

# **Proposition 23: Protect the Lives of Dialysis Patients Act (2020)**

Initiative Statute

By

**Steven Weiss**

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2022  
B.F.A., Theatre & Politics Dual Major, New York University, 2018*

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**Alex Cabaluna**

*J.D. University of the Pacific, McGeorge School of Law, to be conferred May 2021  
B.A., Politics & Legal Studies Double Major, UC Santa Cruz, 2016*

&

**Quentin Barbosa**

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2022  
B.A., Political Science, California Polytechnic State University, San Luis Obispo, 2019*

## 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

### 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

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<sup>1</sup> Cal. Health & Safety Code § 1225(c).

<sup>2</sup> Cal. Proposition 23 at § 2 (2020).

<sup>3</sup> *Id.*

treatment revenue to direct patient care services, health care quality improvement, federal and state taxes, and licensing fees.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> The CDPH would have been responsible for promulgating regulations pursuant to the initiative if it had passed.<sup>8</sup>

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.<sup>9</sup> Administrative costs were excluded from "allowable costs."<sup>10</sup> 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.<sup>11</sup>

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<sup>4</sup> 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](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB251).

<sup>5</sup> *Id.*

<sup>6</sup> 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](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB349).

<sup>7</sup> 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/topl.pdf#prop8> ["NOVEMBER 2018 VOTER GUIDE"].

<sup>8</sup> *Id.* at 50.

<sup>9</sup> *Id.* at 51.

<sup>10</sup> *Id.*

<sup>11</sup> 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>.

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.<sup>12</sup> The Proposition also provided for a procedure for CDCs to challenge the 115% cap.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> Finally, under the language of the initiative, CDCs were prohibited from discriminating against patients with government-backed insurance plans.<sup>16</sup> This would have ensured that clinics would be unable to turn away patients with government-backed insurance such as Medicare, Medi-Cal, or Medicaid.<sup>17</sup> Proposition 8 failed at the ballot box in 2018, with the final vote count at 60% opposed compared to 40% in favor.<sup>18</sup>

### 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.”<sup>19</sup> 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.”<sup>20</sup> Section 494.30(a) requires that 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.<sup>21</sup> The publication sets forth requirements for maintaining proper equipment, supplies, and environmental surface procedures, including sterilization and

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<sup>12</sup> Cal. Proposition 8 at § 3 (2018).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at § 4.

<sup>17</sup> *Id.*

<sup>18</sup> 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)).

<sup>19</sup> 42 C.F.R. § 494.20 (2008).

<sup>20</sup> 42 C.F.R. § 494.30 (2008).

<sup>21</sup> *Id.*

proper maintenance of hemodialysis machines.<sup>22</sup> Under California Health and Safety Code 1225(c)(1), California CDCs are required to meet federal certification standards for licensing.<sup>23</sup>

## 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.”<sup>24</sup> 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.<sup>25</sup> 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.”<sup>26</sup> 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.”<sup>27</sup> The medical director is not required to spend a specific amount of time at the CDC.<sup>28</sup>

## 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.<sup>29</sup> The DPH conducts inspections of each CDC about once every three years.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> Additionally, the CDCs must report specified dialysis-

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<sup>22</sup> *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>.

<sup>23</sup> Cal. Health and Safety Code §§ 1251(c)(2) (2018).

<sup>24</sup> 42 C.F.R.494.180(b)(2) (2008).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Legislative Analyst’s Office, *ESTABLISHES STATE REQUIREMENTS FOR KIDNEY DIALYSIS CLINICS. REQUIRES ON-SITE MEDICAL PROFESSIONAL. INITIATIVE STATUTE*, (2020).

<sup>29</sup> 42 C.F.R. 494.180(h) (2008).

<sup>30</sup> *CDPH Licensing & Enforcement*, California Hospital Association, available at <https://www.calhospital.org/cdph-licensing-enforcement> (last visited October 18, 2020).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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.<sup>33</sup>

#### 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.<sup>34</sup> 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."<sup>35</sup> Patients are required to be informed of any changes, including reduction of services that affect their plan of care.<sup>36</sup>

#### 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 their insurance.<sup>37</sup> 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.<sup>38</sup>

Section 1226.7 mandates that CDCs maintain quality of care and patient access without discrimination against patients with government-backed insurance plans.<sup>39</sup> This section also applies to a CDC's governing entity (private, for-profit companies or non-profit companies that own or operate a CDC).<sup>40</sup>

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<sup>33</sup> Legislative Analyst's Office, *ESTABLISHES STATE REQUIREMENTS FOR KIDNEY DIALYSIS CLINICS. REQUIRES ON-SITE MEDICAL PROFESSIONAL. INITIATIVE STATUTE*, (2020).

<sup>34</sup> *Id.*

<sup>35</sup> 42 C.F.R 494.70 (2017).

<sup>36</sup> *Id.*

<sup>37</sup> Cal. Proposition 23 at §§ 3-6 (2020).

<sup>38</sup> *Id.*

<sup>39</sup> Cal. Proposition 23 at § 3 (2020).

<sup>40</sup> *Id.*

Section 1226.8 requires every CDC to maintain at least one licensed physician on-site during hours of operation.<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup> The section further requires quarterly reporting of all dialysis related infections to both CDPH and the National Healthcare Safety Network.<sup>44</sup> Failure to submit such a report carries a maximum penalty of \$100,000.<sup>45</sup> Finally, definitions for terms used in the section are set forth (including but not limited to “chronic dialysis clinics” and “licensed physician”).<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup>

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<sup>41</sup> *Id.* at § 4.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Cal. Proposition 23 at § 4 (2020).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at § 5.

<sup>48</sup> *Id.*

<sup>49</sup> Cal. Proposition 23 at § 6 (2020).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at § 7.

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.<sup>52</sup> 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.<sup>53</sup>

#### 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.<sup>54</sup>

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.<sup>55</sup> 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.

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<sup>52</sup> *Id.* at § 9.

<sup>53</sup> *Id.*

<sup>54</sup> Compare Cal. Proposition 8 at § 4 (2018), with Cal. Proposition 23 at § 3 (2020).

<sup>55</sup> *Id.*

### 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.<sup>56</sup> This clause creates the presumption that the initiative is severable, but the clause itself is not dispositive.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> Next, an initiative is functionally severable if the valid parts that remain are independent and “complete in itself.”<sup>61</sup> 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.<sup>62</sup> Therefore, Proposition 23 is severable if—after any 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.<sup>63</sup>

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.<sup>64</sup> 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.

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<sup>56</sup> Cal. Proposition 23 at § 12 (2020).

<sup>57</sup> *California Redevelopment Assn. v. Matosantos*, 53 Cal.4th 231, 270 (2011).

<sup>58</sup> *People’s Advocate, Inc. v. Superior Court*, 181 Cal.App.3d 316, 330 (1986).

<sup>59</sup> *California Redevelopment Assn. v. Matosantos*, 53 Cal.4th 231, 270 (2011).

<sup>60</sup> *Id.* at 271.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *People’s Advocate, Inc. v. Superior Court*, 181 Cal.App.3d 316, 330 (1986).

<sup>64</sup> Cal. Proposition 23 (2020).

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.<sup>65</sup> 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,<sup>66</sup> it is likely that voters would pass the measure 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.<sup>67</sup>

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<sup>65</sup> Yes on 23 – Californians for Kidney Dialysis Patient Protection, *Proposition 23*, <https://yesonprop23.com/>.

<sup>66</sup> 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-2\\_LEGAL.pdf](https://yesonprop23.com/wp-content/uploads/2020/08/Prop23-fact-sheet-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”].

<sup>67</sup> § 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

## 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.”<sup>68</sup> 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.<sup>69</sup> 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 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.<sup>70</sup> 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

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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.

<sup>68</sup> Cal. Proposition 23 at § 4 (2020).

<sup>69</sup> *Californians for Disability Rights v. Mervyn’s LLC*, 39 Cal.4th 223 (2006).

<sup>70</sup> Cal. Const. art II, §12.

constitutional language, “may be submitted to the electors or have any effect”<sup>71</sup> 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.”<sup>72</sup> This reference is nearly identical to a similar reference found in Proposition 8 (2018), which was not individually challenged pre-election.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> Thus, there are no constitutional issues likely to arise with respect to Proposition 23.

## 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.<sup>76</sup> 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.<sup>77</sup> Furthermore, because dialysis treatment involves direct access to the bloodstream, inadequate sanitation would exacerbate the existing risk of dangerous infections prevalent in dialysis treatment.<sup>78</sup> 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.<sup>79</sup> 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

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<sup>71</sup> *Id.*

<sup>72</sup> Cal. Proposition 23 at § 2 (2020).

<sup>73</sup> 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”]

<sup>74</sup> *Hernandez v. Town of Apple Valley*, 7 Cal. App. 5th 194, 196 (4th Dist. 2017).

<sup>75</sup> *Id.* at 213.

<sup>76</sup> Kidney Patients Deserve Better, *Proposition 23 – About*, <https://www.kidneypatientsdeservebetter.com/about/> (last visited October 18, 2020).

<sup>77</sup> 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.

<sup>78</sup> Cal. Proposition 23 at § 2A(6) (2020).

<sup>79</sup> Cal. Proposition 23 at § 2A(5) (2020).

dangerous situation for patients.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> The proponents consider this a substantial overcharge and note that the cost is shifted onto all Californians because insurance companies have to pass the costs to all policyholders, which increases premiums.<sup>84</sup> Blue Shield of California reports that it takes 3,800 enrollees to offset the costs of one dialysis patient.<sup>85</sup> Additionally, government programs sometimes pay for treatment, and so it indirectly harms taxpayers too.<sup>86</sup>

Another provision of the initiative ensures that clinics cannot discriminate against patients with government-backed insurance plans.<sup>87</sup> Proponents want to ensure that the quality of—and access to—care is the same regardless of who is paying for the treatment.<sup>88</sup> They argue for preventing CDCs and governing entities from engaging in profiteering and

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<sup>80</sup> Yes on 23 – Californians for Kidney Dialysis Patient Protection, *Proposition 23*, <https://yesonprop23.com/> (last visited October 18, 2020); Yes on 23 Fact Sheet.

<sup>81</sup> 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.

<sup>82</sup> Kidney Patients Deserve Better, *Proposition 23 – About*, <https://www.kidneypatientsdeservebetter.com/about/> (last visited October 18, 2020).

<sup>83</sup> *Id.*

<sup>84</sup> 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>.

<sup>85</sup> Kidney Patients Deserve Better, *Proposition 23 – About*, <https://www.kidneypatientsdeservebetter.com/about/> (last visited October 18, 2020).

<sup>86</sup> 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>.

<sup>87</sup> Cal. Proposition 23 at § 3 (2020).

<sup>88</sup> Yes on 23 – Californians for Kidney Dialysis Patient Protection, *Proposition 23*, <https://yesonprop23.com/> (last visited October 18, 2020); Yes on 23 Fact Sheet.

corner-cutting that could result in deaths.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup>

## 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.”<sup>93</sup> While that figure is likely an exaggeration, there would still be costs incurred to the state in the low millions of dollars.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> Missing just one treatment session increases the

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<sup>89</sup> 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>.

<sup>90</sup> 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>.

<sup>91</sup> 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>.

<sup>92</sup> Cal. Proposition 23 at § 5(b) (2020).

<sup>93</sup> No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

<sup>94</sup> 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>.

<sup>95</sup> No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/>.

<sup>96</sup> *Id.*

chance of death by 30%.<sup>97</sup> Still, the initiative clarifies that CDCs need the consent of the CDPH before closing, so widespread closures are unlikely.<sup>98</sup> 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.<sup>99</sup>

Opponents also note that the initiative would exacerbate the state’s doctor shortage and cause more emergency room crowding.<sup>100</sup> 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 physician shortage worse and cause people to have to wait longer to see their doctors.<sup>101</sup> 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.<sup>102</sup> While the scenario where many CDCs close is unlikely,<sup>103</sup> 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.<sup>104</sup> Opponents claim that a global pandemic is probably the worst time to risk increasing a doctor shortage.<sup>105</sup>

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.<sup>106</sup> According to the opponents, higher insurance premiums and higher taxes for government health care programs are all but guaranteed if the initiative passes.<sup>107</sup> The

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<sup>97</sup> *Id.*

<sup>98</sup> 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>.

<sup>99</sup> 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>.

<sup>100</sup> No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://nopro23.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).

<sup>101</sup> No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://nopro23.com/> (last visited October 18, 2020).

<sup>102</sup> *Id.*

<sup>103</sup> 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>.

<sup>104</sup> No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://nopro23.com/> (last visited October 18, 2020).

<sup>105</sup> *Id.*

<sup>106</sup> No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://nopro23.com/> (last visited October 18, 2020).

<sup>107</sup> *Id.*

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.<sup>108</sup>

Additionally, opponents question the necessity for new regulations because CDCs are already strictly regulated by federal and state law.<sup>109</sup> 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.<sup>110</sup> In 2018, the average California CDC had about 11 patients die, which is below the national average.<sup>111</sup> 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.<sup>112</sup>

Finally, opponents claim that the initiative is “a special interest abuse that uses patients as pawns.”<sup>113</sup> 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.<sup>114</sup> Now, opponents argue, SEIU–UHW is trying again and is putting patients’ lives at risk for their “political game.”<sup>115</sup> 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.”<sup>116</sup> Opponents argue that the initiative process should

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *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>.

<sup>111</sup> 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>.

<sup>112</sup> 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>.

<sup>113</sup> No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

<sup>114</sup> 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/>.

<sup>115</sup> No on Prop 23 – Stop Dangerous and Costly Dialysis Proposition, *Get the Facts*, <https://noprop23.com/> (last visited October 18, 2020).

<sup>116</sup> 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’*

not be “hijacked” for SEIU-UHW’S political gain at the expense of patients’ lives or the money of taxpayers and consumers.<sup>117</sup>

## 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.

## 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.<sup>118</sup>

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.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup>

The next source is Medi-Cal, a federal-state joint program under Medicaid that provides health coverage to low-income people.<sup>122</sup> Unlike Medicare, the state and federal governments both share the costs of Medi-Cal.<sup>123</sup> Some dialysis patients are able to qualify for both Medicare and Medi-Cal coverage, in which case Medicare covers most of the

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*Care*, L.A. TIMES (Sept. 9, 2020), <https://www.latimes.com/opinion/story/2020-09-09/proposition-23-dialysis-vote-no>.

<sup>117</sup> 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).

<sup>118</sup> 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>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

payment for treatment while Medi-Cal covers the remaining amount.<sup>124</sup> However, if a patient is only eligible for Medi-Cal, then the Medi-Cal program is responsible for the entire payment on its own.<sup>125</sup>

The final source is group and individual health insurance.<sup>126</sup> Some people have group health insurance provided through an employer or another organization.<sup>127</sup> Other people have individual health insurance.<sup>128</sup> When a person with insurance develops kidney failure that requires dialysis treatment, that person is usually able to transition to Medicare coverage.<sup>129</sup> However, federal law requires that a group insurer remain the primary payer for dialysis treatment during that transition period, which lasts up to 30 months.<sup>130</sup> 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.<sup>131</sup> Usually, group and individual health insurers pay higher rates for dialysis treatment than government funded programs.<sup>132</sup> Medicare and Medi-Cal pay at rates comparable to the average cost for CDCs to provide dialysis treatment, mostly due to regulations.<sup>133</sup> Conversely, group and individual health insurers must negotiate rates with CDCs and governing entities.<sup>134</sup> Ultimately, the rate depends on the number of people the insurer covers and how many people the CDC treats.<sup>135</sup> As a result, group and individual health insurers pay much more to cover treatment than the government.<sup>136</sup>

#### 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.<sup>137</sup> The onsite doctor requirement will increase CDC costs by several hundred thousand dollars each year

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<sup>124</sup> 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>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> 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>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> 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>.

<sup>137</sup> *Id.*

at each site.<sup>138</sup> The other provisions will not substantially increase CDC costs as they are only data recording or reporting requirements.<sup>139</sup>

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.<sup>140</sup> 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.<sup>141</sup> Governing entities may react to these increased costs by negotiating higher rates from entities that pay for dialysis treatment.<sup>142</sup> 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.<sup>143</sup> Another option for governing entities is to continue operating as is but with reduced profits.<sup>144</sup> 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.<sup>145</sup> As a result, these entities will operate with lower profits but would not have to close CDCs.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup>

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.<sup>149</sup> 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

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> 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>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> 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>.

<sup>149</sup> *Id.*

settings like hospitals.<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup> In fact, the low tens of millions of dollars estimate represents less than 1% of state General Fund spending—the costs are between .01%–.03% of the General Fund.<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup>

### 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.<sup>157</sup> These costs are purely administrative and stem from the new regulatory responsibilities that the initiative delegates to CDPH.<sup>158</sup> 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.<sup>159</sup> To cover these costs, the initiative requires CDPH to increase the annual CDC licensing fee.<sup>160</sup> Estimates indicate that the annual costs to CDPH that stem from these regulatory responsibilities would not exceed the low millions of dollars annually.<sup>161</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> 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>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> 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>.

<sup>161</sup> *Id.*

## 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.