALTH, https://report.nih.gov/categorical_spending.aspx (last visited Oct. 7, 2020).

³² Dan Wei & Adam Rose, *Economic Impacts of the California Institute of Regenerative Medicine (CIRM)*, Schaeffer Center for Health Policy and Economics, Sol Price School of Public Policy, USC (Oct. 3, 2019) available at https://www.cirm.ca.gov/sites/default/files/CIRM_Economic%20Impact%20Report_10_3_19.pdf.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*; Joyce E. Cutler, *California Stem Agency Put \$15 Billion into U.S. Economy (1)*, BLOOMBERG LAW, (Oct. 9, 2019, 7:09PM), <https://news.bloomberglaw.com/health-law-and-business/california-stem-cell-agency-put-15-billion-into-u-s-economy> (last visited Sept. 22, 2020).

³⁶ Wei, *supra* note 32.

local tax revenues by an additional \$207.2 million through 2023.³⁷ Additionally, CIRM created roughly 44,010 full-time equivalent jobs between 2005 and 2018, half of which offer salaries higher than the state average.³⁸ By 2023, that number is expected to increase to 56,549.³⁹

b) Estimated Economic Impacts on the Rest of U.S.

The quantified impact on the rest of the U.S. economy through 2023 is an estimated increase of \$4.7 billion in gross outcome.⁴⁰ Additionally, federal taxes from CIRM-related activities are estimated to have increased by \$726.6 million while adding an additional 25,816 jobs nationwide.⁴¹

D. Relevant Litigation

After voters approved Proposition 71, the California Family Bioethics Council challenged its constitutionality.⁴² In this case, the opponents made four allegations.⁴³ First, they alleged that the initiative violated California's single-subject requirement for initiatives because some of the provisions of the proposition covered more than stem cell research.⁴⁴ Second, they alleged that the Proposition 71 ballot materials were misleading in a way that violated due process of law.⁴⁵ Third, they alleged that the initiative created a taxpayer-funded entity that was not under the direct control of the state as required.⁴⁶ Fourth, they alleged that the Independent Citizens' Oversight Committee (ICOC) had an inherent conflict of interest because it would both award grants and include representatives of institutions that might receive grants.⁴⁷ The trial court rejected these allegations, as did the appellate court.⁴⁸

E. The Proposition

1. Effects of Proposition 14

If approved, Proposition 14 will allow for the issuance of \$5.5 billion in general obligation bonds.⁴⁹ These bonds will be used to continue funding stem cell and other vital

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *California Family Bioethics Council v. California Institute for Regenerative Medicine*, 147 Cal App 4th 1319 (1st Dist. 2007).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1330.

⁴⁹ Cal. Proposition 14 (2020) (adding CAL. HEALTH & SAFETY CODE § 125290.75).

research to develop treatments and cures for serious diseases and conditions.⁵⁰ Proposition 14 will also set aside \$1.5 billion for research and therapy of brain and central nervous system diseases.⁵¹

2. Differences Between Proposition 14 and Proposition 71

Although much of the text is substantially the same, Proposition 14 not only renews this funding, but adds and updates the programs implemented by Proposition 71.⁵² There are four major updates.⁵³ First, Proposition 14 makes changes to improve access to therapies for California patients with insufficient funds, establishing an additional working group to focus on this effort.⁵⁴ Second, it increases the number of members on the ICOC from 29 to 35.⁵⁵ Third, it caps the number of bond-funded, full-time CIRM employees at 70, with an additional 15 dedicated to improving access to stem-cell-derived therapies and treatments.⁵⁶ Fourth, it establishes training programs for undergraduate students and fellowships for graduate students related to advanced degrees and technical careers in stem cell research, treatments, and cures.⁵⁷

Currently CIRM has three working groups that advise the ICOC, one each for medical research funding, research standards, and facilities grants.⁵⁸ Proposition 14 will create a fourth working group that will focus on improving access to treatments and cures.⁵⁹ It will also increase ICOC public meetings from two to four per year and place restrictions on the royalty revenues received through intellectual property agreements that go to the General Fund.⁶⁰ The royalties will be used to offset the costs to California patients who have insufficient means to purchase the treatment from institute-funded research instead of being used for other General Fund items.⁶¹

Under Proposition 14, the additional members of the ICOC will include a faculty member, physician/scientist, researcher, or executive officer from the UCSF Fresno/Clovis campus to promote geographic diversity and access; an additional member may be appointed by the Governor from the California State University system who has an advanced degree in biological sciences; the Governor and Lieutenant Governor each shall appoint an additional member that will include someone from a mental health conditions

⁵⁰ *Id.*

⁵¹ *Id.* adding CAL. HEALTH & SAFETY CODE § 125290.70.5(c).

⁵² *California Proposition 14, Stem Cell Research Bond Initiative (2020)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_14,_Stem_Cell_Research_Institute_Bond_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_14,_Stem_Cell_Research_Institute_Bond_Initiative_(2020)) (last accessed Sept. 23, 2020).

⁵³ *Id.*, *supra* note 52

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Cal. Proposition 71 (2004) (amending CAL. HEALTH & SAFETY CODE § 125290.50).

⁵⁹ Cal. Proposition 14 (2020) (adding CAL. HEALTH & SAFETY CODE § 125290.75).

⁶⁰ *Id.*

⁶¹ *Id.* amending CAL. HEALTH & SAFETY CODE §125290.30(f)(1), (j)(1).

background; and the Treasurer and Controller shall each appoint a nurse with experience in clinical trial management and/or stem cell or genetic therapy delivery.⁶² Additionally, the initiative imposes a new employee cap of 70 that does not include members of the ICOC and 15 additional employees designated for the development of policies and programs to help make treatments available and affordable for Californians.⁶³

If approved, Proposition 14 will establish a scientific advisory task force to provide expert guidance to address specific objectives in areas under the institute's jurisdiction, including scientific, policy, ethical, financial, and technical matters.⁶⁴ The Chair and the President shall each appoint an equal number of members with expertise in the area for which advice is sought, including at least one member with a patient advocate perspective.⁶⁵

The initiative also amends Proposition 71 by adding additional accountability requirements that the ICOC shall update, at its discretion.⁶⁶ These include the standards relating to conflict of interest rules, ethical research and treatment, and independent financial audits, to be generally aligned with standards adopted by the National Academy of Sciences.⁶⁷

F. Path to the Ballot

After helping to draft the proposition, Robert N. Klein filed the ballot initiative on October 10, 2019.⁶⁸ Though the proponents did suspend signature gathering due to the coronavirus pandemic, on May 5, 2020, the proponents submitted 924,216 signatures for the ballot initiative.⁶⁹ Only 623,212 valid signatures were required.⁷⁰

G. Where the Money Goes and How It is Decided

Proposition 14 includes several rules and guidelines how the \$5.5 billion will be allocated.⁷¹ First, at least \$1.5 billion of the \$5.5 billion is reserved for grants for research and therapy for Alzheimer's, Parkinson's, stroke, epilepsy, and other brain and central nervous system diseases and conditions.⁷² Second, royalty revenues received through intellectual property agreements resulting from grants and loans awarded under

⁶² *Id.* amending CAL. HEALTH & SAFETY CODE § 125290.20(a).

⁶³ *Id.* amending CAL. HEALTH & SAFETY CODE § 125290.45(b)(1).

⁶⁴ *Id.* adding CAL. HEALTH & SAFETY CODE § 125290.76

⁶⁵ *Id.*

⁶⁶ *Id.* *supra* note 64.

⁶⁷ *Id.* adding CAL. HEALTH & SAFETY CODE § 125290.30(l).

⁶⁸ BALLOTEDIA, *supra* note 52; Zoom Interview with Robert N. Klein, Proponent, Sacramento, Calif. (Sept. 25, 2020) (on file with the *California Initiative Review*).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Cal. Proposition 14 (2020) (adding CAL. HEALTH & SAFETY CODE § 125290.70.5).

⁷² *Id.* adding CAL. HEALTH & SAFETY CODE § 125290.70.5(c).

Proposition 14 will be placed in an interest-bearing account in the General Fund.⁷³ That amount and its interest will be used to offset the costs of providing treatments and cures from institute-funded research to California patients with insufficient means.⁷⁴

The rest of the proceeds of the bonds sold for Proposition 14 will be divided by certain percentage parameters. First, no less than 95.5% of the proceeds will be used for grants and grant oversight.⁷⁵ Of the 95.5%, no less than 98% of those proceeds will be used for research, therapy development, and therapy delivery grants.⁷⁶ The other up to 2% of those proceeds will be used for research consulting in support of access to and affordability of treatments and cures.⁷⁷

The ICOC determines the amounts of the grants and to whom they are given.⁷⁸ Members of the ICOC are not allowed to participate in or influence decisions regarding approval of grants for their employers, though they may participate in decisions awarding grants for the purpose of research involving a disease from which a family member is suffering or in which they have interests as representatives of disease advocacy organizations.⁷⁹ Since it began granting funds in 2006, CIRM has recorded and published each grant, listing the grant type, the grant title, the institution with which the researcher is associated, the researcher's name, the award amount, the disease focus (beginning in 2007), the type of stem cell used (beginning in 2007), the grant number, the award's status, and the start and end dates.⁸⁰

The remaining 4.5% of the proceeds have more flexibility. Up to 3% of the proceeds may be used for the implementation costs of research and research facilities, which include development, administration, and oversight of the grant-making process.⁸¹ Up to 3% of the proceeds will be used for costs of general administration of CIRM.⁸² Up to 1% of the proceeds may be used to pay for up to 15 full-time employees for CIRM.⁸³

Additionally, Proposition 14 contains provisions that require grantees that gain revenue from their institute-funded projects to pay certain amounts back to the General Fund, dependent on factors such as the amount of revenue received, whether funding sources other than CIRM directly contributed to the development of the therapy or

⁷³ *Id.* amending CAL. HEALTH & SAFETY CODE § 125290.30(j)(1).

⁷⁴ *Id.*

⁷⁵ *Id.* adding CAL. HEALTH & SAFETY CODE § 125290.70.5(a)(1)(A).

⁷⁶ *Id.* adding CAL. HEALTH & SAFETY CODE § 125290.70.5(a)(1)(B).

⁷⁷ *Id.*

⁷⁸ *Id.* *supra* note 71 amending CAL. HEALTH & SAFETY CODE § 125290.40(c).

⁷⁹ Cal. Proposition 14 (2020) (amending CAL. HEALTH & SAFETY CODE §§ 125290.30(i)(1)(A–B)).

⁸⁰ *Grants*, CALIFORNIA INSTITUTE FOR REGENERATIVE MEDICINE, <https://www.cirm.ca.gov/grants> (last accessed Sept. 23, 2020).

⁸¹ *Id.* *supra* note 79, adding CAL. HEALTH & SAFETY CODE § 125290.70.5(a)(1)(C).

⁸² *Id.* adding CAL. HEALTH & SAFETY CODE § 125290.70.5(a)(2)(A).

⁸³ *Id.* adding CAL. HEALTH & SAFETY CODE § 125290.70.5(a)(2)(B).

technology, and whether the grantee self-commercializes a product resulting from an invention that arises from research funded by CIRM.⁸⁴

III. DRAFTING ISSUES

A. Ambiguous Terms

Proposition 14 includes a clause requiring no more than 1% of proceeds be used to pay for up to 15 full-time employees “over 10-15 or more years.”⁸⁵ The drafters state that this was left ambiguous to allow for these employees to be retained after other funding runs out to help wind down the ongoing grants, if necessary.⁸⁶ Another vague provision is the additional accountability requirement, which is framed as a requirement, but only requires that the ICOC update its standards relating to conflict of interest rules, ethical research and treatment, and independent financial audits at its discretion to be generally aligned with standards adopted by the National Academy of Sciences.⁸⁷

Further, in the additions regarding CIRM’s plan to assist California patients in obtaining therapies if those patients have insufficient funds, Proposition 14 does not include a definition of a “California patient” or how “insufficient funds” will be determined. This could cause confusion regarding (1) whether patients must be California residents to receive assistance, and, if so, for how long they must be residents, and (2) whether one’s funds are sufficiently “insufficient” to qualify for assistance. The drafters of the proposition note that this was done intentionally to leave that determination to the state and the board of CIRM.⁸⁸

B. Severability Clause

If any provisions of the text are found invalid, Proposition 14 includes a severability clause allowing the valid provisions to remain.⁸⁹ The majority of the text of Proposition 14 is similar to the text in Proposition 71, none of which has been held invalid. Though there are new added and amended provisions, they are not similar to the types of provisions that have been held invalid in other circumstances, as discussed below, and it is unlikely that Proposition 14 will have any invalid parts that are struck down.

⁸⁴ *Id.* amending CAL. HEALTH & SAFETY CODE § 125290.30(j)(2).

⁸⁵ *Id.* adding CAL. HEALTH & SAFETY CODE § 125290.70.5(a)(2)(B).

⁸⁶ Zoom Interview with Robert N. Klein, *supra* note 68.

⁸⁷ *Id.* *supra* note 67.

⁸⁸ Zoom Interview with Robert N. Klein, *supra* note 68.

⁸⁹ Cal. Proposition 14 at § 27 (2020).

IV. CONSTITUTIONAL AND STATUTORY ISSUES

A. Federal Constitution

The Commerce Clause of the Constitution grants Congress the power to regulate interstate commerce.⁹⁰ Because of this power, states cannot pass legislation that discriminates against or excessively burdens interstate commerce.⁹¹ The federal government has a particular interest in preventing states from enacting policies that favor citizens or businesses of that state at the expense of non-citizens conducting business within that state.⁹² However, when the state is acting as a business, these preferential policies are allowed.⁹³ This is called the market participation exception.⁹⁴

Here, CIRM has been established to be an institution under the “exclusive management and control of the State,” so its structure and actions affecting the market could be attributable to California.⁹⁵ Proposition 14 includes a provision which requires the ICOC to “establish standards to ensure that grantees purchase goods and services from California suppliers to the extent reasonably possible, in a good faith effort to achieve a goal of more than 50 percent of such purchases from California suppliers,” a provision which, on its face, seems to favor businesses within the state.⁹⁶ However, by purchasing goods and services, CIRM acts business in the marketplace, and thus it is likely the market participation exception applies and Proposition 14 does not violate the Constitution.

B. State Constitution

1. General Obligation Bonds

State general obligation bonds allow the state of California to borrow money from investors to fund public works projects.⁹⁷ The state commits to repay the bonds using the state General Fund and requires a majority of voters to approve general obligation bonds.⁹⁸ After selling the bonds the state makes regular payments over time until the bonds are paid off.⁹⁹

⁹⁰ U.S. CONST. art. 1, § 8, cl. 3.

⁹¹ *Commerce Clause*, LEGAL INFORMATION INSTITUTE, Cornell Law School, https://www.law.cornell.edu/wex/commerce_clause (last accessed Sept. 20, 2020).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *California Family Bioethics Council*, *supra* note 42 at 1353.

⁹⁶ Cal. Proposition 14 (2020) (adding CAL. HEALTH & SAFETY CODE § 125290.30(k)).

⁹⁷ *Bonds 101* (2016), CALIFORNIA STATE TREASURER, *available at* <https://www.treasurer.ca.gov/publications/bonds101.pdf>.

⁹⁸ CAL. CONST., art. 16 §§ 1, 1.5.

⁹⁹ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, November 3, 2020, at 78–79, *available at* <https://voterguide.sos.ca.gov/voter-info/overview-state-bond-debt.htm>.

As of 2020, the state has about \$80 billion in General-Fund-supported bonds that it is making annual principal and interest payments on, and it is estimated that the state is paying \$7 billion annually from the General Fund to repay these bonds.¹⁰⁰ The voters and legislature have approved around \$38 billion bonds that have yet to be sold.¹⁰¹ If voters approve Proposition 14, it is projected to increase the portion of the state's annual General Fund revenues that are set aside to pay for bond debt, the debt-service ratio, by about one-fifth of one percentage point compared to what it would otherwise have been over the next couple of years.¹⁰²

2. Single-Subject Rule

The California Constitution requires voter initiatives to have a single subject.¹⁰³ The provisions of the initiative must be reasonably germane to each other.¹⁰⁴ The phrase "reasonably germane" requires that the provisions have a reasonable and common-sense relationship among their various components in furtherance of a common purpose.¹⁰⁵

There were two lawsuits challenging the constitutionality of Proposition 71. As a result, California's First District Court of Appeal held, in part, that Proposition 71 did not violate the single-subject rule.¹⁰⁶ In that case, the court determined the trial court was correct in finding that the overarching subject of Proposition 71 was stem cell research and funding and that the other portions such as the development of the ICOC, inclusion of "other vital research opportunities" catch-all, and other administrative sections were reasonably interrelated and do not violate the single-subject rule.¹⁰⁷ Because Proposition 14 is an update and renewal of Proposition 71, most of the text is the same, and therefore that text almost certainly meets the single-subject rule. Proposition 14 does add new considerations regarding efforts to prioritize some funding for California patients who would otherwise have insufficient funds, but based on previous case law, it seems likely those additions would be 'reasonably germane' to the overarching subject of stem cell research and funding.

V. PUBLIC POLICY ISSUES

A. Proponents' Arguments

On the whole, the proponents essentially assert that the research performed due to projects that CIRM helped fund has been saving and changing lives and that Proposition 14

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ CAL. CONST., art. 2 § 8(d).

¹⁰⁴ *Legislature v. Eu*, 54 Cal.3d 492, 512 (1991).

¹⁰⁵ *Id.* at 513.

¹⁰⁶ *California Family Bioethics Council*, *supra* note 42 at 1337.

¹⁰⁷ *Id.* at 1342-43.

would help sustain those projects and begin new ones.¹⁰⁸ The Yes on 14 campaign states that Proposition 71 has led to more than 90 clinical trials, two FDA-approved drugs for the treatment of two forms of fatal blood cancers, and over 2,900 published medical discoveries.¹⁰⁹ Further, proponents assert that CIRM-assisted research has led to some other promising cancer therapies that have reversed, over the course of two years, 80% mortality rates to 85% survival rates starting in stage four patients.¹¹⁰ There are over 800 patents pending for CIRM-funded discoveries, which proponents add would be a future source of state revenue.¹¹¹ They have added that this proposition is necessary to continue supporting ongoing trials and refining and testing discoveries.¹¹² Additionally, proponents add that, while many of the treatments are still in the early stages of clinical trials, there have been the following improvements to individuals lives: cancer patients who had exhausted all other therapies are now in remission; paralysis patients have regained upper body function; blind patients are regaining their eyesight; a cure has been developed for the once-fatal “bubble baby” disease; patients with Type 1 Diabetes have begun producing their own insulin; and multiple clinical trials are underway for leukemia, non-Hodgkin lymphoma, ovarian cancer, and more.¹¹³

Other supporters of this proposition include the University of California Board of Regents; members of the Yes on 14 coalition: Californians for Stem Cell Research, Treatments & Cures, which includes over 83 patient advocate organizations, several other organizations and individuals, including several Nobel Prize winners.¹¹⁴ One notable group that supports Proposition 14 is Seth and Lauren Rogen’s Hilarity for Charity non-profit, which the two created because Lauren Rogen’s mother suffered from Alzheimer’s; Seth Rogen even voiced a character called Stemmy the Stem Cell in a promotional video for Yes on 14.¹¹⁵

Another factor proponents, within and without CIRM and its grantees, note is the draw the potential for future scientific advancements, stating that the state’s funding attracts the best minds to contribute to the field of science and perhaps to establish their own businesses here; this benefits California’s economy and citizens, as well as the citizens of

¹⁰⁸ BALLOTPEDIA, *supra* note 52.

¹⁰⁹ *By the Numbers*, YES ON 14: CALIFORNIANS FOR STEM CELL RESEARCH, TREATMENTS AND CURES COMMITTEE, <https://caforcures.com/by-the-numbers/> (last accessed Sept. 21, 2020).

¹¹⁰ Zoom Interview with Robert N. Klein, *supra* note 68.

¹¹¹ *Proposition 14 Sample Talking Points*, YES ON 14: CALIFORNIANS FOR STEM CELL RESEARCH, TREATMENTS, AND CURES, (on file with the *California Initiative Review*).

¹¹² David Jensen, *Ballot Targeted for \$5.5 Billion Stem Cell Initiative*, CAP. WKLY., (Sept. 10, 2019), *available at* <https://capitolweekly.net/ballot-targeted-for-5-5-billion-stem-cell-initiative>; California Proposition 14, *supra* note 52.

¹¹³ *Proposition 14 Sample Talking Points*, *supra* note 111.

¹¹⁴ *Our Coalition*, YES ON 14: CALIFORNIANS FOR STEM CELL RESEARCH, TREATMENTS, AND CURES, <https://caforcures.com/coalition/> (last visited Sept. 20, 2020).

¹¹⁵ *Stemmy the Stem Cell Says Yes on 14!*, WORLD STEM CELL SUMMIT, <https://www.worldstemcellsummit.com/2020/09/21/stemmy-the-stem-cell-says-yes-on-prop-14/> (last visited Oct. 7, 2020).

this nation and others.¹¹⁶ According to some, Proposition 71 has made the state the “center of the stem cell universe.”¹¹⁷ Proponents are concerned that potential consequences of this funding not being renewed include the state’s loss of revenue and prestige regarding jobs, intellectual property, and leadership in the science sector.¹¹⁸ If Proposition 14 is not approved, CIRM will take further planned steps to wind down the program, including reducing its staff.¹¹⁹

B. Opponents’ Arguments

Opponents of the proposition argue that CIRM has issues regarding conflicts of interest and a lack of legislative oversight.¹²⁰ These claims appear to be similar to the claims that were dismissed by the courts in the California Family Bioethics Council case regarding Proposition 71.¹²¹ However, opponents assert that Proposition 14 further adds to those concerns by “outsourc[ing] critically important decisions about ethical standards to an unaccountable national committee.”¹²² Presumably, opponents make this argument because the proposition adds a provision regarding additional accountability requirements that require the ICOC to update its standards relating to conflict of interest rules, ethical research and treatment, and independent financial audits at its discretion “to be generally aligned with standards adopted by the National Academy of Sciences to the extent that such standards are consistent with constitutional and statutory requirements applicable to the institute.”¹²³ Opponents further argue that the ICOC is too large at 29 members, so they dislike the addition of 6 more members.¹²⁴ Regarding conflicts of interest in particular, opponents acknowledge that members of the ICOC cannot participate in votes to grant money to their own institutions, but they state that “the appearance of rampant conflicts is inescapable.”¹²⁵

¹¹⁶ Zoom Interview with Robert N. Klein, *supra* note 68.

¹¹⁷ Jocelyn Kaiser, *California’s Stem Cell Research Fund Dries Up*, SCIENCE, (July 9, 2019 3:35PM), available at <https://www.sciencemag.org/news/2019/07/california-s-stem-cell-research-fund-dries#:~:text=Stem%20cell%20scientists%20in%20California,eventually%20run%20out%20of%20money>.

¹¹⁸ Zoom Interview with Robert N. Klein, *supra* note 68.

¹¹⁹ David Jensen, *Stem Cell Contingency Planning in California: Winding Down a \$3 Billion Operation*, <http://californiastemcellreport.blogspot.com/2020/06/stem-cell-contingency-planning-in.html> (last visited Sept. 17, 2020).

¹²⁰ David Jensen, *\$5.5 Billion Stem Cell Rescue Plan Makes November Ballot*, CAP. WKLY., (June 22, 2020), available at <https://capitolweekly.net/5-5-billion-stem-cell-rescue-plan-makes-november-ballot/>.

¹²¹ *California Family Bioethics Council*, *supra* note 42.

¹²² David Jensen, *supra* at 120.

¹²³ Cal. Proposition 14 (2020) (adding CAL. HEALTH & SAFETY CODE § 125290.30(l)).

¹²⁴ The LA Times Editorial Board, *Endorsement: No on Proposition 14: It’s not the best way to support stem cell research*, LA TIMES (Oct. 1, 2020, 3:00 AM), available at <https://www.latimes.com/opinion/story/2020-10-01/endorsement-no-on-proposition-14-not-the-best-way-to-support-stem-cell-research>.

¹²⁵ Chronicle Editorial Board, *Chronicle recommends: No on Prop. 14; no need to replicate California’s disappointing stem cell experiment*, (Sept. 24, 2020, updated Oct. 6, 2020), available at <https://www.sfchronicle.com/opinion/editorials/article/Chronicle-recommends-No-on-Prop-14-no-need-to-15592513.php>

Opponents also note that the original rationale for this funding, the fact that the federal government had restricted funding for stem cell research at the time Proposition 71 was passed, has been eliminated because most of the federal funding restrictions have been lifted.¹²⁶ They also state that the two cancer treatments CIRM helped fund did not use embryonic stem cells, so they could have been federally funded even under the previous restrictions.¹²⁷ They also argue that voting on this sort of investment should be stalled until after the election, asserting that, if Democrats get more power, there should be growing support for embryonic stem-cell research at the federal level, which is from where they argue such funding should originate.¹²⁸

Opponents also assert that private industry has stepped up, though this seems to be difficult to substantiate.¹²⁹ Proponents respond to that argument by noting that private industry, due to its focus on financial return, is unlikely to fund high-risk projects, while government agencies can fund research with a focus on benefits to the public rather than on making money.¹³⁰

The named opponent on the California Voter Information Guide, John Seiler, asserts that the state cannot afford Proposition 14 “during this economic and budget crisis” and CIRM has “management challenges and poor results.”¹³¹ He also argues that “[s]ervicing debt of Prop. 14 could increase pressure for higher taxes or layoffs of nurses, first responders and other public employees.”¹³² When contacted for further information, he did not provide sources that proved these claims.

Right to Life of Central California, one opponent of Proposition 14, is a pro-life non-profit that is focused on activities such as having its employees and volunteers speak with individuals entering and leaving Planned Parenthood and “defend[ing] the sanctity of all human life.”¹³³ Right to Life of Central California states that it is against embryonic stem cell research as a whole because they believe it cheapens human life and is irresponsible spending.¹³⁴ They argue that the human embryos used in some of the research funded by CIRM are unique human organisms, and their use for research instrumentalizes human life.¹³⁵ They also argue that it is a waste of money because the public has not yet seen the

¹²⁶ Orange County Register Editorial Board, *Vote No on Prop. 14, a Costly Unnecessary Bond Measure*, ORANGE COUNTY REG., (Sept. 24, 2020, 10:36 AM), available at <https://www.ocregister.com/2020/08/10/vote-no-on-prop-14-a-costly-unnecessary-bond-measure/>.

¹²⁷ The LA Times Editorial Board, *supra* note 124.

¹²⁸ *Id.*

¹²⁹ Orange County Register Editorial Board, *supra* note 126.

¹³⁰ CIRM FAQ, CALIFORNIA INSTITUTE FOR REGENERATIVE MEDICINE, <https://www.cirm.ca.gov/about-cirm/cirm-faq#industry> (last visited Sept. 22, 2020).

¹³¹ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 3, 2020, at 8, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>.

¹³² *Id.*

¹³³ John Gerardi, *Proposition 14: Vote NO*, RIGHT TO LIFE OF CENT. CAL., (July 13, 2020), available at <https://righttolifeca.org/proposition-14-vote-no/>.

¹³⁴ *Id.*

¹³⁵ *Id.*

benefits of this research, though this can be contradicted by the proponents' list of accomplishments above.¹³⁶ They state they would not support CIRM unless it exclusively turned to adult stem cells and induced pluripotent stem cells, which are derived from skin or blood cells and reprogrammed back into an embryonic-like state.¹³⁷

C. Campaign Finance

1. Proponents

There is a political action committee titled "Yes on 14: Californians for Stem Cell Research, Treatments and Cures."¹³⁸ As of September 22, 2020, it has received \$6,605,389.51 in contributions and has spent \$6,919,032.06.¹³⁹ The largest donor is Robert N. Klein II (Klein Financial Corporation), contributing a total of \$4,628,924.51, in-kind contributions making up \$4,503,924.51 of that amount.¹⁴⁰ Other top donors include Juvenile Diabetes Research Foundation, Open Philanthropy Action Fund, Ann S. Tsukamoto, and One Mind for Research, Inc. Juvenile Diabetes Research Foundation describes itself as the leading global organization funding type 1 diabetes research.¹⁴¹ Open Philanthropy Action Fund is a 501(c)(4) social welfare organization.¹⁴² Ann S. Tsukamoto is a doctor who has spent over 20 years working in stem cell biology, and her work has led to many advancements, including in comprehending the blood systems of cancer patients.¹⁴³ One Mind for Research is a non-profit organization that focuses on encouraging developments in brain health.¹⁴⁴

¹³⁶ *Id.*; Yes on 14, *supra* note 109.

¹³⁷ John Gerardi, *supra* note 133; *Induced Pluripotent Stem Cells (iPS)*, UCLA BROAD STEM CELL RESEARCH CTR., <https://stemcell.ucla.edu/induced-pluripotent-stem-cells> (last visited Oct. 7, 2020).

¹³⁸ *Campaign Finance: Yes on 14: Californians for Stem Cell Research, Treatments and Cures*, CAL. SEC'Y OF STATE, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1422494> (last visited Sept. 22, 2020).

¹³⁹ BALLOTPEDIA, *supra* note 52.

¹⁴⁰ *Id.*

¹⁴¹ *About*, JUVENILE DIABETES RESEARCH FOUNDATION, <https://www.jdrf.org/about/> (last visited Sept. 22, 2020).

¹⁴² *Who We Are*, OPEN PHILANTHROPY, <https://www.openphilanthropy.org/about/who-we-are> (last visited Sept. 22, 2020); Arrianna Eunjung Cha, *Cari Tuna and Dustin Moskovitz: Young Silicon Valley Billionaires Pioneer New Approach to Philanthropy*, WASH. POST, (Dec. 26, 2014), available at https://www.washingtonpost.com/business/billionaire-couple-give-plenty-to-charity-but-they-do-quite-a-bit-of-homework/2014/12/26/19fae34c-86d6-11e4-b9b7-b8632ae73d25_story.html.

¹⁴³ *Powering Change: Women in Innovation & Creativity*, CPA GLOBAL, <https://www.cpaglobal.com/women-innovators/dr-ann-tsukamoto> (last visited Sept. 20, 2020); National Academies of Sciences, Engineering, and Medicine; Health and Medicine Division; Board on Health Sciences Policy; Forum on Regenerative Medicine Washington (DC), *Speaker Biological Sketches*, available at <https://www.ncbi.nlm.nih.gov/books/NBK436801/>.

¹⁴⁴ *About One Mind*, ONE MIND, <https://onemind.org/about-us/> (last visited Sept. 22, 2020).

2. Opponents

Though there is a political action committee for No on Proposition 14 registered with the California Secretary of State, it has not yet recorded any filings.¹⁴⁵ We have not found any readily available evidence about campaign contributions the named opponent, John Sieler, has made.¹⁴⁶

D. Fiscal Considerations

Proposition 14 has an estimated total cost, including interest, of approximately \$7.8 billion, equaling an average of about \$260 million per year over 30 years; this is about 4% more than the state currently spends from the General Fund on its bond debt.¹⁴⁷

An economic impact study, funded by CIRM, focused on the various economic impacts of CIRM over and above its main functions of improving health and well-being.¹⁴⁸ The increases in economic output, employment and tax revenues represent valuable co-benefits of CIRM activities.¹⁴⁹ Such benefits emanate not only from CIRM direct funding commitments but also from co-funding, partnership funding, follow-on funding, and additional leveraged funding.¹⁵⁰ Not only the direct impacts but also various indirect impacts were quantified as CIRM and related expenditures ripple throughout the economy.¹⁵¹

The report estimated that the total impacts of CIRM to date on the California economy have been: \$10.7 billion of additional gross output (sales revenue); \$641.3 million of additional state and local tax revenues; \$726.6 million of additional federal tax revenues; and 56,549 additional full-time equivalent jobs, half of which offer salaries considerably higher than the state average.¹⁵² Additionally, the report determined that the impact on the economy of the rest of the U.S. has been: \$4.7 billion of additional gross output; \$198.7 million of additional state and local tax revenues; \$208.6 million of additional federal tax revenues; and 25,816 additional jobs.¹⁵³

Another consideration is that, under Proposition 14, the bonds are to be sold over a period of no less than 10 years, with the cost of the bonds spread over 40 years so that the

¹⁴⁵ *Campaign Finance: No on Proposition 14*, CAL. SEC'Y OF STATE, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1429603&session=2019&view=electronic> (last accessed Sept. 22, 2020).

¹⁴⁶ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 3, 2020, at 8, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>.

¹⁴⁷ *Id.* at 78–79, available at <https://voterguide.sos.ca.gov/voter-info/overview-state-bond-debt.htm>.

¹⁴⁸ Wei, *supra* note 32.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

repayment is aligned with the period of time over which California patients are expected to benefit from institute-funded research.¹⁵⁴

VI. CONCLUSION

Proposition 14 updates and renews the stem cell research program approved by Californian voters in 2004 (Proposition 71). Proposition 14 grants \$5.5 billion in bonds for projects related to stem cell and other medical research aimed at developing treatments and cures for serious diseases such as diabetes, cancer, and heart disease, among many others.¹⁵⁵ Over the years, many researchers have relied on this funding to perform studies and begin over 90 clinical trials, and it has led to two FDA-approved drugs to treat fatal blood cancer and over 2,900 published medical discoveries.¹⁵⁶ Among other adjustments to the previous program such as increasing the number of members on the ICOC, Proposition 14 adds an emphasis on supporting California patients with insufficient funds.

The proponents argue that this funding will continue to support innovation, develop therapies and cures for patients with serious diseases, and help maintain the jobs and prestige state-assisted stem cell research has brought to California. The opponents argue that Proposition 14 does not address their concern with CIRM's lack of legislative oversight and potential conflicts of interest, though the California courts dismissed these concerns regarding Proposition 71 and Proposition 14 does contain safeguards for managing conflicts of interest. The opponents also argue that there is no longer as much of a need for this funding because the federal government has removed many of its previous restrictions on funding stem cell research.

A "yes" vote for Proposition 14 will allow the state to provide \$5.5 billion in bonds for stem cell and other medical research, renewing and updating the program that has been in place since 2004.

A "no" vote for Proposition 14 will not allow the state to provide \$5.5 billion in bonds for stem cell and other medical research, and the current program will end after spending its remaining funding on projects to which it has already allocated money and completing its employment of CIRM staff members.

¹⁵⁴ Cal. Proposition 14 section 3, Purpose and Intent (2020).

¹⁵⁵ *Id.*

¹⁵⁶ Yes on 14, *supra* note 109.

**Proposition 15:
The California Schools and Local Communities Act
of 2020**

Initiative Constitutional Amendment

By

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I. EXECUTIVE SUMMARY

Proposition 15 is a proposed constitutional amendment that would reassess property taxes on commercial and industrial properties every three years based on the property's fair market value.¹⁵⁷ Proposition 15 would create what is commonly referred to as a "split roll" tax assessment where commercial and industrial properties are assessed differently than residential properties.¹⁵⁸ This additional tax revenue will be distributed to schools and local communities. Schools will receive 40% of the revenue, and the remaining 60% will be distributed to local communities.¹⁵⁹ Any entity that receives these revenues must disclose to the public how much money was received and what it was spent on.¹⁶⁰

A "Yes" vote on Proposition 15 means supporting an increase in property taxes on commercial and industrial properties valued at \$3 million or more by changing their tax assessment to be based on the property's fair market value.¹⁶¹

A "No" vote on Proposition 15 means opposing an increase in property taxes on commercial and industrial properties valued at \$3 million or more and retaining the tax rates imposed on commercial and industrial properties that were enacted in Proposition 13 (1973).¹⁶²

II. THE LAW

A. Current law

1. Proposition 13

Proposition 13 was passed by nearly a two to one vote margin on June 6, 1978. Proposition 13 was passed after nearly a decade of property taxes rapidly increasing on taxpayers and the Legislature's subsequent inability to pass legislation to curtail the rise. Proposition 13 had four major components to it. First, it shifts the assessment method from market valuation to an acquisition method – meaning the property tax rates would be set at the time in which the property was acquired.¹⁶³ Second, the tax is limited to no more than 1 percent of the purchase price, with an annual adjustment to the rate of inflation or 2

¹⁵⁷ Cal. Proposition 15 §2 (2020) available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop15.pdf>

¹⁵⁸ Alexi Koseff, Prop. 13 Fight Looming Over How California Taxes Business Properties, Sacramento Bee (Feb. 7, 2018) <https://www.sacbee.com/news/politics-government/capitol-alert/article198755304.html>

¹⁵⁹ LEGISLATIVE ANALYST'S OFFICE, Proposition 15, at 2 (November 3, 2020), available at <https://lao.ca.gov/ballot/2020/Prop15-110320.pdf>.

¹⁶⁰ Cal. Proposition 15, *supra* note 1, (2020).

¹⁶¹ CAL SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 3, 2020, available at <https://voterguide.sos.ca.gov/propositions/15/> ["NOVEMBER 2020 VOTER GUIDE"]

¹⁶² *Id.*

¹⁶³ Cal. Const. art. XIII § 1.

percent.¹⁶⁴ Third, it requires the Legislature to have a two-thirds vote when passing a tax increase.¹⁶⁵ Lastly, it limits cities, counties, and special districts by requiring the same two-thirds threshold of qualified electors when imposing local taxes.¹⁶⁶

2. Proposition 98 and 111

Proposition 98 (1988) created a mandatory minimum school funding threshold by requiring a minimum of 40% of the State's General Fund to be dedicated to spending on schools.¹⁶⁷ This is the first test for calculating the amount of money that goes to education and schools.¹⁶⁸ The amount allocated as the minimum 40 percent contribution from the General Fund will fluctuate year to year, depending on the General Fund's total revenue.¹⁶⁹ In addition to the money allocated by the General Fund, schools also receive local property tax money as a funding source.¹⁷⁰ Additionally, the funding minimum increases in years of strong General Fund growth based on per capita personal income and average daily attendance.¹⁷¹

Proposition 111 (1990) created an alternative to the guaranteed minimum when growth in the General Fund was low.¹⁷² However, as a trade-off, the Legislature is required to accelerate funding when the General Fund is more stable.¹⁷³ In years where the General Fund revenue falls or is slow, the funding requirement is based on attendance and growth per capita of the General Fund.¹⁷⁴ Tests two and three use the prior year's Proposition 98 funding amount to assess the appropriation of funding for the current year.¹⁷⁵ Test two adjusts the rate of funding based on inflation.¹⁷⁶ Inflation, as defined by Proposition 111, is the change in California's Per Capita Personal Income (CPCPI).¹⁷⁷ Therefore test two adjusts funding based on the prior year's minimum guarantee, average daily k-12 attendance, and CPCPI.¹⁷⁸ Test three uses the growth rate of non-Proposition 98 revenue to the General Fund instead of CPCPI.¹⁷⁹ So test three adjusts funding based on the prior year's minimum

¹⁶⁴ Cal. Const. art. XIII § 2.

¹⁶⁵ Cal. Const. art. XIII § 3.

¹⁶⁶ Cal. Const. art. XIII § 4.

¹⁶⁷ LEGISLATIVE ANALYST'S OFFICE, A Historical Review of Proposition 98, at 9 (January 18, 2017), available at <https://lao.ca.gov/reports/2017/3526/review-prop-98-011817.pdf>.

¹⁶⁸ LEGISLATIVE ANALYST'S OFFICE, A Historical Review of Proposition 98, *supra* note 10, at 7..

¹⁶⁹ *Id.*

¹⁷⁰ LEGISLATIVE ANALYST'S OFFICE, A Historical Review of Proposition 98, *supra* note 10, at 8.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ LEGISLATIVE ANALYST'S OFFICE, A Historical Review of Proposition 98, *supra* note 10, at 12.

¹⁷⁵ LEGISLATIVE ANALYST'S OFFICE, A Historical Review of Proposition 98, *supra* note 10, at 8.

¹⁷⁶ LEGISLATIVE ANALYST'S OFFICE, A Historical Review of Proposition 98, *supra* note 10, at 9.

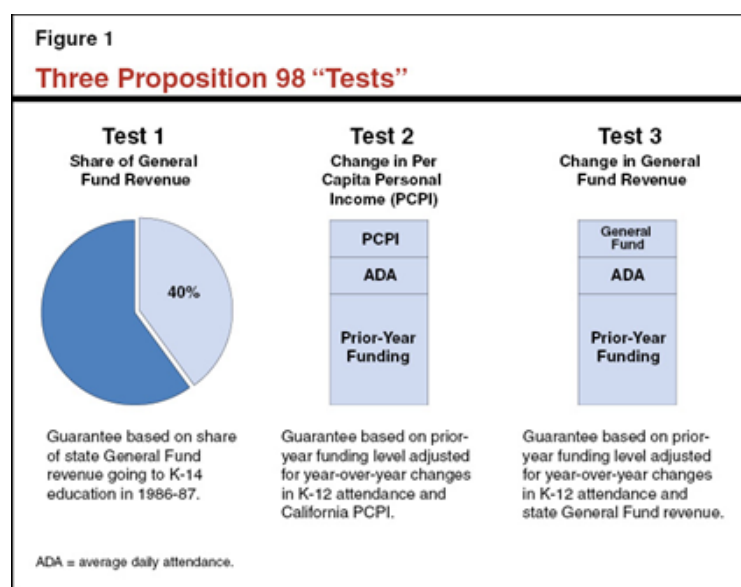
¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

guarantee, average daily k-12 attendance, and the change in non-Proposition 98 revenue to the General Fund to calculate funding for education and schools.¹⁸⁰

Within the mandatory funding requirements, the Legislature is free to allocate the education money to whichever education priorities it deems appropriate.¹⁸¹ With a two-thirds vote of the Legislature, the minimum guarantee can be suspended for one fiscal year, and the Legislature can appropriate education funding at their discretion.¹⁸² According to a 2017 report reviewing the effects of Proposition 98 produced by the Legislative Analyst Office (LAO), the State Legislature's nonpartisan fiscal and policy advisor, there is no real evidence to show the law actually increased funding to schools in a significant way.¹⁸³ This conclusion was drawn by comparing the 1988-89 formula for increasing funding with adjustments for daily attendance and inflation with the actual Proposition 98 funding for each year.¹⁸⁴



3. Proposition 2

Building on Proposition 98, Proposition 2 (2014) created the Public School System Stabilization Account (PSSSA).¹⁸⁵ This account was created to hold money from the General Fund that is designated for schools.¹⁸⁶ The purpose of the PSSSA was for additions to be made when revenues in the General Fund were high, and to withdraw from the account to

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ LEGISLATIVE ANALYST'S OFFICE, A Historical Review of Proposition 98, *supra* note 10, at 26.

¹⁸⁴ *Id.*

¹⁸⁵ LEGISLATIVE ANALYST'S OFFICE, A Historical Review of Proposition 98, *supra* note 6, at 7.

¹⁸⁶ *Id.*

allow for changes consistent with the fluctuation of student attendance and inflation.¹⁸⁷ Proposition 2 did not modify the minimum guarantee laid out in proposition 98.¹⁸⁸ However, in years of economic decline, portions of the account can be reserved for use in the future.¹⁸⁹ According to a 2019-2020 California Department of Finance budget report, five criteria must be met for money to be deposited into the PSSSA¹⁹⁰:

1. State General Fund revenues from capital gains exceed 8 percent of total revenues
2. Proposition 98 "Test 1" is operative
3. Proposition 98 maintenance factor obligations created prior to 2014-15 have been paid
4. The Proposition 98 required minimum funding level is not suspended
5. The Proposition 98 funding level is greater than the prior year's funding level, adjusted for attendance growth and inflation (i.e., "Test 1" is greater than "Test 2")

Funds in the PSSA can be spent in fiscal years where the Proposition 98 funding (adjusted for inflation and growth) is insufficient to fund the prior fiscal year.¹⁹¹ If the Governor declares a state of fiscal emergency, a deposit into the PSSSA can be suspended or reduced by the Legislature.¹⁹² As of the LAO report's publication in 2017, no money had been deposited into the account.¹⁹³

B. Proposed Law

The proposed initiative seeks to add four new sections to the California Constitution. These sections, described in detail below, explain how the new revenue fund will function, how the generated revenues will be distributed to counties across the state, to what properties and how the tax will be applied, and provide a narrow exemption for some properties.¹⁹⁴

1. Addition of Section 8.7 to Article XVI

This addition to the California Constitution creates the Local Schools and Community College Fund ("The Fund") at the State Treasury.¹⁹⁵ This fund is different from the one created under Proposition 2 because there is not a set of criteria that must be met before money can be deposited into The Fund.¹⁹⁶ All money placed in The Fund will be kept in trust

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 8.

¹⁹⁰ CAL. DEPT. FINANCE: 2019-2020 May Budget Revisions, at 18 (May 2019), available at <http://www.ebudget.ca.gov/2019-20/pdf/Revised/BudgetSummary/K-12Education.pdf>.

¹⁹¹ *Id.*

¹⁹² LEGISLATIVE ANALYST'S OFFICE, A Historical Review of Proposition 98, *supra* note 6, at 12.

¹⁹³ *Id.*

¹⁹⁴ Cal. Proposition 15, *supra* note 1, at §4-8.

¹⁹⁵ Cal. Proposition 15, *supra* note 1, at §4(a).

¹⁹⁶ *Id.* See CAL. DEPT. FINANCE: 2019-2020 May Budget Revisions, *supra* note 18 (criteria for money to be deposited into the PSSSA).

and allocated to schools in two ways.¹⁹⁷ First, 11 percent will be allocated to the different community college districts based on the distribution system outlined in the Education Code by the Board of Governors of California Community Colleges.¹⁹⁸ Second, the Superintendent of Public Instruction will allocate the remaining 89 percent to school districts and county education offices statewide based on the procedures outlined in the Education Code.¹⁹⁹

The annual growth or reduction of revenue in The Fund will determine the amount that each school will receive.²⁰⁰ However, each school will receive at least \$100 per unit of average daily attendance.²⁰¹ Proposition 15 states that the allocation of money from The Fund will have no impact on other funding that is earmarked for education.²⁰² Instead, the purpose of The Fund is to supplement other funding that schools receive.²⁰³

Also, money held in The Fund cannot be repurposed for any service not stated in this section by the Governor, Legislature, Director of Finance, or Controller by means of appropriation, transfer, or reversion.²⁰⁴ Nor can the money be loaned to the General Fund, another state fund, or a local fund.²⁰⁵ Lastly, the amount of money in The Fund will have no impact on the constitutional requirement that 40% of the General Fund be designated for education.²⁰⁶ Nothing in Proposition 15 explicitly protects the funding if a state of emergency is declared.²⁰⁷ However, section 22 Article XIII B (which details government spending limitations), states appropriations can be made to the emergency account from any funding source that does not strictly limit such appropriation by a two-thirds vote of the Legislature.²⁰⁸

2. Addition of Section 8.6 to Article XVI

Proposition 15 will leave the Legislature to determine the amount of additional revenue that each county generates in a fiscal year.²⁰⁹ This amount will be calculated using a tax rate of 1 percent of a property's fair market value as constitutionally required by taxation laws in Article XIII and the new tax assessment outlined in section 2.5 of the

¹⁹⁷ Cal. Proposition 15, *supra* note 1, at §4(a).

¹⁹⁸ Cal. Proposition 15, *supra* note 1, at §4(a)(1).

¹⁹⁹ Cal. Proposition 15, *supra* note 1, at §4(a)(2).

²⁰⁰ Cal. Proposition 15, *supra* note 1, at §4(a)(3).

²⁰¹ *Id.*

²⁰² Cal. Proposition 15, *supra* note 1, at §4(c).

²⁰³ *Id.*

²⁰⁴ Cal. Proposition 15, *supra* note 1, at §4(b).

²⁰⁵ *Id.*

²⁰⁶ Cal. Proposition 15, *supra* note 1, at §4(b).

²⁰⁷ *Id.*

²⁰⁸ Cal. Const. Art XIII B § 3(c)(2).

²⁰⁹ Cal Proposition 15, *supra* note 1, at §5(a).

taxation laws (which is created by this initiative and discussed below).²¹⁰ The amount of added revenue in each county will be reported to the county auditor.²¹¹

First, the county auditor will subtract a sum of money that is equivalent to the county's additional proceeds to the General Funds that will be appropriated to schools districts as dictated by Article XVI Section 8 (dealing with school spending) because of the exemption provided in Article XIII Section 3.1 (pertaining to taxation requirements and introduced below).²¹² The Director of Finance will decide what the county's share of the cost will be each fiscal year based on the reduction of revenue due to the exemption provided in the taxation requirements outlined in Article XIII Section 3.1.²¹³ Then, the decrease in tax revenue from Personal Income Taxes and Corporation Taxes will be examined by the Franchise Tax Board to evaluate how the increased tax revenue from the operation of the tax limitations governed by Article XIII A Section 2.5, and the taxation requirements in Section 3.1(a) of Article XIII, have impacted the reduction of revenue for the General Fund and other state funds.²¹⁴ County auditors will be responsible for transferring the determined deduction amount as identified by the Franchise Tax Board to the General Fund and any other impacted state fund.²¹⁵ The amount allocated to the General Fund is predetermined by the government spending limitations stated in Article XIII B of the California Constitution and is related to each county's obligation to pay money into the State General Fund.²¹⁶ The revenues generated in each county by the implementation of this tax assessment will fluctuate each fiscal year and be reflected in the amount the county auditor allocates to various State funds.²¹⁷

Also, counties will be annually compensated for the "administrative cost" of implementing the new tax assessment.²¹⁸ The Legislature will define what an "administrative cost" is, but that definition must include the cost of assessments, assessment appeals, legal counsel, tax allocation and distribution, and auditing and enforcing the provisions of this initiative that pertain to the operation of the tax assessment.²¹⁹ It will also be the Legislature's responsibility to establish the start-up costs for each county and provide funding via the General Fund until sufficient funding is established by other means.²²⁰ This statute will also provide that the General Fund be reimbursed for funding the start-up.²²¹ Counties will make annual refunds for the correction of tax assessments in the prior fiscal year and then will be

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Cal Proposition 15, *supra* note 1, at §5(b)(1)(B).

²¹³ *Id.*

²¹⁴ Cal Proposition 15, *supra* note 1, at §5(c).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Cal Proposition 15, *supra* note 1, at §5(d)(1).

²¹⁹ *Id.*

²²⁰ Cal Proposition 15, *supra* note 1, at §5(d)(2).

²²¹ *Id.*

reimbursed for those payments.²²² The reimbursement amount will be subtracted from the county's share of the total added revenue that is generated by the new tax assessment scheme.²²³

Finally, this section of Proposition 15 stipulates that all school districts, counties, and education agencies that receive funding from this Proposition must publicly disclose the amount of money they received resulting from the property tax revenue generated by the new tax assessment and how the money was spent.²²⁴ These disclosures must be made widely available to the general public and be articulated in a manner that is easy to understand.²²⁵

3. Addition of Section 2.5 to Article XIII A

Section 6 of Proposition 15 would amend Section 2.5 of Article XIII A of the California Constitution by establishing the operative dates for Proposition 15. Section 6 also provides definitions and procedures relating to the operative dates as well as the criteria for exempting small businesses. Lastly, Section 6 also establishes a task force to assist with the administration of Proposition 15.

The operative dates come in two phases. First, Proposition 15 would be effective January 1, 2022, for some businesses' real property, and some businesses would start to be reassessed at least once every three years thereafter unless the following small business exemption applies.²²⁶ If a small business occupies more than half of a commercial or industrial property's occupied square footage, then the property's reassessment would be delayed until the 2025-2026 assessment period.²²⁷ To qualify as a small business, a business must meet the following three criteria. First, the business must have fewer than fifty annual full-time equivalent employees.²²⁸ Second, the business must be independently owned and operated such that the business ownership interests, management, and operation are not subject to control, restriction, modification, or limitation by an outside source, individual, or business.²²⁹ Third, the business owns real property located within California.²³⁰ Additionally, a small business owner with property worth less than the full market value of \$3 million would be exempt from the market-based reassessment.²³¹

²²² *Id.*

²²³ Cal Proposition 15, *supra* note 1, at §5(e).

²²⁴ Cal Proposition 15, *supra* note 1, at §5(f).

²²⁵ *Id.*

²²⁶ Cal. Proposition 15, *supra* note 1, at §6(a)(1)

²²⁷ Cal. Proposition 15, *supra* note 1, at §6(e)(1)

²²⁸ Cal. Proposition 15, *supra* note 1, at §6(e)(4)(a).

²²⁹ Cal. Proposition 15, *supra* note 1, at §6(e)(4)(b).

²³⁰ Cal. Proposition 15, *supra* note 1, at §6(e)(4)(c).

²³¹ Cal. Proposition 15, *supra* note 1, at §6(d).

Lastly, Section 6 requires that the Legislature establish a task force to assist with implementing and administering the new regime. The task force will consist of a county assessor, taxpayer representative, a member from the Board of Equalization, a member of the Legislature, and a proponent of Proposition 15.²³² The Proposition does not specify the task force's selection criteria or whom within the Legislature will select the task force members.²³³ The task force will recommend changes to the Legislature outlining necessary statutory and regulatory changes for Proposition 15 to be implemented.²³⁴

4. Addition of Section 3.1 to Article XIII

Section 7 of Proposition 15 permits small businesses, as defined above, to exempt up to \$500,000 of tangible personal property from taxation.²³⁵ The Legislature may not lower this amount, but the Legislature does have the authority to raise the amount of tangible property that small businesses may exempt from taxation.²³⁶ This section explicitly does not allow aircrafts or vessels to qualify for this exemption.²³⁷ Lastly, this section also states that any related entities are considered to be one taxpayer, thereby not allowing independently managed and operated businesses to qualify for these exemptions if they are related to a business that does not qualify as a small business.²³⁸

C. PATH TO THE BALLOT

On May 22, 2020, Proposition 15 qualified to appear on the ballot during the November 2020 election.²³⁹ Subsequently, the California Attorney General drafted a title and summary as required by California law.²⁴⁰ Coalition partners of the opponents to Proposition 15 filed litigation against the Attorney General on the grounds that the title was false and misleading.²⁴¹ While Judge Earl of the Sacramento County Superior Court felt that some portions of the description were "somewhat misleading," Judge Earl stated that the "Court is not convinced the sentence is so misleading that it justifies judicial intervention."²⁴² Judge Earl rejected all the opponent's claims citing the current legal standard that provides the

²³² Cal. Proposition 15, *supra* note 1, at §6(b).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Cal. Proposition 15, *supra* note 1, at §7(a).

²³⁶ Cal. Proposition 15, *supra* note 1, at §7(a)(3).

²³⁷ Cal. Proposition 15, *supra* note 1, at §7(a)(2).

²³⁸ Cal. Proposition 15, *supra* note 1, at §7(b).

²³⁹ Nick Cahill, *Property Tax Overhaul Initiative Qualifies for California Ballot*, Courthouse News Service (May 29, 2020), <https://www.courthousenews.com/property-tax-overhaul-initiative-qualifies-for-california-ballot/>

²⁴⁰ Cal. Elec. Code § 13313

²⁴¹ Ben Christopher, *Critics demand fairer prop ballot labels and summaries, but lawsuits tend to flame out*, Calmatters (August, 6 2020), <https://calmatters.org/politics/california-election-2020/2020/08/california-proposition-descriptions-lawsuits-attorney-general/>

²⁴² *Jon Coupal v. Alex Padilla*, No. 34-2020-80003440 (CA. Sup. Ct. Sacramento Co. August, 6, 2020), <https://www.law360.com/tax-authority/articles/1298705/calif-court-upholds-ballot-language-of-property-tax-measure>

Attorney General broad discretion in drafting the title and summary, barring anything false or misleading.²⁴³ The appeal was denied, and the Attorney General's title and summary remained unchanged.

III. DRAFTING ISSUES

Proposition 15 does not appear to have any drafting errors.

IV. CONSTITUTIONAL AND STATUTORY ISSUES

Proposition 15 does not violate any provisions of the United States Constitution. Proposed initiative amendments to the California Constitution cannot revise the Constitution.²⁴⁴ A revision to the Constitution means the changes would fundamentally alter the structure of government.²⁴⁵ There is not a revision issue here.²⁴⁶ Also, all provisions in an initiative must be reasonably related to a single subject.²⁴⁷ All of the provisions in Proposition 15 relate to the tax revenues created from this change in the tax assessment for commercial and industrial properties and how the revenues will be used.²⁴⁸ There is not a single subject issue.²⁴⁹

V. PUBLIC POLICY ISSUES

Both sides of the Proposition ground their argument in sound public policy concerns facing California. The proponents base their argument for Proposition 15 in more funding for schools and community services, including emergency services, affordable housing, and infrastructure projects.²⁵⁰ The opposition to Proposition 15 stems from negative impacts on small businesses, minority-owned businesses, and inadequacies and inefficiencies in the funding scheme for schools.²⁵¹

A. Proponent's Argument

The proponents argue that millions of dollars will be generated in additional revenue that will provide funding for community services.²⁵² Likely beneficiaries of the revenue are park and recreation programs, housing projects, homeless initiatives, and

²⁴³ *Id.*

²⁴⁴ Cal. Const. art. XIII § 3.

²⁴⁵ *Strauss v. Horton*, 46 Cal.4th 364, 425 (Cal. 2009).

²⁴⁶ Cal. Proposition 15, *supra* note 1, at § 3-8.

²⁴⁷ *Senate of State of Cal. v. Jones*, 21 Cal. 4th 1142, 1156 (Cal. 1999).

²⁴⁸ Cal. Proposition 15, *supra* note 1, at § 3-8.

²⁴⁹ *Id.*

²⁵⁰ CAL SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 3, 2020, available at <https://voterguide.sos.ca.gov/propositions/15/arguments-rebuttals.htm> [NOVEMBER 2020 VOTER'S GUIDE].

²⁵¹ *Id.*

²⁵² *Id.*

unemployment services.²⁵³ However, each community may use the funds at their own discretion to meet the needs of their citizens.²⁵⁴ Proposition 13 severely restricted the use of property tax revenue as a funding source for schools by capping property taxes at 1 percent.²⁵⁵ In contrast, many states already reassess commercial and industrial property based on their fair market value.²⁵⁶

Additionally, California's schools are severely underfunded.²⁵⁷ Before Proposition 13, California ranked 7th in spending per student; in 2019, California ranked 39th.²⁵⁸ With the additional stream of tax revenue reserved specifically for school use, the proponents believe class sizes can be reduced, extra-curricular and after school programs can be funded, and additional staff (counselors, nurses, and librarians) can be hired.²⁵⁹

Proposition 15 will encourage new housing developments by taking away the incentive of commercial property owners to hold onto land.²⁶⁰ The current cap on property taxes means communities' best chances of raising revenues is to apply sales taxes, leading to the development of auto malls and other retail properties instead of housing units.²⁶¹ By changing the tax assessment for commercial and industrial properties, owners will have a stronger incentive to use the land rather than pay the higher taxes and not develop the land.²⁶²

Currently, commercial and industrial properties are assessed on their acquired value.²⁶³ A property that has not been sold in decades has not been reassessed since the current owner acquired the property.²⁶⁴ Also, there are legal loopholes that property owners use to avoid having their property reassessed.²⁶⁵ One such loophole is that property owners that do not invest in improvements to their property do not trigger a reassessment of the property's value, whereas owners who do invest in improvements are subject to having their

²⁵³ *Id.*

²⁵⁴ *Id.* Cal. Proposition 15, *supra* note 1, at §2(e).

²⁵⁵ *Id.*

²⁵⁶ Cal. Proposition 15, *supra* note 1, at §2(e).

²⁵⁷ *Id.*

²⁵⁸ EDSOURCE. *States in Motion: Visualizing how education spending has changed overtime*. November 12, 2019), <https://edsources.org/2015/states-in-motion-school-finance-naep-child-poverty/83303>

²⁵⁹ Cal. Proposition 15, *supra* note 1, at § 3.

²⁶⁰ Yes on 15 Housing Brief. August 7, 2020. PDF.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Cal. Proposition 15, *supra* note 1, at §2(m).

²⁶⁴ Cal. Proposition 15, *supra* note 1, at §2(e).

²⁶⁵ *Id.*

property reassessed.²⁶⁶ Under Proposition 15, commercial and industrial properties would be reassessed every three years.²⁶⁷

B. Opponent's Argument

1. Would Hurt Small Businesses

Opponents and opposition coalition partners from the minority business community and social justice groups contend that Proposition 15 would have disparate impacts on small businesses and minority communities. Opponents argue that the small business exception is crafted narrowly and therefore, would not properly protect small businesses from a property tax increase. As described earlier, to qualify, a small business must meet three metrics. First, the business must have fewer than fifty annual full-time equivalent employees.²⁶⁸ Second, the business must be independently owned and operated such that the business ownership interests, management, and operation are not subject to control, restriction, modification, or limitation by an outside source, individual, or business.²⁶⁹ Third, the business owns real property located within California.²⁷⁰ Opponents specifically take issue with the second small business requirement that requires businesses to be "independently owned and operated" as they would prohibit small businesses with larger business partners and franchisees of major chains from being exempt.

Opponents also argue that most small businesses, especially in minority communities, rent the buildings they operate in and are in a triple net lease agreement.²⁷¹ Triple net lease agreements are leasing agreements in which the tenants are contractually bound to pay all the property expenses, including real estate taxes, building insurance, and maintenance - in addition to their rent. Opponents contend that most small businesses do not own the building where they operate and that virtually all commercial landlords, especially in areas with high property valuations, such as Los Angeles, San Francisco, Orange County, and San Diego, will not meet the criteria to qualify as a small business. Therefore, many small businesses will see their property taxes increase upon the market value reassessment of the owner's property. Opponents contend that small businesses and consumers will be hurt because businesses will have to raise prices on their products or services or lay off workers to remain competitive, especially against online retailers or service providers.

2. Small and Rural Counties will Experience a Decrease in Tax Revenue

²⁶⁶ Cal. Proposition 15, *supra* note 1, at §2(j).

²⁶⁷ Cal. Proposition 15, *supra* note 1, at §2(e).

²⁶⁸ Cal. Proposition 15, *supra* note 1, at §6(e)(4)(a).

²⁶⁹ Cal. Proposition 15, *supra* note 1, at §6(e)(4)(b).

²⁷⁰ Cal. Proposition 15, *supra* note 1, at §6(e)(4)(c).

²⁷¹ Social Justice Impact Study of Split Roll, CA NAACP: California State Conference of the National Association for the Advancement of Colored People, http://www.ca-naacp.org/images/Forms/NAACP_Social_Justice_Study_two.pdf (last visited September, 22, 2020).

Opponents argue that this ballot measure would result in negative revenue for rural and less populated counties. Santa Clara County Assessor Larry Stone estimated that the \$500,000 exemption in tangible business expenses would exceed the potential property tax increases from the market valuation scheme.²⁷² Further, the California Assessors Association (CAA) commissioned a study that found that more wealthy counties will benefit disproportionately while smaller and more rural counties could see declines in their property tax revenues.²⁷³ The LAO similarly indicated that situations in which Mr. Stone described where existing areas with high property tax revenue and higher property tax rates could receive more funding than areas with lower property tax rates and less commercial buildings.²⁷⁴ Opponents contend that since Californians have such dramatically different median property values, disparate impacts on revenue will result from the Proposition.

3. Will Weaken the Economic Recovery and Lead to Lost Jobs

Opponents to Proposition 15 argue that the \$6.5 billion and \$12.5 billion tax increase would significantly impact employment in the state; these figures align with the LAO and proponents of Proposition 15.²⁷⁵ Opponents cite a 2012 Pepperdine study that examined the effects of a similar proposal on the economy and jobs. The 2012 study found that the shift from the acquisition model to the periodic assessment model would result in almost \$72 billion of lost economic output and almost 397,000 lost jobs.²⁷⁶ While this study does not analyze the exact proposal, the opponents argue that the underlying change to the property tax system would have a similar impact on the economy and jobs. A recent study completed in 2020, but before the COVID-19 pandemic impact was fully realized, projects that Proposition 15 would lead to 120,000 jobs lost.²⁷⁷

4. Adversely Impacts the Agricultural Community

Proposition 15 makes several exemptions from the new market valuation scheme. One of those exemptions is for agricultural lands. Specifically, the text within Proposition 15 states that "real property used for commercial agricultural production."²⁷⁸ However, under

²⁷² J. Hearing Assemb. Rev. and Tax. and Local Gov. Comm. 2020 Leg., (CA 2020) (prepared testimony of Larry Stone, Santa Clara County Assessor, California Assessors' Association)

²⁷³ Split Roll Implementation - estimated Costs to County Assessors, Capitol Matrix Consulting, May 2020, <https://noonprop15.org/wp-content/uploads/2020/06/CAA-Oppose-SplitRoll-w-attachments.pdf>.

²⁷⁴ J. Hearing Assemb. Rev. and Tax. and Local Gov. Comm. 2020 Leg., (CA 2020) (prepared testimony of Brian Uhler, Deputy Legislative Analyst, Legislative Analyst's Office)

²⁷⁵ LEGISLATIVE ANALYST'S OFFICE, Proposition 15, *supra* note 2, at 2.

²⁷⁶ Pepperdine University, Davenport Institute, *An Analysis of Split Roll Property Tax Issues and Impacts (March 2012)*, available at <https://publicpolicy.pepperdine.edu/davenport-institute/content/research/archived-reports/split-roll.pdf>

²⁷⁷ Berkeley Research Group, *Taxing Commercial and Industrial Property at Full Market Value (March 2020)*, available at <https://www.politico.com/t/?id=00000171-5087-d6b1-a3f1-d4d7be430000>

²⁷⁸ Cal. Proposition 15, *supra* note 1, at §6(c)(1).

current law, real property is divided into two major categories: land and improvements.²⁷⁹ The Board of Equalization provides examples of what constitutes an improvement to real property in Property Tax Rule 124.²⁸⁰ Examples of "improvements" include machinery, buildings, fences, paved roads, and fruit and nut trees.²⁸¹ According to an LAO analysis, Proposition 15's agricultural exemption would apply to land, but not improvements.²⁸² Legal experts have similarly expressed this claim in the field.²⁸³ The authors of Proposition 15 attempted to exempt commercial agricultural production from the split roll; however, since "improvements" to agricultural producing lands will qualify a property for a market value assessment, and improvements are so essential to the production of agricultural products, it renders this exemption functionally ineffective. Opponents argue that the exemption is ineffective because while the land itself would be exempt from reassessment, the land's improvements could reclassify the land as commercial and trigger a market value reassessment.

C. Fiscal Impact

According to the LAO, between \$6.5 billion and \$12.5 billion will be generated from the tax increase on commercial and industrial properties.²⁸⁴ A USC report found the potential revenue increase would be between \$10 billion to \$12 billion.²⁸⁵ The LAO report stated the tax assessment implementation would result in an annual cost of several million dollars.²⁸⁶ Additionally, some rural communities may see a reduction in tax revenue because the initiative lowers the tax on business equipment to \$500,000.²⁸⁷ Any business equipment valued at less than \$500,000 will no longer be taxed.²⁸⁸ The drop in revenue from business equipment is expected to be several million dollars a year.²⁸⁹ The CAA commissioned a fiscal analysis, which concluded the costs to implement the proposed tax assessment over the next three years would be one billion dollars.²⁹⁰ In this report, CAA also expressed

²⁷⁹ Cal. Rev. & Tax. § 104

²⁸⁰ Cal. Code Reg., tit. 18, § 124

²⁸¹ *Id.*

²⁸² J. Hearing Assemb. Rev. and Tax. and Local Gov. Comm. 2020 Leg., (CA 2020) (prepared testimony of Brian Uhler, Deputy Legislative Analyst, Legislative Analyst's Office)

²⁸³ Craig A. Becker, The Split-Roll Initiative Is Poised to Rock California's Property Tax System, Pillsbury Law (June 29, 2020), <https://www.pillsburylaw.com/en/news-and-insights/split-roll-initiative-california.html>

²⁸⁴ LEGISLATIVE ANALYST'S OFFICE, Proposition 15, *supra* note 2, at 2.

²⁸⁵ USC DORNSIFE, Program for Environmental and Regional Equity, *Getting Real About Reform II: Estimating Revenue Gains from Changes to California's System of Assessing Commercial Real Property* (February 2020), at 1, Available at https://dornsife.usc.edu/assets/sites/242/docs/Updated_2019_Rev_Est_memo_Design_v5.pdf.

²⁸⁶ LEGISLATIVE ANALYST'S OFFICE, Proposition 15, *supra* note 2, at 2.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ California Assessors' Assoc., *California Assessors' Association White Paper on a "Generic" Split-Roll* (March 2020), at 2, available at <https://www.calassessor.org/index.php/resources/publications/2019-003-white-paper-split-roll/viewdocument/2433>.

concerns regarding staffing and stated that they will need to hire about 900 more county tax assessors throughout the state to maintain the periodic market value assessment of commercial and industrial properties.²⁹¹ Proposition 15 states that counties will be reimbursed by the General Fund for the "administrative costs" of implementing the Proposition, which cover the costs of performing these assessments until other sufficient funding is established.²⁹²

VI. CONCLUSION

Proposition 15 would effectively create a "split roll" tax assessment where commercial and industrial properties are assessed differently than residential properties and commercial properties valued at less than \$3 million.²⁹³ The additional revenue generated from the new tax assessment would be placed in a trust to be distributed to schools and local communities.²⁹⁴ Opponents to Proposition 15 argue that the tax increase will have a negative impact on the costs of living and small businesses by raising the costs to rent building space and fear consumers will bear the burden of increased costs of goods and services.²⁹⁵

A "Yes" vote on Proposition 15 means supporting an increase in the property taxes on commercial and industrial properties valued at \$3 million or more by changing their tax assessment to be based on the property's fair market value.²⁹⁶

A "No" vote on Proposition 15 means opposing an increase in the property taxes on commercial and industrial properties valued at \$3 million or more and retaining the tax rates imposed on commercial and industrial properties that were enacted in Proposition 13.²⁹⁷

²⁹¹ *Id.*

²⁹² Cal Proposition 15, *supra* note 1, at §5(d)(1).

²⁹³ Cal. Proposition 15, *supra* note 1, at § 3.

²⁹⁴ Cal. Proposition 15, *supra* note 1, at § 5.

²⁹⁵ CAL SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 3, 2020, *supra* note 81.

²⁹⁶ CAL SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 3, 2020, *supra* note 4.

²⁹⁷ *Id.*

Proposition 16:
**Allowing Affirmative Action in Public Contracting,
Employment, and Education**

Legislative Constitutional Amendment

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I. EXECUTIVE SUMMARY

Proposition 16, also known as the Repeal Proposition 209 Affirmative Action Amendment, is an initiative constitutional amendment that would repeal Proposition 209.²⁹⁸ Proposition 209 was a 1996 ballot measure that prohibited government and other public institutions from considering race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting.²⁹⁹

A **YES** vote would allow state and local entities to consider race, sex, color, ethnicity, and national origin in public education, public employment, and public contracting to the extent allowed under federal and state law.³⁰⁰

A **NO** vote would leave Proposition 209 as is and would retain the statewide ban on affirmative action.³⁰¹

II. THE LAW

A. Current Law

Proposition 209 was authored by Ward Connerly, an ally of then Governor Pete Wilson.³⁰² Governor Wilson, who was running for President in the Republican primaries, had recently been successful “in using the ballot initiative process (specifically Proposition 187 of 1994) as a wedge issue to drive electoral support from [W]hite men.”³⁰³ Both Connerly and Governor Wilson emphasized the “need for a colorblind society.”³⁰⁴ Specifically, they argued that Proposition 209 was essential because California children could only have access to equal opportunity if they were allowed to “succeed on a fair, color-blind, race-blind, [and] gender-blind basis.”³⁰⁵

Proposition 209, referred to as the California Civil Rights Initiative by its proponents, amended the California Constitution through a ballot proposition placed before voters in 1996.³⁰⁶ With approximately 55 percent of votes cast in favor of its passage, Proposition 209 amended the state Constitution to add Section 31 of Article I, titled “Affirmative Action.”³⁰⁷

²⁹⁸ Cal. Proposition 16 (2020); Text of Prop. 16 (Assembly Constitutional Amendment 5), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200ACA5 (last visited Sept. 6, 2020).

²⁹⁹ Cal. Proposition 209 (1996).

³⁰⁰ Ballot Analysis of Proposition 16, <https://lao.ca.gov/BallotAnalysis/Proposition?number=16&year=2020> (last visited Sept. 21, 2020).

³⁰¹ *Id.*

³⁰² SENATE FLOOR ANALYSIS OF ACA 5, at 3 (June 23, 2020).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ ASSEMBLY FLOOR ANALYSIS OF ACA 5, at 1 (June 5, 2020); Cal Const, Art. I § 31.

While Article 31 generally bans the consideration of race, sex, color, ethnicity, or national origin in public programs, it contains some exceptions. For instance, subsection (d) of Section 31 allows the State to consider the sex of an employee when it is “reasonably necessary” for the staffing of certain jobs, such as ensuring that staff and inmates at state prisons are the same sex.³⁰⁸ Additionally, subsection (e) of Article 31 gives state and local entities the authority to consider “specified characteristics when it is required to receive federal funding.”³⁰⁹ One example of this is that in order to receive federal funding for transportation projects, the state is required to set goals for the portion of contracts awarded to specified groups, such as businesses owned by women or people of color.³¹⁰ Under Proposition 209, the state can comply with such program requirements in order to receive federal funds.

B. Path to the Ballot

Proposition 16, also referred to as Assembly Constitutional Amendment (“ACA”) 5, would amend the Constitution by repealing Section 31 of Article I, and enabling government preferences.³¹¹ The California Constitution allows for members of the state legislature to propose an amendment or revision of the Constitution, or to amend or withdraw a proposal.³¹² To do so, the member proposing the amendment or revision must secure a two-thirds roll call vote from members of both houses.³¹³ Once the Legislature passes the amendment, it proceeds to go on the ballot before California voters.³¹⁴

Proposition 16 was introduced as ACA 5 by Assembly Member Shirley Weber on January 18, 2019.³¹⁵ It was then amended in Spring 2020 in the Assembly Committee on Public Employment and Retirement and the Assembly Committee on Rules.³¹⁶ Proposition 16 was passed in the Assembly on June 10, 2020 with a 60-14 vote, then in the Senate on June 24, 2020 with a 30-10 vote.³¹⁷ It was subsequently filed with the Secretary of State on June 25, 2020 to be placed on the November 2020 ballot for California voters.³¹⁸

³⁰⁸ Cal Const, Art. I § 31(d); Ballot Analysis of Proposition 16, <https://lao.ca.gov/BallotAnalysis/Proposition?number=16&year=2020> (last visited Sep. 21, 2020).

³⁰⁹ Ballot Analysis of Proposition 16, <https://lao.ca.gov/BallotAnalysis/Proposition?number=16&year=2020> (last visited Sept. 21, 2020).

³¹⁰ *Id.*

³¹¹ 2019 California Assembly Constitutional Amendment No. 5, California 2019-2020 Regular Session, 2019 California Assembly Constitutional Amendment No. 5, California 2019-2020 Regular Session.

³¹² CA Const. art. 18, § 1.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

C. Proposed Law

Proposition 16 proposes to repeal Section 31 of Article I of the California Constitution, which was added by Proposition 209 in 1996.³¹⁹ Proposition 209 implemented a ban on the consideration of race, sex, color, ethnicity, or national origin in public employment, education, and contracting in the state.³²⁰ Proposition 16 would eliminate this ban, giving state and local entities the option to consider these immutable characteristics.

Though Proposition 16 would provide the option to consider these characteristics in public contracting, education, and employment, it would not require it.³²¹ State officials could opt to engage in affirmative action programming but would not be required to give preferential treatment. Proposition 16 would simply restore affirmative action as an available practice, and public entities would still be bound by existing federal and state laws that protect individuals from arbitrary discrimination based on gender, race, ethnicity, color, and national origin.

III. LITIGATION RELATED TO PROPOSITION 209

Proposition 209 was challenged in federal court almost immediately upon its enactment and was ultimately found to be constitutional by the Ninth Circuit Court of Appeals.³²² Since then, there have been a number of lawsuits filed alleging that various public programs are in violation of Proposition 209 because they grant some form of preferential treatment to women or minorities.

A. Coalition for Economic Equity v. Wilson

One day after the passage of Proposition 209, several individuals and groups representing the interests of racial minorities and women filed a complaint in United States District Court for the Northern District of California against state officials and political subdivisions.³²³ Brought under 42 U.S.C. section 1983, the complaint alleged that Proposition 209 denied racial minorities and women the equal protection of the laws guaranteed by the Fourteenth Amendment.³²⁴ It also alleged that Proposition 209 conflicted with Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972.³²⁵ The plaintiffs asked the court to declare Proposition 209 unconstitutional and sought a permanent injunction to stop the State from implementing and enforcing it.³²⁶ They also filed an application for a temporary restraining order and a preliminary injunction.³²⁷

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Proposition 16 Allows Diversity as a Factor in Public Employment, Education, and Contracting Decisions. Legislative Constitutional Amendment*, California Legislative Analyst's Office, <https://lao.ca.gov/ballot/2020/Prop16-110320.pdf>.

³²² *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692 (9th Cir. 1997).

³²³ *Id.* at 697.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

The district court engaged in extensive fact-finding and found that the elimination of affirmative action programs “would reduce opportunities in public contracting and employment for women and minorities.”³²⁸ Additionally, it would “cause enrollment of African-American, Latino, and American Indian students in public colleges to fall, though enrollment of Asian-American students would increase.”³²⁹ Finally, the district court found that if affirmative action programs were to be reinstated, the California Constitution would have to be amended with another initiative.³³⁰ For these reasons, the district court granted both the temporary restraining order and the preliminary injunction, barring the State from implementing and enforcing Proposition 209 until a trial or a final judgment was reached by the court.³³¹

However, the Ninth Circuit reversed the district court. The Ninth Circuit held that Proposition 209 was constitutional under the Equal Protection Clause of the United States Constitution.³³² The plaintiffs argued that women and racial minorities would be denied equal protection under Proposition 209 because it would deny them preferential treatment intended to level the playing field with non-minorities.³³³ However, the Ninth Circuit asserted that the Equal Protection Clause prohibits the government from classifying individuals “on the basis of impermissible criteria.”³³⁴ Since Proposition 209 actually prohibits the government from classifying individuals by race or gender, the court determined that it did not classify individuals by race or gender and therefore, did not violate the Equal Protection Clause.³³⁵

B. Hi-Voltage Wire Works v. City of San Jose

In 2000, the California Supreme Court found a San Jose program requiring contractors bidding on city projects to use a specified percentage of women and minority subcontractors to be in violation of Article I Section 31 of the California Constitution (Proposition 209).³³⁶ In that case, a general contracting firm intended to use its own work force on a project and thus failed to comply with the city’s program requirements.³³⁷ When the contracting firm’s bid was rejected, it filed a lawsuit alleging that the city’s program violated Proposition 209 because it granted preferential treatment to individuals on the basis of race and sex.³³⁸ The California Supreme Court affirmed the appellate court’s

³²⁸ *Id.* at 698.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 701.

³³³ *Id.* at 702.

³³⁴ *Id.*

³³⁵ *Id.* (finding also that Proposition 209 was consistent with the 1964 Civil Rights Act and that Title VII does not require states to give preferential treatment to women or minorities).

³³⁶ *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal. 4th 537 (2000).

³³⁷ *Id.* at 544.

³³⁸ *Id.*

holding and found that the ballot materials accompanying Proposition 209 made it clear that Article I Section 31 was intended to prohibit the kind of preferential treatment encouraged by the city's program.³³⁹

IV. CONSTITUTIONAL AND STATUTORY PROTECTIONS

While Proposition 16 would allow the state to consider diversity as a factor in public employment, education, and contracting, the state and federal constitutions continue to provide all people with equal protection under the law.³⁴⁰ Prior to the enactment of Proposition 209, state and local entities that considered race, sex, color, ethnicity, or national origin in their policies and programs still had to comply with other provisions of state and federal law that limit the use of these considerations.³⁴¹ Laws that protect against discrimination in public employment, public education, and public contracting exist at both the state and federal level. Federal law covers all three grounds in the form of Title VI and Title VII of the Civil Rights Act of 1964, Title IX, and interpretations of the Equal Protection Clause to public contracting.

A. Federal Constitution and Other Statutory Provisions

Much of the rhetoric surrounding Proposition 16 involves concerns regarding racial, gender, and other types of discrimination. However, there are several federal safeguards in place to protect individuals in the fields of public employment, education, and contracting from such forms of discrimination, including statutory, constitutional, and common law provisions.

Title VI of the Civil Rights Act of 1964 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."³⁴² This statute prohibits those programs that receive federal financial assistance from engaging in discrimination, and if a recipient of federal assistance is found to have engaged in discrimination, their contract for federal funding can be terminated.³⁴³

Title VII of the Civil Rights Act of 1964 is similar to Title VI, but specifically prohibits employment discrimination based on race, color, religion, sex, and national origin.³⁴⁴ Under Title VII, an employer cannot discriminate on any of these bases in regard to any term, condition, or privilege of employment.³⁴⁵

³³⁹ *Id.*

³⁴⁰ Ballot Analysis of Proposition 16, <https://lao.ca.gov/BallotAnalysis/Proposition?number=16&year=2020> (last visited September 21, 2020).

³⁴¹ *Id.*

³⁴² 42 U.S.C. § 2000d.

³⁴³ 42 U.S.C. § 2000d-1.

³⁴⁴ 42 U.S.C. § 2000e-2.

³⁴⁵ *Id.*

In the realm of public education, Title IX, a federal civil rights law, protects individuals from discrimination based on sex in education programs or activities that receive federal financial assistance.³⁴⁶ Title IX states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³⁴⁷

Outside of these federal statutes, Proposition 16 may present longstanding federal constitutional concerns due to its engagement with affirmative action. In 1978, the United States Supreme Court reviewed *Regents of University of California v. Bakke*, a case involving an affirmative action issue with the UC Davis School of Medicine.³⁴⁸ In that case, UC Davis had set aside 16 of the 100 available spaces for qualified minorities.³⁴⁹ The court held that although race was a legitimate factor for admission, racial quotas violate the Equal Protection Clause of the Fourteenth Amendment.³⁵⁰ Following this case, there are still concerns that initiatives which aim to allow government preference are akin to the racial quotas in *Bakke*, and thus violate the Fourteenth Amendment of the United States Constitution.

The Equal Protection Clause of the Fourteenth Amendment states: “No State shall make or enforce any law that abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws”.³⁵¹ In essence, the Equal Protection Clause under the federal constitution requires that state and local government entities treat different classes of people similarly, unless there is a legitimate reason to treat them differently.

In cases analyzing the Equal Protection Clause as it pertains to immutable characteristics, racial classifications are subjected to the most rigid, strict scrutiny and to be upheld, must exist for a compelling state purpose.³⁵² For example, in *City of Richmond v. J.A. Croson Co.*, the Supreme Court found a government program that set aside city contracts for minority-owned businesses lacked a compelling government interest.³⁵³ The Court felt the city program needed to be more narrowly tailored to remedy the history of discrimination against those minority groups in the United States.³⁵⁴

This principle was already touched upon in *Bakke*. In that case, the Supreme Court stated that to avoid violating the Equal Protection Clause, state and local governments using affirmative action programs must engage in more narrowly tailored efforts, and use

³⁴⁶ 20 U.S.C. § 1681.

³⁴⁷ *Id.*

³⁴⁸ *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

³⁴⁹ *Id.* at 275.

³⁵⁰ *Id.*

³⁵¹ U.S. Const. amend. XIV.

³⁵² *Bakke*, 438 U.S. at 299.

³⁵³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989).

³⁵⁴ *Id.*

“race-plus” factors to support minority students; in other words, race could be a “plus” on an applicant’s file, but need not be the sole determining factor.³⁵⁵ Similarly, in *Parents Involved in Community Schools v. Seattle School District No. 1*,³⁵⁶ the Supreme Court held more recently that programs using race as a tiebreaker for admission to public schools require more narrow tailoring to the underlying motivation, such as remedying historical discrimination. This development of law from the Court regarding government preferences demonstrates that under appropriate circumstances, classifications that have clear remedial motivations do not violate the Equal Protection Clause.

Thus, Proposition 16 opponents may be concerned that the initiative violates the Equal Protection Clause, because its passage will allow the state to treat one class of people differently than other classes of people based on race, gender, ethnicity, and other characteristics. However, Proposition 16 does not require the consideration of these immutable traits in public contracting, employment, or education. It only provides the option for these state entities to look at these traits in their hiring, contracting, or admissions decisions. Additionally, the Equal Protection Clause, as well as the Due Process Clause of the Fifth and Fourteenth Amendments, and the case law described above that interpret these clauses, would remain in effect if Proposition 16 were to pass. These constitutional provisions would continue to prohibit discrimination based on race, gender, and other traits.

B. California Constitution and Other Statutory Provisions

In addition to protections provided by the federal government, states have the authority to pass legislation that prohibits invidious discrimination in public employment, education, and contracting.³⁵⁷ Accordingly, California provides for the protection of civil rights through the state Constitution, state statutory provisions, and common law principles.³⁵⁸ The most significant civil rights protections are provided by the California Constitution’s Equal Protection Clause, the Unruh Civil Rights Act, the Fair Employment and Housing Act (“FEHA”), the Education Code, and the Public Contract Code.³⁵⁹

Article I Section 7 of the California Constitution provides, “A person may not be deprived of life, liberty, or property without due process.”³⁶⁰ It also guarantees that individuals may not be denied equal protection of the laws.³⁶¹ Building upon that foundation, the Unruh Civil Rights Act protects individuals from discrimination in all business establishments.³⁶² It states:

³⁵⁵ *Bakke*, 438 U.S. at 317.

³⁵⁶ *Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1*, 551 U.S. 701, 724 (2007).

³⁵⁷ 12 CAL. JUR. 3D, *Civil Rights* § 2 (2020).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ Cal. Const. art. I, § 7.

³⁶¹ *Id.*

³⁶² Cal. Civ. Code § 51.

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.³⁶³

The Unruh Civil Rights Act prohibits only “arbitrary, invidious, or unreasonable discrimination.”³⁶⁴ Therefore, affirmative action policies could be adopted by state entities if Prop 16 passes, but they would be limited by the Unruh Act’s prohibition against arbitrary distinctions, including gender-based ones.

The strongest protection against discrimination in public employment under California law comes from the FEHA. California’s FEHA states that the “practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information in housing accommodations is against the public policy of this state.”³⁶⁵ FEHA applies to public and private employers.³⁶⁶ It provides that it is “illegal for employers of five or more employees to discriminate against job applicants and employees because of a protected category, or retaliate against them because they have asserted their rights under the law.”³⁶⁷

With respect to public education, the California Education Code provides that any educational institution that receives state financial assistance or enrolls students who receive state financial aid cannot discriminate based on “disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic...including immigration status.”³⁶⁸

Turning to public contracting, Assembly Bill 2844, signed into law by Governor Jerry Brown in 2016, specifically prohibits discrimination in public contracting.³⁶⁹ AB 2844 added section 2010 to the Public Contract Code.³⁷⁰ This bill requires that a person who “submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a state agency with respect to any contract in the amount of \$100,000 or more to certify, under

³⁶³ *Id.*

³⁶⁴ 12 CAL. JUR. 3D, *Civil Rights* § 7.

³⁶⁵ 12 CAL. JUR. 3D, *Civil Rights* § 30; Cal. Gov. Code, §§ 12900 to 12996.

³⁶⁶ CAL. DEP’T OF FAIR EMP. & HOUS., <https://www.dfeh.ca.gov/employment/> (last visited. Oct. 6, 2020).

³⁶⁷ *Id.*

³⁶⁸ CAL. EDUC. CODE § 220 (2018).

³⁶⁹ AB 2844, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2844 (last visited Oct. 6, 2020).

³⁷⁰ *Id.*

penalty of perjury,...that they are in compliance with the Unruh Civil Rights Act and the California Fair Employment and Housing Act.”³⁷¹

Therefore, while voters and Proposition 16 opponents may be concerned that repealing Proposition 209 will allow the state to discriminate against individuals arbitrarily, this is definitely not the case. The California Constitution and state statutes offer a broad range of protections against invidious and arbitrary discrimination based on protected characteristics. Even if Proposition 16 passes, repealing Proposition 209, state and local entities cannot discriminate against individuals.

V. PUBLIC POLICY CONSIDERATIONS

Due to the longstanding history of affirmative action and similar programs not only in California, but in the United States generally, there are strong proponents and opponents to Proposition 16. Much of the debate is centered on whether affirmative action can actually address institutionalized, systemic oppression in these public forums, such as racism or sexism, or if it creates quotas, particularly in university admissions.³⁷² Proponents of Proposition 16 are hoping to address barriers to entry in academia, especially in the UC system for prospective students.

When ACA 5 was on the Senate floor for a vote, various senators of color appealed to their peers, calling for racial justice in the passage of ACA 5.³⁷³ Due to the current social movement spurred by various police shootings throughout the country, particularly after the death of George Floyd, over two thirds of the California legislature voted to put Proposition 16 on the ballot before voters in the November election.³⁷⁴ But many, including opponents in communities of color, view this proposition as offensive to notions of equal opportunity, arguing that success should stem from meritocracy.³⁷⁵

Currently, with less than a month before the election, Proposition 16 does not seem to have overwhelming backing, nor overwhelming disapproval, from surveyed voters; yet, there appears to be a slight tip towards the opposition, as shown in a study completed by the Public Policy Institute of California.³⁷⁶ This study was completed in September 2020 and showed 31% of likely voters in support, 22% undecided, and 47% in opposition, to

³⁷¹ *Id.*

³⁷² “Proposition 16: Restoring Affirmative Action”, CalMatters, <https://calmatters.org/election-2020-guide/proposition-16-affirmative-action/>.

³⁷³ Mario Koran, “California weighs overturning 24-year ban on affirmative action”, The Guardian (June 22, 2020), <https://www.theguardian.com/us-news/2020/jun/24/california-affirmative-action-aca5-vote>.

³⁷⁴ CalMatters, *supra* note 75.

³⁷⁵ Nico Savidge, *Proposition 16: Why some Asian Americans are on the front lines of the campaign against affirmative action*, The Mercury News (September 17, 2020), <https://www.mercurynews.com/2020/09/17/proposition-16-why-some-asian-americans-are-on-the-front-lines-of-the-campaign-against-affirmative-action/>.

³⁷⁶ Public Policy Institute of California (“PPIC”), “Californians and Their Government–September 2020–Full Crosstabs–Likely Voters Only”, PPIC Statewide Survey (Sept. 2020), 16.

Proposition 16.³⁷⁷ And, according to the 2020 Asian American Voter Survey (“AAVS”), Chinese Americans opposed Proposition 16 by a 38-30 margin, with the other 32 percent of voters unsure or undecided on the issue.³⁷⁸ An opponent from the StopProp16 grassroots organization believes proponent politicians voted against the will of the people because the polls demonstrate a preference to retain Proposition 209.³⁷⁹ Although this polling data suggests that undecided voters may be confused or conflicted about the proposition, opponents stand behind this slight majority in the polling results.³⁸⁰

A. Proponents’ Arguments

Proposition 16 has many high-profile proponents. These include United States Senators Kamala Harris and Dianne Feinstein, Governor Gavin Newsom, and the University of California Board of Regents.³⁸¹

The proponents of Proposition 16 primarily argue that affirmative action provides equal opportunities for women and people of color who “are paid less for the same work, given fewer chances to access higher education, and denied job opportunities.”³⁸² Affirmative action “level[s] the playing field by allowing policymakers to consider race and gender—without quotas—when making decisions about contracts, hiring and education” to eliminate systemic discrimination and remedy past harm.³⁸³ A source from the “Yes on 16” campaign asserted that “Some people have always been operating at a disadvantage. Proposition 16 is just making sure that everyone is on equal footing to begin with.”³⁸⁴ Before Proposition 209, state and local entities had policies and programs in place to “increase opportunities and representation for people who faced inequalities as a result of their race, sex, color, ethnicity, or national origin.”³⁸⁵ For example, state and local entities had employment and recruitment policies in place to increase the hiring of people of color and women.³⁸⁶ After the enactment of Proposition 209, all of these policies and programs were either discontinued or modified unless they fell within one of the exceptions.³⁸⁷

In 2015, Equal Justice Society, an Oakland based nonprofit, conducted a study regarding the impact of Proposition 209 on California’s minority and women business

³⁷⁷ *Id.*

³⁷⁸ Savidge, *supra* note 78.

³⁷⁹ Interview with Tony Guan, StopProp16 (September 28, 2020) (notes on file with *California Initiative Review*).

³⁸⁰ *Id.*

³⁸¹ *California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_16_Repeal_Proposition_209_Affirmative_Action_Amendment_\(2020\)](https://ballotpedia.org/California_Proposition_16_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020)).

³⁸² *Facts, YES ON 16*, <https://voteyesonprop16.org/why-prop-16/facts/>.

³⁸³ *Id.*

³⁸⁴ Interview with “Yes on 16,” (Sept. 25, 2020) (notes on file with the *California Initiative Review*).

³⁸⁵ Ballot Analysis of Proposition 16, <https://lao.ca.gov/BallotAnalysis/Proposition?number=16&year=2020> (last visited Sept. 21, 2020).

³⁸⁶ *Id.*

³⁸⁷ *Id.*

enterprises ("MWBEs").³⁸⁸ This study demonstrated that MWBEs "lost the potential equivalent of \$1 billion in public contracts because of Proposition 209."³⁸⁹ "Taxes from women and people of color help fund public contracts, but [they] are denied equal opportunities to obtain those contracts," said Eva Paterson, the president of the Equal Justice Society.³⁹⁰ After the enactment of Proposition 209, the study found a loss of approximately \$820 million per year in MWBE contracts with the State and a loss of approximately \$200 million per year in MWBE contracts with the City and County of San Francisco.³⁹¹

Assembly Member Shirley Weber, one of the authors of Proposition 16, also points out that "the improvement of my schools is contingent upon getting teachers who understand the kids."³⁹² She argues that Proposition 16 is critical because "everybody tells us we need teachers who look more like our students, yet we can't develop a teacher training and a program of recruitment" designed to recruit a diverse teaching pool.³⁹³

Additionally, proponents argue that Proposition 209 has significantly reduced the enrollment of Black and Latinx students at UC campuses.³⁹⁴ A UC Berkeley study released in August 2020 found that not only has Proposition 209 reduced the enrollment of minority students, it has also lowered their graduation rates and driven down their wages when they enter the workforce.³⁹⁵ The study also found that affirmative action programs that existed prior to Proposition 209 "did not significantly hurt Asian American and [W]hite students denied admission to UC's most selective campuses. That's because they enrolled instead at universities of comparable high quality and earned similarly high earnings in the following years."³⁹⁶ This is likely why the UC Board of Regents unanimously supports repealing Proposition 209.³⁹⁷ Immediate-past UC President Janet Napolitano points out that, "It makes little sense to exclude any consideration of race in admissions when the aim of the

³⁸⁸ Tim Lohrentz, *The Impact of Proposition 209 on California's MWBEs*, <https://equaljusticesociety.files.wordpress.com/2019/10/ejs-impact-prop-209-mwbes.pdf>.

³⁸⁹ *Id.*

³⁹⁰ Keith Kamisugi, *Impact of Prop. 209 on Calif. MWBEs*, <https://equaljusticesociety.org/2015/02/24/one-billion-in-potential-contract-dollars-lost-annually-by-businesses-owned-by-women-and-people-of-color-due-to-proposition-209/>.

³⁹¹ *Id.*

³⁹² Shalina Chatlani, *Prop. 16 Would Bring Affirmative Action Back to California, Critics Say It's Not Necessary*, <https://www.kpbs.org/news/2020/oct/01/prop-16-would-bring-affirmative-action-back-califo/>.

³⁹³ *Id.*

³⁹⁴ Phil Willon, *New Poll Finds Shaky Support for Proposition 16 to Restore Affirmative Action in California*, L.A. TIMES, <https://www.latimes.com/california/story/2020-09-16/california-proposition-16-ppic-affirmative-action-poll>.

³⁹⁵ *Id.*; Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, https://cshe.berkeley.edu/sites/default/files/publications/rops.cshe.10.2020.bleemer.prop209.8.20.2020_2.pdf.

³⁹⁶ Teresa Watanabe, *Affirmative Action Ban Drove Down Black and Latino UC Enrollment and Wages Study Finds*, L.A. TIMES, <https://www.latimes.com/california/story/2020-08-22/prop-209s-affirmative-action-ban-drove-down-black-and-latino-uc-enrollment-and-wages-study-finds>.

³⁹⁷ *Id.*

University's holistic process is to fully understand and evaluate each applicant through multiple dimensions."³⁹⁸

Proponents also argue that California is out of step with the majority of the country. In all, 41 states currently take gender, race, and ethnicity into consideration when making decisions about government contracts, college admissions, and job opportunities.³⁹⁹ Proposition 16 will align California with the rest of the country and enable our positions of leadership and contracts with businesses to reflect the diversity and values of California.⁴⁰⁰

Additionally, in response to opponents' argument that affirmative action just leads to quotas, proponents point out that colleges and universities cannot and will not use racial quotas to achieve diversity.⁴⁰¹ Racial quotas have been held unconstitutional by the Supreme Court of the United States and have been outlawed in university admissions since 1978.⁴⁰² Passing Proposition 16 will not lead to quotas.

B. Opponents' Arguments

The cornerstone of the opponents' arguments is the belief that equality under the law, regardless of race, should remain a principle enshrined in the California constitution.⁴⁰³ Upon this principle, they present three main arguments: (1) advantaging applicants on the basis of immutable characteristics discriminates against others; (2) the government does not need affirmative action to accomplish diversity initiatives; and (3) Proposition 16 will be expensive for California taxpayers. A large number of the opponents are Chinese Americans, and often first-generation immigrants, who find Proposition 16 insulting to their cultural and traditional belief that under equal opportunity, success comes from hard work in America.⁴⁰⁴ However, the official opponents of the proposition vary widely in race, gender, and background, and are largely concerned about Proposition 16 potentially lowering standards in education and hiring and endorsing discrimination.⁴⁰⁵

First, opponents of Proposition 16 argue that providing the option to consider immutable characteristics in state processes inevitably involves disadvantaging other groups of people, on the same grounds.⁴⁰⁶ In essence, they claim that making decisions based on race, ethnicity, or gender is "its own kind of prejudice."⁴⁰⁷ Opponents view

³⁹⁸ *UC Board of Regents Unanimously Endorses ACA 5, Repeal of Prop. 209*, UNIV. OF CAL. PRESS ROOM, <https://www.universityofcalifornia.edu/press-room/uc-board-regents-endorses-aca-5-repeal-prop-209>.

³⁹⁹ *Facts, YES ON 16*, <https://voteyesonprop16.org/why-prop-16/facts/>.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ Interview with Stephen Miller, Californians For Equal Rights (Oct. 6, 2020) (notes on file with the *California Initiative Review*).

⁴⁰⁴ Savidge, *supra* note 78.

⁴⁰⁵ "Keep Discrimination Illegal", Californians for Equal Rights, <https://californiansforequalrights.org>.

⁴⁰⁶ *Id.*

⁴⁰⁷ CalMatters, *supra* note 75.

Proposition 16 as a way to legalize discrimination.⁴⁰⁸ One opponent of Proposition 16, Assembly Member Steven Choi, fears implementing the ideology that race, ethnicity, and other traits can determine one's chances at getting a job.⁴⁰⁹ An immigrant from South Korea, Assembly Member Choi opposes Proposition 16 due to his concerns that if passed, it could allow state programs to use one's skin color or national origin to determine qualifications for a position or college admission.⁴¹⁰

Another major opponent of Proposition 16 is Ward Connerly, a former appointee to the Board of Regents of California's public university system.⁴¹¹ He now serves as the President of Californians for Equal Rights (CFER), the official nonprofit organization that is defending Proposition 209 and opposing Proposition 16.⁴¹² Connerly was the creator of Proposition 209, as a fervent advocate against affirmative action.⁴¹³ He opposes affirmative action because he believes "race-based remedies only prolong America's racial divisions and inequities."⁴¹⁴ As a Black man, he believes affirmative action initiatives like Proposition 16 reinforce the idea that students of color are inferior, because these programs tell students they need a preference to succeed.⁴¹⁵ To preserve his legacy and defend his creation, he leads CFER's campaign.⁴¹⁶ CFER views the initiative as "divisive and discriminatory" because it threatens "hard-fought equal rights for all regardless of race, sex, color, ethnicity or national origin."⁴¹⁷ Opponents of Proposition 16 support Proposition 209 because they feel it affirms the notion that the government should consider people on equal terms instead of giving government preference to some people over others.⁴¹⁸ They view Proposition 209 as having "enhanced California's good civil reputation...in support of equal opportunity for all individual American citizens."⁴¹⁹

For Asian Americans in particular, many feel Proposition 16 "doesn't fit into their American journey" because it threatens their chances at success and admission into

⁴⁰⁸ Californians for Equal Rights, *supra* note 108.

⁴⁰⁹ Dan Morain, "Ending California's ban on affirmative action could show how far it's come", The Washington Post (Aug. 6, 2020), <https://www.washingtonpost.com/opinions/2020/08/06/ending-californias-ban-affirmative-action-could-show-how-far-its-come/>.

⁴¹⁰ *Id.*

⁴¹¹ Ward Connerly, *America: A Nation of Equals* at Harvard University, Cambridge, M.A. (Apr. 5, 1998) (transcript at <http://americanradioworks.publicradio.org/features/blackspeech/wconnerly.html>).

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ Kevin Carey, "A Detailed Look at the Downside of California's Ban on Affirmative Action", The New York Times (August 21, 2020), <https://www.nytimes.com/2020/08/21/upshot/00up-affirmative-action-california-study.html>.

⁴¹⁶ *Id.*

⁴¹⁷ Californians for Equal Rights, *supra* note 108.

⁴¹⁸ The Editorial Board, "Vote No on Proposition 16 to defend state's respect for diversity and equality", The Los Angeles Daily News (August 28, 2020), <https://www.dailynews.com/2020/08/28/vote-no-on-proposition-16-to-defend-states-respect-for-diversity-and-equality/>.

⁴¹⁹ Charles Geshekter and David Randall, "The Effects of Proposition 209 on California", The National Association of Scholars (July 16, 2020), <https://www.nas.org/blogs/article/the-effects-of-proposition-209-on-california-higher-education-public-employment-and-contracting-2020-update>.

California's public universities such as the prestigious UC Berkeley and UCLA.⁴²⁰ According to Janelle Wong, a professor of Asian American Studies at the University of Maryland, many opponents from older, first-generation Chinese American groups are motivated by values of prestige and equity, as well as fears of scarcity and racial quotas.⁴²¹ In a study relied on by opponents, Princeton researchers found that in a race-neutral system, the number of white students would see little change, while Asian Americans would increase from 23.7% to 31.5% of admitted students, meaning the current system rejects one-fourth of all Asian Americans that would be admitted in a race-neutral system.⁴²² Opponents believe this result is racial discrimination, even though proponents view these practices as simply race-conscious.⁴²³ Meanwhile, proponents point to other studies such as the Civil Rights Project at UCLA, which found that although the student sizes at UC Berkeley and UCLA have doubled since the passage of Proposition 209, of the applicants offered admission to the two universities, Black and Latinx students dropped by 70 to 75 percent, while White and Asian students dropped only by 40 and 35 percent, respectively.⁴²⁴ Though there are social science studies on both sides of the issue, the strong concerns presented by each side may result in a continued battle over affirmative action in courts and the Legislature, regardless of the election result.⁴²⁵

Second, opponents of Proposition 16 argue the government does not need to have a preference for certain immutable characteristics to accomplish racial, gender, and ethnic equity in state programs. Opponents claim that increased diversity can be accomplished by targeting other characteristics not banned by Proposition 209, such as being a first in one's generation, or coming from a low-income or working-class family.⁴²⁶ And since the passage of Proposition 209, they claim public entities have succeeded in their consideration of these additional characteristics, to support underrepresented groups without resorting to government preference.⁴²⁷ Extraneous factors such as income level, educational achievement, and a household's familiarity with higher education can determine the success of individuals from various ethnic and racial groups in college.⁴²⁸ According to the National Association of Scholars, both the UC and CSU systems have expanded their efforts to prepare low-income high school students for college, without using government preference, after 1996.⁴²⁹ Thus, opponents of Proposition 16 retort to campaigns for affirmative action by urging for a stronger focus on improving K-12 education.⁴³⁰

⁴²⁰ Savidge, *supra* note 78.

⁴²¹ Koran, *supra* note 76.

⁴²² Interview with Miller, *supra* note 76.

⁴²³ *Id.*

⁴²⁴ Patricia Gandara, "California: A Case Study in the Loss of Affirmative Action", The Civil Rights Project/ *Proyecto Derechos Civiles*, (August 8, 2012), <https://civilrightsproject.ucla.edu/research/college-access/affirmative-action/california-a-case-study-in-the-loss-of-affirmative-action>.

⁴²⁵ Carey, *supra* note 118.

⁴²⁶ The Editorial Board, *supra* note 121.

⁴²⁷ *Id.*

⁴²⁸ Gesheker and Randall, *supra* note 122.

⁴²⁹ *Id.*

⁴³⁰ The Editorial Board, *supra* note 121.

Furthermore, opponents of Proposition 16 are concerned that if Proposition 16 passes, though public entities will avoid establishing a concrete racial quota, race-based admissions efforts will strongly push towards one, without naming it.⁴³¹ To them, if proponents are truly motivated to achieve diverse and genuine representation in public institutions to reflect the population, this cannot be accomplished without balancing percentages and numbers.⁴³² And this comparison of numbers, opponents believe, is inherently a quota-like activity.⁴³³ Should Proposition 16 pass, opponents are worried that instead of treating applicants equally based on their qualifications and experiences, public institutions will be preoccupied with pushing towards representation of the population insofar as the Fourteenth Amendment allows.⁴³⁴

Outside the realm of education, CFER argues that in public employment, diversity for people of color in public employment has increased.⁴³⁵ From 1990 to 2007, minorities rose from 38% to 50% of the public workforce.⁴³⁶ And, regarding public contracting, supporters of Proposition 209 argue that since the passage of Proposition 209, there are still minority and women-owned businesses that have thrived and expanded. This success is attributed to personal characteristics outside of those that are immutable, such as “patience, hard work, ingenuity, innovativeness, education, and the ability to delay gratification.”⁴³⁷ Additionally, they claim those MWBEs that went out of business after the passage of Proposition 209 were perhaps not competitive to begin with.⁴³⁸ These supporters of Proposition 209 further claim that the success or failure of MWBEs may not be attributed to a single disparity such as race or gender discrimination, but can be due to the lack of the specific expertise or capability of doing the work sought.⁴³⁹ Ultimately, they align with Governor Pete Wilson’s belief that “business has no color.”⁴⁴⁰

Lastly, opponents argue that the passage of Proposition 16 will be costly to taxpayers, largely due to the ramifications it will have on public contracting. According to the CFER fact-tracker, Proposition 209 saved the California Department of Transportation millions of dollars.⁴⁴¹ From 1998 to 1999, following the passage of Proposition 209, the Department saved approximately \$64 million, equivalent to over \$1 billion dollars in 2020. Proponents use this same figure to demonstrate how MWBEs lost millions of dollars after the passage of Proposition 209.⁴⁴² In essence, opponents have toted these savings because

⁴³¹ Interview with Miller, *supra* note 76.

⁴³² Interview with Tony Guan, StopProp16 (September 28, 2020) (notes on file with *California Imitative Review*).

⁴³³ *Id.*

⁴³⁴ Interview with Miller, *supra* note 76.

⁴³⁵ Californians for Equal Rights, *supra* note 108.

⁴³⁶ *Id.*

⁴³⁷ Gesheker and Randall, *supra* note 122.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ Californians for Equal Rights, *supra* note 108.

⁴⁴² Interview with “Yes on 16”, *supra* note 87.

public entities have the ability to contract with corporate businesses at a reduced cost.⁴⁴³ The scale and capacity of these businesses allow them to bid for contracts at a lower rate than MWBEs, which are often smaller businesses who need to bid at a higher rate to fulfill a contract.⁴⁴⁴

VI. FUNDING SUPPORT

Despite the slight lead for the opposition with regard to recent polling, the fundraising efforts by the proponents of Proposition 16 overwhelmingly outweigh those of the opponents. The proponents' campaign is being bankrolled at over \$17 million dollars, whereas the opponents are at just over \$1 million dollars.⁴⁴⁵ Donors in support of Proposition 16 include the California Teachers Association and Kaiser Foundation Health Plan and Hospitals.⁴⁴⁶ Recently, opponents protested outside of a Netflix office in Los Gatos, CA after learning that Patricia Quillen, wife of the Netflix CEO Reed Hastings, donated \$1 million dollars to the proponents.⁴⁴⁷ On the other side, donors in opposition to Proposition 16 include Students for Fair Admissions, an anti-affirmative action advocacy group, and coalition members of CFER.⁴⁴⁸

VII. CONCLUSION

Proposition 16 would repeal Section 31 of Article I of the California Constitution, which was added in 1996 through the passage of Proposition 209. In effect, this constitutional amendment initiative will eliminate the ban on allowing state institutions to have the option to consider immutable characteristics in public contracting, employment, and education. Although these public entities would be able to consider these traits under Proposition 16, they are not required to do so, and the repeal of Proposition 209 would not result in arbitrary discrimination. Proponents support the initiative because in their view, it can begin to remedy the institutionalized barriers that marginalized groups have had to traverse over the years, by empowering state and local entities and schools to consider applicants more holistically. Opponents of Proposition 16 argue that the initiative would only legalize discrimination, as the consideration of race, gender, and other traits would inherently disadvantage individuals from other groups. They also argue it could be costly to California taxpayers.

⁴⁴³ Justin Marion, "How Costly is Affirmative Action? Government Contracting and California's Proposition 209", University of California, Santa Cruz, Department of Economics (October 2007), 19.

⁴⁴⁴ *Id.*

⁴⁴⁵ CalMatters, *supra* note 75.

⁴⁴⁶ *Id.*

⁴⁴⁷ Savidge, *supra* note 78.

⁴⁴⁸ CalMatters, *supra* note 75.

Proposition 17: Voting Rights Restoration for Persons on Parole (2020)

Legislative Constitutional Amendment

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I. EXECUTIVE SUMMARY

Current California law prohibits those who are imprisoned or on parole for a felony conviction from registering to vote and voting. Election officials are required to cancel the voting registration of such individuals. The proposed measure would amend the California Constitution to allow individuals who are on parole to have their voting rights restored.

A **YES** vote on this measure means: Individuals on parole for a felony who are U.S. citizens, residents of California, and at least 18 years of age would be able to re-register to vote and participate in voting.

A **NO** vote on this measure means: Individuals on parole for a felony would continue to be prohibited from voting and registering to vote until completion of their parole term.

II. BACKGROUND

A. Prior Attempts at Changing the Law

The Voting Rights Restoration Amendment (1974)—offered on the ballot as California Proposition 10—was a legislative bill approved by voters on the November 5, 1974 ballot. Prior to enactment of the bill, California law prohibited the mentally insane and those convicted of high crimes and other enumerated crimes from exercising the privileges of an elector. The amendment changed the language of Article II, Section 3⁴⁴⁹ of the California Constitution (renumbered in 1976 to Section 4) to allow for the restoration of voting rights after the completion of the imprisonment sentence and parole. Disqualification of the mentally insane or mentally incompetent still applied.

In 2018, Initiate Justice, a non-profit organization focused on issues of criminal justice reform, proposed the Voting Restoration and Democracy Act of 2018 as an initiative measure. The Act sought to amend the California Constitution by eliminating existing voting restrictions on individuals in prison or on parole for the conviction of a felony. The ballot measure did not obtain the necessary signatures and failed to qualify for the November 2018 ballot.

B. Existing Law

Article II, Section 4 requires that the California Legislature restrict the voting rights of parolees. Elections Code Section 2101 states that “[a] person entitled to register to vote shall be a United States citizen, a resident of California, not imprisoned or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election.”⁴⁵⁰ Any

⁴⁴⁹ Cal. Const. art. II, § 4.

⁴⁵⁰ Cal. Elec. Code § 2101 (West 2017).

person who is imprisoned or on parole for the conviction of a felony is prohibited from voting and elections officials are required to cancel the voter registrations of such individuals.⁴⁵¹ However, a person who is on probation for conviction of a felony is permitted to vote.⁴⁵² Once an individual completes parole, then their right to vote is restored and they can re-register to vote.⁴⁵³

C. Proposed Law

This measure would alter the language of the California Constitution to allow for the restoration of voting rights to individuals on parole. The changes to the language of the California Constitution are as follows:

Article II Sec. 2

(a) A United States citizen 18 years of age and a resident in this State may vote.

(b) *An elector disqualified from voting while serving a state or federal prison term, as described in Section 4, shall have their right to vote restored upon the completion of their prison term.*

Article II Sec. 4

(a) The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or ~~imprisoned or on parole~~ *serving a state or federal prison term* for the conviction of a felony.

III. PUBLIC POLICY CONSIDERATIONS

A. Various Forms of Post-Release Supervision

In California, there are four distinct programs for correctional supervision: probation, parole, post-release-community-supervision (PRCS), and mandatory supervision (MS). Probation is the largest category of the four, with nearly 300,000 individuals on probation in the state during FY 2015-16.⁴⁵⁴ Judges may sentence convicted offenders to probation as an alternative to jail or prison, in which case the offender serves their sentence under the supervision of a county probation department and a probation officer.⁴⁵⁵ Under current law, those on probation are legally eligible to register to vote, whereas those on parole are

⁴⁵¹ *Id.*

⁴⁵² *Voting Rights: Persons with a Criminal History*, California Secretary of State, available at <https://www.sos.ca.gov/elections/voting-resources/voting-california/who-can-vote-california/voting-rights-californians/> (last visited October 18, 2020).

⁴⁵³ *Id.*

⁴⁵⁴ Brandon Martin & Ryken Grattet, *Probation in California*, PUB. POLICY INST. OF CALIFORNIA (Dec. 2015), available at <https://www.ppic.org/publication/probation-in-california/> (detailing probation statistics statewide and effects of recent legislation on the probation population).

⁴⁵⁵ *Id.*

not.⁴⁵⁶ Mandatory supervision is a form of split-sentencing where a prisoner serves part of their sentence in prison then serves the remainder under the supervision of county probation departments.⁴⁵⁷ PRCS, created by the Realignment Act of 2011, is a county-led form of supervision for those who have served sentences for lesser felonies.⁴⁵⁸ A person released from state prison is only eligible for PRCS after serving a sentence for a felony that is neither “serious” or “violent” within definitions prescribed by statute.⁴⁵⁹ All prisoners serving sentences for felonies who do not qualify for PRCS are only eligible for release on parole.⁴⁶⁰

B. California’s Parole Population

According to the California Department of Corrections and Rehabilitation (CDCR), the total parole population currently sits at just over 56,000 people.⁴⁶¹ During 2019, the Board of Parole Hearings conducted just over 6,000 parole suitability hearings.⁴⁶² Based on data from the Department of Finance and CDCR, the Public Policy Institute of California reported that “the 10 counties with the lowest release rates received an average of 46 offenders per 100,000 while the 10 counties with the highest release rates received 220 offenders per 100,000” in 2016.⁴⁶³ Prior to the passage of the Realignment Act in 2011, the parole population was about 91,000. As a result of the diversion to county-led community supervision programs created under the Act for less serious offenders, the parole population dropped to about 61,000 in the first year after its passage.⁴⁶⁴

⁴⁵⁶ Cal. Const. art. II, § 4.

⁴⁵⁷ Chief Probation Officers of California, *Mandatory Supervision: The Benefits of Evidence Based Supervision under Public Safety Realignment*, CHIEF PROBATION OFFICERS OF CAL., available at <https://www.cpoc.org/sites/main/files/file-attachments/issuebrief2.pdf?1501700011> (last visited October 18, 2020)(describing positive impacts of the Realignment Act of 2011 on public safety statewide).

⁴⁵⁸ Criminal Justice Realignment Resource Center, *Court Related Impact of Criminal Justice Realignment*, CRIMINAL JUSTICE REALIGNMENT RESOURCE CTR., available at <https://www.courts.ca.gov/partners/894.htm> (last visited October 18, 2020) (detailing the distinctions between eligibility for probation, PRCS, and parole).

⁴⁵⁹ Cal. Pen. Code § 3451(b)(1-5) (2020) (incorporating “serious” felonies as listed in Cal. Pen. Code § 1192.7(c)(1) and “violent” felonies as listed in Cal. Pen. Code § 667.5(c)).

⁴⁶⁰ *Id.*

⁴⁶¹ California Department of Corrections and Rehabilitation Office of Research Division of Correctional Policy Research and Internal Oversight, *Weekly Report of Population*, CAL. DEPT OF CORRS. AND REHAB., available at <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/09/Tpop1d200916.pdf> (last visited October 18, 2020)(reporting the total parole population of 56,328 among other prison population statistics).

⁴⁶² California Department of Corrections and Rehabilitation, *Board of Parole Hearing Proceedings Suitability Hearing Results Summary*, CAL. DEPT OF CORRS. AND REHAB., available at <https://www.cdcr.ca.gov/bph/2019/10/24/cy-2019-suitability-results/> (last visited October 18, 2020)(reporting the total number of parole suitability hearings conducted, grant rate, denial rate, and other factors).

⁴⁶³ Justin Goss & Joseph Hayes, *California’s Changing Parole Population*, PUB. POLICY INST. OF CALIFORNIA (Feb. 2018), available at <https://www.pplic.org/publication/californias-changing-parole-population/> (finding county specific release rates for parolees in 2016).

⁴⁶⁴ *Id.*

Racial disparities in the parole population continue to persist. At the close of 2016, African Americans made up approximately 26% of the parole population, but only 6% of California's adult population.⁴⁶⁵ Caucasians also make up 26% of the parole population, but make up a much more substantial percentage of the general population, at about 41%.⁴⁶⁶ These statistics track with the overrepresentation of African Americans with respect to statewide arrest numbers and the statewide prison population as a whole. In 2016, African Americans accounted for 16.3% of all arrests made statewide,⁴⁶⁷ and in 2017, "28.5% of the state's male prisoners were African American."⁴⁶⁸

C. Recidivism in California

In a report by the CDCR, which followed 18,830 offenders released from state prison on parole between July 1, 2014, and June 30, 2015, the three-year conviction rate was 43.3%, lower than that for offenders directly discharged (52.7%), or released on post-release-community-supervision (49.3%).⁴⁶⁹ Parolees also had the lowest one-year and two-year recidivism rates at 17.9% and 33.6%, respectively.⁴⁷⁰

Shifting focus to the total population of prisoners released during this period, of the 18,235 offenders reconvicted, 47.6% were convicted of felonies and 52.4% were convicted of misdemeanors.⁴⁷¹ Contrary to one of the main arguments against Proposition 17, out of the total population of those released, the three-year reconviction rate for those in prison for a violent offense was substantially lower than that of offenders convicted for non-violent offenses. These "violent felons" had a three-year reconviction rate of just 29.1%.⁴⁷² The majority of those reconvicted within three years of their release were sent to prison for property (54%) and drug crimes (51.1%).⁴⁷³

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ Justin Goss, Joseph Hayes, Magnus Lofstrom, Brandon Martin & Steven Raphael, *New Insights into California Arrests: Trends, Disparities, and County Differences*, PUB. POLICY INST. OF CALIFORNIA (Dec. 2018), available at <https://www.ppic.org/publication/new-insights-into-california-arrests-trends-disparities-and-county-difference/> (making findings regarding the demographic breakdown of statewide arrests compared to percentage of population).

⁴⁶⁸ Justin Goss, Alexandria Gumbs, Heather Harris & Joseph Hayes, *California's Prison Population*, PUB. POLICY INST. OF CALIFORNIA (Jul. 2019), available at <https://www.ppic.org/publication/californias-prison-population/> (setting forth statistics concerning the present population of California inmates).

⁴⁶⁹ Kevin Grassel, Kendra Jensen & Sam Mooc, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014-15*, CAL. DEPT OF CORRS. AND REHAB. (Jan. 2020), 8 available at <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/01/Recidivism-Report-for-Offenders-Released-in-Fiscal-Year-2014-15.pdf> (last visited October 18, 2020)(listing three-year recidivism rate broken down by demographics and offense of conviction).

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.*

According to a report released by the State auditor, many factors are at play when it comes to an inmate's propensity to recidivate, such as age, gender, and past criminal history. For example, "inmates over age 55 are significantly less likely to recidivate than inmates who are 25 or younger."⁴⁷⁴ CDCR's data supports these findings; CDCR reported that, "offenders ages 18 and 19 had the highest three-year conviction rate at 70%, followed by offenders ages 20 to 24 with a three-year conviction rate of 59%."⁴⁷⁵ Categorized by gender, the three-year reconviction rate for females was 13% lower than the rate for male offenders, and marked a 12.4% decrease from the 2011-2012 cohort of parolees.⁴⁷⁶ Finally, it is significant to note that property and drug offenders "are consistently associated with higher rates of recidivism," according to the same CDCR report.⁴⁷⁷

D. Felony Re-Enfranchisement, Recidivism, and Voter Turnout

In Virginia, the state constitution permanently disenfranchises citizens with felony convictions; however, the Governor has the power to unilaterally restore voting rights.⁴⁷⁸ During 2016, then-Governor Terry McAuliffe restored voting rights to over 150,000 citizens.⁴⁷⁹ According to a report by the Center for American Progress, "in Virginia, 25,941 of the 173,166 formerly incarcerated people who had their voting rights restored by [Governor] McAuliffe voted in 2016, amounting to a 14.98 [%] turnout rate for the group."⁴⁸⁰ As of February 2020, Virginia boasted the lowest recidivism rate in the country at 23.1%.⁴⁸¹

⁴⁷⁴ Elaine M. Howle, *California Department of Corrections and Rehabilitation: Several Poor Administrative Practices Have Hindered Reductions in Recidivism and Denied Inmates Access to In-Prison Rehabilitation Programs*, CAL. STATE AUDITOR (Jan. 2019), 14 available at <https://www.auditor.ca.gov/pdfs/reports/2018-113.pdf> (finding that inmates over 55 are significantly less likely to recidivate than younger offenders).

⁴⁷⁵ Kevin Grassel, Kendra Jensen & Sam Mooc, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014-15*, CAL. DEPT OF CORR. AND REHAB. (Jan. 2020), 8 available at <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/01/Recidivism-Report-for-Offenders-Released-in-Fiscal-Year-2014-15.pdf> (finding that younger and property or drug offenders are significantly more likely to recidivate than older and violent offenders).

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ Va. Const. art. II § 1.

⁴⁷⁹ See Stuart Baum, *Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUSTICE (April 2018), available at <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia> (summarizing current felony disenfranchisement policies and legislative advocacy in Virginia).

⁴⁸⁰ Danielle Root, *Increasing Voter Participation in America*, CTR. FOR AM. PROGRESS (Jul. 2018), available at <https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/> (finding that offenders re-enfranchised by action of Virginia Governor McAuliffe had a voter registration rate of 14.98%).

⁴⁸¹ *Virginia's Recidivism Rate Remains Lowest in the Country*, CBS 19 NEWS, Feb. 3, 2020, <https://www.cbs19news.com/story/41644910/virginias-recidivism-rate-remains-lowest-in-the-country>

In Maine and Vermont, felons never lose their right to vote—even while incarcerated.⁴⁸² According to a report released by the Virginia Department of Corrections comparing Virginia’s recidivism rate to those of the other 50 states, Maine and Vermont’s recidivism rates were 30.5% and 45%, respectively as of October 2018.⁴⁸³

In April 2018, Governor Andrew Cuomo of New York issued an executive order removing the restrictions on parolees’ right to vote.⁴⁸⁴ Data is not yet available to make a comparison with respect to any impact Governor Cuomo’s executive order might have had with respect to recidivism in the state.

As of May 2019, Colorado’s Legislature has passed HB 1266 giving voting rights to individuals on parole.⁴⁸⁵ However, similar to New York Governor Cuomo’s executive order, data is not yet available to make a meaningful study whether the law reduced recidivism in the state.

E. Main Arguments in Support of Proposition 17

Proponents assert the purpose of parole is the supervised reintegration of felony offenders back into civil society.⁴⁸⁶ The right to vote has long been recognized as an invaluable right of United States citizens, historically denied to significant segments of society—even today.⁴⁸⁷ Proponents claim that—by re-enfranchising individuals on parole—parolees are given an incentive to adhere to the terms of their release, conform to societal standards of conduct, and are less likely to recidivate for fear of losing their newly regained franchise and out of respect for the community they feel a part of.⁴⁸⁸ Felony disenfranchisement has historically been used as a means of retaining a cheap labor supply in the aftermath of abolition.⁴⁸⁹ While some progress has been made, racial

⁴⁸² Jane C. Timm, *Most States Disenfranchise Felons. Maine and Vermont Allow Inmates to Vote from Prison*, NBC NEWS, Feb. 26, 2018, <https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406>

⁴⁸³ *State Recidivism Comparison*, VA. DEP’T OF CORRECTIONS (Dec. 2018), available at <https://vadoc.virginia.gov/media/1363/vadoc-state-recidivism-comparison-report-2018-12.pdf> (finding that Virginia has the lowest recidivism rate of any state, while Maine and Vermont have 30.5% and 45% recidivism rates, respectively).

⁴⁸⁴ N.Y., *Restoring the Right to Vote for New Yorkers on Parole*, No. 181, (April 2018) available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_181.pdf

⁴⁸⁵ Stephanie Daniel, *Parolees Vote for the First Time, Thanks to New Colorado Law*, KUNC, (Oct. 2019), <https://www.kunc.org/news/2019-10-28/parolees-vote-for-the-first-time-thanks-to-new-colorado-law>

⁴⁸⁶ *People v. Nuckles*, 56 Cal.4th 601, 608 (Cal. 2013) (finding the purpose of parole to be reintegration rather than punishment).

⁴⁸⁷ Taina Vargas-Edmond, Gregory Fidell, Lisa Schottenfeld & Sasha Feldstein, *Democracy Needs Everyone*, INITIATE JUSTICE, available at <https://www.initiatejustice.org/project/democracy-needs-everyone/> (last visited October 18, 2020).

⁴⁸⁸ *Id.* at 19.

⁴⁸⁹ *Id.* at 11.

disparities in criminal justice linger, and parole is no exception.⁴⁹⁰ As proponents argue, parolees contribute to their communities, work hard, pay taxes, and yet are barred from voting, resulting in the system functionally operating as “taxation without representation,”⁴⁹¹ which the United States has rejected since its founding. Over 150 organizations were registered as supporting ACA 6 upon its third reading in the State Senate, while only one organization registered in opposition—Election Integrity Project California, Inc.⁴⁹²

According to the Brennan Center for Justice at New York University School of Law, making voting rights dependent on the type of correctional supervision a former offender is on post-release leads to “de facto disenfranchisement.”⁴⁹³ The Brennan Center argues that passage of Proposition 17 would create “a clear bright-line rule” and remove the confusion around voter eligibility.⁴⁹⁴ For example, in California, those on probation are eligible to vote, but those on parole are not. Proponents at the Brennan Center argue that when distinctions are drawn between forms of supervision with respect to voting rights, otherwise eligible voters either think they cannot vote, or refrain from voting out of apprehension that they may be breaking the law or violating a provision of their release.⁴⁹⁵ The confusion is not limited to the formerly incarcerated. The Brennan Center found: “people with misdemeanor convictions in Kentucky do not lose the right to vote. However, 53% of county clerks interviewed in 2005 responded incorrectly to the question of whether individuals with misdemeanor convictions are eligible to vote.”⁴⁹⁶ Even the famous rapper Snoop Dogg has stated he was “brainwashed into thinking that you couldn’t vote because you had a criminal record” and thus he refrained from voting due to the misconception that his former felony gun and drug charges rendered him ineligible to vote, even though his record had been expunged.⁴⁹⁷

⁴⁹⁰ Justin Goss & Joseph Hayes, *California’s Changing Parole Population*, PUB. POLICY INST. OF CALIFORNIA (Feb. 2018), available at <https://www.ppic.org/publication/californias-changing-parole-population/> (finding county specific release rates for parolees in 2016).

⁴⁹¹ Initiate Justice, *Voting Rights for People on Parole: Proposition 17*, INITIATE JUSTICE, available at <https://www.initiatejustice.org/project/prop17/> (claiming that prohibitions on parolee voting operates as “taxation without representation”).

⁴⁹² SENATE FLOOR, COMMITTEE ANALYSIS ON ACA 6, at 6-10 (June 23, 2020) available at https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200ACA6.

⁴⁹³ ASSEMBLY FLOOR, COMMITTEE ANALYSIS ON ACA 6, at 6-10 (June 12, 2019) available at https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200ACA6.

⁴⁹⁴ ASSEMBLY FLOOR, COMMITTEE ANALYSIS ON ACA 6, at 6-10 (June 12, 2019) available at https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200ACA6.

⁴⁹⁵ Rachel Bloom & Erika Wood, *De Facto Disenfranchisement*, ACLU & BRENNAN CTR. FOR JUSTICE (Sept. 2008) available at <https://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf> (finding that eligible voters under correctional supervision and even some election officials are confused as to whether those on probation are eligible to vote).

⁴⁹⁶ *Id.*

⁴⁹⁷ Annie Lord, *Snoop Dogg says he will vote for first time in 2020: ‘I can’t stand to see this punk in office one more year’*, THE INDEPENDENT (June 9, 2020) available at <https://www.independent.co.uk/arts-entertainment/music/news/snoop-dogg-vote-2020-election-trump-joe-biden-a9555736.html>

F. Main Arguments in Opposition to Proposition 17

Opponents argue that paroled inmates have not earned the right to participate in the voting process because they have not fully paid their debt to society.⁴⁹⁸ Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, and Wyoming require further steps after completion of parole before an offender is re-enfranchised.⁴⁹⁹ Opponents also argue that parole is intended to be a period of adjustment, and thus voting rights should be withheld up until the point where parolees have demonstrated they are no longer a “threat to innocent civilians.”⁵⁰⁰ Additionally, opponents argue privileges such as voting, which is “the most fundamental and valuable of American privileges,” should be earned and deserved.⁵⁰¹ Finally, opponents point out that offenders on parole are supervised by a trained state agent, their movements are restricted, there are limitations on what property they can own, and “any misstep results in immediate re-incarceration.”⁵⁰²

G. Analysis of Competing Arguments

While both sides make forceful arguments for their respective positions, certain points of contention remain unclear. For instance, whether re-enfranchisement directly results in lower rates of recidivism is less clear than proponents suggest. In the coming years this body of data will certainly develop, given the recent passage of legislation and executive actions in states that have restored voting rights to former felony offenders.⁵⁰³ With respect to the proponent’s argument on the positive effects of re-enfranchisement on recidivism, the reality of recidivism in states such as Vermont muddy the waters. As

⁴⁹⁸ Christopher Weber, *2 California ballot measures would expand voting rights*, ASSOCIATED PRESS (Oct. 5, 2020), available at <https://apnews.com/article/election-2020-constitutions-voting-rights-general-elections-elections-72d27ee63fe4d755e19f8fcae2415431>

⁴⁹⁹ *Felon Voting Rights*, NAT’L CONF. OF STATE LEGS. (Sept. 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx#recent> (finding that in certain listed states, felons lose their voting rights until completion of sentence plus an additional waiting period or those states require additional action before rights are restored).

⁵⁰⁰ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 3, 2020, at 32, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf> (last visited Oct. 6, 2020) [“November 2020 Voter Guide”].

⁵⁰¹ *Id.*

⁵⁰² BALLOTPEDIA, *California Proposition 17, Voting Rights Restoration for Persons on Parole Amendment (2020)*, (2020), available at [https://ballotpedia.org/California_Proposition_17,_Voting_Rights_Restoration_for_Persons_on_Parole_Amendment_\(2020\)](https://ballotpedia.org/California_Proposition_17,_Voting_Rights_Restoration_for_Persons_on_Parole_Amendment_(2020))

⁵⁰³ N.Y., Restoring the Right to Vote for New Yorkers on Parole, No. 181, (April 2018) available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_181.pdf ; Stephanie Daniel, *Parolees Vote for the First Time, Thanks to New Colorado Law*, KUNC, Oct. 2019, <https://www.kunc.org/news/2019-10-28/parolees-vote-for-the-first-time-thanks-to-new-colorado-law>

previously stated, Vermont allows those on parole and even those still incarcerated to vote, but its recidivism rate is virtually identical to California's, sitting at about 45%.⁵⁰⁴

Although violent felonies feature prominently in the arguments and campaign materials of the opponents to the measure, the data shows that in California, violent offenders are far less likely to recidivate than property and drug offenders.⁵⁰⁵ Furthermore, opponents argue that parole is a part of a convicted offender's criminal sentence; however, the Supreme Court of California disagrees. In *People v. Nuckles*, the court articulated the difference between parole and the prison sentence, "under the present law the prison 'term' is the actual time served in prison before release on parole, and the day of release on parole marks the end of the prison term. . . . [T]he period of parole is not part of a defendant's prison term."⁵⁰⁶ Furthermore, the objective of parole is not to punish but to "assist in the parolee's transition from imprisonment to discharge and *reintegration into society*" (emphasis added).⁵⁰⁷

IV. CAMPAIGN FINANCE

Free the Vote, Yes on 17 is the main registered PAC in support of Proposition 17. Additionally, Proposition 17 is supported by California Secretary of State, Alex Padilla, and the Ballot Measure Committee for Democracy and Justice.⁵⁰⁸ Proponents have raised \$847,007 as of September 27, 2020.⁵⁰⁹ There are no PACs registered to oppose Proposition 17 and no reported campaign contributions have been raised as of September 27, 2020.⁵¹⁰

⁵⁰⁴ *State Recidivism Comparison*, VA. DEPT OF CORRS. (Dec. 2018), available at <https://vadoc.virginia.gov/media/1363/vadoc-state-recidivism-comparison-report-2018-12.pdf> (finding that Virginia has the lowest recidivism rate of any state, while Maine and Vermont have 30.5% and 45% recidivism rates, respectively).

⁵⁰⁵ Kevin Grassel, Kendra Jensen & Sam Mooc, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014-15*, CAL. DEPT OF CORRS. AND REHAB. (Jan. 2020), 8 available at <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/01/Recidivism-Report-for-Offenders-Released-in-Fiscal-Year-2014-15.pdf> (listing three-year recidivism rate broken down by demographics and offense of conviction).

⁵⁰⁶ *People v. Nuckles*, 56 Cal.4th 601, 608 (Cal. 2013) (finding that parole is distinct from the prison term).

⁵⁰⁷ *Id.* at 609.

⁵⁰⁸ California Secretary of State, *Proposition 17 - ACA 6 (Resolution Chapter 24), McCarty. Elections: disqualification of electors.*, available at <https://www.sos.ca.gov/campaign-lobbying/cal-access-resources/measure-contributions/2020-ballot-measure-contribution-totals/proposition-17-aca-6-resolution-chapter-24-mccarty-elections-disqualification-electors> (last visited October 18, 2020).

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

V. FISCAL CONSIDERATIONS

This initiative would have both annual and one-time fiscal effects on the state.⁵¹¹ In particular, the initiative would increase annual costs to counties for more voter registration and ballot materials, which the Legislative Analyst estimates to be in the hundreds of thousands of dollars throughout the state.⁵¹² This cost comes from the likely increase in the number of registered voters after parolees become eligible to register to vote under the initiative.⁵¹³ Because of this increase in the number of people who can register to vote and vote in elections, county elections offices would have an increased workload, processing the voter registrations of people on parole who register to vote and sending ballot materials to people on parole who register to vote.⁵¹⁴ The actual cost is uncertain and depends on how many people on parole actually register to vote in each election cycle as well as the specific costs of providing ballot materials during a given election.⁵¹⁵

It is difficult to project the number of people that will be on parole because of previous ballot initiatives that require a year of parole for misdemeanor re-sentencing or provide offenders with good behavior opportunities for parole.⁵¹⁶ However, the number of people released on parole is slight overall; trends in the last five years indicate that the parole population changes at a rate between -3.6% all the way to +7.3%.⁵¹⁷ Prior to COVID-19, the five-year projection was a net +2.1% increase in the parole population.⁵¹⁸ After the pandemic began, the projection shifted to +4.1%, representing a five-year increase of 2,135 parolees relative to the number of parolees projected in 2019.⁵¹⁹ However, this projection preceded the announcement that up to 8,000 prisoners are slated for early release this year to combat COVID-19 infections in prisons; as a result, the actual increase for 2020 may be substantially larger as more inmates are released on parole.⁵²⁰ The number of parolees

⁵¹¹ LEGISLATIVE ANALYST'S OFFICE, *Proposition 17, Restores Right to Vote After Completion of Prison Term. Legislative Constitutional Amendment.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop17-110320.pdf>.

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ Justin Goss & Joseph Hayes, *California's Changing Parole Population*, PUB. POLICY INST. OF CALIFORNIA (Feb. 2018), <https://www.ppic.org/publication/californias-changing-parole-population/>.

⁵¹⁷ See Huihui Xu et al, *Fall 2019 Population Projections*, CAL. DEPT OF CORRS. AND REHAB. (Jan. 2020), 16 available at <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/01/Fall-2019-Population-Projections.pdf> (listing annual percent change in the parole population from 2015–2019: 2.2%, -3.6%, 3.3%, 4.7%, and 7.3% respectively. This totaled to a five-year net increase of 13.9% or 5,349 parolees).

⁵¹⁸ *Id.* at 15.

⁵¹⁹ Juan Angel Villon et al, *Spring 2020 Population Projections*, CAL. DEPT OF CORRS. AND REHAB. (May 2020), 15–16 available at <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/05/Spring-2020-Population-Projections.pdf>.

⁵²⁰ Matthew Green, *California Could Release 8,000 State Prisoners by End of August to Slow Coronavirus Outbreaks*, KQED (July 10, 2020), <https://www.kqed.org/news/11828460/california-could-release-8000-people-in-state-prisons-by-august>.

for a given year necessarily impacts the costs incurred at the county level for registering parolees to vote.

As of July 3, 2020, the California Secretary of State reports that roughly 83.49% of eligible voters in California are registered to vote.⁵²¹ However, there is no data on how many of those voters are formerly incarcerated individuals, which limits the ability to project how many parolees will likely register to vote. However, studies conducted in other states have indicated that there is a drop in political participation after incarceration—both in terms of voting and registering to vote.⁵²² If California parolees behave similarly to parolees in other states, this measure would have a limited annual fiscal impact because although more people would become *eligible* to vote, less people would actually register to vote—which is the source of the ongoing county costs. Still, counties would experience some costs each year associated with distributing voter registration and ballot materials to parolees who in the end register to vote.

In addition to the ongoing cost at the county level, there would also be a one-time state cost to update voter registration cards and systems as well. This updating process is also estimated by the Legislative Analyst to cost somewhere in the hundreds of thousands of dollars.⁵²³ This one-time cost represents less than 1% (roughly .00035%–.00065%) of the state’s current General Fund budget (\$153 billion); thus, these costs are marginal.⁵²⁴ These costs are also associated with the likely increase in the number of registered voters.⁵²⁵ The state would need to update all voter registration cards and systems to reflect that people on parole can register to vote.⁵²⁶ For example, the Secretary of State provides voter registration cards and manages an electronic voter registration system, both of which would need to be updated to reflect that parolees can vote.⁵²⁷ Other state agencies also have voting-related workloads that could be affected by this change.⁵²⁸

⁵²¹ CAL. SEC’Y OF STATE, *123 Day Report of Registration for the November 3, 2020, General Election*, (July 3, 2020), available at <https://elections.cdn.sos.ca.gov/ror/123day-gen-2020/historical-reg-stats.pdf>.

⁵²² See Alan S. Gerber et al., *Does Incarceration Reduce Voting? Evidence about the Political Consequences of Spending Time in Prison?*, UNIV. OF PA. (2017), available at <https://www.sas.upenn.edu/~marcmere/workingpapers/EffectOfIncarceration.pdf> (documenting that a sample of formerly incarcerated individuals in Pennsylvania registered at a rate of 43.9% but voted at a rate of 14% in the 2012 election); see also Ernest Drucker and Ricardo Barreras, *Studies of Voting Behavior and Felony Disenfranchisement Among Individuals in the Criminal Justice System in New York, Connecticut, and Ohio*, SENTENCING PROJECT (Sept. 2005) (reporting that samples of formerly incarcerated individuals in Connecticut and New York respectively had a 50% and 33% decrease in voter registration post-incarceration compared to pre-incarceration).

⁵²³ LEGISLATIVE ANALYST’S OFFICE, *Proposition 17, Restores Right to Vote After Completion of Prison Term. Legislative Constitutional Amendment.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop17-110320.pdf>.

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

VI. CONCLUSION

Proposition 17 would amend the California Constitution to allow for individuals convicted of a felony to register to vote and vote while on parole. If passed, Proposition 17 would align the state's parole population with populations under other forms of criminal supervision, such as probation. Being a Legislative Constitutional Amendment, Proposition 17 has been drafted by the Legislature to specifically avoid legal challenge and constitutional issues.

Proposition 18:
Primary Voting For 17-Year-Olds Amendment
Allows 17-Year-Olds to Vote in Primary Elections

Legislative Constitutional Amendment

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I. EXECUTIVE SUMMARY

Proposition 18 is a constitutional amendment proposed by the California Assembly. This proposition would amend the California Constitution to allow 17-year-olds who are U.S. citizens, residents of California, and will be at least 18 years old at the time of the next general election, to vote in the primary or special election prior to the general election that they will be eligible to vote in.

There have been numerous attempts to lower the voting age in California. Since 1995, there have been five proposed constitutional amendments, four of which would have allowed the new voters to vote in all elections, not just college and school board elections. There have also been just as many proposals to allow exactly what Proposition 18 is proposing. Assembly Constitutional Amendment ("ACA") 4, which became Proposition 18, was the sixth such attempt since 2004.

A **YES** vote on this measure allows eligible 17-year-olds who will be 18 years old by the time of the next general election to vote in the primary election and any special elections preceding the general election.

A **NO** vote on this measure retains the current rule for elections that no one younger than 18 years of age may vote in any election.

II. THE LAW

A. Existing Law

Current California law requires an elector to be at least 18 years old to vote in any local, state, or federal election.⁵²⁹ Prior to voting, a person must register to vote.⁵³⁰ A person may register to vote if they are a U.S. citizen, a resident of California, not in prison or on parole for the conviction of a felony, and will be at least 18 years old at the time of the next election.⁵³¹ A person may also pre-register to vote if they are at least 16 years old and otherwise meet all voter eligibility requirements. For pre-registrants, the registration will be deemed effective when they are 18 years old at the time of the next election.⁵³²

B. Background

There have been significant attempts to provide minors with more access to California elections. Two primary methods have been used: lowering the voting age and allowing minors to preregister to vote. The latter method has been more successful.

⁵²⁹ CAL. CONST. art. II, § 2.

⁵³⁰ CAL. ELEC. CODE § 2000 (2020).

⁵³¹ CAL. ELEC. CODE § 2101 (2020).

⁵³² CAL. ELEC. CODE §§ 2101-02 (2020).

1. Preregistration

In 2009, the California Assembly passed Assembly Bill (“AB”) 30. This law allowed 17-year-olds to preregister to vote as long as they meet all the voter eligibility requirements.⁵³³ When the preregistered 17-year-old turns 18 years old, the voter registration becomes effective, granting them the right to vote.⁵³⁴

In 2014, the California Senate enacted Senate Bill (“SB”) 113. This law was similar to AB 30, allowing 16-year-olds to preregister.⁵³⁵ This law also granted the preregistered voters the right to vote when they turned 18 years old.⁵³⁶ The Department of Motor Vehicles (“DMV”) is one of the primary places in which young people tend to interact with the government and register to vote.⁵³⁷ Consequently, one of the rationales for this bill was to allow 16-year-olds to preregister to vote when they go to the DMV for their driver’s license.⁵³⁸

2. Lowering the Voting Age

All the attempts to lower the voting age below 18 have failed. The most recent attempt at lowering the voting age was in 2019. In 2019, the Assembly considered three constitutional amendments pertaining to voting rights: ACA 4 (Proposition 18), ACA 6 (Proposition 17), and ACA 8.

ACA 8 was a constitutional amendment that sought to amend the California Constitution to allow anyone “who is at least 17 years of age” to vote.⁵³⁹ The Assembly ratified this proposal.⁵⁴⁰ However, when it was sent to the Senate it was never brought to a vote in the Senate Elections and Constitutional Amendments Committee.⁵⁴¹

⁵³³ AB 30, 2009 Leg., 2009–2010 Reg. Sess. (Cal. 2009).

⁵³⁴ CAL. ELEC. CODE § 2102(d) (2009).

⁵³⁵ SB 113, 2014 Leg., 2013–2014 Reg. Sess. (Cal. 2014).

⁵³⁶ CAL. ELEC. CODE § 2102(d) (2014).

⁵³⁷ Senate Committee on Elections and Constitutional Amendments, Committee Analysis of SB 113, at 2–3 (April 2, 2013).

⁵³⁸ *Id.*

⁵³⁹ ACA 8, 2019 Leg., 2019–2020 Reg. Sess. (Cal. 2019).

⁵⁴⁰ Complete Bill History of ACA 8, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200ACA8 (last visited Sept. 21, 2020).

⁵⁴¹ *Id.*

In 2017, Assembly Member Evan Low introduced ACA 10. This constitutional amendment proposed lowering the voting age to 17.⁵⁴² However, this proposal failed to garner enough support in the Assembly to overcome the required two-thirds threshold.⁵⁴³

In 2016, Assembly Member Lorena Gonzalez proposed ACA 7. This constitutional amendment proposed to allow 16- and 17-year-olds to vote in school and community college board elections in the districts where they resided.⁵⁴⁴ However, this proposed amendment did not come up for a vote in the Assembly Elections and Redistricting Committee.⁵⁴⁵

In 2016, Assembly Member Tony Thurmond proposed AB 2517. This bill would have allowed a charter city to amend its charter to provide 16- and 17-year-olds the opportunity to vote in the school board elections in the district where they reside.⁵⁴⁶ However, this proposal did not come up for a vote and failed after leaving the committee without a vote.⁵⁴⁷

In 2004, Senator John Vasconcellos introduced Senate Constitutional Amendment (“SCA”) 19. This amendment initially proposed to lower the voting age to 14, counting 14- and 15-year-olds’ votes as one-quarter of a vote, and 16- and 17-year-olds’ votes as one-half of a vote.⁵⁴⁸ This proposal was subsequently amended to instead lower the voting age to 16, counting all votes equally as a single vote, but failed to pass in the Senate Appropriations Committee.⁵⁴⁹

In 1995, Assembly Member Jackie Speier proposed ACA 23. This constitutional amendment proposed lowering the voting age in California to 14.⁵⁵⁰ However, it was never set for a hearing in the Assembly Elections, Reapportionment, and Constitutional Amendments Committee.⁵⁵¹

⁵⁴² ACA 10, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017).

⁵⁴³ Complete Bill History of ACA 10, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180ACA10 (last visited Sept. 21, 2020).

⁵⁴⁴ ACA 7, 2016 Leg., 2015–2016 Reg. Sess. (Cal. 2016).

⁵⁴⁵ Complete Bill History of ACA 7, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160ACA7 (last visited Sept. 21, 2020).

⁵⁴⁶ AB 2517, 2016 Leg., 2015–2016 Reg. Sess. (Cal. 2016).

⁵⁴⁷ Complete Bill History of AB 2517, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2517 (last visited Sept. 29, 2020).

⁵⁴⁸ SCA 19, 2004 Leg., 2003–2004 Reg. Sess. (Cal. 2004) (as introduced Mar. 8, 2004, but not enacted).

⁵⁴⁹ SCA 19, 2004 Leg., 2003–2004 Reg. Sess. (Cal. 2004) (as amended July 26, 2004, but not enacted); Complete Bill History of SCA 19, http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=200320040SCA19 (last visited Sept. 21, 2020).

⁵⁵⁰ ACA 23, 1995 Leg., 1995–1996 Reg. Sess. (Cal. 1995).

⁵⁵¹ Assembly Committee on Elections and Redistricting, Committee Analysis of ACA 4, at 4 (June 19, 2019).

3. Previous Legislation

There were five previous proposals that were substantially similar to Proposition 18.⁵⁵² All of them would have allowed 17-year-olds who would have been 18 before the next general election to vote in any intervening primary or special election.⁵⁵³ Due to the perceived partisan nature of the proposals, they were viewed as mere attempts to increase the number of Democratic voters, none of these proposals passed.⁵⁵⁴ However, with Democrats comprising over 70 percent of lawmakers in both chambers of the Legislature, on the sixth time the proposal was approved.⁵⁵⁵

4. Other States

Currently, seventeen states, including Washington D.C., allow 17-year-olds to vote in the primary and special elections if they will be 18 years old by the next general election.⁵⁵⁶ However, no state allows 17-year-olds to vote in general elections.⁵⁵⁷ Of these eighteen jurisdictions, only two constitutionally guarantee this right.⁵⁵⁸ In the other jurisdictions, this right is only statutorily granted.⁵⁵⁹ In some states 17-year-olds have the right to vote in presidential caucuses, however, in many of those states the party is primarily responsible for the caucus.⁵⁶⁰

In 2019, the Colorado Legislature enacted House Bill (“HB”) 1278, without any Republicans voting in favor.⁵⁶¹ This law granted 17-year-olds the right to vote in primary and special elections if they would turn 18 by the next general election.⁵⁶² In November 2020, Colorado voters will consider a ballot initiative amending the state constitution – Amendment 76.⁵⁶³ The primary purpose of this amendment is to ensure that non-citizens will

⁵⁵² ACA 2, 2015 Leg., 2015–2016 Reg. Sess. (Cal. 2015); ACA 7, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2014); ACA 2, 2008 Leg., 2009–2010 Reg. Sess. (Cal. 2008); ACA 17, 2005 Leg., 2005–2006 Reg. Sess. (Cal. 2005); ACA 25, 2004 Leg., 2003–2004 Reg. Sess. (Cal. 2004).

⁵⁵³ Assembly Committee on Elections and Redistricting, Committee Analysis of ACA 4, at 4 (June 19, 2019).

⁵⁵⁴ *Prop 18 - Voters to Decide on Giving the Right to Vote to Some 17-year-olds*, Both Online and Off, PROPOSITIONED (Oct. 12, 2020), <https://www.iheart.com/podcast/85-propositioned-29998297/episode/prop-18-voters-to-decide-72496815/>.

⁵⁵⁵ *California Proposition 18, Primary Voting for 17-Year-Olds Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_18_Primary_Voting_for_17-Year-Olds_Amendment_\(2020\)](https://ballotpedia.org/California_Proposition_18_Primary_Voting_for_17-Year-Olds_Amendment_(2020)) (last visited Oct. 16, 2020).

⁵⁵⁶ *Voting Age for Primary Elections*, NAT’L CONF. ST. LEGIS. (NCSL), <https://www.ncsl.org/research/elections-and-campaigns/primaries-voting-age.aspx> (last visited Oct. 16, 2020).

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

⁵⁶⁰ *Facts: 17-Year-Old Primary Voting*, FAIRVOTE, https://www.fairvote.org/facts_17_year_old_primary_voting (last visited Sept. 21, 2020).

⁵⁶¹ Jesse Paul, *17-year-olds Would No Longer Be Able to Vote in Colorado Primaries if Ballot Question Passes*, COLO. SUN (Sept. 4, 2020), <https://coloradosun.com/2020/09/04/amendment-76-colorado-noncitizens-voting/> (last visited Oct. 16, 2020).

⁵⁶² *Id.*

⁵⁶³ *Id.*

not vote in Colorado elections.⁵⁶⁴ However, due to a minor change in language, the amendment will undermine HB 1278, by inadvertently removing 17-year-olds' ability to vote.⁵⁶⁵ This amendment replaces the word "Every" with the words "Only a" in the sections of the Colorado Constitution pertaining to voting rights.⁵⁶⁶ If the amendment passes, the resulting section would read: "Every Only a citizen of the United States who has attained the age of eighteen years, has resided in this state for such a time as may be prescribed by law, and has been duly registered as a voter if required by law shall be qualified to vote at all elections."⁵⁶⁷ Consequently, this change would take away 17-year-olds' ability to vote.⁵⁶⁸

5. Voter Turnout

On the local level, lowering the voting age may increase voter turnout, at least for the younger age group. In 2013, when Takoma Park, Maryland lowered its voting age to 16, the voting turnout for 16- and 17-year-olds was four times higher than the overall voter turnout.⁵⁶⁹ The turnout for the young voters was 44 percent compared to an overall turnout of 11 percent.⁵⁷⁰ However, in the 2003 Baltimore mayoral primary election, there was no meaningful difference between the general turnout and the turnout for 16- and 17-year-olds.⁵⁷¹ The voter turnout for the former was 36 percent compared to 35 percent for the latter.⁵⁷²

On the state level, there is less data available.⁵⁷³ Though one recent example is from Colorado, which granted 17-year-olds the right to vote in the primary in 2019.⁵⁷⁴ In the 2020 Presidential Primary, the voter turnout for 17-year-olds was 45.24 percent compared to the general turnout of 45.5 percent.⁵⁷⁵ Of the 10,634 ballots cast by 17-year-olds, 6,841 were cast in the Democrat Primary and 3,235 were cast in the Republican Primary.⁵⁷⁶ However,

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

⁵⁶⁶ *Colorado Amendment 76, Citizenship Requirement for Voting Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Amendment_76,_Citizenship_Requirement_for_Voting_Initiative_\(2020\)](https://ballotpedia.org/Colorado_Amendment_76,_Citizenship_Requirement_for_Voting_Initiative_(2020)) (last visited Sept. 29, 2020).

⁵⁶⁷ *Id.* (amending COLO. CONST. art. VII, § 1).

⁵⁶⁸ Paul, *supra* note 33.

⁵⁶⁹ Simran Saini, *Low Voter Turnout Among Young People - And How to Increase It*, LEAGUE WOMEN VOTERS WAKE COUNTY (July 24, 2020), <https://www.lwvwake.org/the-voter-blog/2020/7/22/causes-of-low-voter-turnout-among-young-people-and-how-to-increase-it> (last visited Oct. 17, 2020).

⁵⁷⁰ J.B. Wogan, *Takoma Park Sees High Turnout Among Teens After Election Reform*, GOVERNING (Nov. 7, 2013), <https://www.governing.com/news/headlines/gov-maryland-city-sees-high-turnout-among-teens-after-election-reform.html> (last visited Oct. 17, 2020).

⁵⁷¹ *Voting Age: Facts and Resources*, National Youth Rights Association, <https://www.youthrights.org/issues/voting-age/facts-and-resources/> (last visited Oct. 17, 2020).

⁵⁷² *Id.*

⁵⁷³ Saini, *supra* note 41.

⁵⁷⁴ Paul, *supra* note 33.

⁵⁷⁵ *Colorado's Young Voter Turnout Strong for Presidential Primary*, Colorado Secretary of State, <https://www.sos.state.co.us/pubs/newsRoom/pressReleases/2020/PR20200309YoungVoters.html> (last visited Oct. 17, 2020).

⁵⁷⁶ *Id.*

due to the limited amount of jurisdictions that allow 17-year-olds to vote, there is insufficient data to conclusively state whether allowing 17-year-olds to vote would significantly increase voter turnout on the state level.⁵⁷⁷

C. Path to the Ballot

In 2019, Assembly Member Kevin Mullin introduced ACA 4.⁵⁷⁸ ACA 4 was a constitutional amendment seeking to grant 17-year-olds the right to vote in any primary or special election, if they would be at least 18 years of age by the next general election.⁵⁷⁹ This constitutional amendment was adopted by a two-thirds vote in the Assembly (Ayes 58, Noes 13), then adopted by the Senate with a two-thirds vote as well (Ayes 31, Noes 7).⁵⁸⁰ While in the Senate it was amended to add “election in which the citizen would be eligible to vote if at least 18 years of age” and remove the word “intervening.”⁵⁸¹ The Assembly concurred with the amendments with a two-thirds majority (Ayes 56, Noes 13).⁵⁸² After being approved by both chambers, the constitutional amendment must be presented to the people.⁵⁸³ So on July 1, 2020, ACA 4 was submitted to the Secretary of State of California, so he could present the initiative on the November 2020 ballot.⁵⁸⁴

III. DRAFTING ISSUES

The language of the amendment consists of two subsections with eighty-four words total (Subsection A contains twenty words and Subsection B contains sixty-four).⁵⁸⁵ Since the proposed amendment slightly modifies one subsection while adding another, it does not appear to contain any drafting issues.

While in the Senate the language of the proposal was amended to add the words “election in which the citizen would be eligible to vote if at least 18 years of age” and removed the word “intervening.”⁵⁸⁶ This amended language clarifies that the elector must still attain the age of 18 years old, while not creating any potential drafting issues.

⁵⁷⁷ Saini, *supra* note 41.

⁵⁷⁸ This was Assembly Member Mullin’s third attempt to pass this amendment; ACA 7 in 2013 and ACA 2 in 2015 were his previous attempts. His father, Assembly Member Gene Mullin, introduced ACA 25 in 2004 and ACA 17 in 2005.

⁵⁷⁹ ACA 4, 2019 Leg., 2019–2020 Reg. Sess. (Cal. 2019).

⁵⁸⁰ Complete Bill History of ACA 4, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200ACA4 (last visited Oct. 16, 2020).

⁵⁸¹ ACA 4, 2019 Leg., 2019–2020 Reg. Sess. (Cal. 2019) (as amended June 20, 2020).

⁵⁸² Complete Bill History of ACA 4, *supra* note 52.

⁵⁸³ CAL. CONST. art. XVIII, §§ 1-4.

⁵⁸⁴ ACA 4, *supra* note 53.

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.*

IV. CONSTITUTIONAL ISSUES

A. Federal Constitution

The Twenty-Sixth Amendment to the United States Constitution prohibits abridging or denying people of eighteen years of age the right to vote based on their age.⁵⁸⁷ Proposition 18 does not abridge any voting rights, but rather expands the right to vote. According to the Legislative Counsel, expanding the right to vote to persons under the age of 18 would not conflict with federal law.⁵⁸⁸

Further, there are eighteen other states that permit those who are 17 years old to vote and have not yet been found to conflict with the United States Constitution or other federal law. Thus, Proposition 18 is not likely to be found in conflict with the United States Constitution.

B. State Constitution

Proposition 18 amends the language of the California Constitution. Currently the California Constitution states that “A United States citizen 18 years of age and resident in this State may vote.”⁵⁸⁹ This amendment would make the following changes, denoted by the underlined text:

“(a) A United States citizen who is at least 18 years of age and a resident in this State may vote.

(b) A United States citizen who is 17 years of age, is a resident in this State, and will be at least 18 years of age at the time of the next general election may vote in any primary or special election that occurs before the next general election in which the citizen would be eligible to vote if at least 18 years of age.”⁵⁹⁰

The State Constitution also restricts the state legislature’s authority to package contrasting proposals together in a single amendment and requires they be presented to the people separately for separate votes.⁵⁹¹

In the 2019-2020 Legislative Session, the Assembly considered two additional constitutional amendments pertaining to voting rights. ACA 6 proposed to amend the California Constitution to give the right to vote to those who have completed a prison sentence, or are on parole for, a felony conviction.⁵⁹² ACA 8 proposed to amend the California Constitution to lower the voting age for any election to 17 years old.⁵⁹³

⁵⁸⁷ U.S. CONST. amend. XXVI.

⁵⁸⁸ Assembly Committee on Elections and Redistricting, Committee Analysis of ACA 4, at 2 (June 19, 2019).

⁵⁸⁹ CAL. CONST. art. II, § 2.

⁵⁹⁰ ACA 4, *supra* note 53.

⁵⁹¹ CAL. CONST. art. XVIII, § 1.

⁵⁹² ACA 6, 2019 Leg., 2019–2020 Reg. Sess. (Cal. 2019).

⁵⁹³ ACA 8, 2019 Leg., 2019–2020 Reg. Sess. (Cal. 2019).

However, both ACA 6 and ACA 8 were added as separate and distinct amendments from ACA 4. Therefore, Proposition 18 should not raise any separate-vote concerns as it merely amends Subsection (a) and adds Subsection (b) to Section 2 of Article II of the California Constitution.⁵⁹⁴

V. PUBLIC POLICY ISSUES

A. Proponents

1. Civic Engagement

Proponents argue that allowing 17-year-olds to vote would facilitate civic engagement. Proposition 18 would capitalize on the high rates of political participation and allow for the youth to convert that activism into civic engagement at the polls. Young people are very politically active and are leading the charge on a gun control agenda, especially after the Parkland shooting.⁵⁹⁵ Additionally, the young people participate in many protests related to climate change and systemic racism.⁵⁹⁶

Further, proponents want to help form voting habits in youth that will be 18 years old by the next general election.⁵⁹⁷ Allowing 17-year-olds who will be 18 by the general election to vote in the primary election will help form this habit. Some proponents also highlight that it is easier to engage in and learn the process of voting in the spring, while still in high school, rather than in the fall when a person is trying to acclimate to a new job or college.⁵⁹⁸

In 2020, the youth (ages 18-24) consisted of about 14.5% of the eligible voting population, however, only about 6% voted in the 2020 primaries.⁵⁹⁹ The proponents argue that in order to increase the representation of the youth, it is important to instill in them a habit of voting even before they turn 18.⁶⁰⁰

⁵⁹⁴ ACA 4, *supra* note 53.

⁵⁹⁵ Alex Padilla, *Commentary: Vote Yes on Prop. 18 to Engage, Energize and Empower the Next Generation of Voters*, SAN DIEGO UNION-TRIB. (Sept. 17, 2020), <https://www.sandiegouniontribune.com/opinion/commentary/story/2020-09-17/yes-on-proposition-18-teen-voters> (last visited Sept. 21, 2020).

⁵⁹⁶ *Id.*

⁵⁹⁷ Alfred Twu, *Why I'm Voting Yes on Proposition 18*, MEDIUM (Aug. 3, 2020), <https://medium.com/@firstcultural/why-im-voting-yes-on-proposition-18-eeca072f7b7b> (last visited Sept. 21, 2020).

⁵⁹⁸ *Id.*

⁵⁹⁹ USC PRICE, CALIFORNIA'S 2020 PRIMARY ELECTION: TURNOUT ANALYSIS, *available at* <https://static1.squarespace.com/static/57b8c7ce15d5dbf599fb46ab/t/5ee5279aac46160bd52a3fa9/1592076188968/CCEP+Fact+Sheet+CA+2020+Primary+Election+Turnout+Final.pdf>.

⁶⁰⁰ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY NOVEMBER 3, 2020, at 36, *available at* <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf> ["NOVEMBER 2020 VOTER GUIDE"].

2. Consistency

One argument in favor of allowing 17-year-olds to vote is that they already work and pay taxes.⁶⁰¹ Further, 17-year-olds can join the military, albeit with parental consent.⁶⁰² Consequently, the proponents argue that, just as with the Twenty-Sixth Amendment, 17-year-olds should have the right to vote the year they turn 18 since they “put their lives on the line for our country and [contribute] financially to society.”⁶⁰³

Additionally, according to the California Secretary of State Alex Padilla, Proposition 18 is the next logical step for California to strengthen the political participation by the youth, since 16- and 17-year-olds already have the right to preregister.⁶⁰⁴

B. Opponents

1. Not Legal Adults

The primary argument against Proposition 18 is that 17-year-olds are legally children.⁶⁰⁵ Consequently, as children, 17-year-olds have no experience balancing a budget or paying taxes. Since they have no experience paying taxes, they should not have the opportunity to vote on taxes, which tend to appear on the primary ballot.⁶⁰⁶

Recently, there has been a trend to increase the age at which young adults are required to become responsible for themselves or to secure certain rights. According to the Affordable Care Act (“ACA”) people can be considered dependents until the age of 26.⁶⁰⁷ Additionally, California increased the age at which one may buy tobacco to mirror the age required to purchase alcohol: 21.⁶⁰⁸ Thus, if 17-year-olds cannot be trusted to purchase tobacco or alcohol, it makes absolutely no sense to trust them with deciding on bond and tax measures indebteding the state.⁶⁰⁹

⁶⁰¹ STATE OF CAL., DEP’T OF FIN., 2011 AMERICAN COMMUNITY SURVEY 1-YEAR REPORT:

CALIFORNIA, (Oct. 2013, Rev. April 2014) *available at*

http://dof.ca.gov/Reports/Demographic_Reports/documents/2011ACS_1year_Rpt_CA.pdf.

⁶⁰² *Join the Military*, USA.GOV (last updated Aug. 28, 2020), <https://www.usa.gov/join-military>.

⁶⁰³ NOVEMBER 2020 VOTER GUIDE at 37.

⁶⁰⁴ Padilla, *supra* note 57.

⁶⁰⁵ CAL. FAM. CODE §§ 6500–01 (2020).

⁶⁰⁶ Mercury New Editorial Board & East Bay Times Editorial Board, *Editorial: Who should be allowed to cast a ballot in California?*, MERCURY NEWS (Aug. 13, 2020), <https://www.mercurynews.com/2020/08/13/editorial-who-should-be-allowed-to-cast-a-ballot-in-california/> (last visited Sept. 21, 2020).

⁶⁰⁷ Ruth Weiss, *Commentary: Vote no on Prop. 18 because allowing minors to vote is wrong and could be disastrous*, SAN DIEGO UNION-TRIB. (Sept. 17, 2020), <https://www.sandiegouniontribune.com/opinion/commentary/story/2020-09-17/no-on-proposition-18-teen-voters> (last visited Oct. 16, 2020).

⁶⁰⁸ CAL. BUS. & PROF. CODE §§ 17537.3, 22951, 22952, 22956, 22958, 22963, 22964 (2020); CAL. PENAL CODE § 308 (2020).

⁶⁰⁹ Weiss, *supra* note 69.

Further, this double standard of lowering the voting age while increasing the age limit in other spheres extends to criminal justice reform as well.⁶¹⁰ According to scientific evidence, the brain is not completely developed until a person is at least 24.⁶¹¹ As a result of this evidence, Senator Nancy Skinner proposed SB 889, to allow the juvenile courts to not only maintain jurisdiction over individuals between the ages of 12 and 19 but to extend its jurisdiction to 24-year-olds.⁶¹² Some opponents think it is hypocritical of the Legislature to consider two conflicting claims about young adults: on the one hand, young adults are so irrational when they commit crimes that they should be tried in juvenile court; while on the other hand, teens are completely rational when it comes to deciding the future of this state and should be allowed to vote.⁶¹³ Some opponents believe that attempts at reconciling these two claims is either pure hypocrisy or evidence of a hidden agenda.⁶¹⁴

2. Undue Influence

Opponents also suggest that 17-year-olds are too dependent on their parents.⁶¹⁵ Consequently, allowing them to vote would essentially give an extra vote to the parents rather than facilitate independent thought from the 17-year-olds.⁶¹⁶

Furthermore, 17-year-olds are typically still in high school. As high school students, they are dependent on teachers and counselors for letters of recommendation and grades that will determine their immediate future.⁶¹⁷ Consequently, they would be likely to listen to whatever their teachers and counselors advise them, even for vital political decisions.⁶¹⁸ Opponents point to Measure EE, proposed by the Los Angeles Unified School District, to illustrate their point. In that case, teachers and administration posted political banners on campus and distributed literature for students to take home.⁶¹⁹

C. Fiscal Impact

The Legislative Analyst's Office ("LAO") predicts two types of fiscal impacts from Propositions 18, one a minor cost for Counties and one a minor one-time cost for the State.

⁶¹⁰ Anita Chabria, *Offenders under 21 would be automatically tried as juveniles under new California bill*, L.A. TIMES (Jan. 28, 2020), <https://www.latimes.com/california/story/2020-01-28/california-considers-charging-all-teens-as-juveniles> (last visited Oct. 16, 2020).

⁶¹¹ *Id.*

⁶¹² SB 889, 2020 Leg., 2019–2020 Reg. Sess. (Cal. 2020).

⁶¹³ Weiss, *supra* note 69.

⁶¹⁴ Weiss, *supra* note 69.

⁶¹⁵ Mercury New Editorial Board & East Bay Times Editorial Board, *supra* note 68.

⁶¹⁶ Assembly Committee on Elections and Redistricting, Committee Analysis of ACA 4, at 3 (June 19, 2019).

⁶¹⁷ Weiss, *supra* note 69.

⁶¹⁸ *Id.*

⁶¹⁹ NOVEMBER 2020 VOTER GUIDE at 37.

Statewide county costs generated from processing and distributing election material to eligible 17-year-olds are estimated to be between several hundreds of thousands of dollars and \$1 million.⁶²⁰ The cost would depend on the number of 17-year-olds that register to vote in the primary elections.⁶²¹

The one-time cost to the state of updating the existing voter registration systems is estimated to be in the several hundreds of thousands of dollars.⁶²²

VI. CONCLUSION

Proposition 18 would amend the California Constitution to allow 17-year-olds to vote in interim primary and special elections if they will be 18 years old by the time of the next general election. The proponents argue that allowing 17-year-olds to vote will encourage the youth to convert their political activism into constructive habits for civic engagement and is consistent with other rights and obligations 17-year-olds already have. On the other hand, the opponents argue that 17-year-olds should not be allowed to vote because they are not responsible or developmentally mature enough to participate in the weighty decision-making process of elections and would vote according to the influence of their parents and school faculty.

A **YES** vote on this measure allows eligible 17-year-olds who will be 18 years old by the time of the next general election to vote in the primary election and any special elections preceding the general election.

A **NO** vote on this measure retains the current election rule that no one younger than 18 years of age may vote in any election.

⁶²⁰ LEGIS. ANALYST'S OFF., PROPOSITION 18 2 (Nov. 3, 2020), *available at* <https://lao.ca.gov/ballot/2020/Prop18-110320.pdf>.

⁶²¹ *Id.*

⁶²² *Id.*

Proposition 19:
**The Home Protection for Seniors, Severely
Disabled, Families, and Victims of Wildfire and
Natural Disasters Act**

Legislative Constitutional Amendment

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I. EXECUTIVE SUMMARY

Proposition 19 is a legislatively referred constitutional amendment seeking to change certain property tax rules and create two related funds. It will allow those over the age of 55, severely disabled, or victims of wildfires and natural disasters to transfer their property tax base to a new residence.⁶²³ Proposition 19 will also create two new funds, the California Fire Response Fund and the County Revenue Protection fund.⁶²⁴

A **Yes** vote means those over the age of 55, severely disabled, or victims of wildfire and natural disaster would have eligibility for property tax savings when moving anywhere in the state.⁶²⁵ Additionally, only properties inherited for the use as primary residences would be eligible for pre-existing property tax benefits that are attached to inherited property.⁶²⁶

A **No** vote means that some individuals over the age of 55 would be eligible for property tax savings if they meet current qualifications.⁶²⁷ Additionally, all properties inherited would continue to receive property tax savings.⁶²⁸

A. Path to the Ballot

Under California law, the Legislature is granted the power to refer proposed constitutional amendments to the people.⁶²⁹ A two-thirds majority vote is needed in both the Assembly and Senate before a proposed amendment can be referred to the people.⁶³⁰

Proposition 19 was introduced as Assembly Constitutional Amendment 11 (ACA 11) by lead authors Assembly Members Mullin, Burke, Friedman, Gray, and Mayes as well as Principal Coauthors Senators Atkins, Galgiani, and Hill.⁶³¹ ACA 11 passed its Senate floor vote with 29 ayes, 5 noes, and 6 abstentions (approval by 72.5% of the Senate).⁶³² It later

⁶²³ Cal. Sec'y of State, Official Voter Information Guide: California Primary Election, Tuesday November 3, 2020., <https://voterguide.sos.ca.gov/propositions/19/> (Last Visited, Sept. 22, 2020).

⁶²⁴ ACA 11, 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶²⁵ *Official Voter Guide*, California Secretary of State, <https://voterguide.sos.ca.gov/propositions/19/> (Last Visited, Sept. 22, 2020).

⁶²⁶ *Id.*

⁶²⁷ *Id.*

⁶²⁸ *Id.*

⁶²⁹ Cal. Constitution Art. XVIII, § 1

⁶³⁰ *Id.*

⁶³¹ Current Bill Status of ACA 11, https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200ACA11 (Last Visited, Sept. 19, 2020).

⁶³² Senate Floor Vote of ACA 11 (June 25, 2020), https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201920200ACA11 (Last Visited, Sept. 19, 2020).

passed its Assembly floor vote with 56 ayes, 5 noes, and 18 abstentions (approval by 70% of the Assembly).⁶³³ Upon passage by the legislature, ACA 11 was enrolled, filed, and chaptered by the Secretary of State.⁶³⁴ ACA 11 will now appear on the November ballot as Proposition 19.⁶³⁵ A similar, previously qualified initiative backed by the California Association of Realtors was also on the ballot due to lack of a withdrawal by the deadline.⁶³⁶ However, the Secretary of State removed the nearly identical measure from the ballot, resulting in only Proposition 19 appearing on the ballot. At the time of publication, there had been no legal challenge to this removal.⁶³⁷

II. THE LAW

A. Current Law

As the law stands today, the California Constitution (amended by the passage of Proposition 13 in 1978) limits real property *ad valorem* taxes to one percent of the cash value of the property at 1975 values.⁶³⁸ Properties will then only be reappraised if it is a new property or there is a change in ownership.⁶³⁹ There is also a constitutional limit of inflationary growth of two percent per year.⁶⁴⁰

The California Constitution has an exception that allows for persons over the age of 55 or who are considered disabled to transfer the base year value of their property to a new property within their county or a county that allows transfers from other counties.⁶⁴¹ A base year value is the value of the property as of 1975-1976 or when a change of ownership occurs or there is new construction on the property.⁶⁴² Current law also states that a transfer of a primary residence between parent and child, or between grandparent and grandchild so long as the parents are deceased, is not considered a purchase or change of ownership

⁶³³ Assembly Floor Vote of ACA 11 (June 26, 2020) https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201920200ACA11 (Last Visited, Sept. 19, 2020).

⁶³⁴ Current Bill Status of ACA 11, https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200ACA11 (Last Visited, Sept. 19, 2020).

⁶³⁵ *Qualified Statewide Ballot Measures*, California Secretary of State, <https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures> (Last Visited, Sept. 19, 2020).

⁶³⁶ Howard Jarvis Taxpayers Association, About Page. Hjta.org/about-hjta (Last Visited, Sept. 22, 2020).

⁶³⁷ *Id.*

⁶³⁸ SENATE FLOOR, COMMITTEE ANALYSIS OF ACA 11 at 2, (June 25, 2020).

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*

⁶⁴² *Understanding Proposition 13*, Office of the Assessor, County of Santa Clara, <https://www.sccassessor.org/index.php/faq/understanding-proposition-13#:~:text=Understanding%20Base%20Year%20Values&text=Properties%20that%20have%20not%20sold,of%20the%20date%20of%20transfer>. (Last Visited, Sept. 19, 2020).

for assessing the new value of the property for taxation purposes.⁶⁴³ The current law was set in place by the passage of Proposition 13 in 1978.

B. History

There has been a long history of ballot initiatives regarding this area that has led to proposition 19; California's tax property structure has evolved since Proposition 13 and its subsequent amendments. Primarily, Proposition 13 (1978) was approved by voters to limit *ad valorem* taxes on real property to one percent of its cash value. The full cash value is the estimated price a property would sell for which, as mentioned above, is determined by the County Assessor's evaluation when the property is purchased, newly constructed, or a change in ownership has occurred. Proposition 13 froze this assessment as the property tax base, after which a one percent property tax is then imposed on the property.⁶⁴⁴ Without an event outside of the parameters of Proposition 13, property taxes on a home can only increase at two percent per year or at the inflation rate—whichever is less.⁶⁴⁵

Further approved amendments to Proposition 13 continued on through the 1990's. California Proposition 58 (1986) amended Proposition 13 to allow transfer of primary residences between parents and their children with tax rates based on cash value at the time of purchase of original residence. Proposition 58 also included the million-dollar exemption, which allowed for the same transfer principle previously stated to be applicable to all types of real property owned by the transferor up to the first one million dollars; after the first million, the rest will not be eligible for treatments as a transfer. Additionally, in 1986, voters approved Proposition 60, which allowed people over the age of 55 to transfer the taxable value of their current home to a new home, so long as the new home was of the same or lesser value and within the same county as the homeowner's current residence.⁶⁴⁶ This provides property tax relief for those eligible in order to encourage seniors to downsize and into smaller, less expensive homes without being penalized.⁶⁴⁷ Two years later, California voters expanded Proposition 60 via Proposition 90 (1988) to allow the same rights of transfer to another county, as long as the receiving county participated in such a program.⁶⁴⁸ In 1996, through Proposition 193, California voters approved the transfer and rights granted under Proposition 13 and subsequent amendments to grandchildren from grandparents, so long as the parents are deceased.⁶⁴⁹ Approved initiatives relating to disaster victims and the disabled under Proposition 60 came

⁶⁴³ SENATE FLOOR, COMMITTEE ANALYSIS OF ACA 11at 2 (June 25, 2020).

⁶⁴⁴ Shiner, Meghan and Knobel, John (2018) "Proposition 5: Property Tax Transfer", *California Initiative Review (CIR)*: Vol. 2018, Article 6.

⁶⁴⁵ CAL. REV. & TAX. CODE § 51.

⁶⁴⁶ Voter Information Guide for 1986, General Election (1986), http://repository.uchastings.edu/ca_ballot_props/971.

⁶⁴⁷ Proposition 60, Silicon Valley Realtors (2018), <https://siliconvalleyrealtorsblog.com/tag/proposition-60/>.

⁶⁴⁸ Voter Information Guide for 1988, General Election (1988) http://repository.uchastings.edu/ca_ballot_props/988

⁶⁴⁹ Property Appraisal. Exception. Grandparent-Grandchild Transfer. California Proposition 193 (1996), http://repository.uchastings.edu/ca_ballot_props/1114.

in under Proposition 50 (2002), which allowed for disaster related transfer of residential and commercial property owners within the same county, and Proposition 110 (1994), which did the same as Proposition 50 but for the disabled.⁶⁵⁰

In 2018, California voters saw a ballot initiative that was very similar to Proposition 19. Proposition 5 (2018) removed the same restrictions for those who are over 55, severely disabled, and disaster destroyed property, no matter the new home's market value or location in the state.⁶⁵¹ A difference between the 2018 initiative and Proposition 19 is that the 2018 initiative did not limit the buyer's number of moves. Additionally, a large difference is that the Legislative Analyst's Office (LAO) concluded that the 2018 amendment would result in an overall annual loss; the LAO reports a revenue gain under Proposition 19, as analyzed below. California voters rejected Proposition 5 with 58 percent of the electorate voting "no" in the statewide election.⁶⁵²

C. Proposed Law

Proposition 19 would amend the current structure of transferring tax rates on residential property. Beginning on April 1, 2021, persons over the age of 55, those who are severely disabled, and now those who are victims of wildfires or natural disasters would be able to transfer the taxable value of their property to a new residence located anywhere within the state.⁶⁵³ The transfer would need to occur no later than two years from the sale of the original property.⁶⁵⁴ Further, the proposed law would allow persons over the age of 55, victims of natural disasters, and those severely disabled to transfer their property under these exceptions up to three times.⁶⁵⁵

The proposed amendment would also make some changes to the transferring of property tax rate between family members. Beginning on February 16, 2021, the words "purchase" and "change of ownership" would be excluded from determining the full cash value of a transfer of a family home or family farm.⁶⁵⁶ Excluding these terms from the determining the full cash value will make the passage of family homes and farms considered a "transfer" which would allow for the property is to keep its same tax rate. Under the proposal, the family home must continue to be used as the principal residence of the transferee to claim the property tax benefits explained above.⁶⁵⁷ Additionally, the

⁶⁵⁰ CAL. REV. & TAX. CODE § 69.

⁶⁵¹ Shiner, Meghan and Knobel, John (2018) "Proposition 5: Property Tax Transfer", *California Initiative Review (CIR)*: Vol. 2018, Article 6.

⁶⁵² CBS, *CA Prop 5: California Rejects Measure to Expand Property Tax Break*, CB8, Nov. 7, 2019.

⁶⁵³ ACA 11 §2.1(b)(1), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁵⁴ *Id.*

⁶⁵⁵ ACA 11 §2.1(b)(2)(B)(3), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁵⁶ ACA 11 §2.1(c)(1), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁵⁷ *Id.*

proposed amendment includes a formula to assess the taxable value of a transferred family home.⁶⁵⁸

In addition to amending property tax rules regarding property transfers, the proposed amendment will also create two new funds, the California Fire Response Fund and the County Revenue Protection Fund.⁶⁵⁹ The Director of the Department of Finance will determine any increase in revenue the state gains through the implementation of the new property tax rules.⁶⁶⁰ The California Fire Response Fund will receive 75 percent of the funds calculated by the Director and the County Revenue Protection Fund will receive 15 of the funds.⁶⁶¹ These funds would be made available by decreased school funding obligations created by increased property tax revenue and by increased income taxes resulting from the sale of properties.⁶⁶²

The funds within the California Fire Response Fund will be distributed in a variety of ways. Twenty percent of the funds will be granted to the California Department of Forestry and Fire Protection (Cal Fire) for "fire suppression staffing."⁶⁶³ The remaining eighty percent will be in a subset fund named the Special District Fire Response Fund, from which distributions will be calculated by taking into account the longevity of a fire district and its ability to respond to major fires.⁶⁶⁴

Counties are to report to the California Department of Tax and Fee Administration the gain or loss they faced as a result of implementing the property tax changes in the proposed amendment.⁶⁶⁵ Counties that have recorded a negative gain due to the amendment's implementation will be eligible for funds under the County Revenue Protection Fund.⁶⁶⁶ The California Department of Tax and Fee Administration will determine every three years whether a county has experienced a gain or loss, and if a county experienced a loss, they shall be reimbursed with funds from the County Revenue Protection Fund.⁶⁶⁷ If there are insufficient funds, the California Department of Tax and Fee Administration will allocate a pro rata share of the lost funds.⁶⁶⁸

⁶⁵⁸ ACA 11 §2.1(c)(1)(A)-(B)(i)-(ii), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁵⁹ ACA 11 §2.2(b)(1)-(2), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁶⁰ ACA 11 §2.2(d)(1), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁶¹ ACA 11 §2.2(e)(1)-(2), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁶² ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF ACA 11, at 3 (June 25, 2020).

⁶⁶³ ACA 11 §2.2(f)(1), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁶⁴ ACA 11 §2.2(e)(2)(A)-(C)(4), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁶⁵ ACA 11 §2.3(a)(1)-(3), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁶⁶ ACA 11 §2.3(b), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁶⁷ ACA 11 §2.3(c), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁶⁸ ACA 11 §2.3(d), 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

III. FISCAL EFFECTS

In conjunction with the Department of Finance, the LAO produces a report to estimate the fiscal effects of the proposed initiatives. When assessing Proposition 19, the LAO noted there will be increased property tax revenue, as there will be more properties being reassessed at the time of inheritance because Proposition 19 narrows the inheritance reassessment exclusion. Overall, this exclusion would result in increases in property tax payments for 40,000 to 60,000 properties each year, which will increase revenue for local governments. The LAO estimates that in the first few years of this initiative being approved, schools and local governments would each probably gain over \$100 million per year, and eventually grow to gain around \$1 billion per year.⁶⁶⁹

However, the LAO estimates that there will be reduced property tax revenues from the expansion of the rules for eligible homeowners, as there will be reduced taxes from people who would have moved out of a local government's tax base anyway.⁶⁷⁰ In contrast, there may be potentially higher taxes from more home building and higher home prices as more people will be selling their homes and buying different ones; unfortunately for local jurisdictions, the revenue losses from those who would have moved anyway are projected to be bigger than the gains from higher home prices and more building. The LAO reports that these losses will probably start at tens of millions of dollars per year and eventually grow to hundreds of millions of dollars per year.⁶⁷¹

One additional consideration that the LAO reported on is the higher administrative costs for counties by tens of millions of dollars annually to create and carry out new functions. Furthermore, the LAO noted the potential change in state funding for schools that could ultimately result in most schools receiving the same amount they would have received without the incorporation of Proposition 19.⁶⁷² Additionally, as noted above in the Proposed Law section, the Proposition sets up funding for fire suppression staffing and a Special District Fire Support Fund, as well as the County Revenue Protection Fund.⁶⁷³

Overall, due to some parts of the measure likely increasing revenue and smaller parts decreasing revenue—it is likely that revenue gains will exceed revenue losses. For

⁶⁶⁹ LEGISLATIVE ANALYST'S OFFICE, Proposition 19, at 6 (Sept. 23, 2018), available at <https://lao.ca.gov/ballot/2019/190478.pdf>.

⁶⁷⁰ LEGISLATIVE ANALYST'S OFFICE, Proposition 19, at 6 (Sept. 23, 2018), available at <https://lao.ca.gov/ballot/2019/190478.pdf>.

⁶⁷¹ LEGISLATIVE ANALYST'S OFFICE, Proposition 19, at 6 (Sept. 23, 2018), available at <https://lao.ca.gov/ballot/2019/190478.pdf>.

⁶⁷² LEGISLATIVE ANALYST'S OFFICE, Proposition 19, at 6 (Sept. 23, 2018), available at <https://lao.ca.gov/ballot/2019/190478.pdf>.

⁶⁷³ ACA 11, 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

local governments and schools alike, this will amount to tens of millions of dollars per year in the initial years, and eventually grow to hundreds of millions of dollars per year.⁶⁷⁴

IV. DRAFTING ISSUES

A. Ambiguous Terminology

Overall, Proposition 19 is drafted in a concise manner with little to no ambiguity. There do not seem to be drafting issues regarding terms that are ambiguous or can be interpreted in different ways. Most terminology is given definition or has previously been defined by current statute.⁶⁷⁵ Additionally, funding provisions have been given language that defines how and by what equation funding will be allocated.

B. Severance

There is no severance clause within Proposition 19. If a provision of the initiative is found to be unconstitutional, the court will determine if the invalid provision can be severed from the remaining provisions by applying three criteria of severability; “grammatically, functionally, and volitionally severable.”⁶⁷⁶ If a provision of the proposed amendment is to be deemed unconstitutional, issues will arise as to whether or not the other sections will be able to operate. On its face, if one or both of the proposed funds are deemed to be unconstitutional, it will likely have no impact on the function of the change in tax policy. However, if for some reason the change in tax policy is deemed unconstitutional or invalid, the proposed funds would be unable to be created as both are linked to funding from the proposed tax changes, although there appears to be no indication that the proposed tax policy changes would be deemed invalid.

V. CONSTITUTIONAL ISSUES

A. Federal Constitution

Proposition 19 likely will not trigger any constitutional issues under the Federal Constitution. However, a challenge alleging a violation of the Equal Protection Clause under the Fourteenth Amendment may be plausible. The Fourteenth Amendment states, in part, “nor shall any state...deny to any person within its jurisdiction the equal protection of the laws.”⁶⁷⁷ The potential issue rests on whether limiting the property tax provisions only to those over the age of 55, those severely disabled, or victims of wildfires or natural disasters denies equal protection to other classes of Californians.

⁶⁷⁴ LEGISLATIVE ANALYST’S OFFICE, Proposition 19, at 6 (Sept. 23, 2018), available at <https://lao.ca.gov/ballot/2019/190478.pdf>.

⁶⁷⁵ ACA 11, 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020) at 7, 8.

⁶⁷⁶ *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282, 1300 (E.D. Cal. 1998) (Quoting *Gerken v. FPFC*, 6 Cal. 4th 707, 721-22, 863 P.2d 694 (1993)).

⁶⁷⁷ U.S. Const. amend. XIV § 1.

The United States Supreme Court has already addressed similar issues when it held that the classifications in Proposition 13 and Article XIII A of the California Constitution did not violate the equal protection clause.⁶⁷⁸ In *Nordlinger v. Hahn*, the United States Supreme Court stated that “the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification...”⁶⁷⁹ The Court found the exemptions for those over the age of 55 and transfers between parents and children to “further legitimate purposes” by encouraging those who are older to move to places more suitable for their lifestyle and encourage “neighborhood continuity and stability...”⁶⁸⁰ Therefore, the classifications of persons over the age of 55, persons severely disabled, and victims of wildfire or natural disaster will likely not violate the Equal Protection Clause of the Fourteenth Amendment.

B. State Constitution

As a legislatively referred constitutional amendment, Proposition 19 must meet certain constitutional requirements. The California Constitution requires that a legislative referred constitutional amendment be “prepared and submitted that it can be voted on separately.”⁶⁸¹ California’s Supreme Court has interpreted this provision, known as the separate vote requirement, to mean that the provisions of the amendment must be “reasonably germane to a common theme, purpose, or subject.”⁶⁸²

There are two possible separate vote requirement issues that may appear if Proposition 19 is challenged. The first possible issue is the relation between changing property tax transfer provisions and the creation of two new funds.⁶⁸³ The second issue is the relation between individuals who are over the age of 55, those considered severely disabled, and those who are victims of wildfires and other natural disasters.⁶⁸⁴

The California Supreme Court made clear that the “reasonably germane” standard “does not impose a stricter standard requiring a showing of ‘close’ or ‘functional’ relatedness,” simply a connection to a “common theme, purpose, or subject.”⁶⁸⁵ In *Californians for an Open Primary v. McPherson*, Resolution 103, and later Proposition 60 was challenged for violating the separate vote requirement.⁶⁸⁶ The proposed amendments attempted to create two changes to the constitution, first was to create changes to primary elections and second was to address state bond obligations.⁶⁸⁷ The California Supreme

⁶⁷⁸ *Nordlinger v. Hahn*, 505 U.S. 1, 18 (1992).

⁶⁷⁹ *Id.* at 11.

⁶⁸⁰ *Id.* at 17.

⁶⁸¹ Cal. Constitution Art. XVIII, § 1.

⁶⁸² *Californians For An Open Primary v. McPherson*, 38 Cal.4th 735, 777 (2006).

⁶⁸³ ACA 11, 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2020).

⁶⁸⁴ *Id.*

⁶⁸⁵ *McPherson*, *supra*, note 60 at 777.

⁶⁸⁶ *Id.* at 739-40

⁶⁸⁷ *Id.*

Court determined that these two provisions “are not reasonably germane to a common theme, purpose, or subject.”⁶⁸⁸

A potential challenge on the basis of the separate vote requirement will likely not be successful. Opponents may suggest the categorizations and creation of funds in a property tax amendment are not closely related. However, proponents of the proposition can likely assert that protecting vulnerable populations is a broad enough umbrella to encompass the provisions of Proposition 19, and that both the tax changes and the creation of funds are reasonably germane to this purpose of protecting vulnerable populations.⁶⁸⁹

More specifically, proponents can argue that persons over the age of 55, severely disabled, and victims of wildfires are all vulnerable populations. The purpose of a wildfire fund is to protect such populations and prevent more individuals from becoming victims of wildfire destruction. Further, the creation of a county fund is to protect potential loss of revenue so local governments can provide essential services to vulnerable populations. Thus, such a challenge alleging a violation of the separate vote requirement would likely not be successful.

VI. POLICY CONSIDERATIONS

A. Proponents

Proponents of Proposition 19 include YES on 19, California Association of Realtors, California Professional Firefighters, National Association of Realtors, California Nurses Association, and the California Faculty Association.⁶⁹⁰ The YES on 19 coalition has six main arguments:

Limits Property Taxes for Seniors and People with Disabilities

Proponents argue that this Proposition provides savings and housing relief for vulnerable Californians, by allowing them to transfer their tax rate and Prop 13 savings from their existing home to a replacement home anywhere in the state. With this allowance, proponents note that vulnerable Californians can afford to move closer to family, medical care, or a home that is more suited to their needs.⁶⁹¹ Additionally, the proponents contest that the current scheme is unfair and consists of ever-changing location restrictions.⁶⁹²

⁶⁸⁸ *Id.* at 789.

⁶⁸⁹ *Id.* at 777.

⁶⁹⁰ YES on 19, Our Coalition Page. <https://www.yeson19.vote/our-coalition> (Last Visited, Sept. 22, 2020).

⁶⁹¹ YES on 19, Homepage. <https://www.yeson19.vote> (Last Visited, Oct. 20, 2020).

⁶⁹² *Id.*

Limits Property Tax Increases for Wildfire Victims

In the case of wildfire victims, proponents state that “over 20,000 homes [have] been destroyed by wildfires in the past few years” which has resulted in victims facing tax hikes when they move to their replacement homes.⁶⁹³ YES on 19 notes that Proposition 19 provides savings and tax protections needed for victims, which will allow those who are forced to move as a result of wildfires a replacement home anywhere in California.

Protecting Family Homes

Proponents note that Proposition 19 protects family homes so that the children can afford to live in a family home without a sudden tax increase. YES on 19 asserts that as intended under current law, there is a constitutional right for parents and grandparents to pass the family down to a child for that child’s use as a primary residence.⁶⁹⁴

Closing Unfair Tax Loopholes

YES on 19 proponents note that the California tax paying system is being exploited by the wealthy, celebrities, and East Coast investors who avoid paying their fair share on luxury estates and vacation homes. Proponents argue that this has resulted in inequitable tax payments where Californians are paying tax bills 10 to 20 times higher than their neighbors. Advocates for Proposition 19 encourage Californian voters to close this loophole in the name of equity.⁶⁹⁵

Housing Relief for Californians

Proponents of Proposition 19 note that the initiative will open up tens of thousands of homes that have not been on the market for decades, which will help stabilize housing costs and create opportunities for new buyers, as well as renters, across the state. This will create more opportunity for home ownership while encouraging seniors to move to more comfortable housing.⁶⁹⁶

Fire Protection, Local Government, and School Districts

Proposition 19 will deliver funding for cities, counties, and school districts by closing the tax loophole. Proponents argue that the proposition will generate hundreds of millions in annual revenue for fire protection and community services. The funding will especially

⁶⁹³ *Id.*

⁶⁹⁴ *Id.*

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.*

focus on fire districts in rural and urban communities, “to fix inequities that threaten life-saving response times to wildfires” and emergencies.⁶⁹⁷

Overall, proponents argue that the proposition closes unfair loopholes and protects savings and homeowners.

B. Opponents

Opponents argue that Proposition is a billion-dollar tax increase on families that takes away “one of the best tools” parents have to help their children—the right to pass their property on without any increase in property taxes.⁶⁹⁸ The main opponent against Proposition 19 is the Howard Jarvis Taxpayers Association (HJTA); HJTA is a nonprofit lobbying and policy organization that advocates for taxpayer-friendly legal and political structures.⁶⁹⁹ The measure is also opposed by over a dozen major California newspapers including the Los Angeles Times and the San Francisco Chronicle.⁷⁰⁰

Howard Jarvis Tax Association

The HJTA has three main arguments against the passage of Proposition 19.⁷⁰¹ The first is that this Proposition effectively repeals Proposition 58 (1986) and forces the reassessment of inherited or transferred property; opponents cite that the LOA report notes that will result in 40,000 to 60,000 families with higher property taxes each year. The second argument that the HJTA notes is that California voters already rejected the replacement home tax exemption—by 58 percent.⁷⁰² HJTA argues that now the proponents are trying to repeat the 2018 proposition, but also now with a tax increase.⁷⁰³ Finally, the HJTA argues that the California Association of Realtors wants to pass this initiative in order to have more home sales and therefore a larger profit for themselves, even at the expense of a “multi-billion-dollar tax increase”.⁷⁰⁴

⁶⁹⁷ *Id.*

⁶⁹⁸ Cal. Sec’y of State, Official Voter Information Guide: California Primary Election, Tuesday November 3, 2020., <https://voterguide.sos.ca.gov/propositions/19/> (Last Visited, Sept. 22, 2020).

⁶⁹⁹ Howard Jarvis Taxpayers Association, About Page. hjta.org/about-hjta (Last Visited, Sept. 22, 2020)

⁷⁰⁰ California Initiative Editorial Scorecard, Fox and Hounds. <https://www.foxandhoundsdaily.com/2020/10/california-initiative-editorial-scorecard-2/> (Last Visited, Oct. 6, 2020).

⁷⁰¹ Howard Jarvis Taxpayers Association, Proposition 19 is latest assault on taxpayers, Jul. 5, 2020., <https://www.hjta.org/california-commentary/proposition-19-is-latest-assault-on-taxpayers/> (Last Visited, Sept. 22, 2020).

⁷⁰² CBS, *CA Prop 5: California Rejects Measure to Expand Property Tax Break*, CB8, Nov. 7, 2019.

⁷⁰³ Howard Jarvis Taxpayers Association, Proposition 19 is latest assault on taxpayers, Jul. 5, 2020., <https://www.hjta.org/california-commentary/proposition-19-is-latest-assault-on-taxpayers/> (Last Visited, Sept. 22, 2020).

⁷⁰⁴ *Id.*

Editorials

Newspapers opposing the initiative, such as the Los Angeles Times, note that the tax break included in Proposition 19 expands inequities in an already unfair tax system.⁷⁰⁵ Opponents argue that the structure that Proposition 19 creates would largely benefit those who were able to purchase a residence in years prior, allowing them to benefit from values skyrocketing.⁷⁰⁶ This would give those earlier purchasers a great deal of buying power in addition to a tax break that would further disadvantage those who do not own a home and cannot yet afford one — therefore not benefiting those who are struggling from the California housing crisis.⁷⁰⁷ Opponents of Proposition 5 (2018), the similar initiative on the ballot two years ago, additionally noted that Proposition 13(1978) already affords seniors protections and that this population does not need to be given another tax shelter.⁷⁰⁸

Political Considerations

The opponents argue that the political establishment ignored the law when organizing this Proposition. HJTA notes that the California Association of Realtors wanted to withdraw its initially submitted measure and have the Legislature replace it with a similar proposal for political placating reasons.⁷⁰⁹ HJTA asserts that because the California Association of Realtors missed the deadline for withdrawing its initiative, and Secretary of State Padilla took the initiative off the ballot, the political establishment was acting without authority.

VII. CONCLUSION

Proposition 19 would allow homeowners who are over 55, disabled, or wildfire/natural disaster victims to transfer their primary tax base to a replacement residence and would create two related funds.⁷¹⁰ It would also restrict inherited properties eligible for property tax saving to strictly primary homes or farms.⁷¹¹ The fiscal impacts that Proposition 19 can have on California are local governments potentially gaining tens of millions of property tax values per year—with schools and other local and state revenues seeing a similar increase;

⁷⁰⁵ Los Angeles Times, *Endorsement: Vote no on Prop. 19, an unwelcome combo of good and bad tax proposals*, Sept. 17, 2020.

⁷⁰⁶ *Id.*

⁷⁰⁷ *Id.*

⁷⁰⁸ Sacramento Bee, *Supporters say Proposition would help California's housing crisis. That's a sham*, Sept. 17, 2020.

⁷⁰⁹ Howard Jarvis Taxpayers Association, *Proposition 19 is latest assault on taxpayers*, Jul. 5, 2020, <https://www.hjta.org/california-commentary/proposition-19-is-latest-assault-on-taxpayers/> (Last Visited, Sept. 22, 2020).

⁷¹⁰ Cal. Sec'y of State, *Official Voter Information Guide: California Primary Election, Tuesday November 3, 2020.*, <https://voterguide.sos.ca.gov/propositions/19/> (Last Visited, Sept. 22, 2020).

⁷¹¹ *Id.*

this proposition however would increase County property tax administration costs by likely tens of millions of dollars per year.⁷¹²

Voting yes on Proposition 19 would mean that all homeowners who are over 55, disabled, or wildfire/natural disaster victims would be eligible for the property tax savings when they move, and the only inherited properties used as a primary home would be eligible for property tax savings.⁷¹³ Voting no on Proposition 19 would make no changes to the current tax structure, meaning some California homeowners who are over 55 or disabled would be eligible for the property tax exemption when they move, and that all inherited properties—not just primary homes—are eligible for property tax savings.⁷¹⁴

⁷¹² LEGISLATIVE ANALYST'S OFFICE, Proposition 19, at 6 (Sept. 23, 2018), available at <https://lao.ca.gov/ballot/2019/190478.pdf>.

⁷¹³ Cal. Sec'y of State, Official Voter Information Guide: California Primary Election, Tuesday November 3, 2020, <https://voterguide.sos.ca.gov/propositions/19/> (Last Visited, Sept. 22, 2020).

⁷¹⁴ *Id.*

Proposition 20:
Reducing Crime and Keeping California Safe Act of
2018

Initiative Statute

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I. EXECUTIVE SUMMARY

Proposition 20, known as the Reducing Crime and Keeping California Safe Act of 2018, would address several areas of criminal law, including provisions of the California Constitution, parole considerations, DNA collection for misdemeanor offenses, and criminal sentencing of theft crimes. The measure would specify 51 offenses that are ineligible for parole consideration under the framework added to the California Constitution by Proposition 57 (2016), would allow victims and witnesses of crime a greater role in the parole hearing process, and would place new requirements on what is to be considered by the parole board. Proposition 20 would also require DNA collection from those convicted of specified misdemeanor offenses and create two new theft crimes, allowing prosecutors to seek longer sentences even when the value of goods stolen is low. There is potential for confusion in some statutory provisions added by the measure, including the factors that must be considered to grant parole and the ability of probation officers to arrest parolees in violation of the terms of their release. Additionally, there are potential Constitutional issues in that the measure may address more than one subject and may amend the Constitution without complying with the procedural requirements to do so. Proponents favor Proposition 20 as reversing the negative impacts of Proposition 47 (2014) and Proposition 57 (2016), propositions that authorized lighter sentences and parole consideration for non-violent offenders. Opponents view these changes as unnecessary and bemoan the high costs of the changes, citing the Legislative Analyst's Office's estimate that the measure will lead to increased correctional costs in the tens of millions of dollars annually.

II. THE LAW

A. Background

In 2011, the United States Supreme Court ordered California to reduce its prison population.⁷¹⁵ In response, the California legislature gave the county government management and supervision of certain non-serious, non-violent, and non-sexual felons through Assembly Bill 109⁷¹⁶ (AB 109), known as the 2011 Criminal Realignment Legislation.⁷¹⁷ This allowed felons to serve their sentence in a county jail instead of a state prison.⁷¹⁸ Before AB 109, state law required felons to serve their sentences in state prison.⁷¹⁹

⁷¹⁵ Jason Pohl and Ryan Gabrielson, *California Tried to Fix Its Prisons. Now County Jails are More Deadly*, PRISON LEGAL NEWS, October 3, 2019 at 1, <https://www.prisonlegalnews.org/news/2019/oct/3/california-tried-fix-its-prisons-now-county-jails-are-more-deadly/>.

⁷¹⁶ AB 109 amended over 100 sections of the Penal Code and Welfare and Institutions Code. AB 109, 2011 Leg., Reg. Sess. 2011-12 (Cal. 2011).

⁷¹⁷ *California Proposition 20, Criminal Sentencing, parole, and DNA Collection Initiative (2020)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_\(2020\)#Assembly_Bill_109_.282011.29](https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020)#Assembly_Bill_109_.282011.29) (last visited September 19, 2020).

⁷¹⁸ *Id.*

⁷¹⁹ *Id.*

In 2014, voters enacted Proposition 47,⁷²⁰ which made certain offenses, known as wobblers, chargeable only as misdemeanors. Before this proposition, the “wobbler” crimes could be charged as either misdemeanors or felonies.⁷²¹ This included crimes such as petty theft, shoplifting, receiving stolen property worth less than \$250, writing bad checks, check forgery, and drug possession.⁷²² Before this change, when these crimes were charged as felonies, California law required the collection of DNA from the offender.⁷²³

In 2016, voters enacted Proposition 57⁷²⁴, known as “The Public Safety and Rehabilitation Act of 2016.”⁷²⁵ This proposition passed with an overwhelming majority and was intended to stop the “revolving door of crime” by putting emphasis on rehabilitation.⁷²⁶ Under Proposition 57, the number of inmates eligible for parole considerations was increased, and the California Department of Corrections and Rehabilitation (CDCR) was allowed to award sentencing credits to the inmates that would go toward their parole eligibility.⁷²⁷ The aim was to award credits to the inmates to incentivize them to take responsibility for their rehabilitation and promote public safety through educational, vocational, and self-improvement activities.⁷²⁸ Additionally, Proposition 57 aimed to reduce recidivism by “increasing the likelihood that inmates will successfully transition back into” communities.⁷²⁹ Proposition 57 specifically granted rulemaking authority to CDCR to give effect to the measure. After Proposition 57 was enacted, the CDCR adopted rules in accordance with the proposition.⁷³⁰

⁷²⁰ Proposition 47 amended Sections 473, 476a, 490.2, 496, and 666 of the Penal Code, Sections 11350, 11357a, and 11377 of the Health and Safety Code, and added Sections 459.5 and 1170.18 to the Penal Code. Cal. Proposition 47, (2014).

⁷²¹ Selena Farnesi & Emily Reynolds, *Proposition 47: The Safe Neighborhoods and School Act*, CAL. INIT. REV. (Fall 2014).

⁷²² *Id.*

⁷²³ CAL. PENAL CODE § 296 (2020).

⁷²⁴ Proposition 57 amended Sections 602 and 707 of the Welfare and Institutions Code. Cal. Proposition 57 (2016).

⁷²⁵ *Id.*

⁷²⁶ *Proposition 57, The Public Safety and Rehabilitation Act of 2016*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, <https://www.cdcr.ca.gov/proposition57/> (last visited September 20, 2020).

⁷²⁷ *Proposition 57: Criminal Sentences. Juvenile Criminal Proceedings and Sentencing. Initiative Constitutional Amendment and Statute*, LEGISLATIVE ANALYST’S OFFICE, <https://lao.ca.gov/BallotAnalysis/Proposition?number=57&year=2016> (last visited September 20, 2020).

⁷²⁸ *Proposition 57: Credit Earning for Inmates Frequently Asked Questions*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, <https://www.cdcr.ca.gov/blog/proposition-57-credit-earning-for-inmates-frequently-asked-questions-faq/> (last visited September 20, 2020).

⁷²⁹ *Id.*

⁷³⁰ *Notice of Change to Regulations Sections: 3490, 3491, 3495-7, 2449.1, 2449.30-33*, DEPARTMENT OF CORRECTIONS AND REHABILITATION, April 19, 2019. <https://www.cdcr.ca.gov/wp-content/uploads/sites/171/2019/06/ncr19-02posting.pdf?label=Supplemental%20Reforms%20to%20Parole%20Consideration&from=https://www.cdcr.ca.gov/proposition57/>.

Proposition 57 also changed the California Constitution to make individuals who are convicted of non-violent felonies eligible for parole consideration after serving the full prison term for their primary offense.⁷³¹ Under these new rules, the Board of Parole Hearing would “decide whether to release these individuals before they have served any additional time related to other crimes or sentencing enhancements.”⁷³² CDCR, under its authority from Proposition 57, has since defined “violent felony offense” as any crime listed in subdivision 667.5 of the Penal Code for purposes of parole consideration.⁷³³

Since the implementation of Propositions 47 and 57, the prison population dropped by 20,000 inmates and there was no significant increase in crime rates.⁷³⁴ A study from 2016 showed that there was “little or no deviation in the crime rate after the mass prison release” which California began enacting in 2011.⁷³⁵

B. Path to the Ballot

Proposition 20 is titled “Reducing Crime and Keeping California Safe Act of 2018”, has an amended date of November 28, 2017, and is stamped as received on November 28, 2017 from the Initiative Coordinator at the Attorney General’s Office.⁷³⁶ However, it was not on the 2018 initiative ballot because it did not meet the signature threshold at least 131 days before the election, as required by Section 9033(b)(1) of the Elections Code.⁷³⁷ Therefore, it rolled over to the 2020 election.⁷³⁸

Even after the proposition received enough signatures, the proponents could remove it from consideration before it became certified 131 days before the November 2020 election.⁷³⁹ If a legislative bill enacting the same statutory provision passed before that deadline, the proponents would not have to wait until the November election to enact this law and could remove the measure from the ballot. On February 22, 2019, Senator Bates introduced Senate Bill 710, which is identical to Proposition 20.⁷⁴⁰ However, this bill failed

⁷³¹ *Id.*

⁷³² CAL. CODE REGS. tit. 15 § 3490 (2020), subd. (c).

⁷³³ *Notice of Change to Regulations Sections: 3490, 3491, 3495-7, 2449.1, 2449.30-33, supra* note 16, at 2.; Cal. Code of Reg. tit. 15 § 3490 (2020)

⁷³⁴ Vansickle, Abbie and Manuel Villa, *California’s jails are so bad some inmates beg to go to prison*, LOS ANGELES TIMES, May 23, 2019 <https://www.latimes.com/local/lanow/la-me-california-jails-inmates-20190523-story.html>.

⁷³⁵ Jackman, Tom, *Mass reduction of California prison population didn’t cause rise in crime, two studies find*, THE WASHINGTON POST, May 18, 2016 <https://www.washingtonpost.com/news/true-crime/wp/2016/05/18/mass-release-of-california-prisoners-didnt-cause-rise-in-crime-two-studies-find/>.

⁷³⁶ Cal. Proposition 20 (2020).

⁷³⁷ Email with Benjamin Glickman, Supervising Attorney General, California Department of Justice. (October 6, 2020)

⁷³⁸ *Id.*

⁷³⁹ CAL. ELECTIONS CODE § 9033, subd. (b), paragraphs (1) and (2).

⁷⁴⁰ SB 710, 2020 Leg., 2019-20 Reg. Sess. (Cal. 2020).

passage in the Senate Public Safety Committee.⁷⁴¹ According to the Senate Public Safety Committee's Bill Analysis, similar legislation has been attempted since 1998 to no avail.⁷⁴² The bill analysis also states that only the Riverside Sheriff's Association supported the bill, while the American Civil Liberties Union of California, A New Way of Life Reentry Project, California Attorneys for Criminal Justice, California Public Defenders Association, California Safety and Justice, Inland Congregations United for Change, Los Angeles Dependency Lawyers, Inc., Social and Environmental Justice Committee of the Universalist Unitarian Church of Riverside, and Starting Over, Inc., all opposed the bill.⁷⁴³

C. Proposed Changes

Proposition 20 proposes three major changes to the criminal justice system addressing parole considerations, DNA collection, and theft crimes.

1. Parole Considerations

If passed, Proposition 20 would limit the number of inmates who could receive early parole by increasing the list of felonies defined as "violent."⁷⁴⁴ An entire new section defining "violent felony" would be added to the Penal Code.⁷⁴⁵ This new list would determine if the inmate's offense is considered violent and if they are eligible for parole. The first 24 offenses out of the 51 listed are identical to the offense listed in Section 667.5, which constitutes the current definition of violent felony.⁷⁴⁶ While the proposed section does not conflict with the offenses listed in Section 667.5 in defining violent felony, the overlap and redundancy could cause confusion. Additionally, Proposition 20 adds a provision that would deem an inmate a violent offender, thereby removing access to parole consideration under the Proposition 57 framework, if that inmate is serving concurrent, consecutive, or stayed time for a violent felony, is sentenced to an indeterminate sentence, or has an enhancement making the offense violent.⁷⁴⁷

Proposition 20 also proposes a new standard for use at parole hearings. The current standard for parole weighs mitigating and aggravating factors and, based on the totality of the circumstances, determines "if the inmate poses a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity."⁷⁴⁸ The proposed standard of review is "whether the inmate will pose an unreasonable risk of creating victims as a result of felonious conduct if released from prison."⁷⁴⁹ The proposition first lays out factors the hearing officer must consider, such as the inmate's criminal history,

⁷⁴¹ *Id.*

⁷⁴² SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 710, at 1 (January 6, 2020).

⁷⁴³ *Id.*

⁷⁴⁴ Cal. Proposition 20 (2020) § 4.

⁷⁴⁵ Proposed CAL. PENAL CODE § 3040.1, Cal. Proposition 20 (2020).

⁷⁴⁶ CAL. CODE REGS. tit. 15 § 3490 (2020), subd. (c).

⁷⁴⁷ Proposed CAL. PENAL CODE § 3040.3, Cal. Proposition 20 (2020).

⁷⁴⁸ CAL. CODE REGS. tit. 15 § 2449.5 (2020).

⁷⁴⁹ Proposed CAL. PENAL CODE § 3040.2, Cal. Proposition 20 (2020).

circumstances surrounding the current conviction, input from the victim, and any other information regarding the inmate's suitability for release.⁷⁵⁰ The proposition then lays out circumstances to be considered by the hearing officer to determine whether the inmate is unsuitable for release. They include looking at details of the offense the inmate is serving time for, prior history of violence, and conduct while incarcerated.⁷⁵¹ Factors for the hearing officer to consider when determining if the inmate is suitable for release are also added. The factors include looking at the inmate's criminal history, the inmate's plans if released, and the inmate's activities while incarcerated that "demonstrate an enhanced ability to function within the law."⁷⁵²

Finally, Proposition 20 would give new rights to victims and prosecuting attorneys during parole hearings. The new law would require notice to the victims of the crime prior to an inmate being reviewed for early release and would give the victims a right to be heard at the parole hearing.⁷⁵³ The prosecuting attorney would also have a right to review all of the information used at the hearing and would have a right to respond to the parole board in writing.⁷⁵⁴ The inmate and the prosecuting attorney may ask for a review within 30 days of the notice of final decision.⁷⁵⁵ The proposition also would allow the parole board to consider the entire criminal history, including juvenile history, of the inmate when making its determination for release.⁷⁵⁶ Once released from prison, an inmate would not be allowed to live within 35 miles of a witness or victim of the crime.⁷⁵⁷ If there is a period of flash incarceration⁷⁵⁸, the proposition would require the district attorney, public defender, and sheriff be notified.⁷⁵⁹ Additionally, the proposition adds language allowing a probation officer to arrest a parolee if they believe the parolee has violated terms of the parole.⁷⁶⁰

2. DNA Collection

Proposition 20 proposes required DNA collection from offenders found guilty of misdemeanor burglary, forgery, larceny, possession of controlled substance, battery, domestic violence, and elder abuse.⁷⁶¹ These crimes were the same ones that changed from wobblers to mandatory misdemeanors under Proposition 47; prior to Proposition 47, DNA collection was not always required,⁷⁶² because there was discretion to charge the offense as a misdemeanor. Proposition 20, then, goes further than the law that existed prior

⁷⁵⁰ *Id.*, subd. (c).

⁷⁵¹ *Id.*, subd. (d).

⁷⁵² *Id.*, subd. (e).

⁷⁵³ Proposed CAL. PENAL CODE § 3040.4, subd. (a), (c), Cal. Proposition 20 (2020).

⁷⁵⁴ *Id.*, subd. (b), (d).

⁷⁵⁵ *Id.*, subd. (g).

⁷⁵⁶ Proposed CAL. PENAL CODE § 3041, subd. (b), Cal. Proposition 20 (2020).

⁷⁵⁷ Proposed CAL. PENAL CODE § 3003, subd. (h), Cal. Proposition 20 (2020).

⁷⁵⁸ Flash incarceration is a "period of detention in city or county jail due to a violation" of post release supervision and the length "can range between one and 10 consecutive days." CAL. PENAL CODE § 3454 (2020).

⁷⁵⁹ Proposed CAL. PENAL CODE § 3454, subd. (d), Cal. Proposition 20 (2020).

⁷⁶⁰ Proposed CAL. PENAL CODE § 3455, subd. (b), Cal. Proposition 20 (2020).

⁷⁶¹ Cal. Proposition 20 (2020) § 5.

⁷⁶² Cal. Proposition 47 (2014).

to 2014, by making DNA collection for these crimes mandatory. Current law only allows DNA collection from any person, juvenile or adult, who is convicted or pleads no contest to a felony, or any adult who is arrested for a felony offense.⁷⁶³ This law has been in effect since November 2004.⁷⁶⁴

3. Theft Crimes

Proposition 20 proposes two new misdemeanors to the Penal Code: serial theft and organized retail theft.⁷⁶⁵ Serial theft is defined as having two or more convictions of petty theft, shoplifting, grand theft, burglary, carjacking, robbery, crimes against an elder or dependent adult, forgery, unlawful taking or unauthorized use of a vehicle, identity theft, and unlawful use of an access card.⁷⁶⁶ Organized retail theft is defined as a person who acts in concert with one or more people and commits two or more retail thefts within 180 days and the aggregate merchandise value is more than \$250.⁷⁶⁷ A sentence of no longer than one year in county jail would be given to any person who violates the new law.⁷⁶⁸

This proposition would also change the definition of shoplifting to include intent to steal retail property, defining retail property as “any article, product, commodity, item or component intended to be sold”.⁷⁶⁹

4. Amendments

This proposition includes a clause that would not allow this act to be amended by the Legislature unless “by a statute that furthers the purposes, findings, and declarations of the Act” and is passed by a $\frac{3}{4}$ vote in each house, or by a statute approved by voters.⁷⁷⁰ This limits the ability of the legislature to change the list of violent felony offenses, the list of misdemeanor offenses subject to DNA collection, and the definition and penalty for certain theft crimes.

5. Severability Clause and Conflicting Provisions

Proposition 20 signals the intent of the people that any part that might be found unconstitutional or invalid is severable from the rest of the act.⁷⁷¹ A court that finds any provision to be invalid will still conduct an independent analysis, considering whether the provision is grammatically, functionally, and volitionally severable.⁷⁷² If the court does

⁷⁶³ CAL. PEN. CODE § 296 (2020).

⁷⁶⁴ *Id.*

⁷⁶⁵ Cal. Proposition 20 (2020) §§ 7, 8.

⁷⁶⁶ Cal. Proposition 20 (2020) § 7.

⁷⁶⁷ Cal. Proposition 20 (2020) § 8.

⁷⁶⁸ *Id.*

⁷⁶⁹ Cal. Proposition 20 (2020) § 6.

⁷⁷⁰ Cal. Proposition 20 (2020) § 9.

⁷⁷¹ Cal. Proposition 20 (2020) § 10.

⁷⁷² *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 270 (2001).

conclude that the provision is severable—and it likely will—then, the remaining provisions that are unaffected by the invalid or unconstitutional provision will remain in full force.⁷⁷³

Additionally, Proposition 20 declares that in the event there is another measure or law that conflicts with the measure, this proposition “shall be self-executing and given full force and effect” and the other measures “shall be null and void.”⁷⁷⁴

III. STATUTORY INTERPRETATION ISSUES

A. Proposed Addition of Section 3040.2 to the Penal Code

Subdivisions (c), (d), and (e) of proposed Section 3040.2 list factors that the hearing officer must consider when granting parole. Subdivision (c) lists seven factors to be considered generally, subdivision (d) lists 15 to consider whether the inmate is “unsuitable” for release, and subdivision (e) lists 11 factors to consider whether the inmate is “suitable” for release. There is potential for confusion regarding how these factors are to be applied and if they are to be considered differently. Many of the factors listed under the subdivisions are the same or similar. A challenge to the hearing officer’s decision may raise this issue.

One factor that must be considered is the offender’s entire criminal history, including their juvenile records, if any. This raises a question whether there must be specific authorization to access sealed juvenile records or whether a public record that considers details of a sealed record must also be sealed. The law states that a juvenile record that is sealed may be accessed in order to comply with data collection or reporting requirements in the law, but it must not be “further released, disseminated, or published by or through the researcher or research organization.”⁷⁷⁵ This could cause conflict between the new probation standards (which would allow the victim to be heard, would allow the prosecuting attorney to be heard, and would allow the prosecuting attorney to petition for review after the final notice of decision) and ensuring the juvenile records remain private. California law that addresses the records of minor criminal defendants,⁷⁷⁶ specifies the ways in which juvenile records can be sealed,⁷⁷⁷ the time period before juvenile records will be destroyed once sealed,⁷⁷⁸ and the specific instances in which juvenile records may be reviewed, including who has access, for what purpose, and in what scope.⁷⁷⁹ The proposition does not include similar provisions addressing the issue of confidentiality and how juvenile records must be handled in the parole hearing process.

⁷⁷³ *Id.*

⁷⁷⁴ Cal. Proposition 20 (2020) §11.

⁷⁷⁵ CAL. WELF. & INST. § 787

⁷⁷⁶ CAL. WELF. & INST. CODE § 775–787, incl.

⁷⁷⁷ CAL. WELF. & INST. CODE § 781 and 786.

⁷⁷⁸ CAL. WELF. & INST. CODE § 781, subd. (d).

⁷⁷⁹ CAL. WELF. & INST. CODE § 775–787, incl.

B. Amendment of Subdivision (b) of Proposed Section 3455 of the Penal Code

Proposition 20 explicitly adds “probation officer” to a list of individuals authorized to arrest a parolee for failure to comply with the terms of their probation. This change is likely unnecessary, because probation officers already have the powers of peace officers within the jurisdiction defined by Section 830.5 of the Penal Code⁷⁸⁰ so adding “probation officer” explicitly may create confusion. While the creation of confusion is not enough to sever this portion of the proposition, it is possible that confusing text will create a need for time consuming and costly litigation to clear up the confusion.

IV. CONSTITUTIONAL ISSUES

A. Single-Subject Rule

The California Constitution prohibits an initiative measure from addressing more than one subject.⁷⁸¹ This means that if the provisions in the measure are not reasonably related to a common theme or purpose⁷⁸², the measure cannot be placed on the ballot or take effect if passed by the voters.⁷⁸³ Section 11 of Proposition 20 ostensibly acknowledges that the measure embraces multiple subjects. The section lists areas of potential conflict, including, “parole consideration pursuant to Section 32 of Article I of the Constitution, revocation of parole and post release community supervision, DNA collection, or theft offenses.”⁷⁸⁴ However, this rule has typically been applied loosely, so that “even extensive reform in a particular area of public concern does not violate the single subject rule where a comprehensive package of provisions have a common sense relationship, and its various components are in furtherance of a common purpose.”⁷⁸⁵ For example, a proposition that made sweeping changes to the criminal justice system in 2000 was challenged under this rule, but the court held that there was no violation because the proposition’s wide reaching goals all related to reducing crime and courts have repeatedly emphasized “liberal construction” of the single-subject rule.⁷⁸⁶ This suggests that the common thread of criminal law reform is likely enough for Proposition 20 to escape violation of this rule.

However, despite the “liberal construction” that is often afforded initiative measures, there have been a few instances where propositions have been invalidated under this rule.⁷⁸⁷ It seems that the court’s primary concern is when the provisions of the measure have the potential to create voter confusion or there is evidence that the proponents of the

⁷⁸⁰ CAL. WELF. & INST. CODE § 283.

⁷⁸¹ CAL. CONST. art. II, § 8, subd. (d).

⁷⁸² *Senate v. Jones*, 21 Cal. 4th 1142, 1158 (1999).

⁷⁸³ CAL. CONST. art. II, § 8, subd. (d).

⁷⁸⁴ Proposition 20 (2020) § 11.

⁷⁸⁵ *Senate v. Jones*, 21 Cal. 4th 1142, 1158 (1999).

⁷⁸⁶ *Manduley v. Superior Court*, 27 Cal. 4th 537, 575 (2002).

⁷⁸⁷ *California Trial Lawyers Assn. v. Eu*, 200 Cal. App. 3d 351 (3rd Dist. 1988); *Chemical Specialties Manufacturers Assn., Inc. v. Dukmejian*, 227 Cal. App. 3d 663 (1st Dist. 1991); *Senate v. Jones*, 21 Cal. 4th 1142 (1999).

initiative are attempting to deceive voters to pass policies that would not receive majority support by including other, more popular policies in the same measure.⁷⁸⁸ In this vein, there is some evidence of voter confusion or deception where the Proposition 20 proponents focus their rhetoric on “providing law enforcement agencies tools to fight violent crime”⁷⁸⁹ or “rolling back ‘Brown-era leniency’ in criminal sentencing and parole,”⁷⁹⁰ but fail to mention the mandate to collect DNA from certain misdemeanor offenders and the creation of new theft crimes. Additionally, advertisements produced by Keep California Safe include graphic images of crime victims and highlight the crimes that are not considered violent under current law.⁷⁹¹ While it is true that the ballot summary and arguments do mention the DNA collection and theft crime provisions of the proposition, only one sentence of those arguments addresses DNA collection.⁷⁹² Further, financial support from the Albertsons-Safeway, Ralphs Grocery Co., Costco Wholesale and other grocers⁷⁹³ also suggest that proponents are seeking to build a wide coalition around issues that would not normally be tied together. Grocers and retailers may not be as supportive of the measure were it not for the creation of new retail crimes, even though those provisions are quite unrelated to the parole provisions that receive the majority of the proponents’ focus in advertising. While these facts do raise a concern that the proposition does not meet the demands of the single-subject rule, the history of courts applying the rule liberally suggests that Proposition 20 would survive a challenge on this claim.

B. Signature Requirement

Proposition 20 is presented as a statutory initiative rather than a constitutional amendment. There are different requirements depending on whether an initiative amends statutes or the California Constitution. A statutory revision requires a lower number of signatures than a Constitutional amendment.⁷⁹⁴ This means that if an initiative that purports to be a statutory revision actually amends the Constitution, the measure has not received enough signatures to be presented to the voters and those portions amending the Constitution cannot take effect. For Proposition 20, there is a question whether certain provisions actually amend the Constitution.

⁷⁸⁸ *Senate v. Jones*, 21 Cal. 4th 1142, 1168 (1999).

⁷⁸⁹ *Yes on 20 Support Law Enforcement*, REFORM CALIFORNIA, <https://reformcalifornia.org/initiatives/yes-on-20/> (last visited Sept. 22, 2020).

⁷⁹⁰ Ben Christopher, *Props to you, Californians: A preview of what’s on your November ballot*, CALMATTERS, (June 29, 2020) <https://calmatters.org/explainers/california-november-2020-ballot-propositions-final-list/>.

⁷⁹¹ See videos titled “Date Rape,” “Pimp a Child,” “Beat Your Spouse,” and “Hate.” *Tool Kit*, KEEP CALIFORNIA SAFE, <https://keepcalifornia.org/tool-kit/> (last visited Sept. 22, 2020).

⁷⁹² CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 3, 2020, at 50, 51, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>. [“NOVEMBER 2020 VOTER GUIDE”].

⁷⁹³ *2017 through 2018: Campaign Finance: YES ON 20 - KEEP CALIFORNIA SAFE, A PROJECT OF THE CALIFORNIA PUBLIC SAFETY PARTNERSHIP ISSUES COMMITTEE*, CALACCESS, <http://calaccess.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1399447&view=received&session=2017> (last visited Sept. 22, 2020).

⁷⁹⁴ CAL. CONST. art. II, § 8, subd. (b).

This issue exists because Proposition 20 attempts to change Proposition 57 (2016) which was a Constitutional amendment. Proposition 57 (2016) added Section 32 to Article I of the California Constitution; it allowed for a process of parole consideration for non-violent offenders and gave the California Department of Corrections and Rehabilitation (CDCR) the power to create regulations to give effect to the measure.⁷⁹⁵ Since then, CDCR has used that authority to define “violent felony” as a “crime or enhancement as defined by subdivision (c) of Section 667.5 of the Penal Code. Proposition 20 would remove that power from CDCR by creating a statute that would define “violent offense” for purposes of the early release provision created by Proposition 57. As a result of the list being made in statute⁷⁹⁶ and the Legislature’s power to amend that statute,⁷⁹⁷ Proposition 20 would, in effect, strip the CDCR of its power, granted in the Constitution,⁷⁹⁸ to define the terms of the early release provision of Proposition 57 without receiving the required number of signatures to amend the Constitution.

This issue has been raised in the courts, and the Superior Court of Sacramento held that because the other provisions do not amend the Constitution and the provisions at issue could be severed from the measure if it passes, the court will wait to decide the issue.⁷⁹⁹ “There is a strong presumption against preelection resolution of substantive challenges to initiatives, i.e., challenges aimed at the measures’ substantive provisions.”⁸⁰⁰ The challenge is substantive because it asks the court to review the substantive provisions of Proposition 20 to determine whether they conflict with provisions in Article I, Section 32 or any regulations promulgated by CDCR under the authority of Section 32.⁸⁰¹ In order to protect the integrity of the initiative process, a court will allow measures with potentially invalid provisions to be placed on the ballot, unless a significant part of the measure is invalid.⁸⁰² The court found that, “it is not clear that all or even most of the Initiative’s provisions are invalid,”⁸⁰³ because the provisions relating to DNA collection and theft crimes are not challenged.⁸⁰⁴ Further, the court found that the challenged portions could be severed if found invalid after the measure passes because the challenged parole provisions, the DNA collection provisions, and the theft crime provisions “do not appear to be interdependent in the sense that the validity of any depends on the validity of all the others. By all appearances, the DNA-collection and anti-theft provisions could be given effect regardless of whether the early-parole provisions were invalidated in a postelection challenge.”⁸⁰⁵

⁷⁹⁵ CAL. CONST. art. II, § 32, subd. (b).

⁷⁹⁶ Proposition 20 (2020) would add Section 3040.1 to the Penal Code to define violent felony offense “[f]or purposes of early release or parole consideration under the authority of Section 32 of Article I of the Constitution.”

⁷⁹⁷ Proposition 20 (2020) § 9 allows the Legislature to revise the measure with a $\frac{3}{4}$ vote so long as it furthers the purpose of the measure.

⁷⁹⁸ CAL. CONST. art. II, § 32, subd. (b).

⁷⁹⁹ *Newsom v. Padilla*, 2019 Cal. Super. LEXIS 3237, Jun. 13, 2019.

⁸⁰⁰ *Newsom v. Padilla*, 2019 Cal. Super. LEXIS 3237, *12, Jun. 13, 2019.

⁸⁰¹ *Id.*

⁸⁰² *Id.* at *20.

⁸⁰³ *Id.* at *31

⁸⁰⁴ *Id.* at *31–32.

⁸⁰⁵ *Id.* at *32.

V. PUBLIC POLICY CONSIDERATIONS

A. Proponent Arguments

Proponents take particular concern with the effects of Proposition 47 (2014) and Proposition 57 (2016), arguing that those measures were detrimental to public safety and that Proposition 20 will remedy the issues they created. The first of the issues proponents raise is the change in Proposition 47 requiring certain “wobbler” offenses to be classified as misdemeanors. The proponents argue that those crimes were serious and now are not given proper attention by law enforcement because they were downgraded by Proposition 47.⁸⁰⁶ Proposition 20 does not, however, undo the reclassification of offenses under Proposition 47.⁸⁰⁷ The second issue raised by proponents is that changes made by Proposition 57 allow “dangerous offenders” early release. The proponents argue that too many “violent inmates” and “sexual predators” are eligible for early release under the changes made to the California Constitution by Proposition 57.⁸⁰⁸ Proposition 20 attempts to address this issue by creating a list, in statute, of offenses that are ineligible for early release,⁸⁰⁹ circumventing the list created by CDCR under its Constitutional authority. The third issue is that Proposition 47 led to “an explosion of serial theft.”⁸¹⁰ Proposition 20 addresses this issue by creating two new theft offenses and redefining a third.⁸¹¹ Proponents argue that many theft offenders are drug addicts that will benefit from being made criminals because the new laws will get them “off the streets and into the substance abuse and mental health programs they desperately need.”⁸¹² Proponents do not address the fact that “strengthening sanctions against theft”⁸¹³ will get drug addicts incarcerated, not into rehabilitation programs.

Proponents also suggest that stronger criminal law provisions will protect victims of crime.⁸¹⁴ Proposition 20 contains provisions which require that victims are notified of an offender’s release,⁸¹⁵ and that they are able to submit a confidential statement to the parole hearing board.⁸¹⁶ Proponents also argue that the increase in DNA collection of misdemeanor offenders will aid in cold case investigations, referencing a slight decrease in

⁸⁰⁶ *Yes on 20 Support Law Enforcement*, *supra* note 71, at 8.

⁸⁰⁷ Proposition 20 (2020).

⁸⁰⁸ NOVEMBER 2020 VOTER GUIDE at 51.

⁸⁰⁹ Proposed CAL. PENAL CODE § 3040.1. Proposition 20 (2020) §4.

⁸¹⁰ *About: Initiative Overview*, KEEP CALIFORNIA SAFE, <https://keepcalsafe.org/about/> (last visited Sept. 22, 2020).

⁸¹¹ Proposed CAL. PENAL CODE § 459.5. Proposition 20 (2020), § 6. Proposed CAL. PENAL CODE § 490.2. Proposition 20 (2020), § 7. Proposed CAL. PENAL CODE § 490.4. Proposition 20 (2020), § 8.

⁸¹² NOVEMBER 2020 VOTER GUIDE at 50.

⁸¹³ *Id.*

⁸¹⁴ *Id.*

⁸¹⁵ Subd. (a), proposed CAL. PENAL CODE § 3040.4. Proposition 20 (2020), § 4.

⁸¹⁶ Subd. (c), proposed CAL. PENAL CODE § 3040.4. Proposition 20 (2020), § 4.

cold case “hits” since Proposition 47, less than a quarter of which are “connected to violent crime.”⁸¹⁷

B. Opponent Arguments

Opponents argue that Proposition 20 is an “extreme”⁸¹⁸ response to criminal justice reform that was “overwhelmingly” supported by Californians.⁸¹⁹ Opponents highlight that Proposition 47 did not lead to an increase in violent crime,⁸²⁰ though it may have led to a moderate increase in petty theft.⁸²¹ Opponents also point out that the measure will have a disproportionate impact on youth, people of color, and low-income communities because they could be “locked up for years for low-level, non-violent crimes.”⁸²² The Legislative Analyst’s Office has estimated that the initiative will cost tens of millions of dollars annually.⁸²³ There would be an increase in correctional costs because of an increased county jail population and county supervision, state costs because of the reduction in the number of inmates that are eligible for parole, court costs because of the new theft-related crimes, and enforcement costs because of the number of people required to give DNA samples.⁸²⁴ Opponents argue that the increase in spending on correctional facilities will draw resources away from victims and survivors of crime and away from needed social programs that tackle the root causes of crime in California.⁸²⁵ For example, savings of \$350 million since the passage of Proposition 57 have been reinvested in community programs.⁸²⁶ Without this spending, opponents argue, California will be less safe, not more.⁸²⁷

C. Other Considerations

The current COVID-19 pandemic would complicate the efforts of Proposition 20. The pandemic has required the CDCR to enact new rules to ensure inmate safety, including rules for “an expedited transition to parole” for inmates that have 60 days or less to serve.⁸²⁸ However, Proposition 20 would make it harder for inmates to get parole and would consequently require more inmates to stay in prison. It is unclear how the CDCR would maintain proper social distancing protocol if they are required to keep more inmates

⁸¹⁷ *About: Initiative Overview*, *supra* note 84, at 9.

⁸¹⁸ NOVEMBER 2020 VOTER GUIDE at 51.

⁸¹⁹ *Id.* at 50.

⁸²⁰ *NO on Prop 20: it will draw resources away from survivors of crime and our communities*, RUBY’S PLACE <https://www.rubysplace.org/no-on-prop20> (last visited Sept. 22, 2020).

⁸²¹ Mia Bird, Magnus Lofstrom, et al. *The Impact of Proposition 47 on Crime and Recidivism*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (June 2018) https://www.ppic.org/wp-content/uploads/r_0618mbr.pdf. (finding 9% increase in larceny offenses since Proposition 47 took effect).

⁸²² NOVEMBER 2020 VOTER GUIDE at 50.

⁸²³ *Id.* at 48.

⁸²⁴ *Id.* at 48-49.

⁸²⁵ NOVEMBER 2020 VOTER GUIDE at 51.

⁸²⁶ *NO on Prop 20: it will draw resources away from survivors of crime and our communities*, *supra* note 94.

⁸²⁷ NOVEMBER 2020 VOTER GUIDE at 51.

⁸²⁸ *COVID-19 Information: Updates*, CALIFORNIA DEPARTMENT OF CORRECTION AND REHABILITATION, March 31, 2020, <https://www.cdcr.ca.gov/covid19/updates/>.

incarcerated during the pandemic. Also, while Proposition 20 has a clause that says it supersedes conflicting provisions, it is unclear if it would supersede provisions enacted because of the pandemic.

VI. CONCLUSION

Proposition 20 would change the definition of violent felony offense for purposes of parole consideration under Article 32 of the California Constitution and would create new standards for early release and parole hearings. Proposition 20 would also require DNA collection from numerous additional misdemeanors, redefine shoplifting in the penal code, and add serial theft and organized retail theft as new misdemeanors to the penal code. Proponents argue that this proposition will protect victims and increase public safety. Opponents argue that this is an extreme proposition that will have disproportionate impacts on youth, people of color, and low-income families. Proposition 20 may run into problems with statutory interpretation, encompassing multiple subjects in violation of the single-subject rule, and, without the required number of signatures for a constitutional amendment, creating statutes that would amount to a constitutional amendment.

Proposition 21: Rental Affordability Act

Initiative Statute

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I. EXECUTIVE SUMMARY

Proposition 21, the Rental Affordability Act, amends Cal. Civ. Codes §1954.50, §1954.52, and §1954.53 to allow for cities or counties to enact rent control on residential properties over fifteen years old.⁸²⁹ Under the proposed changes to existing law, after a tenant moves out and there is vacancy in a rent-controlled unit, the landlord would be limited to a rent increase of 15% over a span of three years from the start of a new tenancy.⁸³⁰ However, these rent-control provisions would not apply to homes of individuals who own more than two homes.⁸³¹ If this initiative is passed, then the rent control provisions above would replace the Costa-Hawkins Rental Control Act contained in those Cal. Civ. Code sections.⁸³²

Supporters generally argue that rent control would help low-income renters to afford other life necessities, and it would also assist in reducing environmental harm by enabling people to afford to live where they work. The author's purpose is to reduce homelessness by reducing rents and, at the same time, incentivize developers to build more housing that would not be subject to the fifteen-year threshold.⁸³³

Opponents argue that rent control is not the right solution to California's housing problem and that it would put unnecessary financial strain on state and local budgets, which have already been negatively impacted by COVID-19. California's Legislative Analyst's Office estimates the fiscal impact of enacting the rent-control provisions contained in this initiative could result in the reduction of state and local revenue in the tens of millions of dollars per year.⁸³⁴

A **YES** vote *supports* this initiative to allow city or county governments to enact rent-control measures on residential properties over fifteen years old.

A **NO** vote *opposes* this initiative, which means that the Costa-Hawkins Rental Control Act would still limit a city or county government's ability to enact rent-control measures.

⁸²⁹ Cal. Proposition 21 (2020), available at <https://oag.ca.gov/system/files/initiatives/pdfs/19-0001%20%28Rental%20Affordability%20Act%29.pdf> (last visited Oct. 4, 2020).

⁸³⁰ *Id.*

⁸³¹ *Id.* at 8.

⁸³² *Id.*

⁸³³ *Id.* at 6–7.

⁸³⁴ Cal. Legis. Analyst's Office, *Proposition 21 Expands Local Governments' Authority to Enact Rent Control on Residential Property. Initiative Statute*. (November 3, 2020), available at <https://lao.ca.gov/ballot/2020/Prop21-110320.pdf> (last visited Oct. 4, 2020).

II. LAW

A. Existing Law

1. History of Rent Control in the United States and in California

In the United States, Congress twice enacted legislation controlling rental rates on a federal level.⁸³⁵ In 1942, Congress passed the Emergency Price Control Act, which set price controls for “defense rental areas” when local controls were found to be inadequate.⁸³⁶ The federal government feared that rising rents in certain industrial zones would put pressure on wages and reduce the labor supply in these war production centers, thereby hindering the war effort.⁸³⁷ In response, this federal statute was enacted for the purposes of stabilizing prices and preventing irregular and unwarranted increases in rents in areas with a high industrial output, and it expired on its own terms in 1947.⁸³⁸ Later, in 1970, Congress authorized the Nixon administration to create regulations in order to stabilize prices, rents, wages, and salaries during the Energy Crisis.⁸³⁹ Those regulations expired as well.⁸⁴⁰

The United States Supreme Court made its stance on rent control known in the 1985 case of *Fisher v. City of Berkeley*.⁸⁴¹ The Supreme Court held that rent control is not incompatible with the Sherman Act, which is a federal anti-monopoly and antitrust statute that prohibits activities restricting interstate commerce and competition in the marketplace.⁸⁴² However, nothing in the opinion indicates that there is any barrier by federal law to state regulation in this area.⁸⁴³ Therefore, with the exception of the pieces of legislation passed in 1942 and 1970, and in the absence of further Congressional action, the regulation of rent in the United States is an issue for each state to confront.⁸⁴⁴

In California, there are several examples of rent control or rental stabilization. The first occurred in Berkeley in 1972, when voters passed a rent-control charter amendment via

⁸³⁵ John W. Willis, *Short History of Rent Control Laws*, 36 Cornell L. Rev. 54 (1950) at 80.

⁸³⁶ *Id.*

⁸³⁷ Daniel K. Fetter, *The Home Front: Rent Control and the Rapid Wartime Increase in Home Ownership*, Cambridge University Press, 76 Journal of Economic History 4 (2016), available at <https://www.nber.org/papers/w19604.pdf> at 6 (last visited Oct. 4, 2020).

⁸³⁸ Joseph W. Aidlin, *The Constitutionality of the 1942 Price Control Act*, 30 Calif. L. Rev. 648 (1942).

⁸³⁹ Miriam Greenberg & Steve McKay, *History of the Rent Control Debate in California*, No Place Like Home, U.C. Santa Cruz (2018), available at <https://noplacelikehome.ucsc.edu/en/history-of-the-rent-control-debate-in-california/> (last visited Oct. 4, 2020).

⁸⁴⁰ *Id.*

⁸⁴¹ *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 209 (1984).

⁸⁴² Cornell Law School, *Sherman Antitrust Act – Definition*, available at https://www.law.cornell.edu/wex/sherman_antitrust_act (last visited Oct. 4, 2020).

⁸⁴³ *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 209 (1984).

⁸⁴⁴ Lisa Blackwell, Jim Lapides, and Kimble Ratliff, *Rent Control Laws by State*, National Multifamily Housing Council (September 2, 2020), available at <https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/> (last visited Oct. 4, 2020).

the initiative process.⁸⁴⁵ Landlords challenged this amendment in court, where it was held that the Berkeley law was procedurally unconstitutional.⁸⁴⁶ California courts have also consistently held that rent control laws must not infringe on a landlord's right to "fair return" on their investment.⁸⁴⁷ The California Constitution confers regulatory power over rents to the cities and counties as an exercise of the state's police power.⁸⁴⁸ A city's police power is subject to state law, and under this provision, a city can exercise its police power only within its own territory. Otherwise, a city's police power is as broad as the power held by the state legislature.⁸⁴⁹ By 1980, 14 cities in California had some form of rent control. Today, there are 19 cities in the state that have enacted some form of localized rent control.⁸⁵⁰

2. Costa-Hawkins Rental Control Act

There were ten attempts by the state legislature to enact limitations on locally enacted rent control before the passage of the Costa-Hawkins Rental Control Act in 1995. Several forces converged in order to allow that legislation to pass. A combination of Republicans taking control of the Assembly, and the election of Republican Governor Pete Wilson, resulted in the legislature's first successful passage of a limitation on rent control.

In light of these political changes, Costa-Hawkins moved easily through the legislature. In April 1995, the bill passed the Senate Judiciary Committee 5-2; in May 1995, the bill passed out of the Senate 22-14; in June 1995, the bill passed the Assembly Housing Community Development Committee 6-2, and the Assembly Appropriations Committee 10-7.⁸⁵¹ On July 24, 1995, the Senate and Assembly passed the Costa-Hawkins bill by 24-11 and 45-18, respectively.⁸⁵² Governor Pete Wilson signed the measure, AB 1164, into law in early August, and it went into effect on January 1, 1996.⁸⁵³

Costa-Hawkins limited localized rent control in California by prohibiting rent control rules from applying to housing first occupied on or after February 1, 1995, and single-family homes.⁸⁵⁴ While cities and counties retain the ability to implement their own local rent control, they are required to follow the regulations listed in Costa-Hawkins.⁸⁵⁵ The legislation

⁸⁴⁵ Jonathan M. Ross, Comment, *California Rent Control as Applied: Assessed Value as a Measure of Fair Return*, 27 Santa Clara L. Rev. 715 (1987) at 718.

⁸⁴⁶ *Id.*

⁸⁴⁷ *Id.*

⁸⁴⁸ Cal. Const., art. XI, § 7.

⁸⁴⁹ *Stanislaus Co. etc. Assn. v. Stanislaus*, 8 Cal. 2d 378, 383-384 (1937).

⁸⁵⁰ Kenneth H. Carlson, *Cities with Rent Control*, The Renters' Rights Online Legal Help Clinic (2020), available at <https://caltenantlaw.com/cities-with-rent-control/> (last visited Oct. 4, 2020).

⁸⁵¹ Mantel, Henry and Silveria, Sebastian (2018) "Proposition 10: Affordable Housing Act," *California Initiative Review (CIR)*. Vol. 2018, Article 10, available at <https://scholarlycommons.pacific.edu/california-initiative-review/vol2018/iss1/10/> (last visited Oct. 4, 2020).

⁸⁵² *Id.*

⁸⁵³ *Id.*

⁸⁵⁴ Letter from Ashley Johansson, to Xavier Becerra, Attorney General, State of California (December 12, 2017), available at <https://lao.ca.gov/ballot/2017/170629.pdf> (last visited Oct. 4, 2020).

⁸⁵⁵ *Id.*

mandates that local rent-control rules allow landlords the freedom to set market rates when transitioning between tenants.⁸⁵⁶ Further, any housing that was exempt from local rent-control rules at the time Costa-Hawkins passed must remain exempt.⁸⁵⁷

3. Statutory Language of Costa-Hawkins

The text of the Costa-Hawkins Rental Control Act is located within the California Civil Code, at §§ 1954.50–1954.535.⁸⁵⁸ The intent behind this legislation was that it would act as a more moderate approach to some of the more extreme vacancy-control ordinances that were operative in cities such as Berkeley, Santa Monica, East Palo Alto, and West Hollywood.⁸⁵⁹ The passage of Costa-Hawkins imposed three primary limitations. First, rent control cannot apply to any single-family homes.⁸⁶⁰ Second, rent control can never apply to any housing completed on or after February 1, 1995, because the housing is considered to be newly constructed.⁸⁶¹ Third, rent-control laws cannot dictate to landlords what rates they can charge a new tenant when first moving in.⁸⁶²

No law can interfere with the owner's ability to set the rental rate for their property if that property was constructed after February 1, 1995, exempted from rent control prior to that date, or is a single-family home or condominium.⁸⁶³

However, there are exceptions to the owner's ability to establish the rental rate. Specifically, an owner loses that ability if they terminate the tenancy with a 30-day or 60-day notice,⁸⁶⁴ if the owner agrees to a government contract for that rate,⁸⁶⁵ if the owner fails to renew a government contract,⁸⁶⁶ or if the housing is deemed substandard.⁸⁶⁷

Lawmakers included provisions authorizing local cities and communities to enforce eviction rules,⁸⁶⁸ provisions for subleases,⁸⁶⁹ contractual relationships,⁸⁷⁰ protections for

⁸⁵⁶ *Id.*

⁸⁵⁷ *Id.*

⁸⁵⁸ Cal. Civ. Code §§ 1954.50-1954.535.

⁸⁵⁹ Cal. Legislative Analyst's Office. *Proposition 10 Expands Local Governments' Authority to Enact Rent Control on Residential Property. Initiative Statute*. (Nov. 6, 2018), available at <https://lao.ca.gov/ballot/2018/prop10-110618.pdf> (last visited Oct. 4, 2020).

⁸⁶⁰ *Id.*

⁸⁶¹ *Id.*

⁸⁶² *Id.*

⁸⁶³ Cal. Civ. Code § 1954.52(a)(1-3).

⁸⁶⁴ *Id.* § 1954.53(a)(1).

⁸⁶⁵ *Id.* § 1954.52(b), 1954.53(a)(2).

⁸⁶⁶ *Id.* § 1954.53(a)(1).

⁸⁶⁷ *Id.* § 1954.53(f).

⁸⁶⁸ *Id.* § 1954.52(c), 1954.53(e).

⁸⁶⁹ *Id.* § 1954.53(d)(1-4).

⁸⁷⁰ *Id.* § 1954.53(d)(1).

tenants on renewal of a lease,⁸⁷¹ and regulations requiring a 90-day notice when owners terminate a government contract.⁸⁷²

4. Proposition 10 and the Tenant Protection Act

Proposition 10 was a measure on the ballot in 2018 and would have repealed the entirety of Costa-Hawkins by removing §§ 1954.50–53 of the California Civil Code. It would have repealed the limits on local rent-control laws, thereby allowing cities and counties to limit how much a landlord may increase rent when a new tenant moves in.⁸⁷³ Proposition 10 itself would not have made any changes to local rent-control laws and would have had no impact on the requirement that a property owner be allowed a “fair rate of return” as dictated by past court rulings.⁸⁷⁴

However, voters made it clear that they were uninterested in a wholesale repeal of Costa-Hawkins; Proposition 10 lost by a 59.4% vote against versus a 40.6% vote in favor.

Almost one year later, on October 8, 2019, Governor Gavin Newsom signed the Tenant Protection Act into law.⁸⁷⁵ The measure has two major impacts on landlords and tenants of residential property in the state: (1) it imposes a percentage limit on the maximum annual rent increase, capped at 5% of the gross rental rate plus the change in cost of living, which is not to exceed 10% in total; and (2) it introduces a requirement that tenants may only be evicted for “just cause” if they have occupied a property for at least twelve months.⁸⁷⁶ The measure does not apply to housing that has been issued a certificate of occupancy in the last fifteen years, school dormitories, or owner-occupied single-family homes and duplexes.⁸⁷⁷

There are several key differences between the Tenant Protection Act of 2019 and the changes that Proposition 21 would implement. First, the act does not amend any section of Costa-Hawkins, instead amending sections 1946.2, 1947.12, and 1947.13 of the Civil Code.⁸⁷⁸ Second, the legislation caps the annual rent increase at 10% over the course of a single year, where Proposition 21 would cap the annual rent increase at 15% over a three-year period.⁸⁷⁹ For example, under the act, an owner of residential real property could raise

⁸⁷¹ *Id.* § 1954.53(b).

⁸⁷² *Id.* § 1954.535.

⁸⁷³ Mantel, Henry and Silveria, Sebastian (2018) “Proposition 10: Affordable Housing Act,” *California Initiative Review (CIR)*: Vol. 2018, Article 10, available at <https://scholarlycommons.pacific.edu/california-initiative-review/vol2018/iss1/10/> (last visited Oct. 4, 2020).

⁸⁷⁴ *Id.*

⁸⁷⁵ Timothy Hutter, *Governor Newsom Signs Tenant Protection Act of 2019: What Residential Landlords Need to Know About the Capped Rent Increases and New Eviction Protocols*, *The National Law Review* (October 27, 2019), available at <https://www.natlawreview.com/article/governor-newsom-signs-tenant-protection-act-2019-what-residential-landlords-need-to> (last visited Oct. 4, 2020).

⁸⁷⁶ *Id.*

⁸⁷⁷ Cal. Civ. Code § 1946.2(e)(1-8)

⁸⁷⁸ *Id.* § 1946.2, 1947.12, 1947.13.

⁸⁷⁹ *Id.* § 1947.12(a)(1).

rents at a rate of as much as 10% per year, which could result in a rate increase of as much as 30% over three years. An increase of that size is twice what would be permissible under Proposition 21 for a new tenant. Lastly, the Tenant Protection Act is only in place until January 1, 2030.⁸⁸⁰

B. Proposed Law

1. Changes to 1954.50 of the California Civil Code

The title of the sections of the Civil Code spanning from section 1954.50 through section 1954.535 will change from the “Costa-Hawkins Rental Control Act” to the “Rental Affordability Act.”⁸⁸¹

2. Changes to 1954.52 of the California Civil Code

Instead of exempting housing first occupied after February 1, 1995, only housing first occupied within the last fifteen years of the date from which the owner seeks to set the rental rate would be exempt.⁸⁸² Further, the blanket exemption from rental control for property that was already exempt on or before February 1, 1995 is completely eliminated.⁸⁸³ Lastly, while the exemption for single-family homes and condominiums remains in place, it is only effective if the owner is a natural person that owns no more than two residential dwelling or housing units.⁸⁸⁴

Proposition 21 will also codify what California courts consistently hold: that a landlord’s right of fair return on a property shall not be infringed upon by any local charter provision, ordinance, or regulation enacted by a city or county.⁸⁸⁵

3. Changes to 1954.53 of the California Civil Code

Aside from the exceptions outlined in section 1954.52, Proposition 21 will allow a city or county to control initial and subsequent rental rates for residential property by way of local charter provision, ordinance, or regulation. As a result, many of the specific exemptions listed in the existing law within section 1954.53 are eliminated, in favor of only including those exemptions listed in 1954.52.

⁸⁸⁰ *Id.* § 1946.2(j), 1947.12(j), 1947.13(c).

⁸⁸¹ Cal. Proposition 21 (2020), available at <https://oag.ca.gov/system/files/initiatives/pdfs/19-0001%20%28Rental%20Affordability%20Act%29.pdf> (last visited Oct. 4, 2020).

⁸⁸² Cal. Legislative Analyst’s Office, *Proposition 21 Expands Local Governments’ Authority to Enact Rent Control on Residential Property. Initiative Statute*. (November 3, 2020), available at <https://lao.ca.gov/ballot/2020/Prop21-110320.pdf> (last visited Oct. 4, 2020).

⁸⁸³ *Id.*

⁸⁸⁴ *Id.*

⁸⁸⁵ *Id.*

The most significant change within this section is the limitations placed on rent increases for rent-controlled properties at the start of a new tenancy. This increase is capped at 15% over the course of the first three years of the new tenancy, calculated in addition to any increase permitted by local charter provision, ordinance, or regulation.⁸⁸⁶ Hypothetically, if a new tenant moves into a building, and the initial rental rate is set at 1000 dollars per month, then over the course of the first three years, the rent could rise no higher than 1150 dollars per month. This is in contrast to the current permitted 10% increase annually, which could result in the same tenant seeing a rent of 1100 dollars per month by the end of the first year alone, and significantly higher than that by the end of the same three-year period.

It is crucial to note that Proposition 21 will not in itself make any changes to local rent-control laws – it merely allows cities and counties to dictate rent control on a more local basis, with less interference from state law.

III. DRAFTING ISSUES

A. Severability

Section 9 of Proposition 21, generally referred to as a “severability clause,” allows any part of the act to be severed from the rest of the measure if the language of the statute, or its application, are deemed invalid. The existence of a severability clause establishes the presumption in favor of severance.⁸⁸⁷ Courts in California apply three criteria when determining if a provision can be severed: “the invalid provision must be grammatically, functionally, and volitionally severable.”⁸⁸⁸ In the event that any section of Proposition 21 is held invalid, it will be severed from the rest of the measure if the following three statements are true: the rest of the measure makes sense grammatically; the rest of the measure can be implemented on its own; and the electorate would have voted for the initiative even if the invalid section had not been included in the measure. If these criteria are not met, then the court may invalidate the measure in its entirety.⁸⁸⁹

The first key aspect of this measure mainly takes the form of adding and repealing various exemptions to rent control. If one of the added exemptions is found to be improper, or one of the repealed exemptions is found to have been improperly removed, the remaining exemptions can exist on their own. Their removal will not render the code sections grammatically insensible, and the loss of one exemption or another will still allow the rest of the measure to be implemented.

The second key aspect of this measure – that rent increases for a new tenancy be capped at 15% over the course of the first three years – is separate from the listed

⁸⁸⁶ *Id.*

⁸⁸⁷ *Cal. Redevelopment Ass’n v. Matosantos*, 53 Cal. 4th 231, 270 (2011).

⁸⁸⁸ *Id.*

⁸⁸⁹ *Id.*

exemptions, and so the changes to § 1954.52 and § 1954.53 of the Civil Code can occur independent of each other. While the result if one or more provisions were severed would not necessarily be the reform to Costa-Hawkins that the proponents of Proposition 21 intended, the result would still be a partial expansion of the authority to enact rent control to cities that adopt rent-control measures, and so the electorate's interests in voting for the measure would likely be satisfied. Therefore, if one of the sections of Proposition 21 is held invalid by the courts, that section will likely be considered severable, leaving the rest of the measure intact.

IV. CONSTITUTIONAL ISSUES

A. United States Constitutional Issues

The United States Constitution's Fourteenth Amendment Due Process Clause prevents the government from enacting legislation that lacks a reasonable relation to a proper legislative purpose.⁸⁹⁰ The Supreme Court of California interpreted this to mean that rent-control ordinances must be "reasonably calculated to provide landlords with a just and reasonable return on their property."⁸⁹¹ Therefore, if an ordinance does not allow landlords a just or reasonable return on their property then it is confiscatory, unconstitutional, and thus invalid.⁸⁹² In general, the Supreme Court of California is hesitant to decide rent-control cases because an issuance of an opinion can leave the "reviewing court the impossible task of finding somewhere in the penumbra of the Constitution a stipulation that a particular apartment in a particular building should rent for \$746 per month rather than \$745."⁸⁹³

The burden falls on the landlord to challenge a rent control law that does not allow a just or reasonable return.⁸⁹⁴ If the rent-control ordinance is determined to be unconstitutional, then the city or county government has to adjust future rents to a rate that will reasonably compensate landlords in the future.⁸⁹⁵ In order to determine whether rent-control prices offer a just or reasonable return to landlords, courts do an analysis which balances the consumer's interests against the investor's interests.⁸⁹⁶ Included within the balancing analysis is whether the rent-control law allows the city or county to adjust prices "within a broad zone of reasonableness" but not to the extent that would prevent effective real estate enterprises from "operating successfully."⁸⁹⁷

If this proposition is passed, it would face legal challenges from Californian landlords. First, a city or county government would have to adopt the rent-control measures

⁸⁹⁰ *Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (Cal. 1997).

⁸⁹¹ *Id.*

⁸⁹² *Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001), *as modified* (Mar. 21, 2001).

⁸⁹³ *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (Cal. 1997).

⁸⁹⁴ *Id.*

⁸⁹⁵ *Id.*

⁸⁹⁶ *Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001).

⁸⁹⁷ *Id.*

from the proposition, which state voters have already passed into law. Next, after a landlord has incurred enough losses to prove that their ability to raise rent, being restricted to 15% over the span of three years at the start of a new tenancy, did not allow them to make a just or reasonable return, then a they would bring a lawsuit against the city or county. An important note, applying to a landlord's ability to recover, is that a "a constitutional injury does not occur simply because a government regulation limits the value of property."⁸⁹⁸ If the rent-control provision is found to be unconstitutional because it does not allow landlords a just or reasonable return, then the court could order the city or county government to adjust the provision to allow for landlords to be reasonably compensated in the future. After the city or county has adjusted its rent-control ordinance, then the landlord would have to prove that, even after this adjustment, they could not obtain a "fair return" on their property because of the continued rent control.⁸⁹⁹

Landlords have also challenged rent-control ordinances in other states under the Fifth Amendment Takings Clause.⁹⁰⁰ This clause states that private property shall not "be taken for public use, without just compensation."⁹⁰¹ A recent U.S. Supreme Court decision recognized that property owners may bring Fifth Amendment claims for compensation in federal court without first getting a ruling in state court.⁹⁰² This case overturned the previous requirement that property owners bringing a Fifth Amendment claim would have to receive a decision from state court before proceeding to litigation in federal court.⁹⁰³ With this impactful decision, it is expected that the number of landlords who will attempt to bring Fifth Amendment Takings Clause claims in federal court, against local or state rent-control laws, will increase.⁹⁰⁴ If that is true, then federal court circuits may develop their own rent control tests. Therefore, the future of rent control, as a policy, is uncertain and federal court decisions may dictate any new developments.

V. POLICY CONSIDERATIONS

A. Arguments for Proposition 21

Proponents generally cite statewide statistics to support their arguments that rent control helps improve rent affordability, prevent homelessness, and reduce environmental harm.

⁸⁹⁸ *Hillsboro Properties v. City of Rohnert Park*, 41 Cal. Rptr. 3d 441 (Cal. App. 1st Dist. 2006).

⁸⁹⁹ *Id.*

⁹⁰⁰ Luis Ferre-Sadurni, *Landlords Strick Back, Suing to Dismantle Rent Regulation System* (July 16, 2019), available at <https://www.nytimes.com/2019/07/16/nyregion/ny-rent-regulation-lawsuit.html> (last visited Oct. 5, 2020).

⁹⁰¹ U.S. Const. amend. V.

⁹⁰² *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019).

⁹⁰³ *Id.*

⁹⁰⁴ Luis Ferre-Sadurni, *Landlords Strick Back, Suing to Dismantle Rent Regulation System* (July 16, 2019), available at <https://www.nytimes.com/2019/07/16/nyregion/ny-rent-regulation-lawsuit.html> (last visited Oct. 5, 2020).

First, proponents argue that this proposition would assist the many Californians who are renters.⁹⁰⁵ According to California's Department of Housing and Community Development, of California's six million renter households, one in three renters pays more than 50% of their income toward rent.⁹⁰⁶ In addition, home ownership in California is the lowest it has been since the 1940s.⁹⁰⁷ A 2018 USC study found that implementation of rent control to this renter population could protect tenants from price gouging while also being simple to administer by local governments.⁹⁰⁸ Prior studies demonstrates that long-term tenants living in rent-controlled units "receive considerable benefits by paying substantially less than what would otherwise be the case."⁹⁰⁹ In sum, populations who are unable to pay rent could gain social benefits, which are difficult to quantify, because of the money they would retain by living in a rent-controlled unit.⁹¹⁰

Second, proponents associate high rent prices with an increasing number of homeless people in California.⁹¹¹ A 2018 UCLA study's title sums up this argument as "People Are Simply Unable to Pay Rent."⁹¹² This study conducted an overview of Los Angeles's rent-control history which has been characterized by a continual inflation of rent prices since the 1940s.⁹¹³ The number of affordable housing units, covered under Los Angeles's Rental Stabilization Ordinance, has decreased despite the population of Los Angeles increasing.⁹¹⁴ At the time of this study in 2018, there were 53,000 homeless people in the county of Los Angeles.⁹¹⁵ A report from California's Legislative Analyst's Office (LAO) states that, as of 2019, there are a total of 151,000 people experiencing homelessness in California.⁹¹⁶ While the LAO admits that most legislative proposals addressing homelessness have occurred on the local level, the LAO asserts that the state still contributes to resolving the problem through the administering of various grant programs to

⁹⁰⁵ Cal. Proposition 21 (2020), available at <https://oag.ca.gov/system/files/initiatives/pdfs/19-0001%20%28Rental%20Affordability%20Act%29.pdf> (last visited Oct. 4, 2020).

⁹⁰⁶ Cal. Dep't Hous. & Cmty. Dev., *California's Housing Future: Challenges And Opportunities* (Feb. 2018), available at https://hcd.ca.gov/policy-research/plans-reports/docs/sha_final_combined.pdf (last visited Oct. 4, 2020).

⁹⁰⁷ *Id.*

⁹⁰⁸ Pastor, Carter, and Abood, *Rent Matters: What are the Impacts of Rent Stabilization Measures?* (Oct. 2018), available at https://dornsife.usc.edu/assets/sites/242/docs/Rent_Matters_PERE_Report_Web.pdf (last visited Oct. 4, 2020).

⁹⁰⁹ *Id.*

⁹¹⁰ *Id.*

⁹¹¹ Cal. Proposition 21 (2020), available at <https://oag.ca.gov/system/files/initiatives/pdfs/19-0001%20%28Rental%20Affordability%20Act%29.pdf> (last visited Oct. 4, 2020).

⁹¹² Belinkoff Katz, "People Are Simply Unable to Pay the Rent" *What History Tells Us About Rent Control in Los Angeles* (Oct. 2018), available at <https://luskincenter.history.ucla.edu/wp-content/uploads/sites/66/2018/09/People-Are-Simply-Unable-to-Pay-the-Rent.pdf> (last visited Oct. 4, 2020).

⁹¹³ *Id.*

⁹¹⁴ *Id.*

⁹¹⁵ *Id.*

⁹¹⁶ Cal. Legislative Analyst's Office, *Proposition 21 Expands Local Governments' Authority to Enact Rent Control on Residential Property. Initiative Statute*. (November 3, 2020), available at <https://lao.ca.gov/ballot/2020/Prop21-110320.pdf> (last visited Oct. 4, 2020).

developers or landlords. Lastly, the UCLA study recommends repealing the Costa-Hawkins Act in order to address the homelessness crisis.⁹¹⁷

Third, proponents argue that high rent forces people to live further away from their workplace and results in environmental harm from the longer commute.⁹¹⁸ Californians average a 29.3-minute commute, which is the fifth longest in the United States.⁹¹⁹ A 2018 UC Berkeley policy brief argued that workers without stable housing are susceptible to increased difficulties in finding and keeping a job.⁹²⁰ As a result, these workers are forced to live in areas outside of cities, although cities have the most jobs, so they are forced into long commutes through use of private vehicles.⁹²¹ An increased commute time is directly related to an increased amount of harmful greenhouse gases being released into the environment from these vehicles.⁹²² Even with the COVID-19 pandemic causing many people to work from home, Pew Research Center cites data that working from home is only an option for the highest positions in the most affluent professions.⁹²³ Thus, people who are not in these professions must still do in-person work, which necessitates them using some mode of transportation to get there.⁹²⁴ If people could afford to live near where they worked, then environmental harm would be decreased because traffic congestion would be reduced.

B. Proponent's Coalition

There are a variety of organizations who are supporting this proposition which was financed by the AIDS Healthcare Foundation.⁹²⁵ Individuals such as U.S. Senator Bernie Sanders, U.S. Congressperson Maxine Waters, U.S. Congressperson Barbara Lee, President pro Tempore of the California Senate Kevin de Leon, and Reverend Al Sharpton all support this initiative.⁹²⁶ The California Democratic Party is among the most prominent organizations

⁹¹⁷ Belinkoff Katz, *"People Are Simply Unable to Pay the Rent" What History Tells Us About Rent Control in Los Angeles* (Oct. 2018), available at <https://luskincenter.history.ucla.edu/wp-content/uploads/sites/66/2018/09/People-Are-Simply-Unable-to-Pay-the-Rent.pdf> (last visited Oct. 4, 2020).

⁹¹⁸ Cal. Proposition 21 (2020), available at <https://oag.ca.gov/system/files/initiatives/pdfs/19-0001%20%28Rental%20Affordability%20Act%29.pdf> (last visited Oct. 4, 2020).

⁹¹⁹ United States Census Bureau, *Mean Travel Time to work (minutes), workers age 16+ years* (2018), available at <https://www.census.gov/programs-surveys/acs/> (last visited Oct. 4, 2020).

⁹²⁰ Montojo, Barton, and Moore, *Opening the Door for Rent Control: Toward a Comprehensive Approach to Protecting California's Renters* (2018), available at <https://belonging.berkeley.edu/opening-door-rent-control> (last visited Oct. 4, 2020).

⁹²¹ *Id.*

⁹²² *Id.*

⁹²³ Drew Desilver, *Before Coronavirus, telework was an optional benefit, mostly for the affluent few* (Mar. 20, 2020), available at <https://www.pewresearch.org/fact-tank/2020/03/20/before-the-coronavirus-telework-was-an-optional-benefit-mostly-for-the-affluent-few/> (last visited Oct. 4, 2020).

⁹²⁴ *Id.*

⁹²⁵ Yes on Prop 21, *Who We Are*, available at <https://yeson21ca.org/endorsements/> (last visited Oct. 4, 2020).

⁹²⁶ Joshua Smith & Ged Kenslea, *Sen. Bernie Sanders Endorses California's Rental Affordability Act* (Nov. 16, 2019), available at <https://www.businesswire.com/news/home/20191116005038/en/Sen.-Bernie-Sanders-Endorses-California%E2%80%99s-Rental-Affordability> (last visited Oct. 4, 2020); Vivian Bossieux-Skinner, *California Proposition 21: Rent Control* (July 30, 2020), available at <https://www.kalw.org/post/california-proposition-21-rent-control#stream/0> (last visited Oct. 4, 2020).

to endorse a yes vote on this proposition.⁹²⁷ Other supportive organizations include Housing Now! California, National Organization of Black County Officials, and AFSCME California PEOPLE.⁹²⁸ The Los Angeles Times' editorial board, in support, states that, "Rent control can be a helpful tool for cities struggling with gentrification, displacement and homelessness in a booming real estate market."⁹²⁹

C. Arguments Against Proposition 21

Opponents generally argue that rent control will not fix California's housing problem, and that the state needs to create other innovative solutions. Additionally, they cite how the passage of this proposition would lead to a substantial loss in tax revenue for governments and lead to renters being more significantly disadvantaged than they are now.

First, opponents cite how nearly 60% of California voters rejected Proposition 10, the previous form of Proposition 21, in 2018.⁹³⁰ The argument is; because voters rejected a similar proposition, voters should be consistent and reject this one too.⁹³¹ The OC Register sums up this position, "Voters rejected a similar measure two years ago by a significant margin. But once again, they are being presented a measure predicated on the fallacy that rent control is a good policy."⁹³² Simply put, opponents do not think that rent control works because it is an example of a "price ceiling," which kills incentives to build more housing, causes landlords to neglect maintenance, and inflates prices for non-rent-controlled units.⁹³³ Instead of implementing rent control which amounts to excessive regulation, local lawmakers could reform local zoning laws instead.⁹³⁴

⁹²⁷ *Id.*

⁹²⁸ Aids Healthcare Foundation, *Calif. Rent Control Ballot Measure Heads to Voters in Nov.; Campaign Rolls Out 200+ Endorsements* (July 3, 2020), available at <https://www.aidshealth.org/2020/07/calif-rent-control-ballot-measure-heads-to-voters-in-nov-campaign-rolls-out-200-endorsements/> (last visited Oct. 4, 2020).

⁹²⁹ Los Angeles Times Editorial Board, *Endorsement: Yes on Prop. 21. California has a housing crisis and cities should be able to protect tenants* (Sep. 16, 2020), available at <https://www.latimes.com/opinion/story/2020-09-10/yes-prop-21> (last visited Oct. 4, 2020).

⁹³⁰ No on Prop 21, *No on Proposition 21 We need real housing solutions, not the same flawed initiative year after year*, available at https://noonprop21.vote/wp-content/uploads/2020/07/HousingFreeze_FactSheets_1-Initiative_v6-4pdf.pdf (last visited Oct. 4, 2020).

⁹³¹ Cal Matters, *Proposition 21: Rent Control*, available at <https://calmatters.org/election-2020-guide/proposition-21-rent-control/> (last visited Oct. 4, 2020).

⁹³² Orange County Editorial Board, *Proposition 21 will make the housing crisis worse. Vote No.* (Aug. 6, 2020), available at <https://www.ocregister.com/2020/08/06/proposition-21-will-make-the-housing-crisis-worse-vote-no/> (last visited Oct. 4, 2020).

⁹³³ Cal Matters, *5 Things a Californian should know about rent control* (Jan. 2, 2018), available at <https://calmatters.org/housing/2018/01/5-things-californian-know-now-rent-control/> (last visited Oct. 4, 2020).

⁹³⁴ Adam Millsap, *More Rent Control In California Will Make Housing Problem Worse* (Sep. 4, 2020), available at <https://www.forbes.com/sites/adammillsap/2019/09/04/more-rent-control-in-california-will-make-housing-problem-worse/#6e22eaec1955> (last visited Oct. 4, 2020).

Second, opponents argue that the loss of tax revenue would be devastating, especially with the COVID-19 pandemic restricting budgets.⁹³⁵ California's LAO estimates that tens of millions of dollars per year, in the form of lessened property, sales, and income tax revenues, could be lost for state and local governments.⁹³⁶ The value in rental properties will go down, which will cause a decrease in property and income taxes paid by landlords.⁹³⁷ These lost costs would most likely "be paid by fees on owners of rental housing" in an attempt to make up some lost revenue.⁹³⁸ Additionally, rent-control policies necessitate local governments expand their rent oversight boards which would result in increased costs of operation.⁹³⁹ Overall, "most economists – left or right – think rent control is bad."⁹⁴⁰

Third, low to middle class renters who may be seniors, veterans, or disabled are offered no protections under this rent-control policy.⁹⁴¹ An analysis by the California Apartment Association concludes that rent control policies are not a solution to a housing crisis because low-income individuals are not motivated to move out of their rent controlled units while non-rent-controlled units increase in price to make up lost costs.⁹⁴² If fewer people move out of their rent controlled units, then "the supply of available units can actually contract."⁹⁴³ Lastly, a limitation on how much a landlord may increase rent could lead to a disincentive for them to maintain their units in hopes of making up some of the lost revenues.⁹⁴⁴

D. Opponent's Coalition

The Californians for Responsible Housing leads the "No on Prop 21" campaign and has united a wide range of individuals and organizations against rent control.⁹⁴⁵ The most prominent individual is Governor Newsom, who is against this proposition because of the recent passage of AB 1482, which caps annual rent increases at 5% plus inflation for tenants, up to a maximum of 10%.⁹⁴⁶ Organizations who oppose include The California

⁹³⁵ No on Prop 21, *No on Proposition 21 We need real housing solutions, not the same flawed initiative year after year*, available at https://noonprop21.vote/wp-content/uploads/2020/07/HousingFreeze_FactSheets_1-Initiative_v6-4pdf.pdf (last visited Oct. 4, 2020).

⁹³⁶ Cal. Legislative Analyst's Office, *Proposition 21 Expands Local Governments' Authority to Enact Rent Control on Residential Property. Initiative Statute*. (November 3, 2020), available at <https://lao.ca.gov/ballot/2020/Prop21-110320.pdf> (last visited Oct. 4, 2020).

⁹³⁷ *Id.*

⁹³⁸ *Id.*

⁹³⁹ *Id.*

⁹⁴⁰ *Id.*

⁹⁴¹ California Apartment Association, *An Analysis of Rent Control Ordinances in California* (Jan. 2016), available at https://caanet.org/app/uploads/2016/02/Jan2016_Rent_Control_Study.pdf (last visited Oct. 4, 2020).

⁹⁴² *Id.*

⁹⁴³ *Id.*

⁹⁴⁴ *Id.*

⁹⁴⁵ No on Prop 21, *Who We Are*, available at <https://noonprop21.vote/who-we-are/> (last visited Oct. 4, 2020).

⁹⁴⁶ California Apartment Association, *Gov. Newsom no on Proposition 21* (Sep. 11, 2020), available at <https://caanet.org/gov-newsom-vote-no-on-proposition-21/> (last visited Oct. 4, 2020).

Chamber of Commerce, The Congress of California Seniors, The OC Register, and many other veteran's and trade groups.⁹⁴⁷

VI. CONCLUSION

Proposition 21 lifts statewide restrictions on the ability of city and county governments to implement rent control at a time when rising costs of living bear down on Californians to a greater extent than at any other time in history. Rising rents, coupled with economic hardship wrought by COVID-19, have pushed many renters into a position where they are forced to choose between paying rent or providing for their families. If pushed into homelessness, these hardships compounded exponentially.

Similarly, the rising costs of living have an impact on owners and landlords. Proposition 21 seeks to address those concerns while simultaneously giving local politicians the power to address the housing concerns of their constituents as needed. Ultimately, the voters will need to decide what level of priority to give to the issue of rental affordability in November.

⁹⁴⁷ Steve Maviglio, *Leading Seniors Groups Announce Opposition to Proposition 21* (Aug. 5, 2020), available at <https://www.businesswire.com/news/home/20200805005835/en/Leading-Senior-Groups-Announce-Opposition-to-Proposition-21> (last visited Oct. 4, 2020); CalChamber, *OPPOSE: Rental Affordability Act* (Mar. 3, 2020), available at <https://advocacy.calchamber.com/2020/03/03/calchamber-board-votes-to-support-crime-reduction-measure-oppose-rent-control-medical-damage-cap-increase-measures/#rental> (last visited Oct. 4, 2020).

Proposition 22: Protect App-Based Drivers and Services Act

Initiative Statute

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I. EXECUTIVE SUMMARY

Proposition 22, the *Protect App-Based Drivers and Services Act*, would classify app-based drivers as independent contractors. The initiative would exempt app-based transportation and delivery companies from providing drivers with benefits guaranteed to employees but requires benefits not otherwise guaranteed to independent contractors.⁹⁴⁸ Proposition 22 would set minimum compensation and increases overtime pay for app-based drivers.⁹⁴⁹ App-based transportation and delivery companies (“network companies”) would be required to provide healthcare subsidies and carry liability insurance for drivers who average over 15 hours per week during a calendar quarter.⁹⁵⁰ Under Proposition 22, network companies would have to perform background checks on their drivers and implement sexual harassment policies.⁹⁵¹ Proposition 22 would also create criminal penalties for impersonating an app-based driver.⁹⁵²

A **YES** vote supports classifying app-based drivers as independent contractors, not employees, and will override recent judicial decisions.⁹⁵³

A **NO** vote supports existing law classifying app-based drivers as employees and not independent contractors.⁹⁵⁴

II. THE LAW

A. Background

The California Labor Code governs the relationship between employers and employees in the state, but common law additionally recognizes that relationship for the purposes of vicarious civil liability and anti-kickback laws.⁹⁵⁵ The Labor Code defines an “employer” as one who engages a person—the “employee”—to “do something for the employer or a third person.”⁹⁵⁶ California law presumes that workers are employees if they are performing services that require a license.⁹⁵⁷ However, status as an “independent contractor” can be established by proving the worker controls the manner in which they work, performs services normally done by independently established businesses, and is a bona fide vendor not merely trying to avoid employee status.⁹⁵⁸

⁹⁴⁸ LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 22 EXEMPTS APP-BASED TRANSPORTATION AND DELIVERY COMPANIES FROM PROVIDING EMPLOYEE BENEFITS TO CERTAIN DRIVERS. INITIATIVE STATUTE. (2020), *available at* <https://lao.ca.gov/ballot/2020/Prop22-110320.pdf> [LAO Analysis of Measure].

⁹⁴⁹ Cal. Proposition 22 § 1, art. 2 (2020).

⁹⁵⁰ *Id.* at art. 4.

⁹⁵¹ *Id.* at art. 5.

⁹⁵² *Id.*

⁹⁵³ Assembly Bill No. 5, ch. 296, 2019 Cal. Leg. 2017–2018 Sess.

⁹⁵⁴ *Id.*

⁹⁵⁵ 3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, ch. IV § 3 *Employee* (11th ed. 2020).

⁹⁵⁶ CAL. LAB. CODE § 2750 (West 2020).

⁹⁵⁷ *Id.* § 2750.5.

⁹⁵⁸ *Id.*

B. Existing Law

The court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* established a three-factor test to decide a worker's status as an independent contractor,⁹⁵⁹ which California Assembly Bill 5 ("AB 5") codified into law the following year.⁹⁶⁰ This three-prong "ABC" test presumes workers are employees, and permits hiring companies to classify workers as independent contractors if: (1) the worker is free from the hiring company's control and while working; (2) the worker is doing work outside of the company's usual course of business; and (3) the worker is engaged in an established trade, occupation, or business that is the same as the work being done.⁹⁶¹ Based on this test, a hiring business must prove that the worker in question satisfies all three conditions to successfully classify that worker as an independent contractor rather than as an employee. This distinction becomes significant with respect to compensation and benefits.

California's wage and hour laws—which include minimum wage, overtime, and breaks—workplace safety laws, and retaliation laws only protect employees—not independent contractors.⁹⁶² Employees can go to a state agency—such as the Labor Commissioner's Office—to seek enforcement of these laws, but independent contractors must resolve their disputes and enforce their contractual rights through the courts.⁹⁶³

The California Legislature passed AB 5 on September 11, 2019, and Governor Gavin Newsom signed it into law on September 18, 2019.⁹⁶⁴ Many app-based network companies—like Uber, Lyft, Doordash, and Postmates—considered leaving California because they thought they would not be able to continue to effectively operate in California under the requirements established by AB 5.⁹⁶⁵ After the law took effect in January 2020, Uber and Postmates requested a preliminary injunction preventing the enforcement of AB 5 against companies.⁹⁶⁶ Plaintiffs offered several constitutional challenges to the law, but the district court rejected their request for an injunction, so AB 5 still applies to network companies.⁹⁶⁷

⁹⁵⁹ *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903, 916 (2018).

⁹⁶⁰ Assembly Bill No. 5, ch. 296, 2019 Cal. Leg. 2017–2018 Sess.

⁹⁶¹ *Dynamex Operations West, Inc.*, 4 Cal. 5th, at 955.

⁹⁶² Labor Commissioner's Office, *Independent Contractor Versus Employee*, STATE OF CAL DEP'T. OF INDUS. REL., https://www.dir.ca.gov/dlse/faq_independentcontractor.htm#:~:text=What%20difference%20does%20it%20make,employees%2C%20but%20not%20independent%20contractors (last visited Oct. 4, 2020).

⁹⁶³ *Id.*

⁹⁶⁴ Complete Bill History of AB 5, https://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB5, (last visited Oct. 4, 2020).

⁹⁶⁵ Nathan W. Austin, Erika Barbara Pickles, Emilia A. Arutunian & Cecilie E. Read, *California AB 5 and the Status of Independent Contractors*, NAT'L L. REV. (Aug. 28, 2020), <https://www.natlawreview.com/article/california-ab-5-and-status-independent-contractors>.

⁹⁶⁶ *Olson v. California*, 2020 WL 905572 (C.D. Cal. Feb. 10, 2020).

⁹⁶⁷ See *id.* (finding the plaintiffs failed to show "either a likelihood of success on the merits or that serious questions exist as to any of their claims"). See also *infra* Subsection III.A.1 (discussing federal constitutional issues as applied to app-based transportation and delivery companies).

C. Path to the Ballot

1. External Factors

Laws regulating the relationship between network companies and app-based drivers vary nationally:

- In 2016, Uber and Lyft briefly left Texas when lawmakers increased background check requirements for app-based drivers but returned when state courts overruled the law.⁹⁶⁸ In 2019, the Texas Workforce Commission adopted a rule that gig-economy workers—including app-based drivers—are independent contractors.⁹⁶⁹
- In New York City, the Taxi and Limousine Commission issued rules in 2018 that set minimum pay for app-based drivers based on how much time app-based drivers spend transporting passengers.⁹⁷⁰
- Massachusetts filed a lawsuit in July 2020 to declare that Uber and Lyft drivers are employees under state employment law.⁹⁷¹

The United States Department of Labor also announced a proposal in late September 2020 to treat gig workers as independent contractors, but—beyond federal minimum wage and overtime laws—the interpretive rule would not supersede state employment laws.⁹⁷²

2. California v. Uber & Lyft

The State of California brought this case May 5, 2020.⁹⁷³ The complaint alleges that Uber and Lyft avoided complying with workplace standards and requirements by misclassifying their drivers as independent contractors rather than employees.⁹⁷⁴ On August 10, 2020, the San Francisco County Superior Court issued an injunction restraining Uber and

⁹⁶⁸ Harriet Taylor, *What Happened in Austin After Uber and Lyft Got Up and Left*, CNBC (Aug. 18, 2016), <https://www.cnbc.com/2016/08/18/what-happened-in-austin-after-uber-and-lyft-got-up-and-left.html>.

⁹⁶⁹ Lynne Anne Anderson & Alex Harrel, *New Texas Rule Classifies Gig Economy Workers as Independent Contractor*, NAT'L LAW REVIEW (May 7, 2019), <https://www.natlawreview.com/article/new-texas-rule-classifies-gig-economy-workers-independent-contractors>.

⁹⁷⁰ Tina Bellon, *Uber to Limit Drivers' App Access to Comply with NYC Regulation*, REUTERS (Sept. 16, 2019), <https://www.reuters.com/article/us-uber-new-york/uber-to-limit-drivers-app-access-to-comply-with-nyc-regulation-idUSKBN1W12OV>.

⁹⁷¹ Kate Conger and Daisuke Wakabayashi, *Massachusetts Sues Uber and Lyft Over the Status of Drivers*, N. Y. TIMES (July 14, 2020), <https://nyti.ms/32iKtTU>.

⁹⁷² Noam Scheiber, *Uber and Lyft Could Gain from U.S. Rule Defining Employment*, N. Y. TIMES (Sept. 22, 2020), <https://nyti.ms/2RLVrdY>.

⁹⁷³ Complaint for Injunctive Relief, Restitution, and Penalties at 27, *California v. Uber & Lyft*, San Francisco Superior Court No. CGC20584402 (2020).

⁹⁷⁴ *Id.* at 3.

Lyft from classifying their drivers as independent contractors.⁹⁷⁵ Uber argued the work drivers perform is outside of Uber's normal course of business.⁹⁷⁶ Judge Ethan P. Schulman wrote, "to state the obvious, drivers are central, not tangential, to Uber and Lyft's entire ride-hailing business."⁹⁷⁷

The case is currently on appeal before the California First District Court of Appeal to determine whether Uber and Lyft have misclassified their employees against the current standard set up by the "ABC" test in AB 5.⁹⁷⁸ On August 20, 2020, the appellate court stayed Judge Schulman's injunction from taking effect.⁹⁷⁹ Instead, the court allowed Uber and Lyft to file written consents to expedited procedures until August 25, 2020. Additionally, the court required Uber and Lyft to file sworn statements confirming that their companies have developed implementation plans should the court uphold the injunctions and should voters reject Proposition 22.⁹⁸⁰ In September and October, several parties filed amicus curiae briefs in support of each side, and both parties presented their arguments on October 13, 2020.⁹⁸¹

3. Filing of Proposition 22

Three network companies—Uber, Lyft, and Doordash—filed Proposition 22 in October 2019.⁹⁸² After proponents spent nearly \$6.5 million gathering signatures, the initiative qualified for the ballot the following May.⁹⁸³ In California, Office of the Attorney General writes the title, summary, and label for initiatives that appear on the ballot and ballot pamphlet.⁹⁸⁴ Backers of Proposition 22 sued Attorney General Xavier Becerra this summer, charging his label, title, and summary for the ballot were "infected with the contagion of bias and hostility" left over from *California v. Uber & Lyft*.⁹⁸⁵ However, Sacramento Superior Court Judge Laurie Earl held that the descriptions were not false, misleading, or inaccurate

⁹⁷⁵ Order on People's Motion for Preliminary Injunction and Related Motions at 32–33, *California v. Uber & Lyft*, San Francisco Superior Court No. CGC20584402 (2020).

⁹⁷⁶ Tony West, Chief Legal Officer, Uber, Press Call (Sept. 11, 2019), available at <https://drive.google.com/file/d/1O9EDg-wmgZBOWeUmGNUvZ2JOVFZch54z/view>.

⁹⁷⁷ See Dara Kerr, *Judge Issues Injunction Against Uber and Lyft, Says Drivers are Employees*, CBS5 SF BAYAREA, (Aug. 10, 2020), <https://sanfrancisco.cbslocal.com/2020/08/10/judge-issues-injunction-uber-lyft-ride-hailing-employees/> (quoting Judge Schulman's decision).

⁹⁷⁸ *People of the State of California vs. Uber Technologies, et al.*, California First District Court of Appeal No. A16076 (2020).

⁹⁷⁹ *Id.*

⁹⁸⁰ *Id.*

⁹⁸¹ *Id.*

⁹⁸² *Qualified Statewide Ballot Measures*, CAL. SEC. OF STATE, <https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures/> (last visited Sept. 23, 2020).

⁹⁸³ *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)) (last visited Oct. 16, 2020).

⁹⁸⁴ Carolyn Said, *Prop. 22 Backers Sue California AG over Gig-Worker Initiative Description*, S.F. CHRON. (July 29, 2020, updated Aug. 7, 2020), <https://www.sfchronicle.com/business/article/Prop-22-backers-sue-California-AG-over-15444429.php>.

⁹⁸⁵ *Id.*

and that the previous lawsuit was irrelevant.⁹⁸⁶ Judge Earl noted that Proposition 22 would exempt network companies from complying with various state laws pertaining to employers.⁹⁸⁷

D. Proposed Law

Proposition 22, the *Protect App-Based Drivers and Services Act*, declares that app-based drivers are independent contractors in California if the network company meets certain conditions.⁹⁸⁸ To maintain their workers' status as independent contractors, network companies may not require app-based drivers to work specific or minimum hours or accept any service request as a condition of maintaining access to the network.⁹⁸⁹ Network companies also may not restrict app-based drivers from working for other network companies or restrict app-based drivers from working in another lawful occupation.⁹⁹⁰ The initiative also requires network companies and app-based drivers to enter work agreements that include provisions requiring cause to terminate employment and a process to appeal termination.⁹⁹¹ Proposition 22 prevents the California State Legislature from amending this measure unless seven-eighths of Assembly members and Senators vote in support of the amendment.⁹⁹²

The proposition establishes a minimum level of compensation for app-based drivers.⁹⁹³ This calculation is based on an app-based driver's "engaged time," which begins when the driver accepts a network request and ends when the driver completes that request.⁹⁹⁴ Under Proposition 22, if a driver earns less than the minimum for the driver's engaged time during a pay period, the network service must remit the difference to the driver before the end of the next pay period.⁹⁹⁵ If a driver averages 15 hours per week engaged in a network's service requests over a calendar quarter, the driver earns a healthcare subsidy from the network company. The healthcare subsidy is a payment equal to 50% of the average Affordable Care Act contribution for Covered California premiums for that quarter.⁹⁹⁶ App-based drivers averaging at least 25 hours per week over a calendar quarter are entitled to a payment equaling 100% of the average Covered California

⁹⁸⁶ See Carolyn Said, *Judge Rejects Prop. 22 Backers' Attempt to Change Gig-Work Ballot Language*, S.F. CHRON. (Aug. 4, 2020), <https://www.sfchronicle.com/business/article/Judge-rejects-Prop-22-backers-attempt-to-15459333.php> (reporting that the judge noted that state officials are entitled to take positions on important public matters).

⁹⁸⁷ *Id.*

⁹⁸⁸ Cal. Proposition 22 § 1, art. 2 (2020).

⁹⁸⁹ *Id.*

⁹⁹⁰ *Id.*

⁹⁹¹ *Id.*

⁹⁹² *Id.* at art. 9.

⁹⁹³ *Id.* at art. 3 (defining "net earnings floor" as 120% of the applicable minimum wage for engaged time plus \$0.30 per engaged mile to compensate for vehicle expenses).

⁹⁹⁴ *Id.* at arts. 3-4 (omitting coverage requirements while drivers are waiting to accept a request).

⁹⁹⁵ *Id.*

⁹⁹⁶ *Id.* at art. 4 (defining the average contribution as 82% of the monthly premium).

premiums for that quarter.⁹⁹⁷ Network companies would also have to carry loss and liability insurance covering medical expenses and death/disability payments for events that occur during a driver's engaged time.⁹⁹⁸

Proposition 22 prohibits discrimination against app-based drivers, requires network companies to implement and maintain sexual harassment policies, and contains additional measures intended to protect the public.⁹⁹⁹ A network company must conduct a criminal background check for every app-based driver that uses its network, provide safety training to its app-based drivers, and give law enforcement an exclusive channel to submit requests for information.¹⁰⁰⁰ The proposition requires network companies to immediately suspend drivers reasonably suspected of intoxication during engaged time and to limit app-based drivers to 12 hours of network access within a 24-hour period.¹⁰⁰¹ Furthermore, Proposition 22 criminalizes the impersonation of app-based drivers as a misdemeanor.¹⁰⁰² Offenders face up to six months in jail and a \$10,000 fine.¹⁰⁰³

III. DRAFTING ISSUES: AMENDMENT CLAUSE

Proposition 22 contains an amendment clause that explains how the California State Legislature could amend the initiative.¹⁰⁰⁴ According to the California Constitution, "the Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval."¹⁰⁰⁵ Initiative statutes may contain language that requires a supermajority vote by the Legislature in order for the amendment to pass.¹⁰⁰⁶ Proposition 22 contains an amendment clause that allows the Legislature to "amend this chapter by a statute passed in each house of the Legislature by rollcall vote entered into the journal, seven-eighths of the membership concurring" ¹⁰⁰⁷ In effect, 87.5% of the Legislature must vote to enact an amendment of Proposition 22's initiative statute in order for that amendment to succeed. In simpler terms, 35/40 Senate members and 70/80 Assembly members must agree for an amendment to pass. Proposition 22 also expressly prevents the Legislature from reclassifying app-based drivers.¹⁰⁰⁸ While the initiative's thresholds for amendment by the Legislature exceeds the highest thresholds in current California statutory law, several enacted initiatives do not authorize amendments by

⁹⁹⁷ *Id.* (requiring network companies to provide app-based drivers statements every pay period documenting their hours accrued for that period and calendar quarter).

⁹⁹⁸ *Id.* at arts. 3-4.

⁹⁹⁹ *Id.* at art. 5.

¹⁰⁰⁰ *Id.*

¹⁰⁰¹ *Id.*

¹⁰⁰² *Id.*

¹⁰⁰³ *Id.*

¹⁰⁰⁴ *Id.* at art. 9.

¹⁰⁰⁵ CAL. CONST., art. II § 10(c).

¹⁰⁰⁶ *See* CAL. REV. & TAX. CODE § 3700 (West 2020) (requiring four-fifth of both houses of the Legislature to amend under the initiative statute passed as Proposition 99 in 1988).

¹⁰⁰⁷ Cal. Proposition 22 § 1, art. 9 (2020).

¹⁰⁰⁸ *Id.* (precluding amendments to CAL. BUS. & PROF. CODE § 7451).

the Legislature at all.¹⁰⁰⁹ If Californians pass Proposition 22, they would likely need to enact a new ballot initiative to amend Proposition 22's initiative statute.

IV. CONSTITUTIONAL AND STATUTORY ISSUES

A. Federal Constitutional Issues

The Fourteenth Amendment prohibits states from passing laws that deny equal protection under the law, but Proposition 22 treats app-based drivers differently than other drivers who are entitled to employee benefits and protections under existing law.¹⁰¹⁰ Courts will uphold laws regulating app-based driver employment if the laws are rationally related to a legitimate state interest and do not target app-based driver with animus.¹⁰¹¹ Provisions providing protections and benefits and public support from some app-based drivers likely preclude a court from finding that Proposition 22 targets app-based drivers with animus.¹⁰¹² A court would likely determine that Proposition 22 is rationally related to preserving the state's legitimate interest in regulating employment and uphold the law against an Equal Protection Clause challenge.

The Fourteenth Amendment also prohibits states from depriving a person of liberty or property without due process, but Proposition 22 arguably deprives app-based drivers of employee status and benefits.¹⁰¹³ However, courts do not consider vocational liberty interests—such as worker classification and the benefits that come with employee status—to be fundamental rights.¹⁰¹⁴ Therefore, when elected leaders lawfully pass worker-classification legislation, courts will uphold that legislation if they can find a “conceivable basis on which it might survive constitutional scrutiny.”¹⁰¹⁵

Federal regulations preempt state law, but courts will only strike down state laws that conflict with federal regulation if the impact is more than tangential.¹⁰¹⁶ The United States Department of Labor enforces federal minimum wage and overtime pay rules, but

¹⁰⁰⁹ Email from Kathryn Londenbergh, Deputy Legislative Counsel, State of California Office of Legislative Counsel, to Matt Urban, Student, McGeorge School of Law, University of the Pacific (Oct. 5, 2020, 2:26 PM PT) (on file with the *California Initiative Review*).

¹⁰¹⁰ See LAO Analysis of Measure, *supra* note 1.

¹⁰¹¹ *Olson v. California*, 2020 WL 905572 (C.D. Cal. Feb. 10, 2020).

¹⁰¹² See *Frequently Asked Questions*, PROTECT APP-BASED DRIVERS & SERVICES, <https://yeson22.com/questions-and-answers/> (last visited Oct. 6, 2020) (arguing AB 5 “attempts to prohibit app-based drivers from working as independent contractors with control over their schedules, instead forcing Californians who want to keep driving to become employees with rigid schedules and set shifts”).

¹⁰¹³ See U.S. CONST., amend. XIV (“No State . . . shall deprive any person of life, liberty, or property, without due process of law”).

¹⁰¹⁴ See *Olson*, 2020 WL 905572 at *10 (discussing why AB 5 does not deprive gig economy workers the right to pursue their chosen occupation).

¹⁰¹⁵ See *id.* (quoting *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999)).

¹⁰¹⁶ *W. States Trucking Ass'n v. Schoorl*, 377 F. Supp. 3d 1056, 1073 (E.D. Cal. 2019), *appeal dismissed*, 2019 WL 5212963 (9th Cir. Sept. 5, 2019).

states have authority to determine worker classifications.¹⁰¹⁷ Proposition 22 does not treat out-of-state app-based drivers differently than California app-based drivers and therefore does not likely violate the Dormant Commerce Clause.¹⁰¹⁸

B. State Constitutional Issues: Workers' Compensation

The California Constitution gives the Legislature full authority to create and enforce workers' compensation.¹⁰¹⁹ Nothing prohibits the inclusion of workers' compensation in an initiative statute.¹⁰²⁰ Proposition 22 does not explicitly provide workers' compensation benefits within its compensation section; however, it does provide comparable benefits to workers classified as independent contractors.

Proposition 22 requires network companies to provide occupational accident insurance to cover injuries in addition to disability payments that would cover 66% of a worker's income up to 104 weeks.¹⁰²¹ The proposition also extends accidental death coverage to families of drivers who die during network company engaged time.¹⁰²² Automobile insurance coverage is not included for driver injuries or car damage but is included for third-party injuries.¹⁰²³ A network company can deny the coverage offered in Proposition 22 if the worker was online on the app but not on "engaged time."¹⁰²⁴ This gap in coverage raises an issue of app-based workers being potentially liable for accidents that could occur while they are simply sitting in their car waiting to accept a request from the network company app. California law, on the other hand, currently requires an employer to supply workers' compensation coverage that covers workers for on-the-job injuries.¹⁰²⁵ Additionally, California law states that insurance coverage still extends to workers who take minor detours at work,¹⁰²⁶ which contrasts with the lack of coverage for non-engaged time indicated by the language in Proposition 22.¹⁰²⁷

While Proposition 22 would offer new benefits to independent contractors creating a new class of workers, it carves out an exemption that allows network companies to deny

¹⁰¹⁷ Noam Scheiber, *Uber and Lyft Could Gain from U.S. Rule Defining Employment*, N. Y. TIMES (Sept. 22, 2020), <https://nyti.ms/2RLVrdY>.

¹⁰¹⁸ *Cf. W. States Trucking Ass'n v. Schoorl*, 377 F. Supp. 3d, at 1073.

¹⁰¹⁹ CAL. CONST., art. XIV § 4.

¹⁰²⁰ CAL. SEC. OF STATE, STATEWIDE INITIATIVE GUIDE (2020), available at <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/statewide-initiative-guide.pdf> (on file with the *California Initiative Review*).

¹⁰²¹ Cal. Proposition 22 § 1, art. 4 (2020).

¹⁰²² *Id.*

¹⁰²³ *Id.*

¹⁰²⁴ *Id.*

¹⁰²⁵ CAL. LAB. CODE § 3700 (West 2020).

¹⁰²⁶ *See* *Mason v. Lake Delores Group, LLC*, 117 Cal. App. 4th 822, 830, 834, 838 (2004) (acknowledging that an injury must arise out of employment to be covered by workers' compensation, disputes are a question of fact, workers' compensation law be liberally interpreted in favor of coverage, and that coverage is not broken even if the worker is engaged in "certain acts necessary to the life, comfort, and convenience of the employee while at work").

¹⁰²⁷ *See* Cal. Proposition 22 § 1, art. 4 (2020) (omitting coverage guarantees for non-engaged time).

their drivers employee benefits.¹⁰²⁸ These network companies would not have to provide standard employee benefits because their workers would be independent contractors rather than employees.¹⁰²⁹ If Proposition 22 passes, drivers could file lawsuits against the hiring network company for incidents that could foreseeably occur on the job. For example, a driver who is actively on the app could potentially be involved in an accident while waiting to accept a ride or delivery. Because that driver would not have accepted a ride or delivery, that driver would not be covered under Proposition 22's provisions because the incident occurred while the driver was between a ride or delivery. It is unclear how successful these lawsuits would be but, considering drivers spend significant time in their vehicles waiting for a ride or delivery request, drivers are vulnerable to incidents that Proposition 22 does not expressly cover.¹⁰³⁰

V. PUBLIC POLICY ISSUES

A. Proponent's Arguments

Proponents of Proposition 22 have support from a broad spectrum of interest groups including business and taxpayer associations, as well as the prominent network companies that would be subject to the initiative statute. Public safety organizations, senior advocates, several local chapters of the NAACP, the National Action Network, and other community advocacy groups also support Proposition 22.¹⁰³¹

1. Labor Issues

Independent contractor status provides worker flexibility not guaranteed to employees because they may determine their own hours, choose which requests they accept, and work for multiple companies in any industry.¹⁰³² This flexibility allows workers to earn extra money through app-based driving without sacrificing their autonomy or making undesirable long-term commitments. Proposition 22 would enable app-based driver to maintain their independence, but it also entitles them to benefits not otherwise guaranteed to independent contractors.

¹⁰²⁸ *No on Prop 22 Fact Sheet*, CAL. LABOR FED'N (last visited Oct. 16, 2020), available at <https://calaborfed.org/no-on-prop-22-faq/> (on file with the *California Initiative Review*).

¹⁰²⁹ See LAO Analysis of Measure, *supra* note 1.

¹⁰³⁰ See *id.* (estimating that app-based drivers spend one-third of their time waiting for a request).

¹⁰³¹ *Proposition 22 Coalition*, PROTECT APP-BASED DRIVERS & SERVICES, <https://yeson22.com/coalition/> (last visited Oct. 7, 2020).

¹⁰³² Cal. Proposition 22 § 1, art. 2 (2020).

2. Business & Consumer Concerns

The majority of large network companies are based in California,¹⁰³³ and they argue AB 5 is problematic legislation that places a burden on a vital industry in the state.¹⁰³⁴ Standard employee benefits account for 20% of employee costs.¹⁰³⁵ Forcing network companies to comply with existing law risks thousands of jobs if companies choose to reduce wages or jobs in order to mitigate any potential reductions in profits.

If worker classification under existing law applies to rideshare and delivery workers, the costs could be so burdensome to network companies that it would significantly limit the availability and affordability of these services. These network companies have publicly threatened to cease operations and relocate headquarters if forced to comply with existing law.¹⁰³⁶ Losing these services could increase costs and reduce choices for consumers unless other companies can find a way to make the employee model profitable for network companies.

3. Public Safety

Proposition 22 would provide increased protections for both app-based drivers and riders alike. The initiative would introduce requirements for app-based drivers to pass criminal background checks and be subject to antidiscrimination and sexual harassment training.¹⁰³⁷ Proposition 22 would also protect consumers by introducing misdemeanor criminal penalties for impersonating app-based drivers.¹⁰³⁸

California cities have seen significant reductions in DUI rates after network companies started offering rideshare and delivery services.¹⁰³⁹ Furthermore, app-based drivers deliver food and medicine to people forced to stay indoors—essential services during the COVID-19 crisis.¹⁰⁴⁰

B. Opponent's Arguments

Opponents of Proposition 22 include prominent Democrats like former Vice President Joe Biden, California Senator Kamala Harris, Massachusetts Senator Elizabeth Warren,

¹⁰³³ See LAO Analysis of Measure, *supra* note 1.

¹⁰³⁴ *Frequently Asked Questions, PROTECT APP-BASED DRIVERS & SERVICES*, <https://yeson22.com/questions-and-answers/> (last visited Oct. 7, 2020).

¹⁰³⁵ See LAO Analysis of Measure, *supra* note 1.

¹⁰³⁶ Complaint for Injunctive Relief, Restitution, and Penalties at 3, *California v. Uber & Lyft*, San Francisco Superior Court No. CGC20584402 (2020).

¹⁰³⁷ Cal. Proposition 22 § 1, art. 5 (2020).

¹⁰³⁸ *Id.*

¹⁰³⁹ *Prop 22 Protects Public Safety & Keeps Our Roads Safe, PROTECT APP-BASED DRIVERS & SERVICES*, <https://yeson22.com/safety-protections/> (last visited Oct. 6, 2020).

¹⁰⁴⁰ *Id.*

Speaker of the California Assembly Anthony Rendon, and several labor organizations.¹⁰⁴¹ California Labor Commissioner Lilia García-Brower recently sued both Uber and Lyft for committing wage theft by misclassifying their workers as independent contractors instead of employees and is seeking reimbursement for lost drivers' wages.¹⁰⁴² Commissioner García-Brower stated this misclassification "leaves workers without protections such as paid sick leave and reimbursement of drivers' expenses, as well as overtime and minimum wages."¹⁰⁴³ The main arguments against Proposition 22 are labor issues, public safety, fair elections, and potential ripple effects.

1. Labor Issues

Proposition 22 establishes a base level of compensation for app-based transportation or delivery workers that consists of two components: (a) 120% of the "applicable minimum wage" and (b) 30 cents per mile.¹⁰⁴⁴ However, the minimum wage and mileage reimbursements are both determined based on a driver's engaged time or engaged miles, as defined in the definitions section of Proposition 22.¹⁰⁴⁵ So, a network company will only pay its workers for the time between accepting and completing a ride or delivery but not for waiting time or minor detours while logged into the app.¹⁰⁴⁶ To make up for this loss in revenue, drivers might be forced to work longer shifts or more days in the week than originally planned. Also, there is no express provision in Proposition 22 for overtime pay. In California, employers are required to pay employees 150% of the state or local minimum wage after that worker has worked eight hours in one day or after the worker has completed 40 hours in one week.¹⁰⁴⁷

Proposition 22 does include mileage reimbursements for drivers, at a rate of 30 cents per mile,¹⁰⁴⁸ but that is lower than what employee drivers receive under current California law. California law calculates the standard IRS mileage reimbursement rate for driving time at 57.5 cents per mile.¹⁰⁴⁹ Unlike Proposition 22, current California law does not take into account "engaged time."¹⁰⁵⁰ Proposition 22's compensation provision indicates that

¹⁰⁴¹ *California Propositions: A Voter's Guide to the 2020 Ballot Measures*, ABC7 NEWS, (Sept. 15, 2020) <https://abc7.com/california-ballot-measures-november-2020-ca-props-propositions-guide-to/6419431/>

¹⁰⁴² Press Release, Dep't of Indus. Relations, Labor Commissioner's Office Files Lawsuits against Uber and Lyft for Engaging in Systemic Wage Theft (Aug. 5, 2020), *available at* <https://www.dir.ca.gov/DIRNews/2020/2020-65.html>.

¹⁰⁴³ *Id.*

¹⁰⁴⁴ Cal. Proposition 22 § 1, art. 3.

¹⁰⁴⁵ *Id.* at art. 3.

¹⁰⁴⁶ *Id.* at art. 6.

¹⁰⁴⁷ CAL. LAB. CODE § 510 (West 2020).

¹⁰⁴⁸ Cal. Proposition 22 § 1, art. 3.

¹⁰⁴⁹ *Standard Mileage Rates*, INTERNAL REV. SERV., <https://www.irs.gov/tax-professionals/standard-mileage-rates> (last visited Oct. 16, 2020).

¹⁰⁵⁰ REY FUENTES, ET AL., PEOPLE FOR WORKING FAMILIES, RIGGING THE GIG 11 (July 2020), *available at* https://www.forworkingfamilies.org/sites/default/files/publications/Rigging%20the%20Gig_Final%2007.07.2020.pdf (on file with the *California Initiative Review*).

drivers will receive 120% of the applicable wage for that engaged time.¹⁰⁵¹ However, after taking into account several loopholes—unpaid waiting time, unreimbursed waiting time expenses, underpayment for driving expenses, unpaid payroll taxes and employee benefits, and an added health care stipend—drivers will likely receive much less than Proposition 22 implies.¹⁰⁵² For example, in 2021, minimum wage in California will be \$13 per hour, meaning that drivers would theoretically receive \$15.60 per hour.¹⁰⁵³ After subtracting hidden costs for these variables, a driver could be left with a mere \$5.64 per hour of engaged time.¹⁰⁵⁴ Under Proposition 22, drivers could be paid less than what they are currently earning—and potentially even less than minimum wage.

Additionally, California law requires employers to compensate their workers for all other work-related expenses, including the worker’s phone plan costs or cleaning equipment for their vehicle, but there is no comparable language for independent contractors in Proposition 22.¹⁰⁵⁵ Exempting network companies from providing these resources raises concerns for workers and consumers alike because drivers need to continuously sanitize their vehicles during the COVID-19 crisis to ensure adequate decontamination.¹⁰⁵⁶ Finally, because Proposition 22 classifies app-based drivers as independent contractors, the proposition would preclude them from receiving unemployment insurance in the event of job loss within California.¹⁰⁵⁷

2. Public Safety

The California Division of Occupational Safety and Health is the state agency that enforces workplace safety and health standards. Current California law requires all employers to ensure a safe and healthy workplace.¹⁰⁵⁸ All employers must create and implement an Injury and Illness Prevention Program for their employees, including a reoccurring assessment of potential new hazards.¹⁰⁵⁹ However, Proposition 22 eliminates this requirement for network companies.¹⁰⁶⁰ California law requires that employers keep a record of any work-related injuries.¹⁰⁶¹ While the California Public Utilities Commission requires employers to report accidents, there is no requirement within Proposition 22 that

¹⁰⁵¹ Cal. Proposition 22 § 1, art. 3.

¹⁰⁵² Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour*, UC BERKELEY LABOR CENTER (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/>.

¹⁰⁵³ *Id.*

¹⁰⁵⁴ *Id.*

¹⁰⁵⁵ CAL. LAB. CODE § 2802 (West 2020).

¹⁰⁵⁶ Telephone Interview with Rey Fuentes, Skaden Fellow, People for Working Families (Oct. 7, 2020) (notes on file with the *California Initiative Review*).

¹⁰⁵⁷ FUENTES, ET AL., *supra* note 103, at 16.

¹⁰⁵⁸ CAL. LAB. CODE § 2802 (West 2020).

¹⁰⁵⁹ CAL. CODE REGS. tit. 8, §§ 3203, 14300, 14300.29(a)–(b) (West 2020).

¹⁰⁶⁰ FUENTES, ET AL., *supra* note 103, at 11.

¹⁰⁶¹ CAL. CODE REGS. tit. 8, §§ 14300, 14300.29 (West 2020).

mandates network companies to keep a record of these work-related injuries.¹⁰⁶² Proposition 22 also does not include any language indicating that the network companies will handle workplace violence even though drivers commonly encounter or experience workplace violence.¹⁰⁶³ While Proposition 22 does include a requirement that drivers have to complete a safety training course,¹⁰⁶⁴ California law already contains this requirement for employees.¹⁰⁶⁵ Proposition 22 would require app-based drivers to “review and confirm” the network company’s sexual harassment policy, but the initiative’s provisions do not specify details for compliance.¹⁰⁶⁶

3. Fair Elections

From the beginning of January until the middle of September 2020, proponents raised over \$184 million in support of Proposition 22, which is the most money raised in support of an initiative in California history.¹⁰⁶⁷ These funds are primarily coming from the network companies who will likely benefit from the adoption of Proposition 22.¹⁰⁶⁸ Some of these network companies have already lost in court with respect to worker classifications, and now they are resorting to California’s initiative process to financially push their preferences into law.¹⁰⁶⁹ Furthermore, Proposition 22’s unprecedented seven-eighths amendment provision will likely lock-out any future legislative consideration regarding driver classification.¹⁰⁷⁰

4. Potential Ripple Effects & Adoption by Other Industries

Opponents to Proposition 22 argue that it establishes a dangerous precedent for misclassification of organized labor, which could potentially be adopted by other industries and ultimately limit worker benefits for workers beyond those working as app-based drivers. Currently, Proposition 22 only applies to network companies. However, if other business organizations were to adopt this policy, it could cause rippling effects. So, if Proposition 22

¹⁰⁶² Compare *Require Reports TNCs Must Provide the CPUC*, CAL. PUBLIC UTILITIES COMMISSION, <https://www.cpuc.ca.gov/General.aspx?id=3989> with Cal. Proposition 22 § 1 (2020).

¹⁰⁶³ Seth Rosenfeld, *Safety Report from Uber Leaves out Most Accidents*, S. F. PUBLIC PRESS (Jan. 7, 2020), <https://sfpublicpress.org/safety-report-from-uber-leaves-out-most-accidents/>.

¹⁰⁶⁴ Cal. Proposition 22 § 1, art. 5.

¹⁰⁶⁵ CAL. PUBLIC UTILITIES COMMISSION, DECISION ADOPTING RULES AND REGULATION TO PROTECT PUBLIC SAFETY WHILE ALLOWING NEW ENTRANTS TO THE TRANSPORTATION INDUSTRY (Sept. 23, 2013).

¹⁰⁶⁶ Cal. Proposition 22 § 1, art. 5.

¹⁰⁶⁷ See CAL. SECRETARY OF STATE, *Campaign Finance, Yes on 22*, available at <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1422181&view=general> (last visited on Sept. 23, 2020); see also *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)) (last visited Oct. 16, 2020).

¹⁰⁶⁸ See CAL. SECRETARY OF STATE, *supra* note 120.

¹⁰⁶⁹ Sarah Holder, *California’s Gig Economy Ballot Measure Fails Workers, Labor Group Says*, BLOOMBERG CITYLAB (July 7, 2020), <https://www.bloomberg.com/news/articles/2020-07-07/uber-lyft-ballot-measure-opposed-by-labor-groups>.

¹⁰⁷⁰ See FENTES, ET AL., *supra* note 103, at 21; see also *supra* Part III (discussing Proposition 22’s amendment clause).

passes, other industries could adopt this new independent contractor business model, which potentially threatens middle-class jobs.¹⁰⁷¹

VI. CONCLUSION

Proposition 22 would classify app-based drivers as independent contractors, exempting network companies from giving app-based drivers standard employee benefits.¹⁰⁷² The initiative classifies app-based drivers as independent contractors rather than employees or agents of the network company.¹⁰⁷³ Therefore, Proposition 22 would override the Legislative statute passed in September 2019 that codified the common law test to determine worker status.¹⁰⁷⁴ The ballot measure would require network companies to provide app-based drivers with benefits not otherwise guaranteed to independent contractors but falls short of protections that state law requires for employees.¹⁰⁷⁵ Proposition 22 would also introduce criminal penalties intended to protect vulnerable riders.¹⁰⁷⁶ This initiative codifies a new worker classification for app-based driving, and other industries could follow and adopt this model.

¹⁰⁷¹ *No on Prop 22 Fact Sheet*, CAL. LABOR FED'N (last visited Oct. 16, 2020), available at <https://calaborfed.org/no-on-prop-22-faq/> (on file with the *California Initiative Review*).

¹⁰⁷² See LAO Analysis of Measure, *supra* note 1.

¹⁰⁷³ Cal. Proposition 22 § 1, art. 2 (2020).

¹⁰⁷⁴ Complete Bill History of AB 5, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB5, (last visited Sept. 23, 2020).

¹⁰⁷⁵ See LAO Analysis of Measure, *supra* note 1.

¹⁰⁷⁶ Cal. Proposition 22 § 1, art. 5 (2020).

Proposition 23: Protect the Lives of Dialysis Patients Act (2020)

Initiative Statute

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I. EXECUTIVE SUMMARY

Proposition 23, the “Protect the Lives of Dialysis Patients Act,” regulates dialysis clinics in an effort to improve safety standards for chronic dialysis patients. In particular, Proposition 23 has four major prongs: (1) requires dialysis clinics to have at least one onsite physician during hours of operation; (2) mandates reporting of dialysis-related infections to the state health department; (3) orders clinics to seek state approval before ceasing or reducing operations; and (4) forbids clinics from denying care to patients with government-backed insurance.

A **YES** vote on this measure would require dialysis clinics to maintain at least one on-site physician during operating hours, submit infection reports to the Department of Public Health, obtain state approval before closing or reducing operations, and would prohibit discrimination against patients with government-backed insurance.

A **NO** vote on this measure would allow dialysis clinics to continue to operate under existing laws, including federal and state health, safety, and reporting laws.

II. BACKGROUND

A. What is Dialysis and Who are the Players Involved?

Dialysis treats end-stage kidney failure. For individuals with very low kidney function, dialysis or a kidney transplant is needed for survival. Dialysis treatment removes blood from the body via catheter, sends the blood through a specialized filter, then pumps the blood back into the body as a functioning pair of kidneys would. Treatments take multiple hours and are done about three times per week either at home, at a hospital, or most commonly at a chronic dialysis clinic (CDC). The California Department of Public Health (CDPH) is charged with licensing and inspecting CDCs.¹⁰⁷⁷ As of May 2018, the 588 chronic dialysis clinics licensed in California have reported about 80,000 patients each month. The two largest networks of dialysis clinics are owned and operated by DaVita Inc. and Fresenius Medical Care, who have a combined market share of about 73% of the CDCs in California.¹⁰⁷⁸ Proponents estimate these two providers take in combined annual profits of \$350 million in California and have spent at least \$100 million on lobbying efforts in 2018 and 2019.¹⁰⁷⁹

¹⁰⁷⁷ Cal. Health & Safety Code § 1225(c).

¹⁰⁷⁸ Cal. Proposition 23 at § 2 (2020).

¹⁰⁷⁹ *Id.*

B. Prior Legislation

1. AB 251 (2017)

Assembly Bill 251 was introduced by Assembly Member Rob Bonta in 2017 and would have required dialysis clinics to submit annual reports to CDPH detailing the ratio of treatment revenue to direct patient care services, health care quality improvement, federal and state taxes, and licensing fees.¹⁰⁸⁰ If the ratio of these costs were ever to fall below 85% of a clinic's treatment revenue, the state would mandate the clinic to issue reimbursements to patients.¹⁰⁸¹ The bill was rendered inactive in 2017, revived in 2018, and amended in the Senate where all of the dialysis language was stripped and replaced with an amendment to the Harbors and Navigation Code that never passed into law.

2. SB 349 (2017)

As the Senate companion to AB 251, Senate Bill 349 was initially focused on ratios of direct caregiving staff to patients at outpatient dialysis clinics, but the bill was rendered inactive in 2017.¹⁰⁸² Akin to its Assembly counterpart, it was revived in 2018, and the entirety of the dialysis language was removed. The bill was amended to focus on protecting individuals from civil arrests in California courthouses and was ultimately vetoed.

3. Proposition 8: "Fair Pricing for Dialysis Act" (2018)

The "Fair Pricing for Dialysis Act" contained three primary provisions: (1) a cap on allowable revenue at chronic dialysis clinics and required disbursement of refunds to patients if that cap was exceeded; (2) submission of annual reports to the California Department of Public Health (CDPH); and (3) prohibition on discrimination against patients with government-backed insurance plans.¹⁰⁸³ The CDPH would have been responsible for promulgating regulations pursuant to the initiative if it had passed.¹⁰⁸⁴

Proposition 8 would have capped allowable revenue for chronic dialysis clinics at 115% of "allowable costs," which included direct patient care services costs; health care quality improvement costs; costs of staff wages, training, and benefits; electronic health information systems; drugs and medical supplies; and facilities costs.¹⁰⁸⁵ Administrative costs

¹⁰⁸⁰ AB 251, 2017 Leg., 2017-2018 Reg. Sess. (Cal. 2018) (as amended on Sept. 4, 2018, but not enacted) *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB251.

¹⁰⁸¹ *Id.*

¹⁰⁸² SB 349, 2017 Leg., 2017-2018 Reg. Sess. (Cal. 2018) (as amended on Oct. 12, 2018, but not enacted) *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB349.

¹⁰⁸³ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, Tuesday November 6, 2018, at 48, *available at* <https://vig.cdn.sos.ca.gov/2018/general/pdf/top1.pdf#prop8> ["NOVEMBER 2018 VOTER GUIDE"].

¹⁰⁸⁴ *Id.* at 50.

¹⁰⁸⁵ *Id.* at 51.

were excluded from “allowable costs.”¹⁰⁸⁶ The initiative would have mandated any profits over the revenue cap be reissued to patients via rebate, although patients who paid through Medicare or Medi-Cal would not be entitled to any rebates.¹⁰⁸⁷

If a CDC failed to issue rebate payments to patients, the initiative included a penalty provision requiring a CDC in violation to pay the CDPH a fine and interest amounting up to a maximum of \$100,000.¹⁰⁸⁸ The Proposition also provided for a procedure for CDCs to challenge the 115% cap.¹⁰⁸⁹ To successfully challenge the cap, a CDC had to show that the cap violated due process or enacted a regulatory taking requiring just compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution.¹⁰⁹⁰ Under the requirement that CDCs report annually to CDPH, the contents of such reports were to include the number of patients who received treatment, all allowable costs, the amount which the CDC’s revenue exceeded the statutory cap, and the total amount the CDC paid in rebates to patients.¹⁰⁹¹ Finally, under the language of the initiative, CDCs were prohibited from discriminating against patients with government-backed insurance plans.¹⁰⁹² This would have ensured that clinics would be unable to turn away patients with government-backed insurance such as Medicare, Medi-Cal, or Medicaid.¹⁰⁹³ Proposition 8 failed at the ballot box in 2018, with the final vote count at 60% opposed compared to 40% in favor.¹⁰⁹⁴

C. Existing Law

1. Maintaining Health and Safety Requirements

Federal regulations, found at 42 C.F.R. 494.20, state that dialysis clinics must “operate and furnish services in compliance with Federal, State, and local laws and regulations pertaining to licensure and any other relevant health and safety requirements.”¹⁰⁹⁵ Under Federal law, “[t]he dialysis facility must provide and monitor a sanitary environment to minimize the transmission of infectious agents within and between the unit and any adjacent hospital or other public areas.”¹⁰⁹⁶ Section 494.30(a) requires that

¹⁰⁸⁶ *Id.*

¹⁰⁸⁷ Anupe Litt & John Ponce, *Proposition 8: Fair Pricing for Dialysis Act*, 18 Cal. Init. Rev. 9 (2018) available at <https://scholarlycommons.pacific.edu/california-initiative-review/vol2018/iss1/9>.

¹⁰⁸⁸ Cal. Proposition 8 at § 3 (2018).

¹⁰⁸⁹ *Id.*

¹⁰⁹⁰ *Id.*

¹⁰⁹¹ *Id.*

¹⁰⁹² *Id.* at § 4.

¹⁰⁹³ *Id.*

¹⁰⁹⁴ BALLOTPEDIA, *California Proposition 8, Limits on Dialysis Clinics' Revenue and Required Refunds Initiative (2018)*, (Oct. 2020), available at [https://ballotpedia.org/California_Proposition_8,_Limits_on_Dialysis_Clinics%27_Revenue_and_Required_Refunds_Initiative_\(2018\)](https://ballotpedia.org/California_Proposition_8,_Limits_on_Dialysis_Clinics%27_Revenue_and_Required_Refunds_Initiative_(2018)).

¹⁰⁹⁵ 42 C.F.R. § 494.20 (2008).

¹⁰⁹⁶ 42 C.F.R. § 494.30 (2008).

CDCs demonstrate that they follow standard infection control precautions by implementing, in part, recommendations by the Center for Disease Control as set forth in its “Recommendations for Preventing Transmission of Infections Among Chronic Hemodialysis Patients” publication.¹⁰⁹⁷ The publication sets forth requirements for maintaining proper equipment, supplies, and environmental surface procedures, including sterilization and proper maintenance of hemodialysis machines.¹⁰⁹⁸ Under California Health and Safety Code 1225(c)(1), California CDCs are required to meet federal certification standards for licensing.¹⁰⁹⁹

2. Staffing Requirements

There are no federal or state minimum staffing requirements for CDCs. However, 42 CFR 494.180 requires that CDCs maintain, “[a]n adequate number of qualified personnel...present whenever patients are undergoing dialysis so that the patient/staff ratio is appropriate to the level of dialysis care given and meets the needs of patients.”¹¹⁰⁰ The section does not define “qualified personnel”, but at a minimum, requires members of an interdisciplinary team; including registered nurses, social workers, and dietitian members; to meet the patient’s needs.¹¹⁰¹ Additionally, the section provides that CDC facilities are under the control of an identifiable governing body or person with “full legal authority and responsibility for the governance and operation of the facility.”¹¹⁰² The governing body or person must appoint a chief executive officer or administrator, also termed “medical director”, who “exercises responsibility for the management of the facility and the provision of all dialysis services.”¹¹⁰³ The medical director is not required to spend a specific amount of time at the CDC.¹¹⁰⁴

3. Reporting Requirements

Under Federal law, the California Department of Public Health (DPH) is responsible for licensing CDCs and conducting federal certification surveys for the Center for Medicare and Medicaid Services and at intervals as specified by the Secretary.¹¹⁰⁵ The DPH conducts

¹⁰⁹⁷ *Id.*

¹⁰⁹⁸ *Recommendations for Preventing Transmission of Infections Among Chronic Hemodialysis Patients*, (2001), Center for Disease Control and Prevention, available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5005a1.htm>.

¹⁰⁹⁹ Cal. Health and Safety Code §§ 1251(c)(2) (2018).

¹¹⁰⁰ 42 C.F.R.494.180(b)(2) (2008).

¹¹⁰¹ *Id.*

¹¹⁰² *Id.*

¹¹⁰³ *Id.*

¹¹⁰⁴ Legislative Analyst’s Office, *ESTABLISHES STATE REQUIREMENTS FOR KIDNEY DIALYSIS CLINICS. REQUIRES ON-SITE MEDICAL PROFESSIONAL. INITIATIVE STATUTE*, (2020).

¹¹⁰⁵ 42 C.F.R. 494.180(h) (2008).

inspections of each CDC about once every three years.¹¹⁰⁶ Additionally, the DPH may visit the dialysis clinic at any time to determine if the facility is in compliance with the federal and state licensing requirements.¹¹⁰⁷ If surveyors find that the facility does not comply with federal or state certification requirements, the facility is required to issue a statement of deficiencies and plan of correction to the DPH.¹¹⁰⁸ Additionally, the CDCs must report specified dialysis-related infection information to the National Healthcare Safety Network at the federal Centers for Disease Control in order to continue to receive payments from Medicare.¹¹⁰⁹

4. Insurance Based Discrimination

According to the Legal Analyst's Office, government health coverage programs for dialysis pay lower rates than individual or group insurers and have rates largely determined by either federal or state regulation.¹¹¹⁰ There is currently no state or federal law that prohibits CDCs from negotiating rates with patients under individual or group health insurance.

5. Closure or Reduction of Services

There is currently no state or federal law that requires California CDCs or its governing entity to report to the DPH of any closure or reduction of services, nor are any California CDCs required to obtain written consent to do so. However, 42 C.F.R. 494.70 requires dialysis facilities to inform patients of their rights, including "the facility's policies for transfer, routine or involuntary discharge, and discontinuation of services to patients."¹¹¹¹ Patients are required to be informed of any changes, including reduction of services that affect their plan of care.¹¹¹²

D. Proposed Law

This initiative would: require dialysis clinics to have at least one on-site licensed physician during hours of operation; mandate reporting of all dialysis related infections to the CDPH; order clinics to seek approval from the CDPH before closing down or reducing services; and forbid clinics from denying care to patients based on the payment-source of

¹¹⁰⁶ *CDPH Licensing & Enforcement*, California Hospital Association, available at <https://www.calhospital.org/cdph-licensing-enforcement> (last visited October 18, 2020).

¹¹⁰⁷ *Id.*

¹¹⁰⁸ *Id.*

¹¹⁰⁹ Legislative Analyst's Office, *ESTABLISHES STATE REQUIREMENTS FOR KIDNEY DIALYSIS CLINICS. REQUIRES ON-SITE MEDICAL PROFESSIONAL. INITIATIVE STATUTE*, (2020).

¹¹¹⁰ *Id.*

¹¹¹¹ 42 C.F.R 494.70 (2017).

¹¹¹² *Id.*

their insurance.¹¹¹³ The initiative accomplishes these goals by adding the following sections to the Health & Safety Code: Sections 1226.7, 1226.8, 1226.9, 1226.10, and 1266.3.¹¹¹⁴

Section 1226.7 mandates that CDCs maintain quality of care and patient access without discrimination against patients with government-backed insurance plans.¹¹¹⁵ This section also applies to a CDC's governing entity (private, for-profit companies or non-profit companies that own or operate a CDC).¹¹¹⁶

Section 1226.8 requires every CDC to maintain at least one licensed physician on-site during hours of operation.¹¹¹⁷ A CDC may apply to the CDPH under this section for an exception on the grounds that there is "a bona fide shortage of qualified physicians [that] prevents it from satisfying the requirement."¹¹¹⁸ If the exception is granted, the CDC can satisfy the requirement by maintaining at least one nurse practitioner or physician's assistant in place of a licensed physician; however, the exception may only last for 12 months.¹¹¹⁹ The section further requires quarterly reporting of all dialysis related infections to both CDPH and the National Healthcare Safety Network.¹¹²⁰ Failure to submit such a report carries a maximum penalty of \$100,000.¹¹²¹ Finally, definitions for terms used in the section are set forth (including but not limited to "chronic dialysis clinics" and "licensed physician").¹¹²²

Section 1226.9 sets forth an order to CDCs or their governing entities to provide written notice to—and obtain the written consent of—CDPH before the CDC closes or substantially reduces or eliminates its services.¹¹²³ CDPH has discretion to consent or withhold consent upon specified grounds: (1) effects on the availability and accessibility of health care services to the affected community, including but not limited to the clinic's detailed plan for ensuring patients will have uninterrupted access to care; (2) evidence of good faith efforts by the clinic or governing entity to sell, lease, or otherwise transfer ownership or operations of the clinic to another entity that would provide chronic dialysis care; and (3) the financial resources of the clinic and its governing entity.¹¹²⁴

¹¹¹³ Cal. Proposition 23 at §§ 3-6 (2020).

¹¹¹⁴ *Id.*

¹¹¹⁵ Cal. Proposition 23 at § 3 (2020).

¹¹¹⁶ *Id.*

¹¹¹⁷ *Id.* at § 4.

¹¹¹⁸ *Id.*

¹¹¹⁹ *Id.*

¹¹²⁰ Cal. Proposition 23 at § 4 (2020).

¹¹²¹ *Id.*

¹¹²² *Id.*

¹¹²³ *Id.* at § 5.

¹¹²⁴ *Id.*

Section 1226.10 provides that if a CDC or its governing entity disputes one of CDPH's decisions, the CDC or its governing entity shall be allowed to request an administrative hearing on the subject from a qualified administrative law judge pursuant to Health & Safety Code Section 131071.¹¹²⁵ The hearing shall be conducted according to the administrative adjudication provisions of Chapter 4.5 (commencing with Section 11400) and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except as specified in that section.¹¹²⁶

Section 1266.3 supplements the initiative with an intent statement, specifying that the taxpayers of California are not to be financially responsible for the implementation and enforcement of the measure.¹¹²⁷

Section 9 of Proposition 23 provides the terms for enforcement of the measure. Under Section 9, the CDPH is required to adopt regulations implementing sections 1226.8 and 1226.9 of the measure within one year following the measure's effective date.¹¹²⁸ If CDPH fails to do so in the one year period, emergency regulations consistent with the act shall be adopted within one year of the measure's effective date or as soon as practicable, while final regulations shall be adopted by the time the emergency regulations expire.¹¹²⁹

E. Key Distinctions Between Proposition 8 (2018) and Proposition 23 (2020)

The primary distinguishing characteristic between Proposition 8 and Proposition 23 is the abandonment of the revenue cap and subsequent requirement to reimburse patients. Proposition 8 would have mandated CDCs to reimburse patients if their annual revenues exceeded the 115% cap on "allowable costs." This provision posed significant constitutional issues that almost certainly would have been challenged in court had Proposition 8 not failed at the ballot box. Imposition of a revenue cap and a reimbursement requirement would have required CDCs to forfeit private property in the form of profits they had rightfully earned, without any compensation from the government in return. Such an action is virtually certain to be a regulatory taking under the Fifth and Fourteenth Amendments to the United States Constitution and would have resulted in an ample universe of post-election litigation. It is no surprise that while the proponents of the propositions have stayed the same, the revenue cap and reimbursement language have been fully abandoned. The only piece of Proposition 8 that actually made it into Proposition 23 is the prohibition of discrimination against patients with government-backed insurance.¹¹³⁰

¹¹²⁵ Cal. Proposition 23 at § 6 (2020).

¹¹²⁶ *Id.*

¹¹²⁷ *Id.* at § 7.

¹¹²⁸ *Id.* at § 9.

¹¹²⁹ *Id.*

¹¹³⁰ *Compare* Cal. Proposition 8 at § 4 (2018), *with* Cal. Proposition 23 at § 3 (2020).

Proposition 23 differs from Proposition 8 in that it tightly focuses on one specific theme—protecting the safety of dialysis patients. Where Proposition 8 was focused primarily on the revenue cap and reimbursement issue with the prohibition on discrimination as something of a footnote, Proposition 23 is more holistically constructed around ensuring patient safety.¹¹³¹ Each provision of Proposition 23 has a direct relationship to the safety of dialysis patients. Requiring a physician on-site to direct patient services ensures that patients are receiving safe and quality care. Prohibiting discrimination against patients with government-backed insurance plans further protects those patients’ safety in providing continuity of treatment and a backstop against their care being cut off by a clinic. Requiring each clinic to report cases of dialysis related infections is germane to the safety issue because reporting promotes health care quality and better sanitation. Finally, the requirement that CDCs and their governing entities receive consent from the CDPH before closing down or reducing services promotes the safety of dialysis patients because the CDPH will be aware of changes to the supply of dialysis treatment and can prevent shortages that would endanger patients absent such regulation.

III. DRAFTING ISSUES

A. Severability

It is highly unlikely that a severability issue with Proposition 23 would come up; no section is likely to be invalidated if the measure passes. Additionally, Proposition 23 contains a severability clause, allowing its valid provisions to be severed from any potentially invalid provisions within the initiative.¹¹³² This clause creates the presumption that the initiative is severable, but the clause itself is not dispositive.¹¹³³ Should a court find that any portion of Proposition 23 is unconstitutional, the court will examine the rest of the initiative under a three-part test to confirm that it is severable from the invalid portion.¹¹³⁴ The valid provisions of Proposition 23 must be “grammatically, functionally, and volitionally separable” for a court to sever the valid provisions from any potential unconstitutional provisions.¹¹³⁵ First, an initiative is grammatically severable if the invalid portions “can be removed as a whole without affecting the wording” of the remaining valid parts of the initiative.¹¹³⁶ Next, an initiative is functionally severable if the valid parts that remain are independent and “complete in itself.”¹¹³⁷ Last, an initiative is volitionally severable if the court decides that the voters would have adopted the remaining portion of the initiative without the invalidated portions.¹¹³⁸ Therefore, Proposition 23 is severable if—after any

¹¹³¹ *Id.*

¹¹³² Cal. Proposition 23 at § 12 (2020).

¹¹³³ *California Redevelopment Assn. v. Matosantos*, 53 Cal.4th 231, 270 (2011).

¹¹³⁴ *People’s Advocate, Inc. v. Superior Court*, 181 Cal.App.3d 316, 330 (1986).

¹¹³⁵ *California Redevelopment Assn. v. Matosantos*, 53 Cal.4th 231, 270 (2011).

¹¹³⁶ *Id.* at 271.

¹¹³⁷ *Id.*

¹¹³⁸ *Id.*

invalid portions are removed—the valid provisions make sense, operate independently of the invalid provisions, and the voters would have passed the initiative had the invalid portion been omitted. If the valid portions of the initiative are not severable, then the whole initiative is invalid.¹¹³⁹

In terms of grammatical severability, the invalid portions must be grammatically complete and distinct from the valid portions such that they can be separated by section, paragraph, clause, phrase, or even single words without affecting the wording of the valid portions. The substantive provisions of Proposition 23 are all either in separate sections or in their own paragraphs within sections.¹¹⁴⁰ For sections with multiple paragraphs, presumably one or the other paragraph could be removed and the valid paragraph would occupy the whole section. Therefore, they are grammatically severable. All other substantive provisions in the initiative are within their own sections, so each section can be removed without affecting the wording of the other sections. As a result, none of the provisions implicate a grammatical severability issue.

The next step is to assess functional severability: whether the invalid provisions, if removed, would destroy or significantly alter the functionality of the proposition. Subdivision (b) of Section 1226.8 requires a clinic or its governing entity to report infection-related information to CDPH each quarter. If an onsite doctor required under subdivision (a) of Section 1226.8 were to be required to report data to the department, then these provisions would possibly be functionally inseparable because they would necessarily rely on each other to function. However, subdivision (b) calls for the clinic or governing entity itself to submit the data and requires that the “chief executive officer or other principal officer of the clinic or governing entity” certify that the information given to the department is accurate and complete. The onsite doctors are not implicated in the data reporting, so the provisions are likely functionally severable. All other provisions are functionally severable because they do not directly affect the functionality and outcomes of the other provisions. The provisions of Proposition 23 are independent and complete in themselves and are thus functionally severable.

Finally, turning to volitional severability: would the voters still pass the valid provisions of Proposition 23 even without the (hypothetically) voided sections? Proposition 23’s proponents argue that the main components of the initiative are that it would: (1) require an onsite doctor at all CDCs; (2) require infection reporting; (3) prevent CDCs from closing or cutting services without permission; and (4) prohibit discrimination in treatment because a patient has a government-backed insurance plan.¹¹⁴¹ Given that the proponents of Proposition 23 consistently advocate for all provisions of the initiative equally in its website, fact sheet, and the voter guide,¹¹⁴² it is likely that voters would pass the measure

¹¹³⁹ *People’s Advocate, Inc. v. Superior Court*, 181 Cal.App.3d 316, 330 (1986).

¹¹⁴⁰ Cal. Proposition 23 (2020).

¹¹⁴¹ Yes on 23 – Californians for Kidney Dialysis Patient Protection, *Proposition 23*, <https://yesonprop23.com/>.

¹¹⁴² Yes on 23 – Californians for Kidney Dialysis Patient Protection, *Proposition 23*, <https://yesonprop23.com/>; *Fact Sheet*, Yes on 23, available at <https://yesonprop23.com/wp-content/uploads/2020/08/Prop23-fact-sheet->

even if any invalid sections were removed. Perhaps the order of the list indicates the importance of each provision to the proponents and voters in support. However, this argument is unlikely to prevail because there are some provisions not listed in the fact sheet, website, or voter guide—public facing documents designed to inform or persuade voters—which indicates that the listed provisions were priorities to both voters and proponents. Furthermore, the focus is not on whether the voters would have wanted the whole initiative instead of the valid portion; rather, the focus is on whether the voters would have wanted the valid portion instead of no change in the law at all. The proponents presented these four provisions to the voting public as a whole, and voters would likely want some additional protections instead of no additional protections at all. Therefore, these four main provisions are likely volitionally severable since the voters would likely pass the valid provisions even without one or more of the measure’s provisions. Therefore, if a provision is invalid, it will be severed from the valid provisions and the rest of the initiative will be constitutional.¹¹⁴³

B. Vague Language

Section 4 would add a statutory provision, Section 1226.8, to the Health and Safety Code. Section 1226.8 reads in part, “. . . This physician shall have authority and responsibility over patient safety and to direct the provision and quality of medical care.”¹¹⁴⁴ Where a statutory provision remains silent as to the definition of an ambiguous term or phrase, the Court will undergo ordinary presumptions and rules of statutory construction.¹¹⁴⁵ Opponents of Proposition 23 may argue that Section 1226.8 is impermissibly vague because the phrase laying out the authority of the on-site physician is not defined in the statute or by reference. The phrase “authority and responsibility” can be used under Webster’s Dictionary definition as “legal power, or a right to command or to act” and “the state of being accountable or answerable” respectively. Based on these definitions, the provision could be reasonably interpreted to infer that the physician has the ability to directly influence a patient’s medical treatment, despite not being the patient’s own doctor, and would be in some way liable for failing to take proper action. Alternatively, in reference to the ‘Findings and Purposes’, the provision could be reasonably interpreted to infer that the on-site physician has the ability to oversee the safety standards of the facility. In which case, the

2_LEGAL.pdf (last visited Sept. 17, 2020) [“Yes on 23 Fact Sheet”]; CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 3, 2020, at 60–65, *available at* <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf> (last visited Sept. 17, 2020) [“November 2020 Voter Guide”].

¹¹⁴³ § 7 of Proposition 23 provides that it’s the People’s intent that California taxpayers are not to be “financially responsible for implementation and enforcement” of the initiative; rather, fees on CDCs are to cover the costs of the initiative. This presents a volitional severability question of whether or not the People would tax themselves to cover the costs of the initiative’s protections if the CDC fee provision were invalid. However, the invalidity of § 7 is unlikely—imposing fees on regulated entities to cover costs is routine and unlikely to be unconstitutional. The likelihood of a constitutional challenge to this section is slim, so this volitional severability question is irrelevant.

¹¹⁴⁴ Cal. Proposition 23 at § 4 (2020).

¹¹⁴⁵ *Californians for Disability Rights v. Mervyn’s LLC*, 39 Cal.4th 223 (2006).

on-site physician would serve in the same capacity as the facility's "medical director". If Proposition 23 was to be challenged, the Court would most likely be unwilling to invalidate an initiative measure for vagueness if a reasonably permissible interpretation of the measure exists. While the opposition may nonetheless challenge Proposition 23 for being impermissibly vague, the claim would most likely not succeed.

IV. CONSTITUTIONAL ISSUES

A. California Constitution Article II Section XII

Under Section XII of the California Constitution, statutes or initiatives may not name individuals or private corporations and identify them as performing any function or having a power or duty.¹¹⁴⁶ With respect to Proposition 23, the issue is whether the text of the Proposition—or its campaign materials—specifically name DaVita, Inc. or Fresenius Medical Care and whether the initiative confers a power onto them. If the initiative is found to assign either of the corporations a power, the entire initiative would be rendered invalid. Such a challenge to the initiative could be made before or after the election, because the constitutional language, "may be submitted to the electors or have any effect"¹¹⁴⁷ implies that the initiative could theoretically be taken off the ballot or fully invalidated post-election.

However, the text of the initiative does not mention either corporation by name; the initiative merely states in findings that "two multinational, for-profit corporations operate or manage nearly three quarters of dialysis clinics in California and treat more than 75 percent of dialysis patients in the state."¹¹⁴⁸ This reference is nearly identical to a similar reference found in Proposition 8 (2018), which was not individually challenged pre-election.¹¹⁴⁹ Although campaign materials for Proposition 23 reference the two corporations by name, such references are likely to be unavailing in the absence of a specific mention in the text of the initiative itself if a constitutional challenge to the initiative arises.¹¹⁵⁰ Furthermore, the initiative would have to confer a power onto the corporations for it to be invalid; proponents merely state in campaign materials the market share of each corporation with respect to dialysis treatment centers, thus Proposition 23 does not do so.¹¹⁵¹ Thus, there are no constitutional issues likely to arise with respect to Proposition 23.

¹¹⁴⁶ Cal. Const. art II, §12.

¹¹⁴⁷ *Id.*

¹¹⁴⁸ Cal. Proposition 23 at § 2 (2020).

¹¹⁴⁹ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, Tuesday November 6, 2018, at 76, *available at* <https://vig.cdn.sos.ca.gov/2018/general/pdf/topl.pdf#prop8> ["NOVEMBER 2018 VOTER GUIDE"]

¹¹⁵⁰ *Hernandez v. Town of Apple Valley*, 7 Cal. App. 5th 194, 196 (4th Dist. 2017).

¹¹⁵¹ *Id.* at 213.

V. PUBLIC POLICY CONSIDERATIONS

A. Supporting Arguments

Proponents of Proposition 23 argue that patient care in CDCs is “in crisis,” and causing higher health insurance costs for all Californians.¹¹⁵² Proponents point to reports of sanitation issues in dialysis clinics—such as bloodstains, cockroaches, which expose patients to infectious diseases like hepatitis and tuberculosis—that risk patients’ lives.¹¹⁵³ Furthermore, because dialysis treatment involves direct access to the bloodstream, inadequate sanitation would exacerbate the existing risk of dangerous infections prevalent in dialysis treatment.¹¹⁵⁴ On top of this, proponents note that the initiative’s requirement that a licensed physician be onsite during operating hours to oversee quality of care and safety protocols would increase patient safety.¹¹⁵⁵ Proponents argue that the lack of doctors—and in some situations a lack of technicians and nurses to keep up with the number of patients—presents a dangerous situation for patients.¹¹⁵⁶ Additionally, proponents claim the data reporting requirements and CDPH oversight ensures patient safety.

Another key point for proponents is that roughly 80,000 Californians rely on dialysis, yet only two multi-billion dollar companies—Fresenius and DaVita—control 73% of the market and effectively monopolize the industry, while these patients have no safeguards against corner-cutting or profiteering.¹¹⁵⁷ The average profit margin for these two companies is 15.8% and 16% respectively, which is approximately 6 times more than the average profit margin for American hospitals.¹¹⁵⁸ Relatedly, proponents are concerned that patients with private insurance are charged an average of \$150,000 for a year of dialysis treatment, which is about a 350% markup from the actual cost of providing care.¹¹⁵⁹ The proponents consider this a substantial overcharge and note that the cost is shifted onto all Californians

¹¹⁵² Kidney Patients Deserve Better, *Proposition 23 – About*, <https://www.kidneypatientsdeservebetter.com/about/> (last visited October 18, 2020).

¹¹⁵³ Kidney Patients Deserve Better, *Proposition 23 – About*, <https://www.kidneypatientsdeservebetter.com/about/> (last visited October 18, 2020); Yes on 23 Fact Sheet; November 2020 Voter Guide at 64.

¹¹⁵⁴ Cal. Proposition 23 at § 2A(6) (2020).

¹¹⁵⁵ Cal. Proposition 23 at § 2A(5) (2020).

¹¹⁵⁶ Yes on 23 – Californians for Kidney Dialysis Patient Protection, *Proposition 23*, <https://yesonprop23.com/> (last visited October 18, 2020); Yes on 23 Fact Sheet.

¹¹⁵⁷ Yes on 23 – Californians for Kidney Dialysis Patient Protection, *Proposition 23*, <https://yesonprop23.com/> <https://yesonprop23.com/> (last visited October 18, 2020); Kidney Patients Deserve Better, *Proposition 23 – About*, <https://www.kidneypatientsdeservebetter.com/about/> (last visited October 18, 2020); The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients’ Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>; November 2020 Voter Guide at 60.

¹¹⁵⁸ Kidney Patients Deserve Better, *Proposition 23 – About*, <https://www.kidneypatientsdeservebetter.com/about/> (last visited October 18, 2020).

¹¹⁵⁹ *Id.*

because insurance companies have to pass the costs to all policyholders, which increases premiums.¹¹⁶⁰ Blue Shield of California reports that it takes 3,800 enrollees to offset the costs of one dialysis patient.¹¹⁶¹ Additionally, government programs sometimes pay for treatment, and so it indirectly harms taxpayers too.¹¹⁶²

Another provision of the initiative ensures that clinics cannot discriminate against patients with government-backed insurance plans.¹¹⁶³ Proponents want to ensure that the quality of—and access to—care is the same regardless of who is paying for the treatment.¹¹⁶⁴ They argue for preventing CDCs and governing entities from engaging in profiteering and corner-cutting that could result in deaths.¹¹⁶⁵ After all, dialysis involves complicated four-hour sessions of blood removal, filtration, and reinjection, and if the patient is denied service and misses treatment or a misstep happens, they may die or suffer from complications.¹¹⁶⁶ Proponents are also concerned about discrimination between people based on whether the government is paying for the treatment because CDCs cannot charge government programs like Medicare—and to some degree Medi-Cal—higher rates because of federal law.¹¹⁶⁷

Finally, proponents argue that the costs that Proposition 23 imposes are not as drastic as they may seem at first glance nor will they inevitably lead to widespread closures of CDCs. Proponents claim widespread closures will not occur because the initiative provides CDCs with the opportunity to receive an exemption to the onsite doctor requirement. Proposition 23 also prevents sudden closures or cuts in services by requiring the consent of the CDPH for CDCs to close or cut services.¹¹⁶⁸

¹¹⁶⁰ Kidney Patients Deserve Better, *Proposition 23 – About*,

<https://www.kidneypatientsdeservebetter.com/about/> (last visited October 18, 2020); LEGISLATIVE ANALYST'S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹¹⁶¹ Kidney Patients Deserve Better, *Proposition 23 – About*,

<https://www.kidneypatientsdeservebetter.com/about/> (last visited October 18, 2020).

¹¹⁶² LEGISLATIVE ANALYST'S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹¹⁶³ Cal. Proposition 23 at § 3 (2020).

¹¹⁶⁴ Yes on 23 – Californians for Kidney Dialysis Patient Protection, *Proposition 23*, <https://yesonprop23.com/> (last visited October 18, 2020); Yes on 23 Fact Sheet.

¹¹⁶⁵ Yes on 23 – Californians for Kidney Dialysis Patient Protection, *Proposition 23*, <https://yesonprop23.com/> (last visited October 18, 2020); Yes on 23 Fact Sheet; The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients' Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>.

¹¹⁶⁶ Yes on 23 Fact Sheet; The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients' Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>.

¹¹⁶⁷ LEGISLATIVE ANALYST'S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹¹⁶⁸ Cal. Proposition 23 at § 5(b) (2020).

B. Opposing Arguments

Opponents to Proposition 23 flip the supporting arguments on their head: the main argument is that the initiative would put the lives of the 80,000 dialysis patients in California at risk and hurt all Californians by exacerbating the doctor shortage and increasing health care costs by “hundreds of millions annually.”¹¹⁶⁹ While that figure is likely an exaggeration, there would still be costs incurred to the state in the low millions of dollars.¹¹⁷⁰ Opponents claim the law will make dialysis treatment costs increase by \$320 million every year by requiring a doctor to be available at all times, even if the doctor is not involved directly in patient care or lacks specialty training in kidney care or dialysis treatment.¹¹⁷¹ As a result, opponents claim that this would make nearly half of the state’s nearly 600 CDCs financially unsustainable, resulting in closures or cuts in services that would jeopardize access to the dialysis care patients need to survive.¹¹⁷² Missing just one treatment session increases the chance of death by 30%.¹¹⁷³ Still, the initiative clarifies that CDCs need the consent of the CDPH before closing, so widespread closures are unlikely.¹¹⁷⁴ The necessity for the doctor—especially in light of the fact that the doctor need not be a specialist—is questionable because CDCs already require a physician to oversee all of a patient’s care and a kidney specialist to check in weekly while the patient is treated.¹¹⁷⁵

Opponents also note that the initiative would exacerbate the state’s doctor shortage and cause more emergency room crowding.¹¹⁷⁶ The argument reasons that taking doctors away from caring for non-dialysis patients and placing them in dialysis clinics where they will serve an administrative role instead of directly providing care would make the

¹¹⁶⁹ No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

¹¹⁷⁰ LEGISLATIVE ANALYST’S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹¹⁷¹ No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/>.

¹¹⁷² *Id.*

¹¹⁷³ *Id.*

¹¹⁷⁴ Cal. Proposition 23 at § 5(b) (2020); LEGISLATIVE ANALYST’S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹¹⁷⁵ The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients’ Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>.

¹¹⁷⁶ No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020); see e.g., Elizabeth Aguilera, *Paging More Doctors: California’s Worsening Physician Shortage*, CALMATTERS, <https://calmatters.org/projects/californias-worsening-physician-shortage-doctors/> (Aug. 16, 2019; updated on Feb. 13, 2020) (highlighting California’s severe doctor shortage that is getting worse).

physician shortage worse and cause people to have to wait longer to see their doctors.¹¹⁷⁷ And, as a result of many dialysis clinics shutting down, opponents note that dialysis patients will get ill without regular treatments and end up in the emergency room.¹¹⁷⁸ While the scenario where many CDCs close is unlikely,¹¹⁷⁹ and it is not inevitable that patients would entirely forgo treatment, it is worth noting that if even a fraction of vulnerable patients have to go to emergency rooms there will be overcrowding, limiting the ability of doctors and nurses to attend to other patients.¹¹⁸⁰ Opponents claim that a global pandemic is probably the worst time to risk increasing a doctor shortage.¹¹⁸¹

Opponents argue that the initiative would increase health care costs for taxpayers and consumers because increased dialysis treatment costs will result in higher rates for private insurers and Medi-Cal, which insurers and the government will shift onto consumers and taxpayers.¹¹⁸² According to the opponents, higher insurance premiums and higher taxes for government health care programs are all but guaranteed if the initiative passes.¹¹⁸³ The opponents contend that the current economy is in crisis in the wake of a global pandemic, so a dramatic increase in health care costs would burden Californians even more.¹¹⁸⁴

Additionally, opponents question the necessity for new regulations because CDCs are already strictly regulated by federal and state law.¹¹⁸⁵ Furthermore, the federal Centers for Medicare & Medicaid Services report that California dialysis clinics outperform other states in clinical quality, patient satisfaction, and patient deaths—directly rebutting proponents’ claims of bugs, bloodstains, and risk of death.¹¹⁸⁶ In 2018, the average California CDC had about 11 patients die, which is below the national average.¹¹⁸⁷

¹¹⁷⁷ No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

¹¹⁷⁸ *Id.*

¹¹⁷⁹ LEGISLATIVE ANALYST’S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹¹⁸⁰ No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

¹¹⁸¹ *Id.*

¹¹⁸² No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

¹¹⁸³ *Id.*

¹¹⁸⁴ *Id.*

¹¹⁸⁵ *Id.*

¹¹⁸⁶ *Compare* No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (presenting evidence that California CDCs outperform other states) *with* Yes on 23 Fact Sheet (claiming that some patients have reported about sanitation issues in dialysis clinics); The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients’ Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>.

¹¹⁸⁷ The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients’ Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>.

Opponents are quick to point out that the supporters have not offered any sort of evidence to substantiate their claims that the initiative will actually improve patient care.¹¹⁸⁸

Finally, opponents claim that the initiative is “a special interest abuse that uses patients as pawns.”¹¹⁸⁹ The opponents note that the Service Employees International Union–United Healthcare Workers West (SEIU–UHW) spent \$20 million in 2018 to present a similar dialysis ballot measure (Proposition 8) and voters rejected it.¹¹⁹⁰ Now, opponents argue, SEIU–UHW is trying again and is putting patients' lives at risk for their “political game.”¹¹⁹¹ Politico has reported that the initiative is “a tactic by the union to gain leverage in ongoing labor disputes,” while the Los Angeles Times Editorial Board has noted that “not coincidentally, the SEIU–UHW has been trying in vain to organize [DaVita and Fresenius’s] clinics in California, a campaign the union has tried to advance through a series of ballot measures and legislative proposals.”¹¹⁹² Opponents argue that the initiative process should not be “hijacked” for SEIU–UHW’S political gain at the expense of patients’ lives or the money of taxpayers and consumers.¹¹⁹³

VI. CAMPAIGN FINANCE

Yes on 23 is the primary PAC registered to support Proposition 23. The committee has raised \$6,214,206.09 and spent \$6,205,824.53 as of September 19, 2020.

Stop the Dangerous & Costly Dialysis Proposition is the PAC registered against Prop 23. The committee has raised \$93,059,082.15 and spent \$85,733,250.22 also as of September 19, 2020.

¹¹⁸⁸ The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients’ Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>.

¹¹⁸⁹ No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

¹¹⁹⁰ No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/>; The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients’ Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>; *Prop 8 Fails: California Voters Reject Measure to Limit Dialysis Profits*, ABC 7 NEWS (Nov. 7, 2018), <https://abc7news.com/election-results-prop-8-california-bay-area/4634675/>.

¹¹⁹¹ No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

¹¹⁹² Alex Nieves et al., *California Ballot Tracker*, POLITICO (July 23, 2020, 2:00 A.M. PDT; updated on Sept. 14, 2020, 2:14 P.M. PDT), <https://www.politico.com/interactives/2020/california-november-ballot/#section-9>; The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients’ Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>.

¹¹⁹³ The Times Editorial Board, *Endorsement: No on Prop 23. It Would Raise Costs and Not Improve Kidney Patients’ Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>; No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

VII. FISCAL CONSIDERATIONS

A. Where Payment for Dialysis Comes From

To assess the fiscal impacts of this initiative, it is important to first understand where the money that pays for dialysis treatment comes from. The total annual revenue of CDCs is in excess of \$3 billion, which is derived from three main sources.¹¹⁹⁴

The first source is Medicare, a federal program that provides health coverage to people at or over the age of 65 and people with certain disabilities.¹¹⁹⁵ Under federal law, special rules apply to people with kidney failure, so that they are eligible for Medicare coverage regardless of age or disability status.¹¹⁹⁶ Medicare is the source of coverage for most dialysis patients in California. As a result, Medicare is the largest source of payment for dialysis treatment in the state.¹¹⁹⁷

The next source is Medi-Cal, a federal-state joint program under Medicaid that provides health coverage to low-income people.¹¹⁹⁸ Unlike Medicare, the state and federal governments both share the costs of Medi-Cal.¹¹⁹⁹ Some dialysis patients are able to qualify for both Medicare and Medi-Cal coverage, in which case Medicare covers most of the payment for treatment while Medi-Cal covers the remaining amount.¹²⁰⁰ However, if a patient is only eligible for Medi-Cal, then the Medi-Cal program is responsible for the entire payment on its own.¹²⁰¹

The final source is group and individual health insurance.¹²⁰² Some people have group health insurance provided through an employer or another organization.¹²⁰³ Other people have individual health insurance.¹²⁰⁴ When a person with insurance develops kidney failure that requires dialysis treatment, that person is usually able to transition to Medicare coverage.¹²⁰⁵ However, federal law requires that a group insurer remain the primary payer

¹¹⁹⁴ LEGISLATIVE ANALYST'S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹¹⁹⁵ *Id.*

¹¹⁹⁶ *Id.*

¹¹⁹⁷ *Id.*

¹¹⁹⁸ *Id.*

¹¹⁹⁹ *Id.*

¹²⁰⁰ LEGISLATIVE ANALYST'S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹²⁰¹ *Id.*

¹²⁰² *Id.*

¹²⁰³ *Id.*

¹²⁰⁴ *Id.*

¹²⁰⁵ *Id.*

for dialysis treatment during that transition period, which lasts up to 30 months.¹²⁰⁶ Additionally, the state government, the two public university systems, and many local governments in the state provide group health coverage for current employees, retired employees, and their families.¹²⁰⁷ Usually, group and individual health insurers pay higher rates for dialysis treatment than government funded programs.¹²⁰⁸ Medicare and Medi-Cal pay at rates comparable to the average cost for CDCs to provide dialysis treatment, mostly due to regulations.¹²⁰⁹ Conversely, group and individual health insurers must negotiate rates with CDCs and governing entities.¹²¹⁰ Ultimately, the rate depends on the number of people the insurer covers and how many people the CDC treats.¹²¹¹ As a result, group and individual health insurers pay much more to cover treatment than the government.¹²¹²

B. Proposition 23 Would Increase CDC Costs that Influence State and Local Costs

Proposition 23 would increase the CDC costs predominantly because of the requirement that a doctor be present onsite during all hours of treatment.¹²¹³ The onsite doctor requirement will increase CDC costs by several hundred thousand dollars each year at each site.¹²¹⁴ The other provisions will not substantially increase CDC costs as they are only data recording or reporting requirements.¹²¹⁵

A given CDC will react to the increased costs differently depending on its—or its governing entity's—financial situation; however, most CDCs are likely to shift the increased costs of having an onsite doctor onto the payer.¹²¹⁶ Especially since most CDCs operate under a governing entity that owns or operates multiple CDCs, it is likely that governing entities will spread the costs to payers in multiple locations.¹²¹⁷ Governing entities may react to these increased costs by negotiating higher rates from entities that pay for dialysis

¹²⁰⁶ LEGISLATIVE ANALYST'S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹²⁰⁷ *Id.*

¹²⁰⁸ *Id.*

¹²⁰⁹ *Id.*

¹²¹⁰ *Id.*

¹²¹¹ *Id.*

¹²¹² LEGISLATIVE ANALYST'S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹²¹³ *Id.*

¹²¹⁴ *Id.*

¹²¹⁵ *Id.*

¹²¹⁶ *Id.*

¹²¹⁷ *Id.*

treatment.¹²¹⁸ Negotiating a higher rate for each patient with private group or individual insurance (and potentially Medi-Cal covered patients) could help cover the costs that the onsite doctor requirement brings to all CDCs.¹²¹⁹ Another option for governing entities is to continue operating as is but with reduced profits.¹²²⁰ Some governing entities—particularly larger for-profit corporations with more clinics—will be able to do this despite the higher costs because they will have more resources to commit to the onsite doctor costs.¹²²¹ As a result, these entities will operate with lower profits but would not have to close CDCs.¹²²² Other governing entities—particularly smaller non-profit corporations with fewer clinics—are unlikely to be so lucky; these entities may end up closing due to the financial unsustainability that the increased costs cause.¹²²³ Of course, CDC closures are subject to the consent of the CDPH under the provisions of this initiative, but if a smaller governing entity is unable to operate its CDC(s), it is likely CDPH will agree to the closure.¹²²⁴

Each of these scenarios has a direct impact on the state’s finances. In particular, the initiative will have increased state and local government costs in the low tens of millions of dollars each year, in the form of state Medi-Cal costs, as well as state and local employee and retiree health insurance costs.¹²²⁵ Both the Medi-Cal and group health insurance costs are likely to increase because governing entities will likely negotiate higher rates and some CDCs may close which means that dialysis patients may receive treatments in more costly settings like hospitals.¹²²⁶ As a result, Medi-Cal and private insurers (including employee or retiree group health insurance) will have to pay more than they currently are, which costs the state more money.¹²²⁷ Still, the most likely scenario is that CDCs and governing entities would negotiate higher rates with some payers—particularly those with group or individual health insurance—to cover some of the costs of the initiative and then continue to operate with lower profit margins with few CDC closures.¹²²⁸ These costs to the Medi-Cal program and state and local government employee and retiree health insurance represent only a minor increase in total spending at both the state and local level.¹²²⁹ In fact, the low tens of millions of dollars estimate represents less than 1% of state General Fund spending—the

¹²¹⁸ LEGISLATIVE ANALYST’S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹²¹⁹ *Id.*

¹²²⁰ *Id.*

¹²²¹ *Id.*

¹²²² *Id.*

¹²²³ *Id.*

¹²²⁴ LEGISLATIVE ANALYST’S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹²²⁵ *Id.*

¹²²⁶ *Id.*

¹²²⁷ *Id.*

¹²²⁸ *Id.*

¹²²⁹ *Id.*

costs are between .01%–.03% of the General Fund.¹²³⁰ In the unlikely event that many CDCs close, state and local governments will likely sustain additional short-term costs from higher rates and treatment in more costly settings.¹²³¹ These short-term costs have the potential to be substantial, but any estimate would be highly speculative since the costs in such an unlikely event are so uncertain.¹²³²

C. Proposition 23 Would Increase Costs for the Department of Public Health

In addition to the costs being shifted onto health insurers, which cost the state and local governments more money, the initiative also has increased costs for CDPH.¹²³³ These costs are purely administrative and stem from the new regulatory responsibilities that the initiative delegates to CDPH.¹²³⁴ The new responsibilities that create costs include processing onsite doctor exemptions, developing an infection-related reporting process, processing infection-related reports, issuing penalties for failure to report infection-related information, providing consent to CDC closures and service reductions, and otherwise implementing and enforcing laws related to CDCs.¹²³⁵ To cover these costs, the initiative requires CDPH to increase the annual CDC licensing fee.¹²³⁶ Estimates indicate that the annual costs to CDPH that stem from these regulatory responsibilities would not exceed the low millions of dollars annually.¹²³⁷

VIII. CONCLUSION

Proposition 23 would require chronic dialysis clinics to retain a licensed physician on-site during operating hours; submit reports to CDPH on any dialysis-related infections arising from treatment; order clinics to seek state approval before ceasing or scaling back operations; and forbid clinics from denying care to patients with government-backed insurance plans. There is currently no legal challenge to Proposition 23, but even if there were a future challenge, it is likely to pass constitutional muster. Even if any of the provisions of the measure are invalid, the provisions of Proposition 23 are fully severable. As a result, the initiative will likely be valid despite any potential invalid provision.

¹²³⁰ LEGISLATIVE ANALYST'S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹²³¹ *Id.*

¹²³² *Id.*

¹²³³ *Id.*

¹²³⁴ *Id.*

¹²³⁵ *Id.*

¹²³⁶ LEGISLATIVE ANALYST'S OFFICE, *Proposition 23, Establishes State Requirements for Kidney Dialysis Clinics. Requires On-site Medical Professional. Initiative Statute.*, (2020) available at <https://lao.ca.gov/ballot/2020/Prop23-110320.pdf>.

¹²³⁷ *Id.*

Proposition 24:

Protecting California Consumers by Expanding Protections, Ensuring Governmental Oversight, and Safeguarding the Law from Special Interests

Initiative Statute

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I. Executive Summary

A **YES** vote on this measure expands California’s privacy protections to better safeguard children and Californians’ sensitive information. Proposition 24 would expand consumer protections—beyond the collection and sale of personal information—to include the sharing of personal information. The proposition would also make it easier for consumers to opt out of data collection, sharing, and sale by allowing them to communicate their privacy preferences through a “Do Not Track” signal in their internet browsers. This proposition would reduce the impact of California’s privacy laws on small businesses by increasing the threshold for impacted businesses from one that buys, collects, sells, or shares 50,000 consumers’ information to 100,000. Last, Proposition 24 authorizes \$5 million for the current fiscal year and \$10 million annually thereafter to create a regulatory agency that would enforce California’s privacy laws.

A **NO** vote on this measure would result in no changes to California’s consumer privacy protections. The law would not change; it would still require businesses to respond to consumer privacy requests and take reasonable steps to protect the information they collect. California’s Department of Justice (“DOJ”) would maintain responsibility for developing and enforcing consumer privacy regulations. The DOJ would still spend its budgeted \$4.739 million on regulating and enforcing California’s privacy laws. Interest groups would still be able to lobby the Legislature to change privacy laws without voter approval and without an assurance that the changes were in furtherance of consumer protection.

II. The Law

A. Background

There are no provisions in the United States Constitution that expressly guarantee or protect a right to privacy.¹²³⁸ Since the United States Constitution does not explicitly delegate to or give the federal government the right to regulate privacy, the Tenth Amendment permits states to create privacy laws.¹²³⁹ However, the federal government has not been totally silent on the issue of privacy. In 1961, the Supreme Court declared that the right to privacy is “no less important than any other right” and is “basic to a free society.”¹²⁴⁰

1. Federal Law

While the federal government has left privacy largely to the states, it has created privacy laws on several occasions. Congress enacted the Fair Credit Reporting Act in 1970, which focused on protecting consumer privacy with respect to credit reporting agencies.¹²⁴¹

¹²³⁸ See generally U.S. CONST. (containing no provisions that discuss privacy).

¹²³⁹ U.S. CONST. amend. X.

¹²⁴⁰ *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

¹²⁴¹ 15 U.S.C. § 1681 (2020).

Next, Congress enacted the Privacy Act of 1974, but that law has a limited scope; it only applies to government records.¹²⁴² Congress enacted the Children’s Online Privacy Protection Act (“COPPA”) in 1998, which protects children under the age of thirteen from sharing their personal information without parental consent.¹²⁴³ Most recently, Congress enacted the Gramm–Leach–Bliley Act in 1999 to codify consumer privacy rules for financial institutions.¹²⁴⁴

Today, the Federal Trade Commission (“FTC”) is the federal agency that regulates consumer privacy. As part of its work, “the FTC conducts case studies, holds workshops, and issues reports” to inform people about consumer privacy and data security issues; however, there are no laws protecting consumer information otherwise.¹²⁴⁵ The FTC employs forty people who work specifically on consumer privacy.¹²⁴⁶ The federal government’s lack of consumer privacy laws, taken in conjunction with the Tenth Amendment, is why states may regulate privacy.¹²⁴⁷

2. Europe’s General Data Protection Regulation

The European Union (“EU”) is the global leader in consumer privacy protection. In 2014, its highest court issued a monumental judgment against the technology industry when it ruled an individual may request that a business remove his or her information from the Internet.¹²⁴⁸ This decision established that people have a fundamental right to their privacy and personal information.

Following that decision, the EU adopted the General Data Protection Regulation (“GDPR”).¹²⁴⁹ This regulation gives every EU citizen complete control over his or her personal information and imposes restrictions on what a business may do with that information.¹²⁵⁰ Most notably, the GDPR protects personal data, holds businesses accountable for how they collect and maintain personal data, and requires a business to receive consent before it

¹²⁴² 5 U.S.C. § 552(a) (2020).

¹²⁴³ 15 U.S.C. § 6501 (2020).

¹²⁴⁴ 15 U.S.C. § 6801 (2020).

¹²⁴⁵ *FTC Policy Work*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy-security/ftc-policy-work> (last visited Sept. 5, 2020).

¹²⁴⁶ *Compare* FED. TRADE COMM’N, FISCAL YEAR 2021 CONGRESSIONAL BUDGET JUSTIFICATION, 121 https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf (last visited Sept. 5, 2020) (noting that the FTC employs 61 employees in Privacy and Identity Protection), *with* Telephone Interview with Alastair Mactaggart, Chair, Californians for Consumer Privacy (Sept. 1, 2020) [Mactaggart Interview] (notes on file with the *California Initiative Review*) (stating that only 40 FTC employees work specifically on consumer privacy).

¹²⁴⁷ *See* U.S. CONST. amend. X (reserving powers that the Constitution does not delegate to the states).

¹²⁴⁸ Court of Justice of the European Union, Judgment in Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, (2014), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>.

¹²⁴⁹ Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119/1) 1.

¹²⁵⁰ *Id.* at 32.

can collect personal data.¹²⁵¹ The GDPR created a blueprint for nations and states to follow when enacting consumer privacy protection laws.

3. California's Current Consumer Privacy Laws

a. Overview

Most of California's current consumer privacy laws come from the California Consumer Protection Act of 2018 ("CCPA"). While the CCPA is not as strict as the GDPR, it still provides some protections for California consumers. See Figure 1 below for a comparison of the GDPR, the CCPA, and Proposition 24.¹²⁵²

Figure 1: A Comparison of the GDPR, the CCPA, and Proposition 24¹²⁵³

Protection	GDPR	CCPA	Prop. 24
Right to know what information a business has collected about you	✓	✓	✓
Right to say no to the sale of your information	✓	✓	✓
Right to delete your information	✓	✓	✓
Requires businesses to keep your information safe	✓	✓	✓
Right to access your information in a portable format	✓	✓	✓
Special protection for minors	✓	✓	✓
Requires an easy "Do Not Sell My Information" button for consumers	✗	✓	✓
Provides ability to browse with no pop-ups or sale of your information	✗	✗	✓
Penalties if your email and password are stolen due to negligence	✓	✗	✓

¹²⁵¹ *Id.* at 36.

¹²⁵² *How Prop 24 Gets California On Par with Europe's Broad Privacy Rights*, CALIFORNIANS FOR CONSUMER PRIVACY (Aug. 17, 2020), <https://www.caprivacy.org/how-prop-24-gets-california-on-par-with-europes-broad-privacy-rights/>.

¹²⁵³ In this table, green check marks communicate the types of protections each body of law offers. The GDPR has the strictest applicability of all three laws because it applies to any company or entity that processes personal information as part of its activities in the EU. The CCPA is less strict than the GDPR because it applies only to businesses that collect or sell 50,000 or more consumers' information. Proposition 24 relaxes the law further away from the GDPR's rigorous standard by applying only to businesses that collect, sell, or share 100,000 or more consumers' information. However, that standard is stricter than the CCPA because it includes the "or share" language.

CAL. CIV. CODE § 1798.140(d)(1)(B) (West 2020). Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119/1) 32. Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.140(d)(1)(B)).

Protection	GDPR	CCPA	Prop. 24
Right to restrict a business's use of your sensitive personal information	✓	✗	✓
Right to correct your data	✓	✗	✓
Right to prevent companies from storing your information longer than necessary	✓	✗	✓
Right to prevent companies from collecting more information than necessary	✓	✗	✓
Right to opt out of advertisers using your precise geolocation (within 1/3 of a mile)	✓	✗	✓
Ability to override your privacy protections if you face the threat of injury or death	✓	✗	✓
Provides transparency around "profiling" (e.g., racial profiling) and "automated decision making"	✓	✗	✓
Establishes an agency dedicated to protecting consumers and their personal information	✓	✗	✓
Restricts onward transfer to protect consumer information	✓	✗	✓
Requires high-risk data processors to perform regular cybersecurity audits	✓	✗	✓
Requires high-risk data processors to perform regular risk assessments	✓	✗	✓
Appoints a Chief Auditor with the power to audit business data practices	✓	✗	✓
Protects California's privacy laws from being weakened in the Legislature	N/A	✗	✓

b. Consumer Protections and Opting Out

The CCPA prohibits a business from retaliating against a consumer who opts out of data collection.¹²⁵⁴ The statute defines retaliation as denying goods or services to the consumer, charging different prices/rates, providing a different level of quality, or insinuating there is a difference in quality if the consumer opts out.¹²⁵⁵ Rather, a business may provide incentives for consumers to disclose information.¹²⁵⁶ These incentives may come in the form of compensation or a different quality of service if that quality is reasonably related to the value of the consumer's data.¹²⁵⁷

¹²⁵⁴ CAL. CIV. CODE §§ 1798.125(a)(1)(A)-(D) (West 2020).

¹²⁵⁵ *Id.*

¹²⁵⁶ *Id.* § 1798.125(a)(2).

¹²⁵⁷ *Id.*

Today, Californians may exercise their right to opt out of data collection by clicking a link on a business's website or calling the business directly.¹²⁵⁸ It is a consumer's responsibility to tell a business not to collect or sell his or her information, but the consumer must communicate that preference to each individual business.¹²⁵⁹ While some web browsers already have a Do Not Track signal, businesses need only to acknowledge that signal—they do not have to comply with it.¹²⁶⁰ Under current law, a business can simply acknowledge the signal's existence and respond that it does not comply with the request.¹²⁶¹

c. Business Obligations

As of January 1, 2020, the CCPA applies to businesses that satisfy one or more of the following criteria.¹²⁶² First, the business has annual gross revenue exceeding \$25 million.¹²⁶³ Second, it buys or sells personal information for at least 50,000 consumers.¹²⁶⁴ Finally, it derives at least 50% of its annual revenue from selling consumer data.¹²⁶⁵

The CCPA places multiple restrictions on businesses within the meaning of the statute. First, a business that satisfies the statutory definition cannot have a consumer waive CCPA protections.¹²⁶⁶ Second, the CCPA requires that a business—at the consumer's request—provide, disclose, and deliver any information the business has collected about the consumer to the consumer free of charge.¹²⁶⁷ The CCPA also requires that businesses give consumers two methods to request information, and it imposes a forty-five day timeframe in which a business must respond to those requests.¹²⁶⁸

d. Exceptions

While businesses cannot opt out of the CCPA, there are several exceptions that allow a business to deviate from the statute.¹²⁶⁹ The CCPA explicitly does not impair a business's ability to comply with a federal, state, or local law.¹²⁷⁰ Further, it does not prevent a business from responding to a summons or participating in a civil, criminal, or regulatory

¹²⁵⁸ *Id.* §§ 1798.130, 1798.135.

¹²⁵⁹ *Id.* § 1798.120.

¹²⁶⁰ CAL. BUS. & PROF. CODE § 22575 (West 2020); ASSEMBLY COMMITTEE ON PRIVACY & CONSUMER PROTECTION, COMMITTEE ANALYSIS OF AB 2182, at 2 (Apr. 17, 2018). CAL. DEP'T OF JUST., MAKING YOUR PRIVACY PRACTICES PUBLIC 7 (May 2014), available at https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersecurity/making_your_privacy_practices_public.pdf.

¹²⁶¹ CAL. DEP'T OF JUST., *supra* note 1260, at 7.

¹²⁶² CAL. CIV. CODE § 1798.198(a) (West 2020).

¹²⁶³ *Id.* § 1798.140(d)(1)(A).

¹²⁶⁴ *Id.* § 1798.140(d)(1)(B).

¹²⁶⁵ *Id.* § 1798.140(d)(1)(C).

¹²⁶⁶ *Id.* § 1798.192.

¹²⁶⁷ *Id.* § 1798.100.

¹²⁶⁸ *Id.* § 1798.130.

¹²⁶⁹ *Id.* § 1798.145.

¹²⁷⁰ *Id.* § 1798.145(a)(1).

investigation.¹²⁷¹ The CCPA also does not prevent a business from exercising or defending legal claims.¹²⁷² Finally, because the CCPA is California law, businesses may still collect or sell consumer information when every aspect of the collection takes place wholly outside of California.¹²⁷³

e. Regulating Consumer Privacy

Currently, the CCPA's primary enforcement mechanism is the DOJ; however, the law also creates a limited private right of action.¹²⁷⁴ A twenty-three person team within the DOJ regulates consumer privacy and enforces the CCPA at an annual cost that ranges from \$4.25 million to \$4.739 million.¹²⁷⁵ Beyond the DOJ enforcing the CCPA, a consumer has the limited ability to bring a lawsuit against a business that negligently violated the consumer's data privacy.¹²⁷⁶ An affected consumer may institute an action for \$100–\$750 per incident or actual damages (whichever is greater), injunctive relief, declaratory relief, or any other relief the court deems proper.¹²⁷⁷ The statute does not create any other private right of action.

On August 14, 2020, the DOJ officially promulgated privacy regulations.¹²⁷⁸ These regulations provide clarification regarding the CCPA.¹²⁷⁹ One such clarification pertains to service providers.¹²⁸⁰ It specifies that a service provider (e.g., a business that charges a fee for storage space on the Internet) is not bound by the CCPA.¹²⁸¹ Rather, if a service provider receives a consumer request to opt out of data collection or sale, the service provider may tell the consumer that the request cannot be fulfilled because that business is a service provider.¹²⁸² In essence, a business that operates as a service provider is exempt from the CCPA in that capacity.

4. Attempts to Weaken Existing Law in 2019

There were seven failed attempts to gut massive sections of the CCPA the year after California enacted those laws.¹²⁸³ These bills did not address flaws in the CCPA; rather, they

¹²⁷¹ *Id.* § 1798.145(a)(2).

¹²⁷² *Id.* § 1798.145(a)(4).

¹²⁷³ *Id.* § 1798.145(a)(6).

¹²⁷⁴ *Id.* §§ 1798.150, 1798.185.

¹²⁷⁵ CAL. DEP'T OF FIN., 2019–20 BUDGET CHANGE PROPOSAL: DEPARTMENT OF JUSTICE, https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG0820_BCP2916.pdf (last visited Sept. 21, 2020).

¹²⁷⁶ *See* CIV. § 1798.150 (permitting a consumer whose information was compromised to institute an action against a business that stored that information without encryption or redaction).

¹²⁷⁷ *Id.*

¹²⁷⁸ CAL. CODE REGS. tit. 11, §§ 999.300–337 (2020) (promulgated Aug. 14, 2020).

¹²⁷⁹ *See, e.g., id.* § 999.313 (providing guidance on requests to know and requests to delete consumer information).

¹²⁸⁰ *Id.* § 999.314(a).

¹²⁸¹ *Id.*

¹²⁸² *Id.* § 999.314(e).

¹²⁸³ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*). *See, e.g.,* SB 753, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as introduced on Feb. 22, 2019, but not enacted) (proposing an

would have undermined the CCPA’s purpose by creating exceptions from the right to opt out for things like web-based surveillance ads.¹²⁸⁴ California Senator Robert Hertzberg explained that businesses are using deceptive naming to hide their identities and weaken California’s consumer privacy laws.¹²⁸⁵ Businesses and special interest groups supported the bills that sought to weaken consumer privacy in favor of their own interests.¹²⁸⁶

5. Creating Proposition 24

a. Soliciting Information from the Experts

Proposition 24’s main proponent, Alastair Mactaggart, sent out over 100 requests for input to businesses, academics, advocacy groups, etc.¹²⁸⁷ He solicited businesses in addition to industry experts because he wanted to improve business operations without hindering consumer privacy.¹²⁸⁸ Not every group responded, but the drafters worked with the experts who did.¹²⁸⁹

b. Attempting to Pass the Proposition 24 as Legislation

After soliciting information from industry experts, Mr. Mactaggart partnered with Senator Hertzberg to pass Proposition 24 as legislation.¹²⁹⁰ However, the idea for bolstering consumer privacy did not garner much interest given the Legislature appeared more open to weakening the CCPA than expanding it.¹²⁹¹ The proponents tried to get buy-in from other legislators, but the idea did not get enough support.¹²⁹²

Mr. Mactaggart realized his ideas would not work in the Legislature, so he pivoted the would-be legislation to Proposition 24.¹²⁹³ All things considered, Mr. Mactaggart believed expanding privacy protections alone would be insufficient because the Legislature had seen so many attempts to weaken the law.¹²⁹⁴ Therefore, he sought to shore up that

exemption from the right to opt out for surveillance-based ads), *and* AB 1416, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on May 6, 2019, but not enacted) (proposing legislation to amend the CCPA, which advanced out of its house of origin and would have allowed government entities—such as Immigration and Customs Enforcement—to obtain consumer location information).

¹²⁸⁴ *E.g.*, SB 753, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as introduced on Feb. 22, 2019, but not enacted).

¹²⁸⁵ *Our Growing List of Supporters*, CALIFORNIANS FOR CONSUMER PRIVACY, <https://www.caprivacy.org/our-growing-list-of-supporters/> (last visited Aug. 27, 2020).

¹²⁸⁶ ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION, COMMITTEE ANALYSIS OF SB 1416, at 14–15 (Apr. 26, 2019); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 753, at 9–11 (Apr. 4, 2019).

¹²⁸⁷ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹²⁸⁸ *See id.* (noting that Alastair Mactaggart worked with Ashkan Soltani, former Chief Technology Officer for the Federal Trade Commission, when developing Proposition 24).

¹²⁸⁹ *Id.*

¹²⁹⁰ *Id.*

¹²⁹¹ *Id.*; *see also, supra* Section II.A.4.

¹²⁹² Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹²⁹³ *Id.*

¹²⁹⁴ *Id.*

vulnerability by requiring that future amendments comport with the purpose and intent of the proposition.¹²⁹⁵

B. Proposed Changes to Existing Law

1. Expanding Californians' Privacy Rights

Proposition 24 would protect Californians from businesses that share consumer information in the same way that it protects them from businesses that collect and sell their information.¹²⁹⁶ It extends the right to know what information businesses are collecting and selling to include the right to know what information businesses are sharing and with whom they share that information.¹²⁹⁷ Under Proposition 24, Californians may tell a business not to share their personal information in the same way they currently may tell a business not to collect or sell that information.¹²⁹⁸ Proposition 24 also allows Californians to tell a business to correct inaccurate information about the consumer that the business possesses.¹²⁹⁹

Beyond basic data collection, Proposition 24 recognizes that there are different types of information. Proposition 24 creates a new category of information called "Sensitive Personal Information," which includes things like race, ethnic origin, religion, sexual orientation, social security number, and precise geolocation.¹³⁰⁰ If enacted, Proposition 24 would give Californians the right to limit a business's use and disclosure of Sensitive Personal Information.¹³⁰¹

Last, Proposition 24 compliments federal law by expanding state law protections for minors up to age sixteen.¹³⁰² It requires that businesses not sell or share information for consumers under the age of sixteen unless a parent or guardian has allowed that sharing.¹³⁰³ The proposition also imposes strict penalties on businesses that intentionally violate a minor's privacy.¹³⁰⁴

¹²⁹⁵ *Id.*

¹²⁹⁶ *See, e.g.,* Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.140(ah)) (defining "sharing" within the proposition), *and id.* (amending CAL. CIV. CODE § 1798.140(d)(1)) (expanding the definition of a business to include businesses that share consumer information).

¹²⁹⁷ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE §§ 1798.110, 1798.115).

¹²⁹⁸ *Id.* (amending CAL. CIV. CODE § 1798.120).

¹²⁹⁹ *Id.* (adding CAL. CIV. CODE § 1798.106).

¹³⁰⁰ *Id.* (amending CAL. CIV. CODE § 1798.140(ae)).

¹³⁰¹ *Id.* (adding CAL. CIV. CODE § 1798.121).

¹³⁰² *See* 15 U.S.C. § 6501 (2020) (establishing protections for children thirteen and under), *and* Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.120) (expanding state law protections from age thirteen to sixteen, which would include all minors currently protected under federal law).

¹³⁰³ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.120).

¹³⁰⁴ *Id.* (amending CAL. CIV. CODE § 1798.155(a)) (permitting triple damages for infractions involving minors).

2. Attempting to Provide an Easier Way for Consumers to Opt Out

Unlike the current system, Californians may communicate their right to opt out by using the Do Not Track signal in their web browser.¹³⁰⁵ This aspect of Proposition 24 potentially eases the opt out process because, if the business accepts that signal as communicating a consumer's preference, the consumer does not need to take additional action. Rather, Californians can set that signal once and potentially reduce the amount of times they must opt out.

Beyond the Do Not Track signal, Proposition 24 lightens the burden on consumers who are manually opting out of data collection. Proposition 24 permits a business to collect only the minimum amount of information from a consumer that is necessary for the consumer to opt out of data collection.¹³⁰⁶

3. Preventing Employer Retaliation

After California enacted the CCPA, there was confusion regarding whether an employee qualifies as a consumer.¹³⁰⁷ The CCPA exempts a business from complying with a consumer's request to delete his or her data if that information is necessary to maintain the business-consumer relationship.¹³⁰⁸ It also prohibits businesses from retaliating against a consumer who opts out of data collection.¹³⁰⁹ However, it is not clear whether those protections extend to the employer-employee relationship when the employer qualifies as a business under the law.

Proposition 24 leaves the CCPA's business-consumer anti-retaliation protections in place.¹³¹⁰ It resolves the employer-employee confusion by expanding the business-consumer protections to safeguard employees and applicants from retaliation for opting out of an employer's data collection.¹³¹¹ Under Proposition 24, an employer cannot retaliate or discriminate against an employee or applicant who exercises any rights under the statute.¹³¹² That protection applies when the employer qualifies as a business under the statute.

¹³⁰⁵ *Id.* (amending CAL. CIV. CODE § 1798.135(b)).

¹³⁰⁶ *Id.* (amending CAL. CIV. CODE § 1798.135(c)).

¹³⁰⁷ Justine Phillips & Jessica Gross, *Employee Privacy by Design: Guidance for Employers Beginning to Comply with the California Consumer Privacy Act*, SHEPPARD MULLIN: LABOR & EMP'T L. BLOG (Sept. 19, 2019), <https://www.laboremploymentlawblog.com/2019/09/articles/privacy/employee-privacy-by-design-guidance-for-employers-beginning-to-comply-with-the-california-consumer-privacy-act/> (discussing the question "Are Employees "Consumers" Under CCPA?").

¹³⁰⁸ CAL. CIV. CODE § 1798.105(d)(1) (West 2020).

¹³⁰⁹ *Id.* § 1798.125(a)(1)(B).

¹³¹⁰ *See* Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125) (refraining from modifying sections (a)(1)(A)-(D)).

¹³¹¹ *Id.* (amending CAL. CIV. CODE § 1798.125(a)(1)(E)).

¹³¹² *Id.*

4. Regulating Consumer Privacy

California already has the most robust consumer privacy laws in the United States; nevertheless, Proposition 24 would put California on par with Europe—which offers the strongest consumer privacy protections in the world.¹³¹³ While a division of the DOJ currently enforces the CCPA, Proposition 24 would create a fifty-person agency called the California Privacy Protection Agency.¹³¹⁴ This agency would be the largest privacy regulatory body in the United States, and its sole responsibility would be to enforce California’s consumer privacy laws.¹³¹⁵

Proposition 24 allocates \$5 million from the General Fund for fiscal year 2020–2021 and \$10 million annually thereafter (adjusted for inflation) to support the new agency.¹³¹⁶ Initially, the DOJ’s staff will continue regulating privacy until the new agency is fully staffed.¹³¹⁷ The California Privacy Protection Agency will be responsible for enacting additional regulations that comport with the guidance provided by Proposition 24 on or before July 1, 2022.¹³¹⁸ One example of a regulation that the new agency must create under Proposition 24 would prevent businesses from profiling a consumer by using that consumer’s Sensitive Personal Information.¹³¹⁹

5. Protecting Californians While Remaining Small-Business Friendly

Proposition 24’s primary goal is to protect Californians’ privacy from unwanted access, use, and distribution. To ensure the Legislature preserves that goal, Proposition 24 would build a floor under the law.¹³²⁰ This floor would only permit modifications to the law if the proposed changes comport with Proposition 24’s purpose and intent.¹³²¹ Any amendments to the law would require a finding that the change does not interfere with Californians’ control over their personal information, a simple majority in both houses, and the governor’s signature.¹³²²

¹³¹³ See generally Thomas A. Gerhart, *AB 2182 and Chapter 55: Enacting Privacy Regulations in the Face of Legislative Complacency*, 50 U. PAC. L. REV. 177 (2018) available at <https://scholarlycommons.pacific.edu/uoplawreview/vol50/iss2/3> (last visited Sept. 20, 2020) (discussing how privacy rights had not materialized in the several states prior to California enacting its first internet/consumer privacy laws in 2018). See also *How Prop 24 Gets California On Par with Europe’s Broad Privacy Rights*, *supra* note 1252 (comparing Proposition 24 with California’s and Europe’s privacy laws).

¹³¹⁴ Cal. Proposition 24 (2020) (adding CAL. CIV. CODE § 1798.199.10).

¹³¹⁵ *Id.* (adding CAL. CIV. CODE § 1798.199.40).

¹³¹⁶ *Id.* (adding CAL. CIV. CODE § 1798.199.95); LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 24, 7 <https://lao.ca.gov/ballot/2020/Prop24-110320.pdf> (last visited Sept. 13, 2020).

¹³¹⁷ Cal. Proposition 24 (2020) (adding CAL. CIV. CODE § 1798.199.95(c)).

¹³¹⁸ *Id.* (reenacting CAL. CIV. CODE § 1798.185).

¹³¹⁹ *Id.* (reenacting CAL. CIV. CODE § 1798.185(a)(16)). See also Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*) (providing the example of an app-based ridesharing app that could use racial information to only assign drivers to customers with the same race or ethnicity).

¹³²⁰ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹³²¹ Cal. Proposition 24 (2020) (Section 25).

¹³²² *Id.*

Proposition 24 tries to simultaneously increase consumer privacy protection without hindering business. It takes steps to alleviate confusion under the CCPA by explicitly allowing businesses to offer loyalty programs—something that is neither currently prohibited nor clearly permitted.¹³²³ The proposition explains that a business’s loyalty program must comport with the CCPA if the business falls within the statutory definition of a business.¹³²⁴ Proposition 24 also provides guidance to service providers, ensuring the law protects consumers and informs businesses of their responsibilities.¹³²⁵

Additionally, Proposition 24 reduces its impact on businesses without compromising consumer privacy by increasing the threshold requirement for the term “business” within the statute. The CCPA regulates businesses that buy, collect, sell or share 50,000 consumers’ information, and Proposition 24 increases that threshold to 100,000.¹³²⁶ While this change reduces the number of businesses that must comply with the CCPA, the businesses it excludes are very small and less likely to participate in the consumer information industry.¹³²⁷ The current threshold is over-inclusive and harmful to small businesses because a website need only collect information from 137 visitors per day—which often happens automatically—to satisfy the 50,000 threshold.¹³²⁸ Therefore, Proposition 24 relaxes the CCPA by no longer applying to small businesses whose websites collect visitor and customer data.

There are two other important business exceptions that Proposition 24 creates. First, it creates an exception for businesses that collect data where the collection of that information serves consumer interests and aids the business in performing its job.¹³²⁹ The best illustration of this example would be a car dealership that needs to issue maintenance and recall notices to its customers. Second, Proposition 24 would waive the requirement for a business to provide consumers with the option to opt out by a telephone if that business operates solely online.¹³³⁰ This change would reduce an online business’s expenses by not requiring it to have a phone number if its online operations do not normally require a telephone.

6. Effective Dates

If Californians adopt Proposition 24, it will take effect on January 1, 2023.¹³³¹ Until that date, all existing laws will remain in force.¹³³² The only nuance to the effective date is

¹³²³ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹³²⁴ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)(3)).

¹³²⁵ *Id.* (amending CAL. CIV. CODE § 1798.105(c)(3)).

¹³²⁶ *Id.* (amending CAL. CIV. CODE § 1798.140(d)(1)(B)).

¹³²⁷ *Is Your Small Business Up-To-Date With The CCPA?*, SMALL BUS. RES. CTR., <https://sbrc.employers.com/small-business/operations/ccpa-explained> (last visited Sept. 27, 2020).

¹³²⁸ *Id.*

¹³²⁹ *See, e.g.*, Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.145(g)(1)) (creating an exception for car dealers who collect consumer information for the purpose of facilitating recalls and vehicle maintenance).

¹³³⁰ *Id.* (amending CAL. CIV. CODE § 1798.130).

¹³³¹ *Id.* (Section 31).

¹³³² *Id.*

that a consumer's right to access his or her information will only apply to information collected on or after January 1, 2022.¹³³³

III. Drafting Issues

A. Severability

One of the statutory issues that can arise after voters approve an initiative is the issue of severability. This issue begins when a court finds that a portion of the law is unconstitutional.¹³³⁴ If the unconstitutional portion is severable, a court would remove that part, and the rest of the law may remain in place.¹³³⁵ Otherwise, the court must invalidate the entire statute.¹³³⁶

Proposition 24 contains a severability clause that calls for all remaining provisions of the statute to remain in effect if a court severs any section.¹³³⁷ The clause communicates the voters' desire that Proposition 24 should survive if a court invalidated individual provisions of the initiative.¹³³⁸

A severability clause alone does not guarantee that courts will sever the invalid portion.¹³³⁹ A court will only sever an invalid provision if it is mechanically and grammatically severable, functionally separable, and volitionally separable.¹³⁴⁰ Mechanical and grammatical severability means a court can remove a provision without impacting other provisions of the initiative.¹³⁴¹ "Functionally separable" means the invalidated provision does not impact the remaining provisions' ability to perform their function.¹³⁴² Volitional separability means the voters would still want the remaining provisions to exist in the absence of the invalidated provision.¹³⁴³

Proposition 24's severability clause satisfies the volitional prong because it clearly communicates the voters' intent that the remaining provisions survive a court invalidating any other portion of the initiative.¹³⁴⁴ The remaining severability elements are more fact-specific to the challenged section(s). Currently, Proposition 24 is not facing any substantive challenges. However, if someone challenged an individual portion of the proposition, then

¹³³³ *Id.*

¹³³⁴ *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 822 (1989).

¹³³⁵ *Id.*

¹³³⁶ *See id.* (determining whether the court could sever the offending provision and implement the initiative in part).

¹³³⁷ Cal. Proposition 24 (2020) (Section 26).

¹³³⁸ *Id.*

¹³³⁹ *Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal. 3d 315, 331 (1975).

¹³⁴⁰ *Gerken v. FPPC*, 6 Cal. 4th 707, 721–22 (1993) (citing *Calfarm Ins. Co.*, 48 Cal. 3d at 821–22).

¹³⁴¹ *Raven v. Deukmejian*, 52 Cal. 3d 336, 356 (1990).

¹³⁴² *Calfarm Ins. Co.*, 48 Cal. 3d at 822.

¹³⁴³ *Raven*, 52 Cal. 3d at 356.

¹³⁴⁴ Cal. Proposition 24 (2020) (Section 26).

a court would have to determine if the challenged section is mechanically, grammatically, and functionally severable.

B. Protecting the Purpose of California's Privacy Law

One of the benefits of passing an initiative is the ability to bypass the cumbersome legislative process. However, just because the voters pass an initiative does not mean the Legislature cannot amend the law, although to do so usually means another trip to the ballot.¹³⁴⁵ The California Constitution states, "The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval."¹³⁴⁶ Therefore, the Legislature may only amend an initiative statute in the manner and to the extent the proposition expressly permits.¹³⁴⁷

Proposition 24 specifies the means by which the Legislature may amend its provisions in the future.¹³⁴⁸ While initiative statutes generally require voter approval to amend, Proposition 24 requires that the amendment be consistent with the purpose and intent of Proposition 24, the Legislature pass it with a simple majority, and the governor sign it into law.¹³⁴⁹ This low vote threshold gives the Legislature the ability to amend Proposition 24 with relative ease. However, the condition that any amendment is consistent with the purpose and intent of Proposition 24 ensures future amendments protect Californians' privacy. If the Legislature amends the law and litigation ensues, courts would determine whether that amendment comports with the purpose and intent of California's privacy laws.

C. Deciphering the Purpose and Intent of California's Privacy Laws

A fundamental issue with an initiative is determining its purpose and intent. Often, an initiative's authors include a statement of intent within the initiative. While such statements help a court determine the law's purpose, they are by no means dispositive.¹³⁵⁰ The California Supreme Court has found that—when discerning an initiative's purpose—a court should use the initiative's statement of purpose as a guide; however, that should not be the only thing the court considers.¹³⁵¹ Evidence of an initiative's purpose can be drawn from many sources, including its historical context and ballot arguments in its favor.¹³⁵²

Proposition 24's has a statement of purpose that states, "it is the purpose and intent of the people of the State of California to further protect consumers' rights, including the

¹³⁴⁵ CAL. CONST. art. II § 10(c).

¹³⁴⁶ *Id.*

¹³⁴⁷ *Amwest Surety Ins. Co. v. Wilson*, 11 Cal. 4th 1243, 1251 (1995) ("The voters have the power to decide whether or not the Legislature can amend or repeal initiative statutes. This power is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters.*") (emphasis in original).

¹³⁴⁸ Cal. Proposition 24 (2020) (Section 25).

¹³⁴⁹ *Id.*

¹³⁵⁰ *Amwest Surety Ins. Co.*, 11 Cal. 4th at 1256.

¹³⁵¹ *Id.*

¹³⁵² *Howard Jarvis Taxpayers Ass'n v. Newsom*, 39 Cal. App. 5th 158, 170 (2019).

constitutional right of privacy.”¹³⁵³ Further, the voter information guide’s ballot argument in favor of Proposition 24 describes a scene where large corporations monitor children and sell Californians’ information.¹³⁵⁴ Against that backdrop, the proponents’ argument declares, “Consumers need stronger protections.”¹³⁵⁵ Considering both the statement of purpose and the voter information guide, a court would likely find the purpose and intent of Proposition 24 was to protect—not weaken—consumer privacy.

IV. Constitutional Issues

A. Federal Constitutional Issues

1. Preemption and the Tenth Amendment

While the Constitution does not guarantee a right to privacy, it delegates specific powers to the federal government and reserves all remaining powers for the states.¹³⁵⁶ The Supremacy Clause establishes that federal law is the “supreme Law of the Land.”¹³⁵⁷ The Supreme Court interpreted this clause to mean that federal law is superior to state law and prevails where the laws conflict.¹³⁵⁸ Courts have maintained this position since the Supreme Court’s earliest Supremacy Clause interpretations.¹³⁵⁹ Ultimately, federal law precludes state law where compliance with both state and federal law is impossible and state law impedes federal law.¹³⁶⁰

The United States Supreme Court first discussed the right to privacy beginning in the 1960s, and Congress followed suit in the 1970s.¹³⁶¹ In total, Congress has enacted only four laws relating to data privacy—all taking effect before early 2000.¹³⁶² While these four laws deal with different facets of privacy, not one deals with every consumers’ privacy on the

¹³⁵³ Cal. Proposition 24 (2020) (Section 3).

¹³⁵⁴ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 3, 2020, at 70, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>.

¹³⁵⁵ *Id.*

¹³⁵⁶ *See generally*, U.S. CONST. (containing no provisions relating to privacy); *see also id.* amend X. (reserving non-delegated powers to the states).

¹³⁵⁷ U.S. CONST. art. VI, cl. 2.

¹³⁵⁸ *E.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 361 (1819).

¹³⁵⁹ *Id.*; *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982).

¹³⁶⁰ *Edgar*, 457 U.S. at 631.

¹³⁶¹ *See* 15 U.S.C. § 1681 (2020) (effective Oct. 26, 1970) (focusing on consumer privacy with respect to credit reporting agencies), *and Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (becoming the first case where the Supreme Court discussed the importance of the right to privacy).

¹³⁶² 15 U.S.C. § 1681 (effective Oct. 26, 1970); 5 U.S.C. § 552(a) (2020) (effective Dec. 31, 1974); 15 U.S.C. § 6801 (2020) (effective Nov. 12, 1999); 15 U.S.C. § 6501 (2020) (effective Apr. 21, 2000).

Internet.¹³⁶³ The only quasi-relevant law is the COPPA, which takes steps to protect children under thirteen from sharing personal information without parental consent.¹³⁶⁴

Proposition 24 focuses on protecting every Californians' information from misuse.¹³⁶⁵ It focuses on the ways that businesses collect information and takes steps to ensure Californians can limit what a business can do with that information.¹³⁶⁶ Proposition 24 states that it supplements existing laws and that it does not conflict with the COPPA.¹³⁶⁷ The proposition also harmonizes—not conflicts—with federal law because it would not relax the COPPA's protections.¹³⁶⁸ Additionally, Proposition 24 gives way to Title 15 of the United States Code, which houses the federal government's consumer privacy laws.¹³⁶⁹ Therefore, it is highly unlikely that federal law prevents California from regulating privacy.

2. Dormant Commerce Clause

The Commerce Clause gives Congress the power to regulate commerce among the states.¹³⁷⁰ The Dormant Commerce Clause emerges from the interplay between the Commerce Clause and the Tenth Amendment. Essentially, under a Dormant Commerce Clause analysis, a state may not regulate commerce that crosses state lines.¹³⁷¹

An important aspect of Proposition 24 is how it modifies existing law. Current law uses the wrong word in a manner that could create a Dormant Commerce Clause issue.¹³⁷² Proposition 24 would change the wording of existing law to permit data collection in a way that would constitute interstate commerce.¹³⁷³ In fact, the drafters made this change for the explicit purpose of avoiding constitutional violations.¹³⁷⁴ Therefore, Proposition 24 would avoid—not create—a potential Dormant Commerce Clause violation.

¹³⁶³ 15 U.S.C. § 1681 (protecting consumer information with respect to credit reporting agencies); 5 U.S.C. § 552(a) (creating laws to regulate government agency's use of personal information); 15 U.S.C. § 6801 (regulating financial institutions collection and use of personal institution); 15 U.S.C. § 6501 (protecting children under thirteen while on the internet).

¹³⁶⁴ 15 U.S.C. § 6501.

¹³⁶⁵ Cal. Proposition 24 (2020) (Section 3).

¹³⁶⁶ *Id.*

¹³⁶⁷ *Id.* (Section 30).

¹³⁶⁸ Compare 15 U.S.C. § 6501 (establishing the age threshold for people protected by the statute at thirteen), with Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.120) (protecting children up to the age of sixteen, which includes every person that the COPA protects).

¹³⁶⁹ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE 1798.145(d)(1)).

¹³⁷⁰ U.S. CONST. art. I, § 8, cl. 3.

¹³⁷¹ Compare U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power to . . . regulate commerce . . . among the several states"), with *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

¹³⁷² See CAL. CIV. CODE § 1798.145(a)(6) (West 2020) ("This paragraph shall not permit a business from storing, including on a device, personal information about a consumer when the consumer is in California and then collecting that personal information when the consumer and stored personal information is outside of California.").

¹³⁷³ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE 1798.145(a)(7)) (changing the phrase "shall not permit" to "shall not prohibit" circumstances that would constitute a Dormant Commerce Clause violation).

¹³⁷⁴ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

3. Freedom of Press and First Amendment

The United States Constitution guarantees the right to both free speech and freedom of the press.¹³⁷⁵ Multiple Supreme Court justices have discussed how the press must be free from government influence and how that is the basis of the First Amendment's protection.¹³⁷⁶

Proposition 24 takes steps to ensure it does not interfere with a free press. Its drafters were careful not to create an undue burden on a free press by drafting a statute that would require news companies to provide the news at no cost.¹³⁷⁷ In essence, Proposition 24 permits businesses that collect consumer information to charge a fee for their services.¹³⁷⁸ This provision maintains the status quo, while still holding businesses accountable to the other provisions of the statute.¹³⁷⁹ Without this explicit provision, the drafters feared news organizations would go out of business if they had to give away their services for free.¹³⁸⁰ It is unlikely that Proposition 24 violates the First Amendment because it takes affirmative steps to preserve the free press.

B. State Constitutional Issue: The Single Subject Rule

Under the California Constitution, an initiative must adhere to the Single Subject Rule, which requires a ballot initiative to address only a single issue or subject.¹³⁸¹ The California Supreme Court found that an initiative does not violate the Single Subject Rule if its provisions are reasonably related to the same general purpose.¹³⁸² The law does not require that relatedness to apply to collateral effects.¹³⁸³ In short, an initiative does not violate the Single Subject Rule if its provisions are reasonably related to a single purpose, but those provisions have an impact in an unrelated area of the law.

Proposition 24 would allow people to correct inaccurate personal information that businesses have collected.¹³⁸⁴ It also expands protections specifically for Sensitive Personal Information and creates a consumer privacy regulatory body to enforce Proposition 24.¹³⁸⁵

¹³⁷⁵ U.S. CONST. amend I.

¹³⁷⁶ See, e.g., *Pennkamp v. Florida*, 328 U.S. 331, 354–55 (1946) (“Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied.”).

¹³⁷⁷ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹³⁷⁸ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)(3)).

¹³⁷⁹ *Id.*

¹³⁸⁰ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹³⁸¹ CAL. CONST. art. II § 8(d).

¹³⁸² *Brosnahan v. Brown*, 32 Cal. 3d 236, 245 (1982) (“In determining whether a measure ‘embrac[es] more than one subject,’ we have previously held that ‘an initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are ‘reasonably germane’ to each other,’ and to the general purpose or object of the initiative.” (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 230 (1978))).

¹³⁸³ *Id.*

¹³⁸⁴ Cal. Proposition 24 (2020) (adding CAL. CIV. CODE § 1798.106(a)).

¹³⁸⁵ *Id.* (adding CAL. CIV. CODE §§ 1798.121, 1798.199.10(a)).

Every provision that Proposition 24 adds or amends is related to consumer privacy protection.¹³⁸⁶ A court would likely find that Proposition 24 does not violate the Single Subject Rule because every part of the proposition is reasonably germane to consumer privacy.

V. Public Policy Issues

A. Proponents

Proposition 24's supporters include politicians, consumer groups, trade associations, and civil liberties groups. The main proponent is Alastair Mactaggart, who played a pivotal role in enacting the CCPA.¹³⁸⁷ Other supporters include Senator Hertzberg, former presidential candidate Andrew Yang, the California Democratic Party, the National Association for the Advancement of Colored People ("NAACP"), the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), Consumer Watchdog, California Professional Firefighters, and multiple labor unions.¹³⁸⁸

As an overarching theme to keep in mind with these policy arguments, Alastair Mactaggart was the proponent and champion of the CCPA. Mr. Mactaggart's response to whether Proposition 24 would weaken consumer privacy protections was, "Why would I spend millions of dollars on the CCPA and then spend more money to weaken it?"¹³⁸⁹ Rather, he admired the creativity of businesses, but appreciates the value of regulations.¹³⁹⁰ Consequently, his goal was to keep the law more powerful than companies and ensure California is at the forefront of consumer privacy protections.¹³⁹¹ He noted, if California enacts Proposition 24, it would set a standard for other states—and possibly the nation—to follow.¹³⁹²

1. Makes it Easier for Consumers to Exercise their Right to Opt Out

Under current law, individual Californians shoulder the burden opting out of data collection.¹³⁹³ Californians can set their browser's Do Not Track signal; however, businesses need not respect that preference.¹³⁹⁴ Proposition 24 would allow consumers to communicate their opt out preferences via that Do Not Track signal and would allow businesses to receive the consumer's preference through that signal.¹³⁹⁵

¹³⁸⁶ See generally *id.* (adding, amending, and reenacting sections all within the statutory framework of CAL. CIV. CODE §§ 1798.100–199).

¹³⁸⁷ *About Us*, CALIFORNIANS FOR CONSUMER PRIVACY, <https://www.caprivacy.org/about-us/> (last visited Aug. 27, 2020).

¹³⁸⁸ *Our Growing List of Supporters*, *supra* note 1285.

¹³⁸⁹ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹³⁹⁰ *Id.*

¹³⁹¹ *Id.*

¹³⁹² *Id.*

¹³⁹³ CAL. CIV. CODE § 1798.135 (West 2020).

¹³⁹⁴ CAL. DEP'T OF JUST., *supra* note 1260.

¹³⁹⁵ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

Proponents assert the initiative does not change the requirement that consumers communicate their preferences, but it provides them with an easier way to do so.¹³⁹⁶ Consumers need only enable this feature in their browser once to uniformly communicate their preference.¹³⁹⁷ Existing law takes over if a business informs the consumer that it does not accept preferences via the Do Not Track signal.¹³⁹⁸ Therefore, Proposition 24 potentially makes it easier—not harder—for Californians to opt out of data collection by allowing businesses to accept consumer preferences via the Do Not Track signal. Otherwise, the process remains the same as existing law.

2. Does Not Foreclose a Future Private Right of Action

California’s current privacy laws do not guarantee a private right of action outside of a negligent data breach.¹³⁹⁹ A private right of action would allow individual Californians to file lawsuits against businesses who violate their privacy.¹⁴⁰⁰ While a private right of action was part of Mr. Mactaggart’s early drafts of the CCPA in 2018—which the Legislature enacted instead of it going to the voters—that right was removed in exchange for granting consumers access to see the information businesses had collected.¹⁴⁰¹

Opponents have criticized Proposition 24 because it does not include a private right of action. While that statement is true, the proponents believe that view takes an all-or-nothing approach to privacy that sacrifices additional protections over a single right.¹⁴⁰² Proposition 24’s proponents argue that it better protects Californians than the CCPA and takes steps to ensure businesses cannot undermine the law.¹⁴⁰³ While Proposition 24 will not create a new private right of action, it does not foreclose anyone from enacting such a right in the future.¹⁴⁰⁴

3. Does Not Create Pay-for-Privacy Schemes that Disproportionately Affect Vulnerable Communities

This argument stems from the fact that Proposition 24 allows businesses to have loyalty programs. However, current law does not prohibit loyalty programs.¹⁴⁰⁵ Businesses expressed concern that the CCPA left this open to interpretation.¹⁴⁰⁶ Current law does not

¹³⁹⁶ *Id.*

¹³⁹⁷ *Id.*

¹³⁹⁸ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.135(b)).

¹³⁹⁹ CAL. CIV. CODE § 1798.135 (West 2020).

¹⁴⁰⁰ Joseph Jerome, *Private right of action shouldn’t be a yes-no proposition in federal US privacy legislation*, IAPP (Oct. 3, 2019), <https://iapp.org/news/a/private-right-of-action-shouldnt-be-a-yes-no-proposition-in-federal-privacy-legislation/>.

¹⁴⁰¹ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹⁴⁰² *Id.*

¹⁴⁰³ *Id.*

¹⁴⁰⁴ *Id.*

¹⁴⁰⁵ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)).

¹⁴⁰⁶ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

preclude a business from offering loyalty programs; however, those programs must comport the CCPA if the business meets the statutory definition of a business.¹⁴⁰⁷

Proposition 24 expressly permits loyalty programs that are consistent with the CCPA.¹⁴⁰⁸ California's privacy laws already allow businesses to provide incentives to consumers who give the business their personal information.¹⁴⁰⁹ However, businesses cannot penalize or discriminate against consumers who opt out of data collection.¹⁴¹⁰ Therefore, Proposition 24 does not permit pay-for-privacy schemes. This change is important because it addresses an industry concern that the CCPA forecloses loyalty programs.

4. Provides Greater Protection for Children

Both federal law and the CCPA impose strict protections for consumers who are thirteen years old or younger.¹⁴¹¹ Proposition 24 would expand protections for minors up to age sixteen.¹⁴¹² To accomplish this, Proposition 24 would impose stricter penalties on businesses that intentionally violate a minor's privacy.¹⁴¹³ Under Proposition 24, fines are tripled for any business that violates the privacy of a Californian age sixteen and younger.¹⁴¹⁴ This provision is beneficial because it is a very strong deterrent for businesses who mishandle consumer data. Ideally, this provision will prompt businesses to exercise additional caution with minors' data. This change creates better consumer privacy protections for California's youth.

5. Better Protects Sensitive Personal Information

Currently, California law treats all consumer information the same. However, Proposition 24's proponents recognize some information is so sensitive that businesses should not be able to use it.¹⁴¹⁵ Proposition 24 would classify certain types of information as Sensitive Personal Information.¹⁴¹⁶ Additionally, the proposition directs California's new consumer privacy regulatory agency to enact laws that would prohibit businesses from using Sensitive Personal Information to profile Californians.¹⁴¹⁷ Proponents feel change is very important for social justice because it limits business's ability to profile and commercialize Californians' most intimate data.

¹⁴⁰⁷ CAL. CIV. CODE § 1798.140(c) (West 2020).

¹⁴⁰⁸ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)(3)).

¹⁴⁰⁹ CAL. CIV. CODE § 1798.125(b) (West 2020).

¹⁴¹⁰ *Id.* § 1798.125(a).

¹⁴¹¹ 15 U.S.C. § 6501 (2020); CAL. CIV. CODE § 1798.120(c) (West 2020).

¹⁴¹² Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.155(a)).

¹⁴¹³ *Id.* (amending CAL. CIV. CODE §§ 1798.120(c), 1798.155(a)).

¹⁴¹⁴ *Common Sense Endorses Proposition 24, California Privacy Rights Act (CPRA), Citing New Protections For Families*, CALIFORNIANS FOR CONSUMER PRIVACY, <https://www.caprivacy.org/common-sense-endorses-november-2020-ballot-measure-california-privacy-rights-act-cpra-citing-new-protections-for-families/> (last visited Aug. 27, 2020).

¹⁴¹⁵ *A Look at the New Privacy Rights that Prop 24 Delivers*, CALIFORNIANS FOR CONSUMER PRIVACY (Aug. 26, 2020), <https://www.caprivacy.org/a-look-at-the-new-privacy-rights-that-prop-24-delivers/>.

¹⁴¹⁶ *Id.*

¹⁴¹⁷ Cal. Proposition 24 (2020) (reenacting CAL. CIV. CODE § 1798.185(a)(16)).

6. Creates the Largest Privacy Regulatory Body in the United States

The federal government employs only forty people to enforce consumer privacy laws across the United States.¹⁴¹⁸ California currently has twenty-three employees within the DOJ who enforce the CCPA.¹⁴¹⁹ The DOJ spends between \$4.25 million and \$4.739 million on regulating consumer privacy each year.¹⁴²⁰ Proposition 24 recognizes that consumer privacy is a developing field and that the law needs to develop alongside technology.¹⁴²¹ Proponents argue that California needs a dedicated regulatory body to examine and respond to new methods of data collection.¹⁴²² Therefore, Proposition 24 is the appropriate response because it would protect Californians by creating the most robust privacy regulatory agency in the nation that would grow alongside the fastest-developing technology ever.

7. Makes it Harder for Special Interests to Weaken the Law

Proposition 24's proponents believe an important step to protecting Californians is to ensure that special interests cannot weaken consumer privacy laws. The most important aspect of Proposition 24 is that it builds a floor under California's privacy laws that can grow with, but continue to protect, Californians.¹⁴²³ Rather than requiring more votes to modify the law, Proposition 24 requires that modifications to California's privacy laws comport with the initiative's purpose and intent.¹⁴²⁴ This requirement would prohibit legislators from modifying consumer privacy laws if those modifications were contrary to the initiative's purpose—which is to protect Californians from businesses exploiting their privacy.¹⁴²⁵ Ultimately, this change ensures businesses cannot weaken privacy protections that Proposition 24 and the CCPA created.

B. Opponents

1. Makes it Harder for Consumers to Exercise their Right to Opt Out

Opponents argue that Proposition 24 makes it harder for consumers to exercise their right to opt out of data collection and sale. The American Civil Liberties Union ("ACLU") asserts that "Prop 24 puts the burden on people to protect themselves by paying for their privacy rights or by filling out forms and hoping companies listen. People do not have time

¹⁴¹⁸ Compare FED. TRADE COMM'N, FISCAL YEAR 2021 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 1246, at 121 (showing that the FTC employs 61 people for both Privacy and Identity Protection), with Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*) (explaining that the FTC has only 40 employees who work on consumer privacy).

¹⁴¹⁹ CAL. DEP'T OF FIN., 2019–20 STATE BUDGET DEPARTMENT REPORT: DEPARTMENT OF JUSTICE, <http://www.ebudget.ca.gov/2019-20/pdf/Enacted/GovernorsBudget/0010/0820.pdf> (last visited Sept. 5, 2020).

¹⁴²⁰ CAL. DEP'T OF FIN., 2019–20 BUDGET CHANGE PROPOSAL: DEPARTMENT OF JUSTICE, *supra* note 1275.

¹⁴²¹ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹⁴²² *Our Growing List of Supporters*, *supra* note 1285.

¹⁴²³ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹⁴²⁴ Cal. Proposition 24 (2020) (Section 3).

¹⁴²⁵ *Id.*

or money to pay for their privacy.”¹⁴²⁶ Here, the ACLU is referring to the Do Not Track signal that consumers must select on a business’s website in order to opt out of that site’s data collection plan.¹⁴²⁷ Opponents fear this provision will render much of the law’s protections moot because the average consumer does not have the time, nor potentially the knowledge, to opt out of every website’s data collection program.¹⁴²⁸

2. Does Not Guarantee a Private Right of Action

Another concern is that Proposition 24 contains no guaranteed private right of action.¹⁴²⁹ Without a private right of action, affected citizens cannot sue a business that violates their privacy under California law.¹⁴³⁰ To receive a remedy, a consumer would need to go through the government, which could then punish the business on behalf of the consumer.¹⁴³¹ The Electronic Frontier Foundation (“EFF”)—which neither supports nor opposes Proposition 24—states, “Consumers need a private right of action, so they can do the job when regulators can’t—or won’t.”¹⁴³² The EFF fears the law does not empower consumers to sue when a business violates their privacy.¹⁴³³ Further, opponents assert it will not be possible for regulators to address all privacy violations because every violation goes through one agency.¹⁴³⁴ Therefore, Proposition 24’s opponents believe that the law should guarantee a private right of action, and are disinclined to support a change to the law that does not include that right.

3. Enables Pay-for-Privacy Schemes

The EFF also believes Proposition 24 permits pay-for-privacy schemes.¹⁴³⁵ Proposition 24 permits businesses to offer loyalty programs that are consistent with the statute’s other provisions.¹⁴³⁶ Opponents, like the EFF, assert this provision effectively allows businesses to withhold discounts unless the consumer consents to having his or her data collected and

¹⁴²⁶ Telephone Interview with Jacob Snow, Technology & Civil Liberties Attorney, American Civil Liberties Union (Aug. 31, 2020) [Snow Interview] (notes on file with the *California Initiative Review*).

¹⁴²⁷ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.135(b)). *See also* CAL. DEP’T OF JUST., *supra* note 1260 (indicating that a Do Not Track signal is a browser function that operates in the background after the user activates this feature; it is not part of the individual website).

¹⁴²⁸ Snow Interview, *supra* note 1426 (notes on file with the *California Initiative Review*).

¹⁴²⁹ Lee Tien, Adam Schwartz & Hayley Tsukayama, *Why EFF Doesn’t Support California Proposition 24*, ELEC. FRONTIER FOUND. (July 29, 2020), <https://www.eff.org/deeplinks/2020/07/why-eff-doesnt-support-cal-prop-24>.

¹⁴³⁰ *Id.*

¹⁴³¹ *Id.*

¹⁴³² *Id.*

¹⁴³³ *Id.*

¹⁴³⁴ *Id.*

¹⁴³⁵ *Id.*

¹⁴³⁶ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)(3)).

used.¹⁴³⁷ Opponents fear that allowing a business to provide incentives in exchange for data mining will undermine the purpose of the law and render it far less effective.¹⁴³⁸

4. Disproportionately Impacts Vulnerable Communities

The ACLU contends that Proposition 24 disproportionately impacts vulnerable communities.¹⁴³⁹ An attorney for the ACLU argues, “Disadvantaged communities do not have time and money to go through the laborious process of opting out of all these programs.”¹⁴⁴⁰ The ACLU contends Proposition 24’s opt out system disproportionately impacts communities that both lack the time and resources to effectively exercise their right to opt out.¹⁴⁴¹ Opting out requires time to sort through each business’s website and opt out of data collection.¹⁴⁴² With the amount of time required to complete this task, the ACLU contends that disadvantaged communities will not be able to exercise their rights because they must focus on more immediate concerns unrelated to businesses using their personal data.¹⁴⁴³

5. Contains Too Many Loopholes

Last, opponents argue Proposition 24 contains too many loopholes.¹⁴⁴⁴ The ACLU claims Proposition 24 eliminates the requirement that phones include a setting to allow consumers to opt out of having their information sold.¹⁴⁴⁵ Instead, they claim Proposition 24 requires people to go through a complicated process and go to each app, site, or data broker to prevent their information from being sold.¹⁴⁴⁶ The ACLU contends this loophole places an undue burden on consumers who want to prevent a business from using their data.¹⁴⁴⁷

¹⁴³⁷ But see CAL. CIV. CODE § 1798.125(a)(1)(B) (West 2020) (prohibiting businesses retaliating against consumers who opt out of data collection by charging different rates). Tien, Schwartz & Tsukayama, *supra* note 1429; Geoffrey A. Fowler, *The Technology 202: Privacy advocates battle each other over whether California’s Proposition 24 better protects consumers*, WASHINGTON POST, (Aug. 4, 2020, 5:35 AM) <https://www.washingtonpost.com/politics/2020/08/04/technology-202-privacy-advocates-battle-each-other-over-whether-california-proposition-24-better-protects-consumers/>.

¹⁴³⁸ Tien, Schwartz & Tsukayama, *supra* note 1429.

¹⁴³⁹ Snow Interview, *supra* note 1426 (notes on file with the *California Initiative Review*).

¹⁴⁴⁰ *Id.*

¹⁴⁴¹ *Id.*

¹⁴⁴² *Id.*

¹⁴⁴³ *Id.*

¹⁴⁴⁴ *Id.*

¹⁴⁴⁵ See generally Cal. Proposition 24 (2020) (modifying no section of existing law that impact a person’s ability to opt out using their phone).

¹⁴⁴⁶ But see CAL. CIV. CODE § 1798.120 (West 2020) (placing the burden of opting out on individual consumers), and Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.135(b)(1)) (creating an additional way for consumers to opt out of data collection by setting a Do Not Track signal in their web browser). Snow Interview, *supra* note 1426 (notes on file with the *California Initiative Review*).

¹⁴⁴⁷ Snow Interview, *supra* note 1426 (notes on file with the *California Initiative Review*).

Another loophole opponents frequently cite is the border exception.¹⁴⁴⁸ This exception dictates that—regardless of one’s preferences—once a person leaves California, all data on a device brought out of state can be collected and sold.¹⁴⁴⁹ The ACLU believes that, because of these loopholes, Proposition 24 does not adequately protect consumers and their data.¹⁴⁵⁰

VI. Conclusion

Currently, there are three big problems with the CCPA. First, it allows businesses to easily attack and undercut California’s current privacy protections. Second, it exposes the current privacy laws to potential constitutional violations. Third, it does not offer the flexibility to develop alongside technology. Proposition 24 will remedy these problems and align California’s privacy laws with Europe’s top-tier privacy system. Proposition 24 aims to better serve Californians by expanding consumer privacy protections and insulating those protections from special interests.

Proposition 24’s opponents argue that it weakens existing privacy laws, makes it harder to opt out of data collection, and encourages pay-to-play schemes that disproportionately impact vulnerable communities.¹⁴⁵¹ However, some of the provisions they cite are already part of California’s consumer privacy laws.¹⁴⁵² Proposition 24’s main proponent asks why would he spend millions of dollars undoing something that he spent millions of dollars creating.¹⁴⁵³ Additionally, proponents argue Proposition 24 enhances California’s privacy laws to give Californians maximum protection and is necessary to ensure special interests cannot weaken the state’s consumer privacy laws.¹⁴⁵⁴

A **YES** vote for Proposition 24 would make it harder for special interests to weaken California’s consumer privacy laws, establish better privacy protections for Californians and their children, and allocate approximately \$10 million annually from the General Fund to regulate consumer privacy. A **NO** vote would not enact these changes, and the DOJ would remain in control of regulating consumer privacy and enforcing the CCPA.

¹⁴⁴⁸ *Id.*

¹⁴⁴⁹ *Id.*; but see *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994) (“Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a “negative” aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”).

¹⁴⁵⁰ Snow Interview, *supra* note 1426 (notes on file with the *California Initiative Review*).

¹⁴⁵¹ *Id.*; Homepage, NO ON PROP 24, <https://noon24ca.org> (last visited Sept. 7, 2020).

¹⁴⁵² Compare, e.g., CAL. CIV. CODE § 1798.120 (West 2020) (requiring that a consumer direct their privacy preferences to each business that they would like to opt out of collection and sale from), with Snow Interview, *supra* note 1426 (notes on file with the *California Initiative Review*) (arguing Proposition 24 places the burden on consumers to opt out).

¹⁴⁵³ Mactaggart Interview, *supra* note 1246 (notes on file with the *California Initiative Review*).

¹⁴⁵⁴ *Id.*

Proposition 25:
Replace Cash Bail with Risk Assessment
Referendum

Referendum

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I. EXECUTIVE SUMMARY

In 2018, the California Legislature enacted Senate Bill (“SB”) 10 with the purpose of reforming California’s system for bail and release from jail. The referendum is the power of the people to approve or reject statutes the Legislature adopts.¹⁴⁵⁵ Proposition 25 is a referendum that gives California voters the opportunity to determine the fate of SB 10, essentially giving voters the choice of whether California should keep the current money bail system, or to implement the new risk assessment system that SB 10 created.

A **YES** vote eliminates cash bail in favor of pretrial risk assessment. This risk assessment would determine if an arrestee will be released or detained until their trial. No one will pay any fees for their release.

A **NO** vote retains the cash bail system that was in place prior to 2018 and SB 10. Some people could be released without paying bail, while others would be required to pay bail. Fees could still be collected for a person’s release. SB 10 would not take effect.

II. BACKGROUND

A. Risk Assessment v. Cash Bail

Many states have begun using risk assessments as a supplement to the system of cash bail including Kentucky, Arizona, New Jersey, and Utah.¹⁴⁵⁶ Risk assessments usually take the form of a Public Safety Assessment (“PSA”). These risk assessments consist of an algorithm that judges can use to make a determination about whether a person should be released or should be held in pretrial detention.¹⁴⁵⁷ These PSAs produce two risk scores. One attempts to determine the probability that an arrestee will commit another crime if released.¹⁴⁵⁸ The other attempts to determine the probability the arrestee will fail to appear at court.¹⁴⁵⁹ These PSAs consider various factors including: age, type of offense, criminal history, previous sentencing, and previous appearances.¹⁴⁶⁰

On the other hand, a cash bail system requires an arrestee pay some money as collateral, guaranteeing they will appear in court.¹⁴⁶¹ If the arrestee fails to appear in court, the government keeps the money; if they make their appearances, the money is

¹⁴⁵⁵ CAL. CONST. art. II, § 9.

¹⁴⁵⁶ ARNOLD VENTURES, PUBLIC SAFETY ASSESSMENT FAQs (“PSA 101”) 5 *available at* https://craftmediabucket.s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190319_140124.pdf (last visited Sept. 22, 2020).

¹⁴⁵⁷ *Id.* at 1.

¹⁴⁵⁸ *Id.*

¹⁴⁵⁹ *Id.*

¹⁴⁶⁰ *Id.* at 2.

¹⁴⁶¹ Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CENTER FOR JUST. (Dec. 10, 2019), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

returned.¹⁴⁶² In most states and counties judges have broad discretion in setting the bail amount.¹⁴⁶³ In certain cases, the judge may choose not to fix a bail amount and instead release the offender on their “own recognizance.” Own recognizance is essentially an arrestee’s promise to return to court.¹⁴⁶⁴ However, when a person is unable to pay the bail, they have two options: remain in jail or contact a bail bondsman.¹⁴⁶⁵ The former option is the reason approximately 70 percent of the US jail population consists of pretrial detainees.¹⁴⁶⁶ Many people think the cash bail system discriminates against the poor and minorities.¹⁴⁶⁷ This perspective stems from studies that show that people who are incarcerated come from the poorest economic class, and that police in California arrest minorities at much higher rates than white arrestees.¹⁴⁶⁸ Further, over 63 percent of incarcerated persons in California are in jail because they cannot afford their bail amount.¹⁴⁶⁹

Bail Bonds companies usually provide a bond to secure a person’s release from prison in return for a percentage of the bail amount.¹⁴⁷⁰ However, when an arrestee uses a bondsman, their money is not returned to them when they show up in court or if their case is dismissed, as it typically would be if they had paid the government themselves.¹⁴⁷¹ Instead, the bail bondsman keeps the percentage paid by the arrestee, in addition to various fee charges found in the terms and conditions of the bondsman’s contract.¹⁴⁷² In exchange for a portion of the fee the bail bondsman charges, an insurance company underwrites the bail bondsman.¹⁴⁷³ However, the bail bondsman is always responsible for any losses the insurer may incur, so they pass these fees and payment plans onto the arrestees.¹⁴⁷⁴ Consequently, the bail bonds industry profits substantially from arrestees who cannot afford their bail.¹⁴⁷⁵

¹⁴⁶² *Id.*

¹⁴⁶³ *Id.*

¹⁴⁶⁴ *Id.*

¹⁴⁶⁵ *Id.*

¹⁴⁶⁶ *Id.*

¹⁴⁶⁷ *Id.*

¹⁴⁶⁸ *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, HUM. RTS. WATCH (2017), at 2, 5, 16 <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly#>.

¹⁴⁶⁹ *Id.* at 17

¹⁴⁷⁰ Kayla James, *How the Bail Bond Industry Became a \$2 Billion Business*, GLOBAL CITIZEN (Jan. 31, 2019), <https://www.globalcitizen.org/en/content/bail-bond-industry-2-billion-poverty/>.

¹⁴⁷¹ *Id.*

¹⁴⁷² *Id.*

¹⁴⁷³ *Id.*

¹⁴⁷⁴ *Id.*

¹⁴⁷⁵ *Id.*

III. THE LAW

A. Current Law in California

The bail system in California is similar to systems used in other states. When a person is arrested, the county officials that operate the jail can choose to hold the individual until their arraignment or release them.¹⁴⁷⁶ A person may be released on their own recognizance or on bail, making a financial guarantee that they will return to appear in court.¹⁴⁷⁷ An arraignment is the arrestee's first appearance in court, where the judge reads the person the charges against them and appoints them an attorney if they have not elected to retain an attorney themselves.¹⁴⁷⁸ Some arrestees are held in jail prior to arraignment; however, with the exception of certain violent felony charges, the California Constitution guarantees a right to release prior to trial under conditions that are not excessive.¹⁴⁷⁹ The bail amount is set according to a "schedule" by a judge or a magistrate.¹⁴⁸⁰ The judge will set a fixed amount of bail for the arrestee to pay and will consider the safety of the public, the seriousness of the offense charged, the arrestee's previous criminal record, and the probability that they will appear in court.¹⁴⁸¹ This gives the judge a considerable degree of discretion in setting the terms and conditions of the person's bail and the judge may set an amount that they deem sufficient to ensure the safety of the public or victim, or to ensure that the person will appear in court.¹⁴⁸²

As previously mentioned, there are two ways a person can pay their bail: they can either pay it on their own or with the help of a bail agent.¹⁴⁸³ If the person pays their own bail, it is generally returned to them when they appear in court.¹⁴⁸⁴ If they use a bail agent, they usually are required to pay a percentage of the bail to the agent, and the agent makes the financial guarantee to the court to pay the full bail amount if the arrestee does not make their appearances.¹⁴⁸⁵ The typical cost of using a bail bonds agent is 10 percent of the bail amount set by the court.¹⁴⁸⁶ If the arrestee misses their court date and the bail agent pays the bail amount, the bail agent can seek repayment from the arrestee.¹⁴⁸⁷ If an arrestee is unable to pay their bail amount on their own and is unable to pay a 10 percent

¹⁴⁷⁶ LEGIS. ANALYST'S OFF., PROPOSITION 25 1 (Nov. 3, 2020), available at <https://lao.ca.gov/ballot/2020/Prop25-110320.pdf>.

¹⁴⁷⁷ CAL. CONST. art. 1, § 28(f)(3).

¹⁴⁷⁸ LEGIS. ANALYST'S OFF., *supra* note 22, at 1.

¹⁴⁷⁹ CAL. CONST. art. 1, § 12.

¹⁴⁸⁰ LEGIS. ANALYST'S OFF., *supra* note 22, at 2.

¹⁴⁸¹ CAL. CONST. art. 1, § 12.

¹⁴⁸² CAL. CONST. art. 1, § 28(f)(3); CAL. PENAL CODE § 1270 (2020).

¹⁴⁸³ LEGIS. ANALYST'S OFF., *supra* note 22, at 2.

¹⁴⁸⁴ *Id.*

¹⁴⁸⁵ *Id.*

¹⁴⁸⁶ *Id.*

¹⁴⁸⁷ *Id.*

fee to a bail agent, they stay in jail awaiting their court date.¹⁴⁸⁸

B. Proposed Law

1. Overview

SB 10 was proposed by Senator Robert Hertzberg during the 2017–2018 legislative session.¹⁴⁸⁹ The purpose of the bill is to eliminate release on bail, create a new process for release before arraignment, and change the existing process for release at or after the arraignment hearing.¹⁴⁹⁰ Essentially, SB 10 aimed to eliminate money bail in favor of a risk assessment system for release pending trial.¹⁴⁹¹

SB 10 creates a new system in which each court would be required to create a “entity, division, or program,” called the Pretrial Assessment Services, that is tasked with assessing the risk level of arrestees, reporting their results, and making recommendations to the court for the conditions of the arrestee’s release. The court may assign its own employees to Pretrial Assessment Services or it could contract with a public entity, an adjoining county, or a regional group to perform the assessment, reporting, and recommendation tasks. The members of Pretrial Assessment Services would all be considered officers of the court and would not partake in any supervision services (like probation or parole).¹⁴⁹²

2. Pre-arraignment Release

Under SB 10, any person arrested for most misdemeanor crimes will be booked and released without being taken to jail, or, if they are taken into custody, they will be released within 12 hours of booking with no risk assessment.¹⁴⁹³ For all other crimes, Pretrial Assessment Services will determine the arrestees risk of failing to appear in court and risk posed to public safety if released using a “validated risk assessment tool.”¹⁴⁹⁴ The “tool” must be one selected and approved by the court and Pretrial Assessment Services, and taken from a list provided and maintained by the Judicial Council.¹⁴⁹⁵ Each assessment will include a numeric “score” or a levels system to indicate whether the person is a “low,” “medium,” or “high” risk of failing to appear in court and pose a threat to public safety.¹⁴⁹⁶

¹⁴⁸⁸ *Id.*

¹⁴⁸⁹ SB 10, 2016 Leg., 2017–2018 Reg. Sess. (Cal. 2016).

¹⁴⁹⁰ *Id.*

¹⁴⁹¹ *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_\(2020\)](https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_(2020)) (last visited Sept. 22, 2020).

¹⁴⁹² CAL. PENAL CODE §1320.7(g) (2020).

¹⁴⁹³ CAL. PENAL CODE § 1320.8 (2020).

¹⁴⁹⁴ CAL. PENAL CODE § 1320.9 (2020).

¹⁴⁹⁵ CAL. PENAL CODE § 1320.7(k) (2020).

¹⁴⁹⁶ CAL. PENAL CODE § 1320.9 (2020).

Pretrial Assessment Services may also include recommendations that conditions be placed on a person's release to assure public safety and the person's return to court, but for low and medium risk persons, the conditions must be non-monetary.¹⁴⁹⁷

Those arrested and detained that Pretrial Assessment Services finds to be "low risk" will be released on their own recognizance with the least restrictive non-monetary conditions.¹⁴⁹⁸ Those "medium risk" arrestees may either be released or detained. If released, the same conditions for their release applies as does for "low risk" persons.¹⁴⁹⁹ Any person released on their own recognizance must sign a release agreement that promises, among other things, that the person will appear in court, will not leave the state, and knows about the consequences if they violate the conditions of their release.¹⁵⁰⁰ Any "high risk" arrestee or any person who was arrested for a violent or serious felony offense will not be released.¹⁵⁰¹

3. Release at Arraignment

Courts will adopt rules for "medium risk" persons that the police hold until arraignment, the first hearing in court in which the judge reads the charges.¹⁵⁰² These court rules will allow "medium risk" arrestees to be released on own recognizance or supervised own recognizance.¹⁵⁰³ The rules will also be evaluated annually by the court to consider the impacts on public safety and the defendants' due process rights.¹⁵⁰⁴ A pre-arraignment review may be done for those "medium risk" persons who were not eligible for immediate release.¹⁵⁰⁵ A court may either approve or decline release based on the pre-arraignment review, depending on if the court finds that conditions on release will ensure safety to the public and the person's appearance in court.¹⁵⁰⁶

Pretrial Assessment Services will submit to the court, for consideration at the person's arraignment, information regarding the risk assessment score or level of the arrestee, the criminal charges against the arrestee, additional information relating to the arrestee's risk to the public or risk of failure to appear in court, and their recommendation for conditions of release.¹⁵⁰⁷ The court may choose to release the person at arraignment and must apply

¹⁴⁹⁷ CAL. PENAL CODE § 1320.10(d) (2020).

¹⁴⁹⁸ CAL. PENAL CODE § 1320.10(b) (2020).

¹⁴⁹⁹ CAL. PENAL CODE § 1320.10(c) (2020).

¹⁵⁰⁰ CAL. PENAL CODE § 1320.10(g) (2020).

¹⁵⁰¹ CAL. PENAL CODE § 1320.10(e) (2020).

¹⁵⁰² CAL. PENAL CODE § 1320.11 (2020).

¹⁵⁰³ *Id.*

¹⁵⁰⁴ *Id.*

¹⁵⁰⁵ CAL. PENAL CODE § 1320.13 (2020).

¹⁵⁰⁶ CAL. PENAL CODE § 1320.13(e), (h) (2020).

¹⁵⁰⁷ CAL. PENAL CODE § 1320.15 (2020).

the least restrictive non-monetary conditions to ensure the person will appear in court.¹⁵⁰⁸ The prosecution may request that the person remain detained until trial if they are charged with certain violent crimes.¹⁵⁰⁹ The court may find that there is no sufficient basis for detaining a defendant until trial and may order their release, however, those found to be “high risk” or those charged with violent or serious felonies must overcome a presumption that no condition on release will ensure safety to the public or that they will return to court.¹⁵¹⁰ Most criminal charges that will be considered “high risk” and will be subject to a presumption against release include crimes of violence against another person, serious or violent felonies, or persons arrested while on conditional or supervised release or post-conviction.¹⁵¹¹

C. Path to the Ballot

In August 2018, California became the first state to eliminate the cash bail system when the Legislature enacted and then Governor Jerry Brown signed SB 10 into law.¹⁵¹² Immediately after Governor Brown signed SB 10, the bail bonds industry began collecting signatures to reject SB 10 through a voter referendum.¹⁵¹³ In order to qualify the referendum for the ballot, the proponents needed to collect signatures amounting to 5 percent of the votes cast in the last gubernatorial election.¹⁵¹⁴ After filing the referendum, the proponents had 90 days to collect 365,880 signatures before November 26, 2018.¹⁵¹⁵ Six days before the deadline, the proponents submitted 576,822 signatures.¹⁵¹⁶ After a random sample count, over 80 percent were found to be valid, approximately 409,505 signatures, exceeding the number needed to qualify.¹⁵¹⁷

In January 2019, the “Referendum to Overturn a 2018 Law That Replaced Money Bail System with a System Based on Public Safety Risk” qualified for the November 2020 ballot.¹⁵¹⁸ This referendum became Proposition 25. If voters approve Proposition 25, SB 10 becomes law, eliminating cash bail in California. If voters reject the referendum, SB 10 fails, maintaining the status quo of cash bail.

¹⁵⁰⁸ CAL. PENAL CODE § 1320.17 (2020).

¹⁵⁰⁹ CAL. PENAL CODE § 1320.18 (2020).

¹⁵¹⁰ CAL. PENAL CODE § 1320.20 (2020).

¹⁵¹¹ CAL. PENAL CODE § 1320.10(e) (2020).

¹⁵¹² Vanessa Romo, *California Becomes First State To End Cash Bail After 40-Year Fight*, NPR (Aug. 28, 2018), <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail>.

¹⁵¹³ Reid Wilson, *Bail Bond Industry Mobilizes Against Calif. Law Eliminating Cash Bail*, HILL (Aug. 30, 2018), <https://thehill.com/homenews/campaign/404395-bail-bond-industry-mobilizes-against-calif-law-eliminating-cash-bail>.

¹⁵¹⁴ CAL. CONST. art. II, § 9.

¹⁵¹⁵ BALLOTPEDIA, *supra* note 37.

¹⁵¹⁶ *Id.*

¹⁵¹⁷ CAL. SEC’Y OF STATE, FINAL RANDOM SAMPLE (2019), available at <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/1856-finalrandomsample-1-16-19.pdf>.

¹⁵¹⁸ *Id.*

D. Referendum Changes and Purpose

Proposition 25 is a referendum that gives the people the opportunity to vote on whether to enact SB 10, which proposes to eliminate cash bail. Since Proposition 25 is a referendum, voters who support SB 10 and the elimination of cash bail should vote **YES** on the initiative, while voters who would like to retain cash bail should vote **NO**.

A **YES** vote eliminates cash bail in favor of pretrial risk assessment. This risk assessment would determine if an arrestee would be released or detained until their trial. No one will pay any fees for their release.

A **NO** vote retains the cash bail system. Some people could be released without paying bail, while others would be required to pay bail. Fees could still be collected for a person's release. SB 10 would not take effect.

E. Related Legislation

In 2016, Assembly Member Rob Bonta proposed Assembly Bill ("AB") 42.¹⁵¹⁹ AB 42 was substantially similar to SB 10. It also proposed eliminating cash bail in favor of a pretrial risk assessment to determine whether a person arrested would be detained.¹⁵²⁰ However, AB 42 was voted down on the Assembly floor.¹⁵²¹

In 2017, Assembly Member Blanca Rubio proposed AB 789. AB 789 amended the law pertaining to release on own recognizance.¹⁵²² This proposal passed the Legislature and was signed into law by then Governor Jerry Brown.¹⁵²³ This law expanded the criteria under which a person can be prohibited from being released on own recognizance without a court hearing.¹⁵²⁴ Consequently, the expanded criteria granted judges greater discretion in refusing to release arrestees on their own recognizance in certain circumstances.¹⁵²⁵ This greater discretion made it more difficult for the alleged offenders to obtain release on own recognizance, especially if they had a history of failing to appear in court.¹⁵²⁶

¹⁵¹⁹ Assembly Member Bonta was also a lead coauthor of SB 10.

¹⁵²⁰ AB 42, 2016 Leg., 2017–2018 Reg. Sess. (Cal. 2016) (as amended May 30, 2017, but not enacted).

¹⁵²¹ Complete Bill History of AB 42, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB42 (last visited Sep. 21, 2020).

¹⁵²² AB 789, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017).

¹⁵²³ Complete Bill History of AB 789, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB789 (last visited Oct. 3, 2020).

¹⁵²⁴ CAL. PENAL CODE § 1319.5 (2020).

¹⁵²⁵ See CAL. PENAL CODE § 1319.5 (2020) (requiring court hearing before a magistrate prior to release on own recognizance).

¹⁵²⁶ See CAL. PENAL CODE § 1319.5 (2020) (prohibiting release on own recognizance in the event an alleged offender fails to appear in court three times within three years).

F. Other States

1. Alaska

In the summer of 2016, Alaska enacted SB 91. SB 91 completely overhauled Alaska's criminal justice system, including changes in bail, parole, and probation.¹⁵²⁷ According to a 2018 report, since 2016, the prison population declined 4.8 percent while the prison admission rate increased by 11 percent from October 2017 to July 2018.¹⁵²⁸ This increase in prison admission was attributed to an increase in crime.¹⁵²⁹ Even though some supporters claimed that insufficient time passed to judge the merits of the bill, one of its sponsors became convinced that it was a mistake.¹⁵³⁰ Senator Mia Costello likened SB 91 to giving a "green light" to criminals, allowing them to feel "emboldened by this law."¹⁵³¹

In 2018, in response to this perceived spike in crime, Republican Michael Dunleavy campaigned on the platform "Make Alaska Safe Again."¹⁵³² After his election, Governor Dunleavy proposed and signed House Bill 49 ("HB 49"), which repealed and replaced SB 91.¹⁵³³ HB 49 reclassified many of the drug and sexual offenses that SB 91 attempted to reclassify.¹⁵³⁴ The law also increased sentencing for felonies and misdemeanors while keeping the maximum sentencing lengths.¹⁵³⁵ Discretion for parole and pretrial determination was returned to the parole board and judge, the presumption of release was eliminated, and the Pretrial Services Program was retained.¹⁵³⁶ Additionally, manufacture and distribution of methamphetamines was re-criminalized.¹⁵³⁷

¹⁵²⁷ Devin Kelly, *Alaska's criminal justice reform is achieving its goals, annual report says*, ANCHORAGE DAILY NEWS (Nov. 2, 2018), <https://www.adn.com/alaska-news/crime-courts/2018/11/02/alaskas-criminal-justice-reform-is-achieving-its-goals-annual-report-says/>.

¹⁵²⁸ ALASKA CRIMINAL JUSTICE COMM'N: 2018 ANNUAL REPORT 16 (Nov. 1, 2018), *available at* <https://s3.amazonaws.com/arc-wordpress-client-uploads/adn/wp-content/uploads/2018/11/02093414/ACJC-Annual-Report-2018.pdf>.

¹⁵²⁹ Kelly, *supra* note 73.

¹⁵³⁰ Alan Greenblatt, *After Reforming Criminal Justice, Alaska Has Second Thoughts*, GOVERNING (Feb. 2018), <https://www.governing.com/topics/public-justice-safety/gov-alaska-criminal-justice-increasing-crime-rates.html>.

¹⁵³¹ *Id.*

¹⁵³² Zachary A. Siegel, *Alaska Passed Sweeping Criminal Justice Reforms. Its New Governor Just Unraveled Them.*, APPEAL (July 11, 2019), <https://theappeal.org/alaska-passed-sweeping-criminal-justice-reforms-its-new-governor-just-unraveled-them/>.

¹⁵³³ *Governor Dunleavy Signs Crime-Fighting Legislation Into Law*, OFF. GOVERNOR MIKE DUNLEAVY (July 8, 2019), <https://gov.alaska.gov/newsroom/2019/07/08/governor-dunleavy-signs-crime-fighting-legislation-into-law/>.

¹⁵³⁴ *Id.*

¹⁵³⁵ *Id.*

¹⁵³⁶ *Id.*

¹⁵³⁷ *Id.*

2. New York

In April 2019, New York enacted criminal reform legislation eliminating cash bail and pretrial detention for almost all misdemeanors and nonviolent felonies.¹⁵³⁸ However, it was immediately opposed by law enforcement officials for being too lax on crime and threatening public safety.¹⁵³⁹ After the Coronavirus pandemic caused a budget shortfall in 2020, the Legislature enacted a budget that included modifications to the criminal justice reform enacted in 2019.¹⁵⁴⁰ These modifications expanded the list of crimes in which judges could employ bail and included persistent offenders in that list.¹⁵⁴¹

3. New Jersey

In 2014, New Jersey passed Senate Bill 946 ("S946"). This law all but eliminated cash bail.¹⁵⁴² In place of bail, this law allows judges to determine whether to detain an offender or release them based on an assessment of the risk they pose to the community.¹⁵⁴³ However, judges in New Jersey are empowered to detain offenders for up to 180 days after their indictment, unlike in New York.¹⁵⁴⁴ Further, judges may grant prosecutorial motions for revocation of release to offenders.¹⁵⁴⁵

In 2018, the New Jersey Judiciary published a report assessing the results of this new law. The rate of new offenses committed by people awaiting trial increased from 12.7 percent in 2014 to 13.7 percent in 2017.¹⁵⁴⁶ Court appearances decreased from 92.7 percent in 2014 to 89.4 percent in 2017.¹⁵⁴⁷ The average time defendants spent in pretrial detention decreased from 62.4 days in 2014 to 37.2 days in 2017.¹⁵⁴⁸ The report also showed that

¹⁵³⁸ MICHAEL REMPEL & KRYSTAL RODRIGUEZ, CTR. FOR COURT INNOVATION, BAIL REFORM IN NEW YORK: LEGISLATIVE PROVISIONS AND IMPLICATIONS FOR NEW YORK CITY 1 (2019), *available at* [https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail Reform NY full 0.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail%20Reform%20NY%20full%200.pdf).

¹⁵³⁹ Luis Ferré-Sadurní & Jesse McKinley, *'We Can't Spend What We Don't Have': Virus Strikes N.Y. Budget*, N.Y. TIMES (April 2, 2020), <https://www.nytimes.com/2020/04/02/nyregion/coronavirus-ny-state-budget.html>.

¹⁵⁴⁰ *Id.*

¹⁵⁴¹ *Id.*

¹⁵⁴² Rafael A. Mangual, *How New Jersey Did Bail Reform Better Than New York*, MANHATTAN INST. (Jan. 12, 2020), <https://www.manhattan-institute.org/how-new-jersey-did-bail-reform-better-than-new-york>.

¹⁵⁴³ Joe Hernandez, *N.J. Officials Finally Release Data on Bail Reform. Their Conclusion? It's Working*, WHYY (April 2, 2019), <https://whyy.org/articles/n-j-officials-have-finally-released-data-on-bail-reform-their-conclusion-its-working/>.

¹⁵⁴⁴ Mangual, *supra* note 88.

¹⁵⁴⁵ *Id.*

¹⁵⁴⁶ N.J. JUDICIARY, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 13 (2018), *available at* <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=Zp5>.

¹⁵⁴⁷ *Id.* at 14.

¹⁵⁴⁸ *Id.* at 21.

black arrestees experienced an average reduction of 10.3 days in pretrial detention, and white arrestees 5.2 days.¹⁵⁴⁹

The jail population declined by 5,600 for men and 600 for women from 2012 to 2018.¹⁵⁵⁰ This decline included approximately 3,000 black individuals, 1,500 white individuals, and 1,300 Hispanic individuals.¹⁵⁵¹ However, the proportion of Black prisoners remained constant at 54 percent of the overall population, while the proportion of white prisoners increased slightly from 28 to 30 percent, and the Hispanic population slightly decreased from 18 to 16 percent.¹⁵⁵² The racial distribution remained constant among men, while the proportion of black women decreased from 44 to 34 percent, and the distribution of white women increased from 44 to 54 percent.¹⁵⁵³

Fiscally, the criminal justice reform did not fare well. In 2018, expenses exceeded revenue.¹⁵⁵⁴ The program cost approximately \$35 million, while the new court fees net approximately \$22 million.¹⁵⁵⁵ According to John Donnadio, the Executive Director of the New Jersey Association of Counties, "the state's 21 counties are also dealing with added costs because prosecutors' offices have had to hire additional staff."¹⁵⁵⁶ Some proponents claim that a diminished prison population will lead to a reduction in prison costs.¹⁵⁵⁷ However, the reduction in jail population "hasn't translated to cost savings as of yet. It may, two or three years down the road as jail staff shrink through attrition."¹⁵⁵⁸

II. DRAFTING ISSUES

Proposition 25 is a referendum. This means that its aim is to overturn a law passed and approved by the Legislature — SB 10. Right now, SB 10 is on hold, so there is currently no effect on existing law. Passing the measure allows the proposed law to go into effect, making changes to various sections of the Government and Penal Codes.¹⁵⁵⁹

¹⁵⁴⁹ *Id.* at 22. Time spent in jail pretrial decreased from 42.3 to 32.0 days for black defendants and from 22.7 to 17.5 days for white defendants.

¹⁵⁵⁰ *Id.* at 26.

¹⁵⁵¹ *Id.* at 27.

¹⁵⁵² *Id.* at 27.

¹⁵⁵³ *Id.* at 28.

¹⁵⁵⁴ *Id.* at 39.

¹⁵⁵⁵ Maddie Hanna, *What Happened When New Jersey Stopped Relying on Cash Bail*, PHILA. INQUIRER (Feb. 16, 2018), https://www.inquirer.com/philly/news/new_jersey/new-jersey-cash-bail-risk-assessment-20180216.html.

¹⁵⁵⁶ *Id.*

¹⁵⁵⁷ Katherine Landergan, *Report: Bail Reform Has Lowered Jail Population, but Program Facing 'Funding Crisis'*, POLITICO (April 2, 2019), <https://www.politico.com/states/new-jersey/story/2019/04/02/report-bail-reform-has-lowered-jail-population-but-program-facing-funding-crisis-945756>.

¹⁵⁵⁸ Hanna, *supra* note 101.

¹⁵⁵⁹ SB 10, 2016 Leg., 2017–2018 Reg. Sess. (Cal. 2016) (amending Cal. Gov. Code § 27771; adding Cal. Penal Code §§ 1320.6–1320.34; repealing Cal. Penal Code §§ 1268–1320.5).

III. CONSTITUTIONAL ISSUES

A. Federal Constitution

The Eighth Amendment prohibits excessive bail.¹⁵⁶⁰ In 1951, the Supreme Court clarified that “[the bail] clause has never been thought to accord a right to bail in all cases, but merely to provide that bail should not be excessive in those cases where it is proper to grant bail.”¹⁵⁶¹ Further, in a separate case around the same time, the Court also declared that since bail is used as a means of ensuring a defendant will appear in court, any amount of bail set higher than reasonably necessary to fulfill that purpose is ‘excessive.’¹⁵⁶² In 1987, the Court made another pronouncement regarding pretrial detention and the Eighth Amendment, holding that “nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil.”¹⁵⁶³

Since SB 10 only modifies the type of bail courts will use, by eliminating money bail in favor of release on recognizance, it should not cause an Eighth Amendment issue. A question of excessiveness in bail amount should not arise because SB 10 would eliminate money bail. The question of pretrial detention, which SB 10 would still allow, has been approved by the Supreme Court.¹⁵⁶⁴

B. State Constitution

The California Constitution guarantees a right to release prior to trial under conditions that are not excessive, but stipulates certain violent and serious felonies to which that rule does not apply.¹⁵⁶⁵ The language in SB 10 is consistent with the limitations in the California Constitution regarding which offenses are exempt from the opportunity for non-excessive release.¹⁵⁶⁶

¹⁵⁶⁰ U.S. CONST. amend. VIII.

¹⁵⁶¹ *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952).

¹⁵⁶² *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

¹⁵⁶³ *U.S. v. Salerno*, 481 U.S. 739, 743, 754 (1987).

¹⁵⁶⁴ *Id.* at 754.

¹⁵⁶⁵ CAL. CONST. art. I, § 12.

¹⁵⁶⁶ SB 10, 2016 Leg., 2017–2018 Reg. Sess. (Cal. 2016) (adding Cal. Penal Code §§ 1320.10 (e), 1320.13(b), 1320.20).

IV. PUBLIC POLICY ISSUES

A. Opponents

The opponents of the proposition, seeking a **YES** vote, provide three primary arguments in favor of ending cash bail and replacing it with a risk assessment system: money bail is unfair and unjust; allowing money bail creates a public safety concern; and money bail is more expensive for taxpayers.

Opponents argue that the cash bail system treats people differently based on their ability to pay and often is grossly disadvantageous those experiencing poverty. Because people with wealth have the ability to pay bail costs or bonds, they essentially can pay for their release and are given an advantage and opportunity that the poor are not.¹⁵⁶⁷ Opponents contend that poor people are punished by having to remain in jail for extended periods of time awaiting their trial or arraignment dates because they are unable to pay for their freedom, making the application of the system unjust and unfair to those without the appropriate means.¹⁵⁶⁸ Further, because poverty often disproportionately affects people of color, opponents assert that the system is discriminatory in its effect.¹⁵⁶⁹ Opponents also claim that Prop 25 is predominantly supported by the predatory bail bonds industry that profits off of the poor and does not really have the best interest of the people in mind.¹⁵⁷⁰

Under the new bail system, opponents argue, the safety of the public will be the primary concern.¹⁵⁷¹ Judges' determinations regarding whether to release people will be based on whether they are likely to commit another crime or flee from their court dates, and will not focus on how much money someone has. The risk assessment system, according to the opponents, will make the safety of the public the guiding principle.¹⁵⁷²

Some opponents to Prop 25 also contend that the risk assessment system will result in cost saving to taxpayers. They argue that there are many thousands of people awaiting trial in jail and California taxpayers front the bill for detaining them.¹⁵⁷³ The new system would presumably reduce the number of pretrial detainees and lessen the jail population, saving taxpayers "millions every day."¹⁵⁷⁴

¹⁵⁶⁷ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY NOVEMBER 3, 2020, at 76, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf> ["NOVEMBER 2020 VOTER GUIDE"].

¹⁵⁶⁸ *Id.*

¹⁵⁶⁹ Onyekwere, *supra* note 7.

¹⁵⁷⁰ James, *supra* note 16.

¹⁵⁷¹ NOVEMBER 2020 VOTER GUIDE at 76.

¹⁵⁷² *Id.*

¹⁵⁷³ *Why we need Reform, YES ON 25*, https://yesoncaprop25.com/why_bail_reform (last visited Sept. 22, 2020).

¹⁵⁷⁴ *Id.*

B. Proponents

Proponents, seeking a **NO** vote on Prop 25, make many arguments against replacing the cash bail system with the risk assessment system proposed by SB 10. Some of their arguments include that: (1) the risk assessment system uses unreliable computers systems that will eliminate the right to bail and increase bias against minorities; (2) the use of the risk assessment system will result in an increased risk to public safety; and (3) the SB 10 system will have a significant negative impact on taxpayers and the bail industry.

Proponents argue that the risk assessment system would use computer algorithms that are unreliable and do not provide the level of fair judgment that a judge would have.¹⁵⁷⁵ The use of these kinds of computer systems could result in more burden on the court by requiring them to reevaluate and sometimes “overrule the computer’s decision.”¹⁵⁷⁶ Moreover, proponents argue, the current bail system gives people the choice to secure their release by paying for it and the risk assessment system would deny them of that choice. Some civil rights groups argue that these computer algorithms would use profiling methods that would create more biased outcomes against people of color and the poor than already exists under the cash bail system.¹⁵⁷⁷

Proponents also contend that the risk assessment release system would result in increased risk to public safety by allowing for the release of criminals immediately following their arrest.¹⁵⁷⁸ The current system, according to proponents, ensures that people accused of crimes will make their court appearances and be held accountable for their actions. Some proponents believe this risk assessment system could also result in an increased burden on law enforcement agencies.¹⁵⁷⁹

Contrary to opponents’ arguments, proponents claim that the risk assessment release system would increase the cost to taxpayers. Local and state court costs would increase, according to proponents, from implementing the new system, which will impact the cost to taxpayers.¹⁵⁸⁰ The State Judiciary would bear the cost of contracting out for Pretrial Assessment Service employees and counties would be reimbursed for any outstanding expenses.¹⁵⁸¹ However, some organizations have voiced concerns over the State’s reliability in following through on fiscal promises.¹⁵⁸² Proponents argue that state and

¹⁵⁷⁵ *Get the Facts*, NO ON PROP 25, <https://stopprop25.com/get-the-facts/> (last visited Sept. 22, 2020).

¹⁵⁷⁶ NOVEMBER 2020 VOTER GUIDE at 77.

¹⁵⁷⁷ Nadia Lopez, *California’s Cash Bail System Favors the Rich. Would Replacing it Help People of Color?*, FRESNO BEE (Sept. 16, 2020), available at <https://www.fresnobee.com/news/politics-government/election/article245051135.html>.

¹⁵⁷⁸ *Id.*

¹⁵⁷⁹ NO ON PROP 25, *supra* note 121.

¹⁵⁸⁰ *Id.*

¹⁵⁸¹ CAL. PENAL CODE §§ 1320.26–1320.29 (2020).

¹⁵⁸² RURAL CNTY. REPRESENTATIVES OF CAL. (“RCRC”), MEMO ON SENATE BILL 10 – BAIL REFORM REFERENDUM (2020), available at <https://legistarweb->

county budgets are facing historically deficient budgets resulting from the coronavirus pandemic, and this bill would only increase those deficits, causing taxpayers to suffer.¹⁵⁸³ Furthermore, proponents contend that the bail bonds industry faces elimination and all bail bonds agents, including small business owners, and their employees will face unemployment if this measure passes.¹⁵⁸⁴

C. Fiscal Impact

According to the Legislative Analyst's Office ("LAO"), the size of the effects to state and local budgets is uncertain and would depend on the interpretation and implementation of the statute and other various factors. However, it is estimated that there would be increased state and local pretrial release costs, decreased county jail costs, and impacts on state and local tax revenues.

The increase to the state and local governments would likely result from increased workload on pretrial risk assessment and pretrial detention hearings. These costs may be offset by a decrease in other areas, but ultimately, the LAO estimates increased costs in the mid hundreds of millions annually. However, the financial burden would be shifted from county budgets to the State's General Fund as the costs will primarily be borne by the State Judiciary.¹⁵⁸⁵ However, as evidenced by Proposition 98 and education funding, the Legislature often finds ways to shift revenue to limit financial obligations of the General Fund.¹⁵⁸⁶ Consequently, there may be little hope that the State will follow through on its financial obligations to the Judiciary and local governments, which may leave the county budgets to bear the brunt of the costs.¹⁵⁸⁷

Cost effects on county jails will depend on the number of people released and detained under the new system. There could be a substantial decrease in jail populations because people who normally would not have been able to pay their bail may be increasingly released on own recognizance. On the other hand, the new system could also result in an increase in jail population because people who normally would pay for their release may be increasingly detained. The LAO estimates that the former is more likely and that this will probably result in a decrease of tens of millions of dollars for county jails.

production.s3.amazonaws.com/uploads/attachment/pdf/616158/Senate_Bill_10_-_Bail_Reform_Referendum_MEMO_-_PS.pdf.

¹⁵⁸³ NOVEMBER 2020 VOTER GUIDE at 77.

¹⁵⁸⁴ *No on Prop 25*, AM. BAIL COALITION, <https://ambailcoalition.org/californians-for-safer-communities/> (last visited Sept. 22, 2020).

¹⁵⁸⁵ CAL. PENAL CODE §§ 1320.26–1320.29 (2020).

¹⁵⁸⁶ See LEGIS. ANALYST'S OFF., A HISTORICAL REVIEW OF PROPOSITION 98 18–20 (2017), *available at* <https://lao.ca.gov/reports/2017/3526/review-prop-98-011817.pdf> (detailing twenty-four instances in which the state shifted revenue resulting in increased state revenue and subsequent decrease in education guarantees).

¹⁵⁸⁷ RCRC, *supra* note 128.

The impact on state and local tax revenues is uncertain. In 2018, revenues from taxes on bail fees collected by insurance companies totaled \$13 million.¹⁵⁸⁸ These revenues could decrease due to insurance companies no longer paying insurance taxes on bail bonds.¹⁵⁸⁹ Or tax revenues could increase because the money people would normally spend on bail or bonds could be spent on taxable goods.

V. CONCLUSION

Proposition 25 determines whether California will implement SB 10. The aim of SB 10 is to implement a risk assessment system to replace the existing cash bail system. The risk assessment system would focus on the level of risk a person poses of not appearing in court and to public safety. If Pretrial Assessment Services determines that a person is a flight risk or subject to repeat offenses, the court may choose to keep them detained until their arraignment or trial dates. Proponents of the referendum believe the risk assessment system would create a less just and fair system that would potentially subject people of color to worse biases, create a greater risk to public safety, and cost taxpayers more money. Opponents of the proposition, in favor of SB 10, think that the cash bail system favors the wealthy and unfairly punishes the poor and communities of color, and the risk assessment system would put more focus on public safety and save taxpayers money. The financial effects on the state and local governments is uncertain at this time, with estimates on cost and savings being in the tens of millions.

¹⁵⁸⁸ Lopez, *supra* note 123.

¹⁵⁸⁹ See Letter from Gabriel Petek, Legislative Analyst & Keely Martin Bosler, Director of Finance, to Hon. Xavier Becerra, Att’y Gen., Cal. Dept. of Just. at 2 (Sept. 4, 2019), *available at* <https://lao.ca.gov/ballot/2019/190493.pdf> (describing how the insurance companies paid approximately \$13 million in 2018, for insuring bonds).

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