

Case No. A163655

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

HECTOR CASTELLANOS, ET AL.,

Plaintiffs-Respondents,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants-Appellants,

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

Intervenors-Appellants.

Alameda County Superior Court, Case No. RG21088725
The Honorable Frank Roesch, Presiding

**APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF AND
PROPOSED BRIEF OF AMICI CURIAE GIG WORKERS RISING,
MOBILE WORKERS ALLIANCE, RIDESHARE DRIVERS
UNITED-CALIFORNIA, WE DRIVE PROGRESS, ET AL. IN
SUPPORT OF PLAINTIFFS AND RESPONDENTS CASTELLANOS
ET AL.**

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I. INTRODUCTION

Pursuant to the California Rule of Court 8.200(c), worker organizing group and legal and policy organizations Gig Workers Rising, Mobile Workers Alliance, Rideshare Drivers United-California, We Drive Progress, A Better Balance, ACCE Institute, Action Center on Race & the Economy, Asian Americans Advancing Justice - Asian Law Caucus, Asian Americans Advancing Justice – Los Angeles, Bet Tzedek, California Employment Lawyers Association, California Immigrant Policy Center, Centro Legal de la Raza, Chinese Progressive Association, Economic Policy Institute, Jobs With Justice Education Fund and Jobs With Justice San Francisco, Lawyers Committee for Civil Rights of the San Francisco Bay Area, Legal Aid at Work, Los Angeles Black Worker Center, Maintenance Cooperation Trust Fund, National Black Worker Center, National Council for Occupational Safety and Health, National Domestic Workers Alliance, National Employment Law Project, Pilipino Workers Center, PowerSwitch Action, Public Rights Project, Santa Clara County Wage Theft Coalition, Women’s Employment Rights Clinic of Golden Gate University School of Law, and Worksafe hereby request permission of this Court to file the attached brief as *amici curiae* in support of Plaintiffs and Respondents Hector Castellanos, *et al.* This application is timely made within 14 days of the filing of the last party brief. The proposed brief discusses the precarious conditions that rideshare and delivery drivers (hereinafter “app-based drivers”) toiled under because rideshare and transportation companies (hereinafter “app-based companies”) willfully misclassified them. The brief highlights how proponents of Proposition 22 engaged in a massive misinformation campaign that led voters to believe the measure would give app-based drivers new and better benefits when, in fact, it stripped this workforce, predominately made up of people of color

and immigrants, of the state’s most fundamental protections to the detriment of the drivers and the public.

II. STATEMENT OF INTEREST

Amici curiae are (a) worker organizing groups including groups that organize and train California app-based drivers and (b) national and California-based legal and policy organizations that advance economic, racial and gender justice, particularly for low-wage and vulnerable workers. *Amici* worker organizing groups like Gig Workers Rising, Mobile Workers Alliance, Rideshare Drivers United-California, and We Drive Progress directly represent the voices of tens of thousands of app-based drivers and their struggles for better wages and working conditions before and after the passage of Proposition 22. Further, legal and policy organizations have extensive experience advocating on behalf of underpaid workers, including app-based drivers, who are misclassified as independent contractors.

Amici have a strong interest in this case because Proposition 22 will irreparably harm hundreds of thousands of California app-based drivers, especially people of color, immigrants, and women, as well as the public. The issues presented in this appeal have a direct impact on some of the *amici* as they are themselves app-based drivers.

A brief description of the work and mission of *amici curiae*, explaining their interest in the case, follows.

Gig Workers Rising (“GWR”) is a campaign supporting and educating app and platform workers who are organizing for better wages, working conditions, and respect. GWR has a network of nearly 10,000 gig workers across California. Launched in 2018, GWR supports workers in their organizing – from an international day of action protesting Uber’s initial public offering to lobbying for the successful passage of California Assembly Bill 5. In addition to supporting worker organizing, GWR hosts regular educational workshops and trainings, including a recent series of

workshops for gig workers navigating state benefits and resources during the COVID-19 pandemic.

Mobile Workers Alliance (“MWA”) engages in organizing, service, advocacy, and educational activities for drivers on the local and state level. MWA includes more than 20,000 Southern California app drivers, including Uber and Lyft drivers, and has organized over the last four years to raise standards for all workers in the gig economy. In their fight to demand living wages, a true voice on the job, and an end to misclassification by passing Assembly Bill 5, they have travelled throughout California to share their reality with policymakers, community leaders, and other drivers.

Founded in 2018, **Rideshare Drivers United-California** (“RDU”) is an organization started by app-based drivers in the parking lot of Los Angeles International Airport in response to wage cuts. RDU is a democratic drivers’ organization, with a driver-elected Board of Directors, who have advocated for full labor rights for all app-based workers through protest, strikes and advocacy such as assistance in securing unemployment benefits and wage theft claims. RDU was also key to providing drivers’ voices during the consideration and passage of Assembly Bill 5 in California. With more than 20,000 driver members across the state of California, RDU membership includes many full-time drivers who have driven for Lyft, Uber, and other app-based ride-hail companies, for nearly as long as many of them have been companies.

We Drive Progress (“WDP”) is a movement joined by close to 10,000 app-based drivers across Northern California that fights for better wages and working conditions for gig workers. As part of a coalition of thousands of drivers statewide, WDP drivers and coalition members are responsible for the billions that companies like Uber, Lyft, and their investors pocket every year. WDP engages in organizing, advocacy, and

training for gig workers. Through this work, WDP's mission is to secure economic fairness for gig workers and unite drivers to win a real voice in California.

A Better Balance (“ABB”) is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, public education, and technical assistance to state and local campaigns, ABB is committed to helping workers care for themselves and their families without risking their economic security. Throughout the country, ABB fights for the ability of workers to access vital protections like paid sick time, paid family and medical leave, and pregnancy accommodations, including where those rights have been wrongfully denied due to misclassification.

ACCE Institute is a statewide grassroots organization that organizes with over 16,000 low-income and working-class Californians across the state. Our members are majority Black or Latinx and care deeply about the way people of color and low-income people of all races are treated in the arenas of housing, education, criminal justice, employment, and civic engagement spaces. What is clear to ACCE members, is that the classification of workers as employees vs. contractors is not just a matter of scheduling freedom. It is a matter of access to fair wages and critical benefits like healthcare, paid time off, and retirement and the impacts of misclassification are most deeply felt by workers who are already being left behind in the current economy and have impounded effects on their families and communities.

The **Action Center on Race & the Economy (ACRE)** is a non-profit campaign hub working at the intersection of racial justice and corporate accountability. We provide strategic support for organizations working on campaigns to win structural change by directly taking on the

financial elite responsible for pillaging communities of color, devastating working-class communities, and harming our environment. ACRE has found that through misclassification and by using notions of flexibility and independence, app-based companies like Uber and DoorDash, intentionally sacrifice their Black and Brown workforce's safety, well-being, and financial stability to pursue profit.

Asian Americans Advancing Justice - Asian Law Caucus (“Advancing Justice - ALC”) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. Advancing Justice - ALC is part of a national affiliation of Asian American civil rights groups, with offices in Los Angeles, Chicago, Atlanta, and Washington, DC. Advancing Justice - ALC has a long history of advocating for low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. Advancing Justice - ALC’s clients regularly include rideshare and other gig drivers.

Since 1983, **Asian Americans Advancing Justice – Los Angeles (Advancing Justice-LA)** has been the leading legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (AANHPIs). Today, it serves more than 15,000 individuals and organizations of the AANHPI and other underserved communities in California every year. Through community outreach, advocacy, and litigation, Advancing Justice - LA works to advance civil and human rights that empower those communities and to promote a fair and equitable society for all. Today, almost 40% of California’s AANHPI workers, members of the communities served by Advancing Justice-LA, struggles with poverty and about one-third experience wage theft or other unfair workplace practices every year. Advancing Justice – LA’s support for the

working poor of the communities it serves includes assisting them in staying in their homes, connecting them with services, and aiding them in responding to discrimination and unjust working conditions.

Bet Tzedek - Hebrew for the “House of Justice” - was established in 1974, and provides free legal services to seniors, the indigent, and the disabled. Bet Tzedek represents Los Angeles County residents on a non-sectarian basis in the areas of housing, welfare benefits, consumer fraud, and employment. Bet Tzedek’s Employment Rights Project assists low-wage workers through a combination of individual representation before the Labor Commissioner, litigation, legislative advocacy, and community education. Bet Tzedek’s interest in this case comes from over 20 years of experience advocating for the rights of low-wage workers in California. As a leading voice for Los Angeles’s most vulnerable workers, Bet Tzedek has an interest in ensuring that workers receive all the workplace protections to which they are entitled, including their right to seek fair wages, secure adequate and safe working conditions, and build worker power.

California Employment Lawyers Association (CELA) is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California’s wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before this Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094, *Gentry v. Superior Court* (2007) 42 Cal. 4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC*,

59 Cal. 4th 348 (2014), and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014).

The **California Immigrant Policy Center (CIPC)** is a constituent-based statewide immigrant rights organization with offices in Los Angeles, Sacramento and Oakland. CIPC advocates for policies that uphold the humanity of immigrants and refugees while advancing racial, social and economic justice. CIPC works with coalitions of advocates, organizations, worker centers, and community leaders to build worker power and advance policies to create a more equitable economy. Misclassification is common in many industries, such as trucking, home care, janitorial, courier, and construction – all industries significantly comprised of immigrant workers who are already exploited and marginalized in the workforce.

Since 1969, **Centro Legal de la Raza (Centro Legal)** has provided legal aid services to low-income, predominantly Spanish-speaking residents of the San Francisco Bay Area. Centro Legal assists several thousand clients annually, most of whom are immigrant workers of color. Centro Legal regularly assists workers, including gig workers, who have been misclassified as independent contractors to vindicate their workplace rights. Centro Legal therefore has a significant interest in ensuring that employers do not circumvent California’s legal protections for workers via independent contractor misclassification.

The **Chinese Progressive Association (CPA)** educates and organizes the low income and working-class immigrant Chinese community in San Francisco to build collective power with other oppressed communities to demand better living and working conditions and justice for all people. Our core strategies are community education and organizing, leadership development, and alliance and movement building. No workers should be excluded from key employment protections. All workers deserve dignity and respect and should have access to a voice on the job without

fear of retaliation, thriving wages, and basic living standards like healthcare, family leave, childcare, unemployment insurance, and retirement security regardless of job type, race, or immigration status.

Economic Policy Institute (EPI) is a non-profit organization with over 35 years of experience analyzing the effects of economic policy on the lives of working people in the United States. EPI has studied and produced extensive research on the misclassification of workers. This research includes publishing the report “*Misclassification, the ABC test, and employee status*”, which explores the widespread problem of employer misclassification of workers as independent contractors and the use of the ABC Test to combat employer misclassification. EPI has also participated as *amicus curiae* in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws. EPI strives to protect and improve the economic conditions of working people. EPI is concerned that all employees enjoy the full protections of labor and employment laws and that employers are not permitted to misclassify workers.

Jobs With Justice Education Fund and Jobs With Justice San Francisco are both 501(c)(3) non-profit organizations that believe all workers should have collective bargaining rights, employment security, and a decent standard of living within an economy that works for everyone. We bring together labor, community, student, and faith voices at the national and local levels to win improvements in people’s lives and shape the public discourse on workers’ rights and the economy. Together with UC Santa Cruz professor Chris Benner, we have done significant research on the earnings and working conditions of app-based drivers--including food delivery and ride hailing drivers. We have also supported organizing efforts for app-based drivers and have advocated for policy changes to benefit these workers.

As one of the oldest civil rights institutions on the West Coast, **Lawyers Committee for Civil Rights of the San Francisco Bay Area (LCCRSF)** works to dismantle systems of oppression and racism, and build an equitable and just society. LCCRSF is committed to closing the racial wealth gap and empowering communities of color by increasing economic opportunities that will enable individuals to be in control of their livelihoods. The misclassification of workers, including gig workers, as independent contractors hinder individuals from prospering economically, which has a ripple effect on their communities, mostly communities of color. Due to this, LCCRSF has a significant interest in protecting misclassified workers in order to avoid disparities that can last for generations.

Legal Aid at Work (formerly the Legal Aid Society – Employment Law Center) (“**LAAW**”) is a public interest legal organization founded in 1916 that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. Since 1970, LAAW has represented low-wage clients in both individual and class action cases involving a broad range of employment-related issues, including wage theft, labor trafficking, retaliation, and discrimination. LAAW frequently appears in federal and state courts to promote the interests of clients from wage theft both as counsel for plaintiffs and as amicus curiae. In addition to litigating cases, LAAW advises thousands of low-wage workers, including misclassified workers, on their employment rights through its Workers’ Rights Clinics and helplines, and represents misclassified workers in their appeals for unemployment insurance benefits before the California Unemployment Insurance Appeals Board and in claims for wages at the California Labor Commissioner’s Office. Supporting low-income workers, including ride-hail drivers, who are misclassified as independent contractors is a core part of LAAW’s work.

The **Los Angeles Black Worker Center** develops organized power and authentic grassroots leadership among Black workers and among the extended community, to reverse the disproportionate levels of unemployment and underemployment in the Los Angeles Black community. It is clear to us that the misclassification of workers and the subsequent denial of benefits greatly impacts Black Angelenos' ability to build economic stability and contributes to the Black jobs crisis. This country was built upon the exploitation of Black labor and it is incumbent upon everyone to cease that legacy by combating policy that further serves to disrupt the ability of the Black community to create a secure future.

The **Maintenance Cooperation Trust Fund (MCTF)** is a California watchdog organization that works to eliminate illegal and unfair business practices in the California janitorial industry. Our cases, field investigations and research shows that categorizing employees as "independent contractors" is a common practice in our industry allowing irresponsible employers to violate California labor law, including by failing to pay the minimum wage, pay overtime, provide sick days to an essential workforce, and provide worker compensation for a workforce with higher incidents of personal injury on the job. Misclassification not only hurts workers, but it lowers standards for our entire industry and creates an unfair playing field for responsible law abiding employers to fairly compete. We believe that workers must be properly classified in all low-wage industries to protect workers from wage theft, ensure fair competition for responsible employers and to provide an overall healthy worker economy for our State.

The **National Black Worker Center** ("NBWC") is the go-to source for insight into the discrimination that Black workers – employed, underemployed and unemployed – face and the solutions they seek to end anti-Blackness in the workplace. NBWC launched in 2012 in response to the two-dimensional job crisis that Black workers face: the crisis of

unemployment, and the crisis of low-wage and low-quality work. NBWC focuses on mobilizing Black workers and providing them with the resources necessary to take on systems of worker oppression, including industries and policies that have benefitted from our exploitation for generations. In addition to the National Black Worker Center there are currently 12 local Black Worker Centers across the country, including in Los Angeles, San Diego, Inland Empire, and the Bay Area. We are committed to ending anti-Black racism and discrimination in the workplace. Misclassification of workers is a priority issue area for NBWC because it greatly harms our base, Black working-class people across the U.S. including California.

The **National Council for Occupational Safety and Health** (“COSH”) is dedicated to promoting safe and healthy working conditions for all working people through organizing and advocacy. Our belief that almost all work-related deaths and serious injuries and illnesses are preventable motivates us to encourage workers to take action to protect their safety and health, promote protection from retaliation under job safety laws, and provide quality information and training about hazards on the job and workers’ rights.

The **National Domestic Workers Alliance** (“NDWA”) is the nation’s leading advocacy organization advancing the dignity, rights, and recognition of 2.2 million domestic workers who provide in-home childcare, other caregiving, and housecleaning services in private homes. Domestic workers continue to be excluded from some of the core workplace laws at the federal and state levels, and face new challenges to improving workplace standards as app-based companies have entered the domestic work sector and are misclassifying domestic workers as independent contractors. NDWA fights for improved standards and treatment for every single worker in the domestic work sector.

The **National Employment Law Project (NELP)** is a non-profit legal organization with more than 50 years of experience advocating for the employment and labor rights of underpaid and unemployed workers. For decades, NELP has focused on the ways in which various work structures, such as calling workers “independent contractors,” exacerbate income and wealth inequality, the segregation of workers by race and gender into poor quality jobs, and the ability of workers to come together to negotiate with business over wages and working conditions.

Pilipino Workers Center (PWC) is a non-profit that organizes the low-wage Pilipino community in Southern California to demand better living and working conditions. In this current national and political climate where immigrant rights are being attacked and quickly eroded, workers are pushed even more into vulnerable and exploitative working situations. These situations are made worse when workers lack basic protections because they have been classified as independent contractors. PWC does their part by providing support for human trafficking survivors, immigration legal services, affordable housing, workforce certification training, education on workers’ rights, enforcement of wage theft, free tax preparation, and a cooperative for homecare workers. PWC is an advocate for all workers, and supports the push to ensure drivers and delivery workers have full employment protections and benefits under California law.

PowerSwitch Action (formerly the Partnership for Working Families) is a community of leaders, organizers, and strategists forging multi-racial feminist democracy and economies in our cities and towns. Our network of 20 grassroots affiliates weaves strategic alliances and alignments amongst labor, neighborhood, housing, racial justice, faith, ethnic-based, and environmental organizations. All too often, workers face abuse and exploitation on the job. Those experiences are made more

harmful when employers evade their responsibilities through worker misclassification. Our affiliates witness and confront the direct and daily impact of misclassification, which encompasses not only loss of wages, but also the loss of vital protections of the basic dignity, safety and health of individuals at work.

Public Rights Project (PRP) works at the intersection of community organizing and government enforcement, with a specific focus on catalyzing equitable and community-based enforcement. Spurred by a mission to bridge the gap between the promise of laws and the lived experiences of historically underserved groups, PRP has focused considerable attention advocating for enforcement of needed protections against businesses exploiting workers in the fissured economy as well as connecting government agencies charged with upholding rights to organizations that support affected workers.

The **Santa Clara County Wage Theft Coalition**, founded in 2013, actively works to combat wage theft, defend workers' rights, and enforce wage theft judgments. The Coalition accomplishes this through policy advocacy at the state and local level, community organizing and outreach, direct action, and education. As a result of the Coalition's advocacy, cities in Santa Clara County and the County itself have enacted wage theft ordinances, and the Coalition also advocates for wage theft legislation at the state level. The organizations that comprise the Wage Theft Coalition work with low wage workers in immigrant communities. The Wage Theft Coalition's interest comes from its support for low wage workers who are victims of wage theft, including ride-share workers, who are misclassified or exploited.

The **Women's Employment Rights Clinic of Golden Gate University School of Law (WERC)** is an on-campus clinical program that serves the dual purpose of training law students and providing critical legal

services to the community. WERC represents low-wage workers, predominately women and immigrants, through impact litigation, individual representation, policy advocacy and community education. For more than twenty-five years, WERC has advised and represented employees misclassified as independent contractors across various industries. Since the COVID-19 pandemic, WERC has assisted rideshare drivers, including Lyft and Uber drivers, in accessing unemployment insurance benefits and have provided trainings.

Worksafe has an interest in the outcome of this case because we advocate for the workplace rights of low wage vulnerable workers. Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California's most vulnerable low-wage workers. We know that it is imperative that all workers are protected from workplace hazards, injuries, illnesses and fatalities. Worksafe considers it vitally important these employees not be misclassified as independent contractors and as a result left outside the protections of occupational safety and health laws.

III. PURPOSE OF PROPOSED BRIEF OF *AMICI CURIAE*

The proposed brief of *amici curiae* presents arguments that complement the brief on the merits of Plaintiffs and Respondents, Hector Castellanos, *et al.*, without repeating those arguments. *Amici curiae* worker organizing groups are made up of 60,000 California app-based drivers who are directly harmed by Proposition 22. *Amici curiae* legal and policy organizations have significant experience fighting worker misclassification

issues and have represented and/or advocated for app-based drivers. The brief will provide critical assistance to the Court in understanding (1) the precarity of app-based work because of app-based companies' refusal to treat a workforce made up of predominately people of color and immigrants as employees; (2) the misinformation campaign in support of Proposition 22 that resulted in bait and switch that leaves app-based drivers worse off; and (3) the substantial harm to app-based drivers caused by Proposition 22, which strips away fundamental employee protections and provides inferior benefits.

IV. CONCLUSION

Amici curiae's experience and expertise with enforcing fundamental employee protections will assist the Court in understanding the full reach of a constitutionally flawed ballot initiative that stripped an economically precarious workforce of California's worker protective laws. Furthermore, this brief represents the voices of app-based drivers who have been significantly harmed by Proposition 22.

For all of the foregoing reasons, *amici curiae* respectfully request that the Court grant *amici curiae's* application and accept the enclosed brief for filing and consideration.

Dated: May 23, 2022

Respectfully Submitted,

/s/ Hina B. Shah

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Gov't Code § 12940 38

Unemp. Ins. Code §§ 1085, 1088.....31

S.B. No. 11597, 29

S.F. Admin. Code Chapter 12W29

Rules

CALIFORNIA RULES OF COURT RULE 8.204(c)(1).....55

Other Authorities

Anderson, et. al., Pew Research Center, *The State of Gig Work in 2021* (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>38

Bauer, *Is Uber Cheating On Social Security/FICA Taxes?*, Forbes (Dec. 16, 2019), <https://www.forbes.com/sites/ebauer/2019/12/16/is-uber-cheating-on-social-securityfica-taxes/?sh=63fcf7163ce4>.....22

Benner et al., UC Santa Cruz, *On-demand and On-the-edge: Ride-hailing and delivery workers in San Francisco* (May 5, 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf.....20

Berg & Johnston, *Too Good to Be True? A Comment on Hall and Krueger’s Analysis of the Labor Market for Uber’s Driver-Partners* (2019), ILR Review 72, no. 1: 39-44, <https://journals.sagepub.com/doi/pdf/10.1177/0019793918798593> 47

Bidar, *Women who lost jobs due to COVID turn to food delivery platforms*, CBSNews (Feb. 25, 2021), <https://www.cbsnews.com/news/women-unemployment-covid-food-delivery-doordash-instacart-ubereats-jobs/> 20, 21

Bloomberg Law, *Uber and Airbnb Lobby for Gig Worker Bailout* (March 25, 2020), <https://news.bloomberglaw.com/daily-labor-report/uber-and-airbnb-lobby-for-gig-worker-bailout-1>.....31

Burns, *As Uber and Airbnb Ask for Bailouts, Critics and Workers aren’t Buying It*, Forbes (May 26, 2020), <https://www.forbes.com/sites/janetwburns/2020/03/26/uber-and-airbnb-ask-for-bailouts-critics-arent-having-it/?sh=7b1fa53f7639>> 33

Cal. Dept. of Industrial Relations, *Workers’ Compensation Presumption (SB 1159) Frequently Asked Questions*, <https://www.dir.ca.gov/dwc/Covid-19/FAQ-SB-1159.html>29

Cal/OSHA Guidelines for Workplace Security (1995), at https://www.dir.ca.gov/dosh/dosh_publications/worksecurity.html 28

Castrodale, *California Supermarkets Fire Union Delivery Drivers and Replace them with Gig Workers as Proposition 22 Takes Effect*, Food & Wine (Jan. 5, 2021), <https://www.foodandwine.com/news/california-supermarkets-fire-union-drivers-prop-22>.....46

Chan, *Food delivery workers are coronavirus first responders—here’s how you can repay us*, NBC NEWS (Mar. 22, 2020), https://www.nbcnews.com/think/opinion/food-delivery-workers-are-coronavirus-first-responders-here-s-how-ncna1164946?cid=sm_npd_nn_fb_ma29

Coffey & McLaughlin, *From Lawyer to Judge: Advancement, Sex and Name Calling*, Working Paper (Jan. 25, 2009), <https://www.abajournal.com/files/NamesNLaw.pdf>35

Cook et al., *The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers*, National Bureau of Economic Research (June 2018), <https://www.nber.org/papers/w24732>37

Cortez Masto, U.S. Senator for Nevada, Press Release, *Cortez Masto Urges Administration to Improve Gig Workers’ Access to Unemployment Benefits*, <https://www.cortezmasto.senate.gov/news/press-releases/cortez-masto-urges-administration-to-improve-gig-workers-access-to-unemployment-benefits->.....32

Designing Against Discrimination in Online Markets, (2017) 32 Berkeley Tech. L.J. 118336

DoorDash, *Dasher Ratings Explained*, https://help.doordash.com/dashers/s/article/Dasher-Ratings-Explained?language=en_US.....35, 36

Dua et al., *Unequal America: Ten insights on the state of economic opportunity*, McKinsey & Company (May 26, 2021),

<https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/unequal-america-ten-insights-on-the-state-of-economic-opportunity>.....49

Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy*, UC Hastings Law, Legal Studies Research Paper Series, Research Paper No. 381 (Nov. 2019) 48

Dubal, *The New Racial Wage Code*, 16 Harvard L. and Pol’y Rev. (forthcoming spring 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3855094.....41

Employment Development Department, *California State Payroll Taxes – Overview*, https://edd.ca.gov/en/Payroll_Taxes/What_Are_State_Payroll_Taxes30

Employment Development Department, *Misclassified as Independent Contractor*, < <https://edd.ca.gov/en/unemployment/misclassified>>31

Employment Development Department, *May 2021 Unemployment Insurance (UI) Fund Forecast*, https://edd.ca.gov/siteassets/files/about_edd/pdf/edduiforecastmay21.pdf33

Fuentes et al., National Employment Law Project, *Rigging the Gig: How Uber, Lyft, and Doordash’s Ballot Initiative Would Put Corporations Above the Law and Steal Wages, Benefits, and Protections from California Workers* (July 2020), <https://www.nelp.org/publication/rigging-the-gig/>.....25

Figueroa et al., *Essential but Unprotected: App-based Food Couriers in New York City* (2021), <https://losdeliveristasunidos.org/ldu-report>.....24

Garcia, *Uber releases safety report revealing 5,891 incidents of sexual assault* (Dec. 6, 2019) CNN, <https://www.cnn.com/2019/12/05/tech/uber-safety-report/index.html>38

Gig Workers Rising, *Death and Corporate Irresponsibility in the Gig Economy: An Urgent Safety Crisis* (April 2022),

https://www.gigsafetynow.com/_files/ugd/af5398_74d1c1fd564b42d58e95dd8a2d99ee03.pdf.....27

Hall & Krueger, *An Analysis Of The Labor Market For Uber’s Driver-Partners In The United States* (2016), NBER Working Paper, No. 22843, <https://www.nber.org/papers/w22843>.....47

Harnett, *Black and Brown Gig Workers Report Lower Ratings – But Companies Make Bias Hard to Track*, KQED (July 22, 2021), <https://www.kqed.org/news/11878952/black-and-brown-gig-workers-report-lower-ratings-but-companies-make-bias-hard-to-track>37

Harnett, *Uber and Lyft Officially Owe California Unemployment Money. Will the State Get it Back?*, KQED (May 5, 2020), <https://www.kqed.org/news/11816091/uber-and-lyft-officially-owe-california-unemployment-money-will-the-state-get-it-back>.....31

Hepler, *What to know about gig worker pay before voting on Prop. 22*, Cal Matters (Oct. 6, 2020), <https://calmatters.org/economy/2020/10/gig-worker-pay-prop-22/>..... 40

Hiltzek, *Commentary: Uber reneges on the ‘flexibility’ it gave drivers to win their support for Prop. 22*, The Los Angeles Times (May 28, 2021), <https://www.latimes.com/business/story/2021-05-28/uber-flexibility-prop-22>.....43

Hiltzik, *In Wake of Prop. 22, Albertsons is converting its home delivery to gig work*, L.A. Times Opinion (Jan. 5, 2021), <https://www.latimes.com/business/story/2021-01-05/prop-22-albertsons-home-delivery>46

Howard, *An early-voting survey of the ballot propositions* (Oct. 28, 2020) Capitol Weekly, <https://capitolweekly.net/an-early-voting-survey-of-the-ballot-propositions/>..... 41

Internal Revenue Service, *Affordable Care Act Tax Provisions for Large Employers*, <https://www.irs.gov/affordable-care-act/employers/affordable-care-act-tax-provisions-for-large-employers>.....43

Jacobs & Reich, UC Berkeley Labor Center et al., *What Would Uber and Lyft Owe to the State Unemployment Insurance Fund* (May 7, 2020), <https://laborcenter.berkeley.edu/what-would-uber-and-lyft-owe-to-the-state-unemployment-insurance-fund/>.....33

Jacobs and Reich, U. C. Berkeley Labor Center, *The Uber/Lyft Ballot Initiative Guarantees only \$5.64 an hour* (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/>.....42

Jacobs & Reich, U. C. Berkeley Labor Center, *The Effects of Proposition 22 on Driver Earnings: Response to a Lyft-Funded Report by Dr. Christopher Thornberg* (Aug. 26, 2020), <https://laborcenter.berkeley.edu/the-effects-of-proposition-22-on-driver-earnings-response-to-a-lyft-funded-report-by-dr-christopher-thornberg/> 42

Legislative Analyst’s Office, *Proposition 22: Analysis of Measure*, <https://lao.ca.gov/BallotAnalysis/Proposition?number=22&year=2020>.....53

Lyft, *Driver and Passenger Ratings*, <https://help.lyft.com/hc/en-us/all/articles/115013079948-Driver-and-passenger-ratings>.....35

Lyft, *Economic Impact Report* (2022), <https://www.lyft.com/impact/economic-impact-report>20

Lyft, Inc., *What is Prop. 22 | California Drivers | Vote Yes on Prop. 22 | Rideshare | Benefits| Lyft video*, <https://www.youtube.com/watch?v=-7QJLgdQaf4>.....18

Marshall, *With \$200 Million, Uber and Lyft Write Their Own Labor Law* Wired (Nov. 4, 2020), <https://www.wired.com/story/200-million-uber-lyft-write-own-labor-law/>18

McCullough & Dobler, National Equity Atlas, *Most California Rideshare Drivers are not Receiving Health-care Benefits under Proposition 22* (Aug. 19, 2021), <https://nationalequityatlas.org/prop22>44

Miller, *What really happens when you leave your Uber or Lyft driver a bad review*, MIC (Oct. 20, 2020), <https://www.mic.com/life/how-bad->

[uber-ratings-affect-drivers-careers-why-you-shouldnt-be-scared-to-report-bad-behavior-17865617](#).....36

Miller, *A Key to Returning to Normal Is Paid Sick Leave, Democrats Say*, N. Y. Times The UpShot (Feb. 21, 2022), <https://www.nytimes.com/2022/02/21/upshot/paid-leave-covid-democrats.html>30

Mishel & McNicholas, *Uber drivers are not entrepreneurs: NLRB General Counsel ignores the realities of driving for Uber*, Economic Policy Institute (Sept. 20, 2019), <https://files.epi.org/pdf/176202.pdf>.....50

Moffitt, *Fake ‘Progressive’ mailers urge yes on Uber/Lyft’s Prop. 22*, S.F. Gate, (Oct. 9, 2020), <https://www.sfgate.com/politics/article/Fake-progressive-mailers-urge-yes-on-Uber-Lyft-15635173.php>.....17

National Employment Law Project, *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs* (2021), <https://s27147.pcdn.co/wp-content/uploads/App-Based-Workers-Speak-Oct-2021-1.pdf>24

Ockenfels-Martinez & Farhang, *Human Impact Partners & Gig Workers Rising, Driving Away Our Health: The Economic Insecurity of Working for Lyft and Uber* (Aug. 2019), <https://humanimpact.org/hiprojects/driving-away-health/>28

O’Donovan, *Uber and Lyft Spent Hundreds of Millions To Win Their Fight Over Workers’ Rights. It Worked.*, BuzzFeed News (Nov. 21, 2020), <https://www.buzzfeednews.com/article/carolineodonovan/uber-lyft-proposition-22-workers-rights>..... 17

Parrott & Reich, *A Minimum Compensation Standard for Seattle TNC Drivers* (July 2020), https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf.....23

Protect App-Based Jobs and Services Facebook, <https://www.facebook.com/ProtectAppWork>>.....41

Rosenblat, et al., *Discriminating Tastes: Customer Ratings as Vehicles for Bias*, Data & Society (Oct. 19, 2016),

https://datasociety.net/pubs/ia/Discriminating_Tastes_Customer_Ratings_as_Vehicles_for_Bias.pdf.....36

Rosenblat & Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers*, 10 Int’l J. of Comm. 3758 (2016), <https://ijoc.org/index.php/ijoc/article/viewFile/4892/1739>>..... 50

Russell, *Uber’s Bait and Switch on Paid Sick Leave*, The American Prospect (May 5, 2020), <https://prospect.org/coronavirus/uber-bait-and-switch-on-paid-sick-leave/> 30

Sainato, *‘I can’t keep doing this’: gig workers say pay has fallen after California’s Prop 22*, The Guardian (Feb. 18, 2021), <https://www.theguardian.com/us-news/2021/feb/18/uber-lyft-doordash-prop-22-drivers-california>.....43

Siddiqui & Tiku, *Uber and Lyft used sneaky tactics to avoid making drivers employees in California, voters say. Now, they’re going national*, The Washington Post (Nov. 17, 2020), <https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/>.....40

Stein, *Analysis on Impacts of Driver Reclassification*, Uber Under the Hood Blog (May 28, 2020), <https://medium.com/uber-under-the-hood/analysis-on-impacts-of-driver-reclassification-2f2639a7f902>.....18

Sumagaysay, *Uber CEO made nearly \$20 Million last year, up 63% from 2020*, MarketWatch (March 22, 2022), <https://www.marketwatch.com/story/uber-ceo-made-nearly-20-million-last-year-up-63-from-2020-11648510175>.....16

Thornberg, UC Riverside School of Business Center for Economic Forecasting and Development, *Prop. 22: Analyzing the Impact on App-Based Drivers’ Earnings* 3 (Aug. 2020), https://ucreeconomicforecast.org/wp-content/uploads/2020/08/Prop22_Driver_Earnings_Analysis_August_2020.pdf.....42

Tulchin Research, *New Poll Finds Most App Drivers Not Informed and at Risk of Missing Out On Healthcare Benefits Promised Under Prop. 22* (April 30, 2021), <https://tulchinresearch.com/2021/04/new-poll->

[finds-most-app-drivers-not-informed-and-at-risk-of-missing-out-on-healthcare-benefits-promised-under-prop-22/](#)44

UCLA Labor Center & SEIU- United Healthcare Workers West, *Worker Ownership, Covid-19, and The Future of The Gig Economy* (Oct. 2020), https://www.labor.ucla.edu/wp-content/uploads/2020/10/UCLA_coop_report_Final-1.pdf25

Uber, Benenson Strategy Group, *Uber: The Driver Roadmap 2.0* (Dec. 2015), <https://www.uber.com/newsroom/driver-partner-survey/>.....20

Uber, *Canceling a ride*, <https://help.uber.com/riders/article/canceling-a-ride?nodeId=56270015-1d1d-4c08-a460-3b94a090de23>34

Uber, *Uber & Dress for Success Announce Partnership to Provide Career Resources to Help Support Women Driving & Delivering on the App*, *Cision PR Newswire* (Sept. 21, 2021), <https://www.prnewswire.com/news-releases/uber--dress-for-success-announce-partnership-to-provide-career-resources-to-help-support-women-driving--delivering-on-the-app-301380926.html>.....21

Uber, *US Safety Report, 2017-2018* (Dec. 5, 2019), https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf?uclid_id=85e7d19e-f57d-46bf-9d98-e31412b44c6027

Uber, *How Star Ratings Work*, <https://www.uber.com/us/en/drive/basics/how-ratings-work/> 35

Uberizing Discrimination,
87 Tenn. L. Rev. at 8037

U.S. Bureau of Labor Statistics Beyond the Numbers Publication, *Fatal Occupational Injuries to Independent Workers* (August 2019), Vol. 8, No. 10, <https://www.bls.gov/opub/btn/volume-8/fatal-occupational-injuries-to-independent-workers.htm>..... 26

Vincent, *Uber is spamming users with political push notifications ahead of key gig worker vote*, *The Verge* (Oct. 15, 2020),

<https://www.theverge.com/2020/10/15/21517316/uber-spamming-user-political-push-notifications-prop-22-vote>..... 18, 47

Waheed, et al., UCLA Labor Center, *More Than a Gig: A Survey of Ride-Hailing Drivers in Los Angeles* (May 30, 2018), <https://irle.ucla.edu/publication/more-than-a-gig-a-survey-of-ride-hailing-drivers-in-los-angeles/>.....20

Weller & Roberts, *Eliminating the Black-White Wealth Gap is a Generational Challenge*, The Center for American Progress (March 19, 2021), <https://www.americanprogress.org/article/eliminating-black-white-wealth-gap-generational-challenge/>31

WERK, *The Future is Flexible: The Importance of Flexibility in the Modern Workplace*, https://innovationfund.evp.harvard.edu/files/admininnovation/files/the_future_is_flexible_-_werk_flexibility_study.pdf52

West, *Uber: Drivers tell us through focus groups and surveys they don't want to be employees*, USA Today (Sept. 16, 2019), <https://www.usatoday.com/story/opinion/2019/09/16/uber-drivers-tell-us-they-dont-want-employees-editorials-debates/2346851001/>.....47

Xu, *Prop. 22 Victory Is Clear Win for Dashers, Merchants, and Customers. Here's What Happens Next* (Nov. 4, 2020), <https://doordash.news/merchant/prop-22-victory-is-a-clear-win-for-dashers-merchants-and-customers-heres-what-happens-next/>.....44

PROPOSED BRIEF

INTRODUCTION

The California Supreme Court has long recognized the importance of worker protective legislation, not only for the individual worker but for the public welfare. (See, *In re Trombley* (1948) 31 Cal.2d 801, 809–810; *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations* (1989) 48 Cal.3d 341, 358; *Smith v. Superior Court* (2006) 39 Cal.4th 77, 82.) When workers are misclassified as independent contractors, the harms are “not mere abstractions; they represent real harms to real working people.” (*People v. Uber Techs., Inc.* (2020) 56 Cal. App. 5th 266, 310, as modified on denial of reh’g (Nov. 20, 2020), review denied (Feb. 10, 2021).) A worker misclassified as an independent contractor by their employer may be deprived of the statutory right to minimum wage and overtime pay, paid sick days, compensation for on-the-job injuries, unemployment insurance, protection against discrimination including harassment, or health insurance. (*Id.*)

Since their inception, rideshare and delivery transportation network companies such as Uber, Lyft, and DoorDash (hereinafter “app-based companies”) have flagrantly misclassified their drivers to skirt these minimum worker protections. Excluding rideshare and delivery drivers (hereinafter “app-based drivers”) – who are disproportionately people of color and immigrants– from basic workplace protections guaranteed through employee status has devastated the livelihood and health of many drivers. It has also shifted significant costs to the public. While drivers and the public bear the costs of misclassification, app-based companies have continued to increase their gross profits and the wealth of their CEOs. (Sumagaysay, *Uber CEO made nearly \$20 Million last year, up 63% from 2020* MarketWatch (March 22, 2022), at

<<https://www.marketwatch.com/story/uber-ceo-made-nearly-20-million-last-year-up-63-from-2020-11648510175>> [as of May 23, 2022].)

Given the devastating impacts of misclassification, the California Supreme Court adopted a streamlined employee status test in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903, for wage and hour claims. When the California Legislature later codified and expanded the *Dynamex* “ABC test” in Assembly Bill 5, app-based companies unsuccessfully lobbied for an exemption. (O’Donovan, *Uber and Lyft Spent Hundreds of Millions To Win Their Fight Over Workers’ Rights. It Worked.*, BuzzFeed News (Nov. 21, 2020) (hereinafter “BuzzFeed News, *Uber and Lyft Spent Hundreds of Millions*”), at <<https://www.buzzfeednews.com/article/carolineodonovan/uber-lyft-proposition-22-workers-rights>> [as of May 23, 2022].)

After their failure to legislatively exempt themselves from the law, app-based companies mounted a \$224 million ballot initiative campaign to carve them out of a legal standard that they were evading. (BuzzFeed News, *Uber and Lyft Spent Hundreds of Millions*, *supra*.) App-based companies and their proponents engaged in an aggressive misinformation campaign, using dirty tactics and outspending the opposition by a factor of 10-to-1 to convince voters and drivers that remaining misclassified as independent contractors was good for drivers and the public. (*Ibid.*) The Yes on Prop. 22 Uber/Lyft Political Action Committee sent mailers and voter guides under the names of nonexistent groups, created solely to appeal to women, people of color, and progressive voters. (Moffitt, *Fake ‘Progressive’ mailers urge yes on Uber/Lyft’s Prop. 22*, S.F. Gate (Oct. 9, 2020), at <<https://www.sfgate.com/politics/article/Fake-progressive-mailers-urge-yes-on-Uber-Lyft-15635173.php>> [as of May 23, 2022].)

Lyft was fined for misleading advertisements by not properly disclosing that it paid for certain electronic media and text advertisements. (Marshall,

With \$200 Million, Uber and Lyft Write Their Own Labor Law, Wired (Nov. 4, 2020), at <<https://www.wired.com/story/200-million-uber-lyft-write-own-labor-law/>> [as of May 23, 2022].)

The companies and other ballot proponents touted the proposition as providing “new benefits” while maintaining independence, saving the livelihood of drivers, and keeping rides affordable.¹ Proponents framed Proposition 22 (hereinafter “Prop. 22”) as pro-worker and claimed that drivers and communities of color overwhelmingly supported the ballot initiative.

However, the campaign was duplicitous, hiding from voters the true goal of the initiative. Far from a pro-worker ballot measure, the proposition was nothing more than a subterfuge to preserve an unlawful business model that enriched app-based companies at the expense of a predominately Black and brown, immigrant and increasingly female workforce already facing economic and social precarity. The “new benefits” were far inferior to what workers were entitled to as employees and would continue to inflict economic and social instability that the drivers faced as misclassified workers.

Amici curiae directly represent the voices of app-based drivers, including people of color, immigrants, and women, who have been

¹ See, Lyft, Inc., What is Prop. 22 | California Drivers | Vote Yes on Prop. 22 | Rideshare | Benefits| Lyft video (hereinafter Lyft Benefits Video), at <<https://www.youtube.com/watch?v=-7QJLgdQaf4>> [as of May 23, 2022]; Vincent, *Uber is spamming users with political push notifications ahead of key gig worker vote*, The Verge (Oct. 15, 2020) (hereinafter “Vincent, *Uber is spamming*”), at <<https://www.theverge.com/2020/10/15/21517316/uber-spamming-user-political-push-notifications-prop-22-vote>> [as of May 23, 2022]; Stein, *Analysis on Impacts of Driver Reclassification*, Uber Under the Hood Blog (May 28, 2020), at <<https://medium.com/uber-under-the-hood/analysis-on-impacts-of-driver-reclassification-2f2639a7f902>> [as of May 23, 2022].

organizing for better working conditions in this industry and are substantially harmed by Prop. 22. They will bear the real-world ramifications of a ballot initiative, powered by an unprecedented misinformation campaign, that solidifies app-based companies' unlawful business practice of shifting labor costs to their drivers and the State of California by classifying app-based drivers as independent contractors.

Amici curiae urge the Court to weigh the compelling public policy reasons for strong worker protection laws that protect low-wage workers in exploitative industries. The bedrock protections, many afforded for over a century, are “of course, primarily for the benefit of the workers themselves, intended to enable them to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect.” (Dynamex, 4 Cal.5th at 952.) Prop. 22 deceptively stripped app-based drivers of these fundamental protections.

Given these reasons and the arguments advanced by Plaintiffs-Respondents regarding the constitutional flaws of the proposition, this Court should affirm the trial court's finding that Prop. 22 is unconstitutional and invalid.

ARGUMENT

I. App-Based Workers, Predominately People of Color and Immigrants, Faced Economic and Health Precarity Directly Attributable to App-Based Companies' Refusal to Treat Them as Employees Entitled to Protection Under California Law

Contrary to the fiction weaved by Intervenor-Appellants of app-based work as a flexible, entrepreneurial, “side hustle” for profit, the work is no different than other low-wage jobs: low pay, long hours, and hazardous conditions. Just like other low-wage industries, app-based work is

predominately fueled by the labor of people of color and immigrants.² Uber and Lyft’s own internal data demonstrate that people of color are overrepresented as app-based drivers for their companies. (Lyft, *Economic Impact Report* (2022), at p. 5, at <<https://www.lyft.com/impact/economic-impact-report>> [as of May 23, 2022] (25 percent of drivers are black, 33 percent Latino, and 12 percent Asian); Uber, Benenson Strategy Group, *Uber: The Driver Roadmap 2.0* (Dec. 2015), at <<https://www.uber.com/newsroom/driver-partner-survey/>> [as of May 23, 2022] (60 percent of drivers identify as non-white).)

In California cities with diverse populations, immigrant workers comprise half or more of the app-based workforce. (Benner et al., UC Santa Cruz, *On-demand and On-the-edge: Ride-hailing and delivery workers in San Francisco* (May 5, 2020) (hereinafter “UC Santa Cruz, *On-demand and On-the Edge*”), at p. 8 (56 percent of San Francisco app-based drivers are immigrants), at <https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf> [as of May 23, 2022]; Waheed, et al., UCLA Labor Center, *More Than a Gig: A Survey of Ride-Hailing Drivers in Los Angeles* (May 30, 2018) (hereinafter “UCLA Labor Center, *More Than a Gig*”), at p. 51 (50 percent of Los Angeles full-time drivers foreign-born), at <<https://irle.ucla.edu/publication/more-than-a-gig-a-survey-of-ride-hailing-drivers-in-los-angeles/>> [as of May 23, 2022].)

² While men constitute a majority of app-based drivers, the number of women working on app platforms has skyrocketed during the pandemic. (See, Bidar, *Women who lost jobs due to COVID turn to food delivery platforms*, CBSNews (Feb. 25, 2021) (hereinafter “Bidar, *Women who lost jobs*”), at <<https://www.cbsnews.com/news/women-unemployment-covid-food-delivery-doordash-instacart-ubereats-jobs/>> [as of May 23, 2022].)

More women, especially during the COVID-19 pandemic, are driving for app-based companies. One in five Lyft drivers is a woman. (Lyft, *Economic Impact Report, supra*, at 5.) Since 2021, the number of women earning on Uber has increased by 80 percent. (Uber, *Uber & Dress for Success Announce Partnership to Provide Career Resources to Help Support Women Driving & Delivering on the App*, Cision PR Newswire (Sept. 21, 2021), at <<https://www.prnewswire.com/news-releases/uber--dress-for-success-announce-partnership-to-provide-career-resources-to-help-support-women-driving--delivering-on-the-app-301380926.html>> [as of May 23, 2022].) Food delivery apps like UberEats and DoorDash have also seen a significant increase in female drivers. (Bidar, *Women who lost jobs, supra*.)

Historical and contemporary forces have created a large labor pool of poor workers of color, immigrants, and women that app-based companies are readily exploiting. But unlike low-wage workers who at least have the force of worker protective laws to combat exploitation, app-based workers, misclassified by their employers as independent contractors, are deprived of baseline protections. This section will focus on the harms inflicted on the app-based drivers as a result of their employers' misclassification and Section II will address how Prop. 22 permanently locks drivers out of bedrock employee protections and provides inferior and inadequate measures in their place.

A. Lack Of Access to Employee Benefits, Especially During the COVID Pandemic, Harmed and Continues to Harm Both App-Based Workers and the Public

App-based companies undermine the remedial and public purpose behind worker protective legislation through their misclassification scheme. California's wage and hour laws and safety net programs are designed to guard against the kind of low pay and income instability that have, over

time, left thousands of California workers toiling in poverty and perpetually on the brink of financial ruin. As the trial court in *People v. Uber Tech., Inc.* aptly noted, the drivers' precarious financial existence is "directly attributable to Defendants' refusal to classify and treat them as employees entitled to protection under California law." (56 Cal. App. 5th at 312.) Furthermore, the lack of employee benefits and access to safety net programs, especially during the COVID-19 pandemic, has devastated app-based drivers.

Minimum labor standards serve a fundamental public purpose because "the public will often be left to assume responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions." (*Dynamex*, 4 Cal.5th at 953.) By misclassifying their drivers, app-based companies shift their legal and financial responsibilities onto the public. The companies' failure to pay payroll taxes deprives state and federal government of billions of dollars that fund vital social insurance programs. (Bauer, *Is Uber Cheating On Social Security/FICA Taxes?*, *Forbes* (Dec. 16, 2019), at <https://www.forbes.com/sites/ebauer/2019/12/16/is-uber-cheating-on-social-securityfica-taxes/?sh=63fcf7163ce4> [as of May 23, 2022].) Furthermore, during the pandemic, app-based companies refused to provide data to California's unemployment insurance system so that drivers' misclassification claims could be swiftly processed. Instead, they actively lobbied Congress for federal taxpayers to foot the bill for their drivers' unemployment claims.

The sweeping scale by which the companies flout fundamental workplace protections has far-reaching effect beyond the app-based economy. As the court of appeal stated in *People v. Uber Techs., Inc.*, "[w]hen violation of statutory workplace protections takes place on a

massive scale, as alleged in this case, it causes public harm over and above the private financial interest of any given individual.” (56 Cal. App. 5th at 312.)

B. App-Based Workers Earn Subsistence Wages While Working a Virtually Full-Time Schedule

Contrary to app-based companies’ insistence that app-based work is a “side hustle,” many app-based drivers work a virtually full-time schedule and rely on their work as their main source of income to support their families. These workers fulfill more than half of all app-based trips, constituting a core part of app-based companies’ business. (See, Parrott & Reich, *A Minimum Compensation Standard for Seattle TNC Drivers* (July 2020), at p. 1, at <https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf> [as of May 23, 2022].) Without a guaranteed minimum wage and premium pay for overtime hours, drivers do not earn a steady, predictable income to meet basic life necessities, let alone weather an emergency, like the COVID-19 pandemic. (See, UC Santa Cruz, *On-demand and On-the-edge, supra*, at p. 16 (almost half of respondents did not have money to handle \$400 emergency).)

A UCLA Labor Center survey conducted prior to the COVID-19 pandemic revealed that more than two thirds of Los Angeles’ app-based drivers depended on driving to support themselves and their families. (UCLA Labor Center, *More Than a Gig, supra*, at p. 2.) Nearly half of the respondents cited driving as their main source of income or only job. (*Ibid.*) Almost half of the respondents drove at least 35 hours per week, and 3 in 5 drove more than 5 days a week. (*Id.* at 3.)

Similarly, in a 2020 survey of San Francisco app-based drivers, more than half of the respondents said driving was their only source of income in the month preceding the survey. (UC Santa Cruz, *On-demand and On-the-*

edge, supra, at p. 21.) Seventy-one percent of survey respondents said they worked more than 30 hours per week, with close to half of those working more than 40 hours a week and close to a third more than 50 hours a week. (*Ibid.*)

Despite many app-based drivers working nearly full-time hours, they earned minimum or subminimum wages. (National Employment Law Project, *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs* (2021) (hereinafter “NELP, *App-Based Workers Speak*”), at p. 4, at <<https://s27147.pcdn.co/wp-content/uploads/App-Based-Workers-Speak-Oct-2021-1.pdf>> [as of May 23, 2022].) App-based companies consistently exaggerated driver earnings by failing to account for the substantial operating expenses pushed on to drivers and by discounting as much as half of the working time when drivers were waiting for the next gig. (*Id.* at p. 3; Figueroa et al., *Essential but Unprotected: App-based Food Couriers in New York City* (2021) (hereinafter “*Essential but Unprotected*”), at p. 27, at <<https://losdeliveristasunidos.org/ldu-report>> [as of May 23, 2022].) Due to their misclassification, app-based drivers must bear all of the expenses in operating their vehicle, from gas, maintenance, insurance, amenities for riders (e.g. water), to COVID-related expenses (e.g. masks and sanitation measures). (UCLA Labor Center, *More Than a Gig, supra*, at pp. 3-4.) If the drivers were classified as employees, such expenses would be borne solely by the company. (Lab. Code §2802³.)

These expenses significantly impact drivers’ livelihoods. The UC Santa Cruz survey found that San Francisco’s app-based ride-share drivers averaged about \$900 per week in income before expenses, while delivery drivers averaged only about \$500 per week before expenses. (UC Santa

³ All statutory references are to California codes, unless otherwise noted.

Cruz, *On-demand and On-the-edge*, *supra*, at p. 28.) However, after paying the necessary operating expenses, ride-hailing drivers earned on average as little as \$360 per week and delivery drivers earned \$224 per week. (*Ibid.*) Worse still, as many as 20 percent of respondents were likely to have earned nothing after deducting expenses. (*Ibid.*) To keep up with the costs of work-related expenses, many drivers work additional hours, take out loans, or incur credit card debt. (UCLA Labor Center, *More Than a Gig*, *supra*, at p. 3.)

In addition, under app-based companies' policies, drivers are not compensated for any of the time they are on the app but waiting for a passenger. By the industry's own estimates, drivers spend as much as 37 percent of their time logged into the app but without a passenger. (Fuentes *et al.*, National Employment Law Project, *Rigging the Gig: How Uber, Lyft, and Doordash's Ballot Initiative Would Put Corporations Above the Law and Steal Wages, Benefits, and Protections from California Workers* (July 2020) (hereinafter, "NELP, *Rigging the Gig*"), at p. 10, at

<https://www.nelp.org/publication/rigging-the-gig/> [as of May 23, 2022].)

This means that drivers are not being compensated for that time but *are* available and engaged to wait. Under California law, all time under the control of the employer is compensable time, including wait time.

(*Mendiola v. CPS Security, Inc.* (2015) 60 Cal.4th 833, 840.) Drivers are simply not earning during more than a third of their work hours.

These substandard earnings directly cause housing instability and food insecurity. In a California statewide study of app-based drivers, eight out of ten survey respondents said their current pay was insufficient to meet their household expenses, and one in three were unsure if they had money for next month's rent. (UCLA Labor Center & SEIU- United Healthcare Workers West, *Worker Ownership, Covid-19, and The Future of The Gig Economy* (Oct. 2020) (hereinafter "UCLA Labor Center & SEIU, *Worker*

Ownership”), at p. 15, at <https://www.labor.ucla.edu/wp-content/uploads/2020/10/UCLA_coop_report_Final-1.pdf> [as of May 23, 2022].) The same survey revealed significant levels of food insecurity among app-based drivers and their families. (*Ibid.*)

C. App-Based Driving Is a Dangerous Job that Adversely and Sometimes Fatally Impacts Drivers’ Health

The app-based driving economy is plagued by a markedly high degree of occupational health hazards that make it one of the most dangerous jobs among workers classified as independent contractors. (U.S. Bureau of Labor Statistics Beyond the Numbers Publication, *Fatal Occupational Injuries to Independent Workers* (August 2019) (hereinafter “BLS Publication”), Vol. 8, No. 10, at <<https://www.bls.gov/opub/btn/volume-8/fatal-occupational-injuries-to-independent-workers.htm>> [as of May 23, 2022].) From violence and harassment on the job to musculoskeletal disorders, app-based drivers face a host of physical and mental challenges due to unsafe and hazardous working conditions. App-based companies relieved themselves of any duty to provide a healthy and safe working environment by misclassifying their workers and left drivers and the public to bear the full brunt of occupational injury and illnesses.

Health and safety benefits and rights, like paid sick leave, workers’ compensation, occupational health and safety protections, state disability insurance, and employer-subsidized healthcare protect the health and welfare of California workers and ensure their financial stability during sickness or injury. (See, e.g., A.B. No. 1522, Healthy Workplaces, Healthy Families Act, 2014 Cal. Legis. Serv. Ch. 317 (2014) (“Paid sick days will have an enormously positive impact on the public health of Californians...”); *Borello*, 48 Cal.3d at 354 (one purpose of workers compensation act is “to insure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society”).) These safety net

programs are essential tools to ensure public health and have proven vital to stemming the spread of the COVID-19 virus. However, app-based companies, through misclassification, deprive their workers these essential protections.

App-based driving has one of the highest fatal occupational injury rates. (BLS Publication, *supra*.) In the last five years, approximately 50 app-based drivers were killed on the job in the United States alone. (Gig Workers Rising, *Death and Corporate Irresponsibility in the Gig Economy: An Urgent Safety Crisis* (April 2022) (hereinafter, “*Death and Corporate Irresponsibility*”, at p. 5, at https://www.gigsafetynow.com/_files/ugd/af5398_74d1c1fd564b42d58e95dd8a2d99ee03.pdf) [as of May 23, 2022].) Sixty-three percent of those killed were people of color. (*Id.* at p. 10.) Many of these murders occurred at the hands of passengers who ordered a ride through the app. (*Id.* at pp. 12-13). Fatal car accidents are another major contributor to loss of life. According to Uber’s own safety data, 58 drivers died in a car crash in 2017-2018. (Uber, *US Safety Report, 2017-2018* (Dec. 5, 2019) (hereinafter “Uber Safety Report”), at p. 50, at https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf?uclid_id=85e7d19e-f57d-46bf-9d98-e31412b44c60) [as of May 23, 2022].)

App-based companies do little to compensate families for loss of life and avoid liability by arguing that they owe “no duty of care” to the drivers. (*Death and Corporate Irresponsibility, supra*, at p. 14; see, *Tchakounte Petone et al. v. Uber Tech. Inc.*, Memorandum, Case No. 20-cv-03028 CCB (D.Md. Feb. 3, 2022), 2022 WL 326727 *4 (no common law duty owed by Uber to driver killed by passenger).) Yet, if they properly classified their drivers as employees, these companies would have the legal responsibility

to provide a safe and healthful place of employment, including preventing and addressing workplace violence. (See, *e.g.*, Lab. Code §6400; Cal/OSHA Guidelines for Workplace Security (1995), at https://www.dir.ca.gov/dosh/dosh_publications/worksecurity.html) [as of May 23, 2022] (“Workplace violence has become a serious occupational health problem....”).) Additionally, the dependents of workers killed on the job would be eligible to receive death benefits under California workers’ compensation laws. (Lab. Code §§ 4700 et seq.)

Furthermore, prolonged sitting, lack of regular and predictable access to bathrooms. and the stress and fatigue of driving negatively impacts drivers’ health. Drivers in California report experiencing musculoskeletal disorders and chronic pain in their backs and knees. (Ockenfels-Martinez & Farhang, Human Impact Partners & Gig Workers Rising, *Driving Away Our Health: The Economic Insecurity of Working for Lyft and Uber* (Aug. 2019), at p. 12, at <https://humanimpact.org/hipprojects/driving-away-health/>) [as of May 23, 2022].) Additionally, more than half of drivers suffer from headaches, sleep deprivation and depression because of their work. (*Id.* at pp. 12-15.) Drivers also suffer from dehydration, kidney issues, and hypertension, (*Ibid.*) because they do not drink enough water due to lack of convenient bathroom access. More than three-fourths of survey respondents in the UC Santa Cruz study said they often or sometimes had to use the bathroom but had no nearby access to one. (UC Santa Cruz, *On-demand and On-the-edge, supra*, at p. 35.) App-based companies skirt the requirements to provide breaks and access to bathrooms, carry workers’ compensation coverage and adopt injury and illness prevention plans by misclassifying drivers as independent contractors. (See, *e.g.*, Lab. Code §§ 226.7, 512, 3600 et seq.; 8 C.C.R. §§ 3203, 3364.) These protections help

reduce injury and illness and provide benefits like medical and wage loss in the event of an injury. (*Ibid.*)

The COVID-19 pandemic has further exacerbated the devastating consequences of excluding workers from foundational protections and benefits. While employees who worked outside the home had the benefit of a rebuttable presumption for workers' compensation coverage if they contracted COVID-19 on-the-job, app-based companies made it impossible for their drivers to access coverage due to their misclassification. (See, Cal. Dept. of Industrial Relations, *Workers' Compensation Presumption (SB 1159) Frequently Asked Questions*, at <<https://www.dir.ca.gov/dwc/Covid-19/FAQ-SB-1159.html>> [as of May 23, 2022].) Delivery drivers, essential workers during the pandemic, risked on-the-job exposure to COVID at almost the same rates as nurses and paramedics. (Chan, *Food delivery workers are coronavirus first responders—here's how you can repay us*, NBC NEWS (Mar. 22, 2020), at <https://www.nbcnews.com/think/opinion/food-delivery-workers-are-coronavirus-first-responders-here-s-how-ncna1164946?cid=sm_npd_nn_fb_ma> [as of May 23, 2022].) Yet, app-based companies deprived drivers of workers' compensation coverage and the rebuttable presumption.

Similarly, app-based companies neither provided state or local paid sick leave nor the state's COVID-19 supplemental paid sick leave to their drivers.⁴ (See, Lab. Code §§ 246, 248.2.) Sixty-one percent of respondents

⁴ Under California law, an employee is entitled to 3 days or 24 hours of paid sick leave in a calendar year. (Lab. Code §246.) Some municipalities like San Francisco provide greater leave. (See, S.F. Admin. Code Chapter 12W.) Due to the COVID-19 pandemic, California passed supplemental paid sick leave, mandating employers provide up to 80 hours of paid leave. (Lab. Code §248.2).

to the survey of California app-based drivers said that the companies did not provide any financial assistance or medical reimbursement in case of COVID-19 diagnosis or exposure. (UCLA Labor Center & SEIU, *Worker Ownership*, at pp. 11-12.) While Uber and Lyft claimed to provide paid leave for drivers who tested positive for COVID-19, onerous eligibility requirements made it difficult—sometimes prohibitively so—for workers to be paid for leave. (Russell, *Uber’s Bait and Switch on Paid Sick Leave* *The American Prospect* (May 5, 2020), at <https://prospect.org/coronavirus/uber-bait-and-switch-on-paid-sick-leave/>) [as of May 23, 2022].)

Drivers faced the dire consequences of choosing not to work to their financial detriment or risk contracting a deadly virus without even a modicum of health and safety protection. Paid sick leave is a vital public health tool because infections decrease when contagious workers have the option to remain at home. (Miller, *A Key to Returning to Normal Is Paid Sick Leave, Democrats Say*, *N. Y. Times The UpShot* (Feb. 21, 2022), at <https://www.nytimes.com/2022/02/21/upshot/paid-leave-covid-democrats.html>) [as of May 23, 2022].) Meanwhile, most employees, including Uber and Lyft executives, had the privilege of remaining safely at home and having their meals and groceries delivered by app-based drivers.

D. Lack of Access to Unemployment Insurance Removed a Safety Net for App-Based Workers and Burdened the Public, Especially During a Global Pandemic

Unemployment insurance (UI) provides a temporary safety net when a worker faces unemployment through no fault of their own. The benefit allows workers to put food on their table, keep a roof over their heads, pay for medications and meet their family obligations while searching for a new job. All California employers must pay an unemployment insurance tax for

each of their employees. (Employment Development Department, *California State Payroll Taxes – Overview*, at https://edd.ca.gov/en/Payroll_Taxes/What_Are_State_Payroll_Taxes) [as of May 23, 2022].) The program does not cover independent contractors. (Employment Development Department, *Misclassified as Independent Contractor*, at <https://edd.ca.gov/en/unemployment/misclassified>) [as of May 23, 2022].) When excluded from UI, poor people of color who start out with less wealth are doubly harmed by the inability to access wage replacement. (See, Weller & Roberts, *Eliminating the Black-White Wealth Gap is a Generational Challenge* The Center for American Progress (March 19, 2021), at <https://www.americanprogress.org/article/eliminating-black-white-wealth-gap-generational-challenge>) [as of May 23, 2022].)

Before the COVID-19 pandemic, drivers who were terminated had trouble accessing unemployment insurance because their employers misclassified them; the pandemic intensified the dire consequences of being shut out of this vital program. Because app-based companies do not report drivers' earnings to California's Employment Development Department ("EDD") (see, Unemp. Ins. Code §§ 1085, 1088), drivers who applied for UI had to challenge their misclassification and then go through a lengthy audit of their earnings. (Harnett, *Uber and Lyft Officially Owe California Unemployment Money. Will the State Get it Back?*, KQED (May 5, 2020) (hereinafter "KQED, *Uber Lyft Owe Money*"), at <https://www.kqed.org/news/11816091/uber-and-lyft-officially-owe-california-unemployment-money-will-the-state-get-it-back>) [as of May 23, 2022].)

At the beginning of the pandemic, Uber and Lyft lobbied the federal government to create and fund a new unemployment program for

independent contractors. (Bloomberg Law, *Uber and Airbnb Lobby for Gig Worker Bailout* (March 25, 2020), at <<https://news.bloomberglaw.com/daily-labor-report/uber-and-airbnb-lobby-for-gig-worker-bailout-1>> [as of May 23, 2022].) Congress created the temporary Pandemic Unemployment Assistance (“PUA”), which expired at the end of 2020, as a government subsidy of last resort for self-employed, *bona fide* independent contractors and others who are ineligible for traditional state UI. (15 U.S.C. §9021; KQED, *Uber Lyft Owe Money, supra.*) It was not to be used as an escape hatch for employers who misclassified their workers. (See, Cortez Masto, U.S. Senator for Nevada, Press Release, *Cortez Masto Urges Administration to Improve Gig Workers’ Access to Unemployment Benefits*, at <<https://www.cortezmasto.senate.gov/news/press-releases/cortez-masto-urges-administration-to-improve-gig-workers-access-to-unemployment-benefits->> [as of May 23, 2022].)

Yet, the public and not app-based companies shouldered the financial responsibility for the unemployment claims of the companies’ drivers because Uber and other app-based companies funneled drivers to PUA. (KQED, *Uber Lyft Owe Money, supra.*) *Amici* assisted many app-based drivers at the beginning of the pandemic in navigating the UI system to challenge their misclassification. Although some of these drivers ultimately obtained UI, the wage audit process took months for each driver. Since the start of the pandemic, while other workers received benefits within weeks of becoming unemployed in March 2020, many Uber and Lyft drivers did not receive any insurance benefits until May or June 2020. (KQED, *Uber Lyft Owe Money, supra.*) Every week that a worker went without benefits was a week where they struggled to put food on their table, worry about the rent and go without basic necessities for their families. Drivers that *amici* assisted described their economic situation in dire terms

- “destitute,” “desperate” and “dying.” The delay in securing traditional UI benefits caused many to abandon their meritorious UI claims and seek PUA instead. But PUA was neither proper nor adequate substitute for traditional state unemployment benefits for these drivers. The benefits under PUA were less than traditional UI benefits since UI is calculated on gross earnings and PUA benefits are calculated on net earnings. (KQED, *Uber Lyft Owe Money, supra.*)

Even when app-based drivers were approved for traditional UI, taxpayers picked up the bill because app-based companies refused to contribute to California’s unemployment insurance fund. In one data analysis conducted by the UC Berkeley Labor Center, Uber and Lyft evaded paying \$413 million into the state unemployment insurance fund between 2014 to 2019 by misclassifying their drivers. (Jacobs & Reich, UC Berkeley Labor Center et al., *What Would Uber and Lyft Owe to the State Unemployment Insurance Fund* (May 7, 2020), at <https://laborcenter.berkeley.edu/what-would-uber-and-lyft-owe-to-the-state-unemployment-insurance-fund/>) [as of May 23, 2022].)

The companies saved significant costs by misclassifying their workers and thus protected their bottom line during the pandemic by lobbying for PUA. For example, Uber had \$19 billion in cash reserves at the end of 2019 and an additional \$10 billion of unrestricted cash as of February 2020. (Burns, *As Uber and Airbnb Ask for Bailouts, Critics and Workers aren’t Buying It*, Forbes (May 26, 2020), at <https://www.forbes.com/sites/janetwburns/2020/03/26/uber-and-airbnb-ask-for-bailouts-critics-arent-having-it/?sh=7b1fa53f7639>) [as of May 23, 2022.] Rather than meet their obligations to the unemployment fund, app-based companies offloaded their responsibility onto taxpayers, contributing to the insolvency of the unemployment insurance fund. California borrowed

from the federal government \$17.8 billion by the end of 2020 due to the unprecedented demand for UI during the pandemic. (Employment Development Department, May 2021 Unemployment Insurance (UI) Fund Forecast, at https://edd.ca.gov/siteassets/files/about_edd/pdf/edduiforecastmay21.pdf) [as of May 23, 2022].)

App-based companies' entrenched refusal to treat their drivers as employees and meet their employer obligations during a global pandemic had devastating impacts on drivers and robbed federal and state funds of much needed revenue.

E. App-Based Drivers Face Racial and Other Discrimination, Including Sexual Harassment, On the Job with Little Recourse

App-based drivers in California who are people of color, immigrants, and women, face racial and other forms of prejudice and discrimination in the workplace, including sexual harassment and assault. But when misclassified as independent contractors, drivers cannot easily access critical anti-discrimination protections. (See, e.g., Gov't Code § 12940(a); 42 U.S.C.A. § 2000e et seq.) These protections are crucial given the range of ways that drivers face discrimination as detailed below.

Explicit stereotyping and/or subconscious preconceptions can bias customers when they are presented with just a name and headshot. (Hannak et al., *Bias in Online Freelance Marketplaces: Evidence from TaskRabbit and Fiverr* (hereinafter "*Bias in Online Freelance Marketplaces*") (Feb. 2017), CSCW '17: Proceedings of the 2017 ACM Conference on Computer Supported Cooperative Work and Social Computing.) Yet, that is precisely how app-based companies match drivers to customers. When a customer books a ride, they see the driver's name and photograph. (See, Uber, *Canceling a ride*,

<<https://help.uber.com/riders/article/canceling-a-ride-?nodeId=56270015-1d1d-4c08-a460-3b94a090de23>> [as of May 23, 2022].) A customer can cancel the ride at that point. (*Ibid.*) Ample empirical evidence has shown that names alone can trigger discrimination. In one study, identical resumes were sent out for jobs. Resumes that had stereotypical “white” sounding names received 50 percent more callbacks than identical resumes which had stereotypical “Black” sounding names. (Bertrand & Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (2004) 94 *Am. Econ. Rev.* 991, 997–98.) The experiment has been duplicated with variations including male/female subjects with similar results. (See, Coffey & McLaughlin, *From Lawyer to Judge: Advancement, Sex and Name Calling*, Working Paper (Jan. 25, 2009) (females with masculine names have more successful legal careers), at <<https://www.abajournal.com/files/NamesNLaw.pdf>> [as of May 23, 2022].) While there is currently no study measuring the rates of discrimination on ride acceptance based on race/ethnicity or gender in the app-based industry, these experimental studies point to the likelihood that the app-based industry is no different.

Another context in which discrimination against drivers plays out is through the evaluation system. App-based companies use customer ratings as their main evaluation tool of drivers. Customers, at the end of a ride, are asked to rate their driver on a 5-point scale. (Uber, *How Star Ratings Work*, at <<https://www.uber.com/us/en/drive/basics/how-ratings-work/>> [as of May 23, 2022]; Lyft, *Driver and Passenger Ratings*, at <<https://help.lyft.com/hc/en-us/all/articles/115013079948-Driver-and-passenger-ratings>> [as of May 23, 2022]; DoorDash, *Dasher Ratings Explained*, at <[https://help.doordash.com/dashers/s/article/Dasher-Ratings-](https://help.doordash.com/dashers/s/article/Dasher-Ratings-Explained)

[Explained?language=en_US](#)> [as of May 23, 2022].) Customers have the option to leave comments or to select a predetermined set of compliments. (Levy & Barocas, *Designing Against Discrimination in Online Markets* (2017) 32 Berkeley Tech. L.J. 1183, 1225 (hereinafter “*Designing Against Discrimination*”).)

Drivers who fall below a certain rating are deactivated (terminated) by the companies, without any explanation or opportunity to counter customer reviews. (See, *James v. Uber Techs. Inc.* (N.D. Cal. 2021) 338 F.R.D. 123, 136.) Some platforms, like DoorDash, are transparent on the average customer rating that triggers deactivation and others, like Uber, are vague about the minimum average rating that triggers deactivation. (DoorDash, *Dasher Ratings Explained*, *supra*; *James v. Uber Techs. Inc.*, 338 F.R.D. at 136 (Uber Community Guidelines tell drivers that they will be “automatically deactivated if their ratings fall below a threshold determined by Uber”).) Uber routinely provides drivers with their overall rating, and the ratings of their top drivers for comparison. (Rosenblat, et al., *Discriminating Tastes: Customer Ratings as Vehicles for Bias*, Data & Society (Oct. 19, 2016) (hereinafter “*Discriminating Tastes*”), at p. 5, <https://datasociety.net/pubs/ia/Discriminating_Tastes_Customer_Ratings_as_Vehicles_for_Bias.pdf> [as of May 23, 2022].) Not only can drivers lose their job for low customer ratings, those ratings also impact future job assignments, which can affect earnings. (Miller, *What really happens when you leave your Uber or Lyft driver a bad review*, MIC (Oct. 20, 2020), at <<https://www.mic.com/life/how-bad-uber-ratings-affect-drivers-careers-why-you-shouldnt-be-scared-to-report-bad-behavior-17865617>> [as of May 23, 2022].)

Both explicit and implicit bias⁵ are given free rein in this evaluative framework. Social science research has demonstrated that even seemingly “objective” customer ratings system are steeped with racial bias. “Consumer-sourced ratings like those used by Uber are highly likely to be influenced by bias on the basis of factors like race or ethnicity.” (*Discriminating Tastes, supra*, at p. 7.) In a study of online task platforms, researchers found significant correlation of negative ratings for workers who were perceived as Black or Asian compared to white. (*Bias in Online Freelance Marketplaces, supra*, at p. 10.) The potential for implicit bias is ever present in online ratings. (*Designing Against Discrimination*, 32 Berkeley Tech. L.J. at 1226.)

Not surprisingly, biased reviews lead to more drivers of color being terminated by the companies. (Harnett, *Black and Brown Gig Workers Report Lower Ratings – But Companies Make Bias Hard to Track*, KQED (July 22, 2021), at <<https://www.kqed.org/news/11878952/black-and-brown-gig-workers-report-lower-ratings-but-companies-make-bias-hard-to-track>> [as of May 23, 2022].) Drivers of color have little information for why they got a poor review. The “objective” rating often masks implicit bias. (*Id.*)

Just like in most other industries, female app-based drivers also face pay inequality, earning seven percent less than men. (Cook et al., *The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers*, National Bureau of Economic Research (June 2018), at <<https://www.nber.org/papers/w24732>> [as of May 23, 2022].) The pay gap is attributable to factors that are mired in gender bias: men’s earlier

⁵ Implicit bias is “the unconscious mental processes which cause us to act upon negative stereotypes of stigmatized groups.” *Uberizing Discrimination*, 87 Tenn. L. Rev. at 80.

entry into gig driving leading to more experience on the app and preference for “fast” driving speed attributable to men and constraints on where drivers work. (*Id.*) Where women drive is partly constrained by the need for safety, given the level of sexual harassment and assault that drivers face on the job.

While independent contractors are protected from discriminatory harassment under California law, app-based companies do little to reduce or prevent harassment. (Gov’t Code § 12940(j).) Forty-three percent of ride-hailing drivers and 24 percent of delivery workers in San Francisco felt harassed or made to feel unsafe by a customer. (UC Santa Cruz, *On-demand and On-the-edge supra*, at p. 35.) *Amici* have heard from drivers that riders have yelled, kicked, and spit on them as well as inflicted purposeful damages to their vehicles. Many drivers believe that their race, ethnicity or immigration status motivated the verbal and physical abuse. (See, *Essential but Unprotected, supra*, p. 34; Anderson, et. al., Pew Research Center, *The State of Gig Work in 2021* (Dec. 8, 2021) (hereinafter “Pew Research Center, *The State of Gig Work*”), at <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/> [as of May 23, 2022].)

In addition, drivers also face sexual harassment at the hands of riders. Uber’s own safety report from 2017-2018 documented that of the 5,981 reports of sexual assault, nearly half of the accused were riders. (Uber Safety Report, *supra*, p. 58; Garcia, *Uber releases safety report revealing 5,891 incidents of sexual assault*, CNN (Dec. 6, 2019), at <https://www.cnn.com/2019/12/05/tech/uber-safety-report/index.html> [as of May 23, 2022].) Seven percent of rape victims were drivers. (*Ibid.*) One in five gig workers have often or sometimes experienced unwanted

sexual advances while doing their job. (Pew Research Center, *The State of Gig Work, supra.*)

It is difficult for drivers to challenge discrimination under state or federal law due to their misclassification. The companies plainly could proactively make different design and policy choices to reduce or eliminate bias in their algorithms and to increase driver safety. (See, generally, *Designing Against Discrimination, supra.*) While app-based companies have an affirmative duty to take immediate and appropriate corrective action to address harassment of their contractors, the very systems that they use to evaluate and retain their predominately diverse workforce perpetuate bias and expose drivers to harassment, including assault.

II. Powered by an Expensive Misinformation Campaign, Prop. 22 Was a Bait and Switch that Leaves App-Based Workers Significantly Worse Off

With the passage of Prop. 22, app-based companies solidified a business model that strips their workforce of fundamental employee protections. Prop. 22’s promised “new benefits” have not materialized and are far inferior to existing California worker protections. If nothing else, the ballot initiative provides a roadmap for other sectors to degrade working conditions below statutory limits. Although Appellants and Intervenors urge this court to not overturn the “will of the People,” they fail to acknowledge the overwhelming misinformation campaign that resulted in voter confusion about what exactly Prop. 22 would do. App-based companies engaged in aggressive, duplicitous, and sometimes dirty tactics to shore up support for the measure, including among drivers. Contrary to what voters were told, app-based drivers want employee protections, autonomy and flexibility, not inferior rights that lock them into a secondary status.

A. Prop. 22’s Proponents Misled Voters into Thinking App-Based Drivers Would Obtain Historic New Benefits When in Fact the Measure Would Strip Workers of Existing Employee Protections.

Prop. 22’s proponents inundated television airwaves, social media, and the companies’ own apps promising voters that “a third way” was better for workers. They claimed that Prop. 22 guaranteed earnings for drivers and provided a healthcare subsidy, as well as medical and disability coverage, while preserving flexibility and autonomy. (Lyft Benefits Video, *supra*; Siddiqui & Tiku, *Uber and Lyft used sneaky tactics to avoid making drivers employees in California, voters say. Now, they’re going national*, The Washington Post (Nov. 17, 2020) (hereinafter Siddiqui, *Sneaky Tactics*), at <https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/> [as of May 23, 2022].)

Critically, however, the companies’ initiative campaign conveniently omitted a fundamental fact: at the time of the vote in November 2020, app-based drivers had employee protections under the law. After *Dynamex* and AB5, there was no question that app-based drivers were employees and had the right to a minimum wage of \$13 an hour (higher in many municipalities like San Francisco, \$16.07), \$0.57 a mile expense reimbursement as well as other business expense reimbursement, overtime pay in the amount of 150% of the hourly pay after 8 hours in a day and 40 hours in a week, and 200% after 12 hours in a day, as well as benefits such as paid sick leave, paid family leave, paid meal and rest breaks, workers’ compensation, healthcare and unemployment insurance. (Hepler, *What to know about gig worker pay before voting on Prop. 22*, Cal Matters (Oct. 6, 2020), at <https://calmatters.org/economy/2020/10/gig-worker-pay-prop-22/> [as of May 23, 2022].)

Uber, Lyft, DoorDash and other proponents of Prop. 22 misled voters by obscuring this fact and repeatedly asserting that Prop. 22 provided “historic new benefits” to drivers. (See, Lyft Benefits Video, *supra*; Protect App-Based Jobs and Services Facebook, at <https://www.facebook.com/ProtectAppWork> [as of May 23, 2022].) Most voters and drivers did not know that existing law—due to the companies’ continued unlawful misclassification—already protected app-based drivers and afforded them benefits. Voters believed they were granting drivers benefits with a Yes vote and that a No vote would leave the workers out in the cold with no protections under the law. (Siddiqui, *Sneaky Tactics, supra*). The \$224 million misinformation campaign was so successful that one survey of voters found that 40 percent of voters who voted “yes” on Prop. 22 thought they were supporting gig workers’ ability to earn a living wage. (Howard, *An early-voting survey of the ballot propositions*, Capitol Weekly (Oct. 28, 2020), <https://capitolweekly.net/an-early-voting-survey-of-the-ballot-propositions/>) [as of May 23, 2022]; Siddiqui, *Sneaky Tactics, supra*).

Contrary to the campaign’s messaging, these “new benefits” stripped drivers of their existing benefits under California law, which are far superior to Prop. 22’s promised benefits.

1. Prop. 22’s “Guaranteed Earnings” Results in Sub-Minimum Wages

Prop. 22’s public messaging promised drivers a guaranteed minimum wage, even touting that the wage would be “20% over the current prevailing minimum wage anywhere in California.” (Dubal, *The New Racial Wage Code*, 16 Harvard L. and Pol’y Rev. (forthcoming spring 2022), fn. 78 (quoting Uber policy official in radio interview), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3855094) [as of

May 23, 2022].) The fine print was that drivers earned minimum wage only under the app-based companies’ definition of “engaged time.”

Under California law, workers must be paid at least the minimum wage for all hours they are under the control of their employer, including wait time. (*Mendiola*, 60 Cal.4th at 840.) The time that drivers spend on non-driving tasks such as disinfecting their cars, waiting for the next call or driving back from a remote drop-off location is equally compensable under California law, but not under Prop. 22.

The net effect of Prop. 22’s guaranteed earning promise is that drivers would be guaranteed only \$5.64 an hour, after expenses and non-driving wait times are accounted for. (Jacobs & Reich, U. C. Berkeley Labor Center, *The Uber/Lyft Ballot Initiative Guarantees only \$5.64 an hour* (Oct. 31, 2019) (hereinafter “UC Berkeley Labor Center Study”), at <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/> [as of May 23, 2022].) A Lyft-commissioned study countered that drivers would earn \$25 to \$27 an hour under Prop. 22’s guaranteed minimum. (Thornberg, UC Riverside School of Business Center for Economic Forecasting and Development, *Prop. 22: Analyzing the Impact on App-Based Drivers’ Earnings* 3 (Aug. 2020), at 3, at https://ucreeconomicforecast.org/wp-content/uploads/2020/08/Prop22_Driver_Earnings_Analysis_August2020.pdf [as of May 23, 2022].) Yet, the Lyft study grossly overestimated the guaranteed earnings by making erroneous assumptions about the drivers’ net earnings before Prop. 22 and not accurately accounting for all the wait time and expenses. (Jacobs & Reich, U. C. Berkeley Labor Center, *The Effects of Proposition 22 on Driver Earnings: Response to a Lyft-Funded Report by Dr. Christopher Thornberg* (Aug. 26, 2020), at <https://laborcenter.berkeley.edu/the-effects-of-proposition-22-on-driver->

[earnings-response-to-a-lyft-funded-report-by-dr-christopher-thornberg/](#)> [as of May 23, 2022].)

Since Prop. 22's passage, drivers for app-based companies consistently report that the pay is not reliable and has decreased. (Sainato, *'I can't keep doing this': gig workers say pay has fallen after California's Prop 22*, The Guardian (Feb. 18, 2021), at <<https://www.theguardian.com/us-news/2021/feb/18/uber-lyft-doordash-prop-22-drivers-california>> [as of May 23, 2022].) Uber has slashed the rate it pays for airport trips regardless of the distance traveled, from 60 cents per mile before Prop. 22 to just 32 cents per mile after the passage. (Hiltzek, *Commentary: Uber reneges on the 'flexibility' it gave drivers to win their support for Prop. 22*, The Los Angeles Times (May 28, 2021) (hereinafter "Hiltzek, *Commentary*"), at <<https://www.latimes.com/business/story/2021-05-28/uber-flexibility-prop-22>> [as of May 23, 2022].)

Even before Prop. 22, drivers struggled to earn a living wage. Prop. 22 now further degrades drivers' earnings by guaranteeing a subminimum wage that discounts one-third of their workday and falls far below the minimum wage in California.

2. Most App-Based Drivers Ineligible for Prop. 22's Health Care Subsidy

App-based companies were required, prior to Proposition 22, to provide employees who worked 30 hours per week with affordable health insurance coverage under the Affordable Care Act. (Internal Revenue Service, *Affordable Care Act Tax Provisions for Large Employers*, at <<https://www.irs.gov/affordable-care-act/employers/affordable-care-act-tax-provisions-for-large-employers>> [as of May 23, 2022].) While many drivers prior to Prop. 22 did not receive health insurance due to their employers' willful misclassification, they were entitled to it under the law.

App-based company CEOs touted the health care benefit under Prop. 22 as easy to access, with the first payout in April 2021. (Xu, CEO/Co-Founder DoorDash, *Prop. 22 Victory Is Clear Win for Dashers, Merchants, and Customers. Here's What Happens Next* (Nov. 4, 2020), at <<https://doordash.news/merchant/prop-22-victory-is-a-clear-win-for-dashers-merchants-and-customers-heres-what-happens-next/>> [as of May 23, 2022].)

But, under Prop. 22, drivers must meet a narrow set of qualifying criteria to receive a stipend to cover health care premiums. (Bus. & Prof. Code §7454). Almost 86 percent of drivers surveyed would not qualify for the stipend under the restrictive definition of “qualifying health plan” even if they knew how to apply. (Tulchin Research, *New Poll Finds Most App Drivers Not Informed and at Risk of Missing Out On Healthcare Benefits Promised Under Prop. 22* (April 30, 2021) (hereinafter “Tulchin Research”), at <<https://tulchinresearch.com/2021/04/new-poll-finds-most-app-drivers-not-informed-and-at-risk-of-missing-out-on-healthcare-benefits-promised-under-prop-22/>> [as of May 23, 2022].)

A vast majority of California app-based drivers surveyed in the spring of 2021 did not have enough information about how the health care stipend worked or how to receive it. (Tulchin Research, *supra*; McCullough & Dobler, National Equity Atlas, *Most California Rideshare Drivers are not Receiving Health-care Benefits under Proposition 22* (Aug. 19, 2021) (hereinafter “National Equity Atlas”), at <<https://nationalequityatlas.org/prop22>> [as of May 23, 2022].) Latinx drivers were less likely to know about the health stipends and more likely to be uninsured. (National Equity Atlas, *supra*.)

Almost six months after passage of Prop. 22, nearly half of app-based drivers were either uninsured entirely or relying on Medi-Cal. (National Equity Atlas, *supra*.) The drivers’ uninsured rate under Prop. 22 is now

double the national average. (*Ibid.*) Given the occupational hazards of app-based driving, including on-the job violence and harassment, Prop. 22 imperils the already precarious health of drivers and further burdens public resources by making health insurance virtually inaccessible.

3. Prop. 22 Replaces Workers’ Compensation with an Inferior Private Insurance System, Access to Which Is Largely Controlled by App-Based Companies.

In California, if a worker gets injured on the job, they are entitled to workers’ compensation, which provides medical and disability coverage as well as lost wages. (NELP, *Rigging the Gig*, at p. 13.) Prop. 22 requires app-based companies to offer occupational accident insurance coverage that is inferior and incomplete compared to what these app-based companies were required under the law to provide prior to Prop. 22’s enactment. For instance, the occupational accident insurance under Prop. 22 is silent as to whether it is offered on a no-fault basis, like California’s workers’ compensation program. (NELP, *Rigging the Gig*, at p. 2.) Moreover, Prop. 22 only requires coverage to extend to accidents occurring while the driver is actively engaged with a passenger or in making a delivery. It exempts accidents that occur while the driver is “online but outside of engaged time where the injured app-based driver is in engaged time on one or more network company platforms or where the app-based drives is engaged in personal activities.” (Cal. Bus. & Prof. Code §7455(d).) This limitation stands in stark contrast to California’s comprehensive workers’ compensation coverage. (See, e.g. *Pac. Indem. Co. v. Indus. Acc. Comm’n* (1945) 26 Cal. 2d 509, 513 (“mere fact that employee is performing a personal act when injured does not *per se* bring him without the purview of the compensation law”).) Further, companies under Prop. 22 are permitted to cap medical expenses whereas there is no medical expense cap under workers’ compensation. Prop. 22 also fails to require vocational retraining,

and limits required disability payments to 104 weeks. In contrast, permanent disability benefits for life and vocational retraining are provided under workers' compensation. (NELP, *Rigging the Gig, supra*, pp. 14-15.) If disputes arise, drivers will have to bear the costs of litigating in court or in arbitration under Prop. 22 and will not have the protections of the no-cost administrative process under the Labor Code. (Lab. Code §§ 4621, 5811.) The state's workers' compensation system places the risk and cost of work-related injuries on employers and not on workers. Prop. 22 shifts much of that burden from app-based companies to the drivers themselves and the public by allowing substandard coverage, with gaping loopholes.

B. Prop. 22 Promised to Preserve Jobs But Has Resulted in Displaced Employees

During the campaign, proponents of Prop. 22 told voters that voting “yes” would save jobs. (Siddiqui, *Sneaky Tactics, supra*). The proposition has already displaced employee delivery drivers and stands to eliminate other employee jobs in favor of an app-based model of contract workers. For example, Albertsons Companies, which includes Vons and Pavilions grocery outlets, announced, on the heels of the election, that it would discontinue its delivery driving services in favor of third-party app-based drivers. (Castrodale, *California Supermarkets Fire Union Delivery Drivers and Replace them with Gig Workers as Proposition 22 Takes Effect*, Food & Wine (Jan. 5, 2021), at <<https://www.foodandwine.com/news/california-supermarkets-fire-union-drivers-prop-22>> [as of May 23, 2022]; Hiltzik, *In Wake of Prop. 22, Albertsons is converting its home delivery to gig work*, L.A. Times Opinion (Jan. 5, 2021), at <<https://www.latimes.com/business/story/2021-01-05/prop-22-albertsons-home-delivery>> [as of May 23, 2022].) They followed through on the threat: only one month after the election, Southern California Albertsons' drivers were notified that they would lose their jobs. (*Id.*) With app-based

drivers being paid below the minimum wage and being provided minimal benefits, Prop. 22 portends the beginning of the erosion of permanent jobs in this sector.

C. Drivers Did Not Support Stripping Employee Protections

Prop. 22 proponents told voters throughout the campaign, and now tell this court, that drivers overwhelmingly supported independent contractor status. (West, *Uber: Drivers tell us through focus groups and surveys they don't want to be employees*, USA Today (Sept. 16, 2019), at <<https://www.usatoday.com/story/opinion/2019/09/16/uber-drivers-tell-us-they-dont-want-employees-editorials-debates/2346851001/>> [as of May 23, 2022]; Vincent, *Uber is spamming*, *supra*.) To support this narrative, proponents relied on two surveys, both paid for by Uber, that showed that 79 percent of Uber drivers nationally preferred independent contractor status over employee status. (Hall & Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* (2016), NBER Working Paper, No. 22843 at pp. 5 & 11, at <<https://www.nber.org/papers/w22843>> [as of May 23, 2022].) However, these surveys had significant methodological flaws such as double-barreled questions that misstated the legal standard for employee status (*e.g.* do you want minimum wage and benefits or flexibility to set your own schedule), a low response rate (only 10 percent of drivers responded to the survey), and exclusion of key data points (*e.g.* survey did not ask average number of hours driven for company). (Berg & Johnston, *Too Good to Be True? A Comment on Hall and Krueger's Analysis of the Labor Market for Uber's Driver-Partners* (2019), ILR Review 72, no. 1: 39-44, at pp. 41-44, at <<https://journals.sagepub.com/doi/pdf/10.1177/0019793918798593>> [as of May 23, 2022].)

Qualitative and quantitative surveys of app-based drivers in the San Francisco Bay Area and Los Angeles tell a different story. Workers want flexibility and employee protections. (Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy*, UC Hastings Law, Legal Studies Research Paper Series, Research Paper No. 381 (Nov. 2019) (hereinafter Dubal, *Uber Ambivalence*), at p. 4; UCLA Labor Center, *More Than a Gig*, *supra*, at p. 4.) Drivers “want to have more stable and predictable salaries, the ability to negotiate their contract, to organize with fellow workers, and to receive more support and training from the TNCs [transportation network companies] while retaining their job flexibility and autonomy.” (UCLA Labor Center, *More Than a Gig*, *supra*, at p. 33.) For the drivers who claimed to prefer independent contractor status, their response likely had something to do with the fact that the app-based companies told them that the contractor model was the only way for drivers to enjoy autonomy and flexibility. (*Ibid*; Dubal, *Uber Ambivalence*, *supra*, at p. 13.)

The companies also hoodwinked drivers into supporting the proposition by rolling out new incentives before the election. In the lead up to the election, Uber let drivers see passengers’ ride destination before accepting a job and let them set minimum acceptable fares, options that drivers did not enjoy before the proposition campaign. (Hiltzek, *Commentary*, *supra*.) Drivers believed that this new freedom and autonomy would continue if Prop. 22 passed. But just a few months after the vote, Uber removed this autonomy because too many drivers were declining rides. (*Ibid.*). Rather than the promised autonomy that Prop. 22 guaranteed, app-based companies are back to exerting the level of control they always have over their drivers. The fact that a company like Uber can unilaterally grant new benefits and perks of driver autonomy - and subsequently remove them at

its discretion - clearly demonstrates the substantial control it exerts over the terms and conditions of work for its app-based workforce.

Like many contingent workers, app-based workers want employee protections, regardless of how they are labeled. Studies have found that many contingent workers actually prefer to enter or rejoin the permanent workforce. (Dua et al., *Unequal America: Ten insights on the state of economic opportunity*, McKinsey & Company (May 26, 2021), at <https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/unequal-america-ten-insights-on-the-state-of-economic-opportunity>) [as of May 23, 2022].) App-based drivers are no different. The majority want to earn a guaranteed hourly wage. (UCLA Labor Center, *More Than a Gig*, *supra*, at p. 27.) They want control over the number of hours worked, but also want the benefits of employee status. (*Ibid.*) In the UCLA Labor Center and SEIU statewide survey, a majority of respondents said they would trade the flexibility over their hours for regular and reliable schedules and guaranteed benefits. (UCLA Labor Center & SEIU, *Worker Ownership*, *supra*, at p. 19.)

D. Prop. 22’s Promise of Driver Flexibility and Independence Runs Contrary to the Control Actually Exercised by App-Based Companies Over Drivers

Intervenors-Appellants assert that app-based workers enjoy “unprecedented autonomy” and that the “freedom” to “unilaterally decide that they do not want to work this week or this month” is “central” to app-based workers. (Intervenors’ Appellant Opening Brief, at p. 22.) Voters were repeatedly told that to preserve this independence, they needed to support Prop. 22. But this narrative is in stark contrast to the actual control that these companies leverage over drivers and the legal standard for determining employee status.

Few drivers, even before Prop. 22, enjoyed the freedom they perceived they were getting. Most app-based companies set the customer fare rates without any input from the drivers. (*People v. Uber Techs., Inc.*, 56 Cal. App. 5th at 280; *O’Conner v. Uber Techs., Inc.* (N.D. Cal. 2015) 82 F.Supp. 3d 1133, 1142.) They control how much drivers earn per fare, what the company’s cut of the fare will be, what fares the drivers receive, how many and which job assignments the drivers receive and even how drivers conduct themselves when driving a customer. (Rosenblat & Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers*, 10 Int’l J. of Comm. 3758, 3762 (2016), at <<https://ijoc.org/index.php/ijoc/article/viewFile/4892/1739>> [as of May 23, 2022]; *O’Conner*, 82 F.Supp.3d at 1136-37.) Uber, for instance, unilaterally sets the customer’s fare price and its share of the “fee per ride,” estimated at approximately twenty percent of the fare. (*O’Conner*, 82 F.Supp.3d at 1136-37.)

Furthermore, the app-based companies screen and select the drivers and regulate and monitor their performance. Those who fail to meet the companies’ standards are disciplined or deactivated. (*O’Conner*, 82 F.Supp.3d at 1137.) Uber’s algorithm tracks the drivers’ acceptance rates, time on trips, speed, and customer ratings, among other things. (Mishel & McNicholas, *Uber drivers are not entrepreneurs: NLRB General Counsel ignores the realities of driving for Uber*, Economic Policy Institute (Sept. 20, 2019), at p. 10, at <<https://files.epi.org/pdf/176202.pdf>> [as of May 23, 2022].) This algorithm’s ratings can be the basis for being “deactivated” from the platform. (*Ibid.*) Lyft told drivers that an acceptance rate of ride requests that fell below 75 percent would result in progressive discipline and, after three warnings, termination from the platform. (*Cotter v. Lyft, Inc.* (N.D. Cal. 2015) 60 F.Supp.3d 1067, 1071.) Furthermore, if a driver’s

customer rating fell below a certain threshold, they were automatically deactivated. (*Ibid.*)

Once the drivers accept a ride, app-based companies continue to control how they work. The driver handbooks include parameters of acceptable conduct and conduct that will result in discipline or deactivation. (See, *O’Conner*, 82 F.Supp.3d at 1142 (Uber prohibiting drivers from soliciting rides directly from customers); *Cotter*, 60 F.Supp.3d at 1078-79 (Lyft requiring drivers to wash and vacuum car once a week, offer passenger a cell phone charger, and not smoke).)

Two surveys of San Francisco app-based drivers from 2020 confirm app-based companies’ continued control over drivers. For example, when workers exercised their autonomy to decline certain rides, 56 percent were not offered work for a period and 17 percent of workers were threatened with deactivation. (UC Santa Cruz, *On-demand and On-the-edge*, *supra*, at p. 28.) In a similar survey conducted in May 2020, 29 percent of survey respondents reported they were offered fewer bonuses or incentives when they declined rides. (UC Santa Cruz, *On-demand and On-the-edge*, *supra*, at p. 40.) In an ethnographic survey conducted in San Francisco in 2016, one Uber driver responded, “What flexibility? I sleep in my car; I eat in my car; I work in my car. That is not freedom.” (Dubal, *Uber Ambivalence*, *supra*, at p. 18.) To eke out a living, most drivers work long hours, notwithstanding their preference for flexibility. (*Ibid.*)

As a federal district court judge noted, app-based companies exert real pressure through their algorithms and bonus system: “Drivers are theoretically free to reject any ride they would like, but those attempting to make a living understand the precarious nature of that freedom in the face of a power imbalance and information asymmetry favoring Uber.” (*Tchakounte Petone et al*, *supra*, 2022 WL 326727*6.)

E. Prop. 22’s Proponents Deceived Voters and Drivers by Treating Flexibility and Autonomy as Incompatible with Employee Status

App-based companies have artfully disassembled flexibility and autonomy from employee status. Drivers and voters were repeatedly told that the only way to preserve independence was to vote for Prop. 22. (See, Lyft Benefits Video, *supra*.) The narrative that employee status is antithetical to flexibility contradicts both the applicable legal standard and reality.

California courts have long held that freedom to choose one's days and hours of work does not preclude a finding of employment relationship. (See, e.g., *Burlingham v. Gray* (1943) 22 Cal.2d 87, 100 (“The fact that the employee chooses his own time to go out and return and is not directed where to go or to whom to sell is not conclusive of the relationship and is not inconsistent with the relation of employer and employee....”); *Air Couriers Int'l v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, 926 & 937 (holding drivers were employees as a matter of law despite the fact that “drivers determined their own schedules and decided when and how long to work.”); *JKH Enterprises Inc. v. Dept. of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1051 (holding certain workers were employees as a matter of law despite the fact that they were “not required to work either at all or on any particular schedule”).)

The reality is that many employees, especially white-collar professional workers, enjoy flexibility and autonomy coupled with the significant benefits flowing from employee status. A survey of white-collar professional employees found that 42 percent had access to workplace flexibility prior to the pandemic. (WERK, *The Future is Flexible: The Importance of Flexibility in the Modern Workplace*, at p. 7, at https://innovationfund.evp.harvard.edu/files/admininnovation/files/the_fut

[ure_is_flexible_-_werk_flexibility_study.pdf](#)> [as of May 23, 2022].)

Even in lower-paid jobs, such as the retail and restaurant industry, some employees have flexibility to choose which days and times they are available to work. (See, *Cotter*, 60 F.Supp.3d at 1081, fn 7.)

As app-based companies insist that only independent contractor status can deliver flexibility and autonomy, their business model carries with it many pitfalls, including not having the security of a guaranteed minimum wage, anti-discrimination protections, health care, workers' compensation and access to unemployment as well as little to no opportunity to advance or be promoted. App-based companies peddled a profit-raising measure for themselves and a far inferior status for a workforce that is made up predominately of people of color and immigrants. (Legislative Analyst's Office, *Proposition 22: Analysis of Measure*, at <https://lao.ca.gov/BallotAnalysis/Proposition?number=22&year=2020>> [as of May 23, 2022] (Prop. 22 likely fiscal impact was increase in company profits).)

III. CONCLUSION

By sanctioning an illegal business scheme to misclassify app-based drivers, Prop. 22 permanently relegates app-based drivers - people of color, immigrants, and women - to a second-class citizenship devoid of basic protections, to the detriment of the public. Most voters did not know that a vote for Prop. 22 would, by stripping drivers of essential worker protections, have this sweeping harmful impact. For the foregoing reasons and due to its constitutional defects, *amici* respectfully request that this Court uphold the trial court's order invalidating Prop. 22.

Date: May 23, 2022

Respectfully submitted,

WOMEN'S EMPLOYMENT RIGHTS
CLINIC
Golden Gate University School of Law

By:

/s/ Hina B. Shah

Hina B. Shah

Attorney for Amici Curiae

**STATEMENT OF COMPLIANCE WITH
CALIFORNIA RULES OF COURT RULE 8.204(c)(1)**

I, HINA B. SHAH, declare that:

1. I am a Professor of Law and Director of the Women’s Employment Rights Clinic at Golden Gate University School of Law, counsel for amici curiae in the above-captioned case.

2. I certify that the foregoing Proposed Brief of Amici Curiae contains 10,139 words, including footnotes, as counted by the Microsoft Word for Windows program used to generate this brief.

Executed on May 23, 2022, at San Francisco, California.

/s/ Hina B. Shah
Hina B. Shah, Esq.
Women’s Employment Rights Clinic
Golden Gate University School of Law
Attorney for *Amici Curiae*

Document received by the CA 1st District Court of Appeal.

PROOF OF SERVICE

I, Fe Gonzalez, declare:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 536 Mission Street, San Francisco, CA 94105. On May 23, 2022, I served the following document(s):

APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF AND PROPOSED BRIEF OF AMICI CURIAE GIG WORKERS RISING, MOBILE WORKERS ALLIANCE, RIDESHARE DRIVERS UNITED-CALIFORNIA, WE DRIVE PROGRESS, ET AL. IN SUPPORT OF PLAINTIFFS AND RESPONDENTS CASTELLANOS ET AL.

on the parties for service as designated below:

By filing via TrueFiling: I filed and served such document(s) via TrueFiling to the parties, thus sending an electronic copy of the filing and effecting service.

By First-Class Mail: I placed the document(s) listed above in a sealed envelope with postage thereon fully prepaid, addressed as indicated below for deposit with the United States Postal Service this same day in the ordinary course of business.

The Hon. Frank Roesch
Alameda County Superior Court
Administration Building, Dept. 17
1221 Oak Street
Oakland, CA 94612

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

Executed on May 23, 2022, at San Francisco, California.



Fe Gonzalez