Case No. S279622

IN THE SUPREME COURT OF CALIFORNIA

HECTOR CASTELLANOS, ET AL.,
Plaintiffs and Respondents,

v.

STATE OF CALIFORNIA, ET AL.,
Defendants and Appellants,

PROTECT APP-BASED DRIVERS AND SERVICES, ET AL.,
Intervenors and Appellants.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CRUM & FORSTER HOLDING CO. IN SUPPORT OF DEFENDANTS AND APPELLANTS

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Application to File *Amicus Curiae* Brief

Amicus curiae Crum & Forster Holding Co. hereby applies pursuant to California Rule of Court 8.520(f) for leave of Court to file the attached amicus curiae brief in support of Defendants and Appellants. Amicus curiae "perform a valuable role for the judiciary precisely because they are nonparties who often have a different perspective" and broaden the Court's "perspective on the issues raised by the parties." (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177 (citation omitted).)

As explained below, amicus has a significant interest in the outcome of this case and believes that the Court would benefit from additional briefing on the issues addressed in the attached briefs.[1]

Interest of *Amicus Curiae*

Amicus curiae Crum & Forster Holding Co. is a holding company of various underwriting companies. The insurance companies within Crum & Forster rated A (Excellent) by A.M. Best Company are: United States Fire Insurance Company, The North River Insurance Company, Crum & Forster Insurance Company, Crum & Forster Indemnity Company, Crum & Forster Specialty Insurance Company, Seneca Insurance Company, Inc., Seneca Specialty Insurance Company, First Mercury Insurance Company, and American Underwriters Insurance

[1] No party or counsel for a party in the pending case authored the proposed amicus curiae brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than the amicus or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

Company (individually and collectively "Crum & Forster"). Through these various underwriting companies, Crum & Forster provides specialized insurance solutions across the nation. United States Fire Insurance Company operates under the registered trademark of Crum & Forster, and it specifically offers occupational accident insurance policies in California. This includes policies compliant with Proposition 22 for companies like Lyft and DoorDash, and policies in adjacent industries in the gig economy. United States Fire Insurance Company also writes workers' compensation policies in California. Indeed, it writes more workers' compensation policies than occupational accident policies. Crum & Forster is thus uniquely positioned to comment on Proposition 22 due to this on-the-ground experience with not only occupational accident policies, but also with workers' compensation policies in California.

Crum & Forster has a significant interest in the constitutionality of Proposition 22, which requires network companies to provide app-based drivers with valuable occupational accident insurance. This insurance is especially well suited to the gig economy because it can be affordably priced based on individual usage and provides substantial coverage—a minimum of $1 million under Proposition 22—to all drivers regardless of how much or little they decide to work. This insurance is thus an effective way to protect app-based drivers in the case of injury while allowing drivers to retain the flexibility and control afforded to independent contractors.

The People of California thus made a reasonable choice in concluding that occupational accident insurance is a better fit for app-based drivers and other gig workers than traditional workers'

compensation, which can cost substantially more and—in the case of app-based drivers—likely over-insures given the specific and predictable risks app-based drivers face. This Court should respect that choice, uphold the constitutionality of Proposition 22, and affirm the decision below.

DATED: April 2, 2024

Respectfully submitted,

EIMER STAHL LLP

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INTRODUCTION AND INTEREST OF AMICUS

Proposition 22 was approved by an overwhelming majority of voters in 2020. Given its high visibility, there can be little doubt that voters knew what Proposition 22 would do—ensure that app-based drivers are treated as independent contractors—and wanted it done. Contrary to Respondents' caricature, Proposition 22 did not leave app-based drivers unprotected in the case of workplace injury or throw the burden of caring for injured drivers onto the state. Instead, Proposition 22 requires network companies—such as Lyft, Uber, DoorDash, and Instacart—to make occupational accident insurance available to all drivers using their apps. Not only that, but the law requires that these policies must provide a minimum of $1 million in occupational accident coverage. Network companies are required to provide other types of benefits to app-based drivers as well, including accidental death and dismemberment insurance and automobile liability insurance. The result is that gig workers in California can enjoy the flexibility and autonomy that comes with being independent contractors without sacrificing the protection and security that typically comes from being an employee.

Respondents warn that occupational accident insurance is inferior to workers' compensation, but in the context of the gig economy that is simply not true. *Amicus* writes both workers' compensation policies and occupational accident insurance policies in California and thus can confirm that occupational accident insurance policies are well-suited to address the unique needs of app-based drivers. Indeed, occupational accident insurance provides the exact same medical benefits, temporary disability payments, and accidental death benefits as workers'

compensation up to the $1 million coverage limit. But occupational accident insurance is much more affordable than workers compensation insurance because of how the premiums are charged. Workers' compensation is charged on a per-employee basis using a standardized formula, which results in high insurance costs even for drivers who use the apps for only a few hours per week and thus require very little coverage. By contrast, occupational accident insurance premiums for app-based drivers are charged based on individual *usage*. It thus costs significantly less to provide occupational accident insurance to individuals who drive only a few hours per week—as many app-based drivers do—than it would to provide workers' compensation insurance. And because the risks confronted by app-based drivers are few and easily defined, premiums need not reflect potential exposure to the myriad risks confronted by employees working in offices, factories, warehouses, agriculture, and other occupations. This too keeps premiums affordable, which gives network companies the flexibility to make app-based driving more lucrative and to make use of their apps more affordable.

Although occupational accident insurance policies (unlike workers' compensation insurance) are typically capped at $1 million—the minimum required by Proposition 22—that is more than enough coverage to ensure that injured drivers are cared for in the event of an accident. Indeed, Crum & Forster writes occupational accident insurance for gig workers across the country, and of the more than 17,000 claims that they received from app-based drivers and other gig workers since 2019, *only two* involved claims totaling more than $1 million. More than 99 percent of claims are for less than $100,000, and nearly 90 percent are for less than $10,000. Benefits provided under these claims are

typically dispensed within days of injury, with little hassle to the injured party, thus ensuring that they receive the medical care, rehabilitation, and therapy they need to get back on their feet. Occupational accident insurance is thus an effective means of protecting app-based drivers, and California voters made a reasonable choice when deciding that these drivers should be protected by occupational accident insurance rather than workers' compensation insurance.

There are thus no policy-based reasons to subvert the People's decision to classify app-based drivers as independent contractors protected by generous occupational accident insurance. Nor does the Constitution pose any obstacle to Proposition 22. The Constitution puts the People on equal footing with the Legislature, and Article XIV, Section 4 does not give the Legislature any special authority to draw the line between employees and independent contractors. Accordingly, this Court should affirm the judgment below.

ARGUMENT

I. PROPOSITION 22 BENEFITS APP-BASED DRIVERS BY ENSURING FLEXIBILITY AND PROTECTING AGAINST ON-THE-JOB INJURIES

Proposition 22 affords autonomy and flexibility to app-based drivers, while ensuring that those drivers are covered in the event of injury by comprehensive occupational accident insurance. Although workers' compensation insurance provides valuable protection to millions of employees in California—many of whom are protected by policies written by Crum & Forster—occupational accident insurance is particularly well suited for the gig economy, and especially for app-based drivers, because its usage-based premiums make it substantially less expensive without sacrificing coverage. Striking down Proposition 22

would leave app-based drivers worse off than they are under the current regulatory regime.

A. Proposition 22 preserves app-based drivers' ability to control their own schedules and working conditions.

Proposition 22 was enacted to protect app-based drivers' "flexibility to decide when, where, and how they work." (Bus. & Prof. Code § 7449(a).) Unlike traditional employees, app-based drivers "include parents who want to work flexible schedules while children are in school; students who want to earn money in between classes; retirees who rideshare or deliver a few hours a week to supplement fixed incomes and for social interaction; military spouses and partners who frequently relocate; and families struggling with California's high cost of living that need to earn extra income." (*Ibid.* § 7449(b).) In addition to flexibility regarding scheduling, the genius of the gig economy is that individuals can work for numerous network companies—such as Lyft, DoorDash, and Instacart—without conflict.

For example, a mother can drop her children off at school, open the Lyft app, and drive for several hours. While using Lyft, she can choose the routes and passengers that work best for her. She can then turn off the Lyft app, open Instacart, and spend several hours making deliveries. After picking up her children at school and helping them with homework, she can turn on the DoorDash app and spend an hour or two in the evening delivering food orders. She can even toggle back and forth between Lyft and its main competitor, Uber, throughout the day.

No one from Lyft, Instacart, DoorDash, or Uber must approve this schedule. Nor can Lyft prevent her from earning money with Uber, or Instacart interfere with her ability to work with DoorDash. As an

independent contractor, she is free to work when, where, and with whom she chooses. This is because Proposition 22 prohibits network companies from "unilaterally prescrib[ing] specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the . . . application or platform"; "requir[ing] the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the . . . application or platform"; "restrict[ing] the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time"; or "restrict[ing] the app-based driver from working in any other lawful occupation or business." (*Ibid.* § 7451.)

Reclassifying all app-based drivers as employees would eliminate or significantly curtail this flexibility. In the example above, if the parent were employed by Lyft, she would likely be forced to accept specific passengers and routes, even if they put her far from her children's school near pickup time or made her feel unsafe. As an employee, she would likely not be permitted to toggle between Lyft, DoorDash, and Instacart—and almost certainly would be prohibited from using Uber's app. And instead of choosing which days to work, she would likely be subject to a fixed schedule. Without such flexibility, many app-based drivers would cease using these network platforms, losing the income they currently generate. The independent-contractor status preserved by Proposition 22 thus offers hundreds of thousands of Californians a means to earn money while working around their lives and schedules.

In addition to benefiting the app-based drivers themselves, the independent-contractor model benefits the tens of millions of Californians who now rely on these drivers for transportation and

delivery services. As Proposition 22 recognizes, app-based drivers provide "convenient and affordable transportation for the public," reduce "impaired and drunk driving," improve "mobility for seniors and individuals with disabilities," provide "new transportation options for families who cannot afford a vehicle," and offer "new affordable and convenient delivery options for grocery stores, restaurants, retailers, and other local businesses and their patrons." (Bus. & Prof. Code § 7449(c).) More Californians can make use of these services because the independent contractor model affords the flexibility and control that app-based drivers seek, thereby increasing the pool of drivers offering these important services.

B. Under Proposition 22, app-based drivers are protected in case of on-the-job injury through the provision of comprehensive occupational accident insurance.

In addition to autonomy and flexibility, Proposition 22 provides a number of other benefits and protections to app-based drivers, including "a healthcare subsidy consistent with the average contributions required under the Affordable Care Act [ ]; a new minimum earnings guarantee tied to 120 percent of minimum wage with no maximum; compensation for vehicle expenses"; "protection against discrimination and sexual harassment"; and "occupational accident insurance to cover on-the-job injuries." (Bus. & Prof. Code § 7449 (f).) That final benefit—occupational accident insurance—is especially important because, in this context, it provides an adequate replacement for comprehensive workers' compensation insurance at a fraction of the price.

1. Occupational accident insurance has evolved to provide tailored coverage for workers in various contexts.

The concept of providing compensation for bodily injury dates to ancient times. Both the law of Ur, in ancient Sumeria, and the code of Hammurabi itemized rewards for specific injuries. (Gregory P. Guyton, *A Brief History of Workers' Compensation*, 19 IA Orthopaedic J. 106, 106 (1999), available at http://tinyurl.com/39byfzk8 [last visited Apr. 2, 2024].) This practice fell away during the Middle Ages, with compensation awarded subject to the arbitrary benevolence of one's feudal lord. (*Ibid.*) But at the start of the Industrial Revolution this practice was somewhat revived through the common law tort system, which compensated injured workers for on-the-job injuries if they could prove that their employers were negligent. (*Id.* at 106–07.)

In 1884, the first major law to provide compensation for workplace injury was introduced in modern-day Germany. (*Id.* at 107; Julia Moses, *Workplace Accidents, Occupational Illness and the Long Road to Workers' Compensation and Safety Policies around the World*, Centers for Disease Control and Prevention (Apr. 26, 2019), http://tinyurl.com/ycx24385 [last visited Apr. 2, 2024].) This system served as the basis for workers' compensation laws in other western nations, including the United States. (Guyton, *supra* at 107–08.) All these laws were "based on the same premise: accidents were part and parcel of work, and no one could be blamed for them." (Moses, *supra.*) Under this system, injured workers received compensation for their injuries, and families of workers who died on the job received a death benefit. (*Ibid.*)

During this period, investigators ranging from factory inspectors to physicians began to realize that "[c]ertain jobs were especially likely

to involve certain kinds of accidents." (*Ibid.*) The predicable nature of these accidents meant that insurance could pay for such accidents. (*Ibid.*)

Today, employers primarily provide one of two types of insurance to their employees: workers' compensation or occupational accident insurance. (*Breaking Down the Difference Between Occupational Accident Insurance and Workers' Compensation*, U.S. Risk (May 10, 2018), http://tinyurl.com/wu9ap8zx.) Workers' compensation is generally state-administered and covers all medical expenses and lost wages. (*Ibid.*) Occupational accident insurance also covers medical expenses and lost wages, but only up to the coverage limits set in the policy, which are determined in part by the perceived risks of the workplace. (*Ibid.*)

Independent contractors also often purchase occupational accident insurance policies, tailoring their coverage to best suit their needs. (*See, e.g. Occupational Risk*, Crum & Forster, http://tinyurl.com/5n99mnhe [last visited Apr. 2, 2024].) For example, Crum & Forster provides occupational accident insurance to independent owner-operated motor carriers—e.g., truckers. In addition to covering on-the-job injuries, this insurance provides accidental death benefits, payments for loss of use resulting from accidental dismemberment, and temporary total disability. (*Ibid.*) Thousands of independent truckers have relied on this insurance for decades to ensure coverage for themselves and their families in the event of death or injury while driving tractor-trailers. Crum & Forster now offers similar policies tailored to cover app-based drivers and other gig workers. (*Ibid.*)

2. Proposition 22 requires network companies to provide robust occupational accident insurance to app-based drivers.

Network companies that contract with app-based drivers in California must "carr[y], provide[], or otherwise make[] available" "occupational accident insurance" "[f]or the benefit of app-based drivers." (Bus. & Prof. Code, § 7455.) The insurance is designed "to cover medical expenses and lost income resulting from injuries suffered while the app-based driver is online with a network company's online-enabled application or platform." *(Ibid.)* At a minimum, these policies must provide at least $1 million of "[c]overage for medical expenses incurred" and "[d]isability payments equal to 66 percent of the app-based driver's average weekly earnings from all network companies as of the date of injury."[2] (*Ibid.*).

Significantly, the Commissioner of the Department of Insurance will not approve any policy that includes a deductible in the context of disability insurance, including occupational accident insurance under Proposition 22. An injured driver will thus not incur *any* out-of-pocket costs before the insurance kicks in.

Proposition 22 requires coverage under these policies to apply whenever the app-based driver is "online." (Bus. & Prof. Code § 7455.) The term "online" "means the time when an app-based driver is utilizing a network company's online-enabled application or platform and can receive requests for rideshare services or delivery services from the network company, or during engaged time." (*Ibid.* § 7455(c).) Proposition

[2] "Average weekly earnings" "means the app-based driver's total earning from all network companies during the 28 days prior to the covered accident divided by four." (Bus. & Prof. Code, § 7455(a)(2)(B).)

22 further explains what coverage applies if an app-based driver works with more than one network company. A network company's policy is not "required to cover an accident that occurs" when the app-based driver is "online but outside of engaged time where the injured app-based driver is in engaged time on one or more other network company platforms." (*Ibid.* § 7455(d).) In other words, if an app-based driver was online for Lyft and available to receive requests, but actively engaged in a delivery for Instacart and an accident occurred, Lyft's occupational accident insurance would not be required to cover that accident—instead, the insurance provided by Instacart would cover all expenses up to $1 million.

Nor is a policy required to cover an accident that occurs when the driver is online but "engaged in personal activities." (*Ibid.* § 7455(d).) Thus, if a driver has the Lyft app turned on but is driving to see his girlfriend, an accident that occurs during that side trip is not covered. That makes sense, as the driver in that example is engaged in the same type of activity that millions of non-app-based drivers undertake each day without being covered by occupational accident insurance.

If an accident is covered by occupational accident insurance "maintained by more than one network company, the insurer of the network company against whom a claim is filed is entitled to contribution for the pro-rata share of coverage attributable to one or more other network companies up to the" minimum coverage and limit requirements. (*Ibid.* § 7455(d).) So, if an app-based driver was "online" with both Lyft and InstaCart—but not engaged currently with either company—any compensable injuries would be split pro rata between Lyft and InstaCart's policies. If the driver files claim with Instacart's

occupational accident insurer, the Instacart insurer could seek contribution from Lyft's insurer. By contrast, if a driver is online with Lyft but in the process of delivering groceries for Instacart when her injuries occurred, InstaCart's occupational accident policy would provide coverage. This provision ensures that drivers are always covered while allowing network companies to purchase affordable policies by clarifying that they are not required to insure drivers against accidents that occur while the drivers are working with their competitors.

In addition to occupational accident insurance, network companies must carry, provide, or make available "accidental death insurance" "[f]or the benefit of spouses, children, or other dependents of app-based drivers." (*Ibid.* § 7455(b).) The required accidental death insurance policy must compensate "for injuries suffered by an app-based driver while the app-based driver is online with the network company's online-enabled application or platform that result in death." (*Ibid.*) The "burial expenses and death benefits" are determined based on the standards set by the California Labor Code. (*Ibid.*) This coverage likewise applies when the app-based driver is "online," (*Ibid.* § 7455 (c)), and coverage is subject to the same limits and pro-ration when the app-based driver is working with more than one network company, as described above, (*Ibid.* § 7455 (d)).

Finally, network companies must also provide "at least one million dollars" of "automobile liability insurance" "per occurrence to compensate third parties for injuries or losses proximately caused by the operation of an automobile by an app-based driver during engaged time in instances where the automobile is not otherwise covered by a policy" that complies with a particular provision of the Insurance Code. (*Ibid.*

§ 7455 (f)(1).) This coverage requirement protects the public—providing third-party liability coverage if an app-based driver does not have third-party automobile liability insurance that complies with the statute.

Reimbursements and direct payments under occupational accident insurance within the policy limit are effectively identical to reimbursements under workers' compensation. Medical payments for both occupational accident insurance and workers' compensation are made pursuant to California's Official Medical Fee Schedule. (See Labor Code § 5307.1; Code Regs. Tit. 8, §§ 9789.10–9789.111.) Temporary disability payments for both types of insurance are calculated using the formula provided in Labor Code § 4453. And both types of insurance provide accidental death benefits in the amounts specified by Labor Code § 4702.

In addition to the minimum requirements established by Proposition 22, any Proposition 22 policy must be approved by the California Insurance Commissioner. (*See generally* Ins. Code §§ 12919–13555.) Shortly after Proposition 22 was enacted, the California Department of Insurance issued guidance describing "the principal requirements of California law with respect to the several insurance coverages mandated by Proposition 22, and approaches to comply with the requirements of Proposition 22 that are consistent with current California law." (Policy Approval Bureau, California Department of Insurance, *Implementation of Insurance Provisions of Proposition 22* p. 2 http://tinyurl.com/z94etwc5 [last visited Apr. 2, 2024].) This guidance explained, *inter alia*, how to combine accidental death coverage and burial benefits in compliance with California law and detailed the automobile liability insurance provisions extended by Proposition 22.

(*Id.* at 3.) Because group occupational insurance policies are available only to certain groups of independent contractors (*see* Ins. Code § 10270.2), the Insurance Commissioner issued an order "to authorize network companies as entities that are eligible to purchase blanket insurance for the benefit of their app-based drivers." (*Order Approving Additional Discretionary Blanket Group Pursuant to California Insurance Code Section 10270.2.5(a)* http://tinyurl.com/4dufb7j5 [last visited Apr. 2, 2024].) Ultimately, the Insurance Commissioner must approve any Proposition 22 policy before it goes into effect.

3. Occupational accident insurance policies that comply with Proposition 22 provide valuable protection to app-based drivers.

Crum & Forster offers Proposition 22 compliant occupational accident policies to network companies. Each of the currently offered policies has been filed and approved by the Insurance Commissioner.

Although these policies provide coverage for app-based drivers, the network companies—not the drivers—are required to purchase the policies. This differs from the occupational accident policies that independent contractors typically purchase on their own or through groups after negotiating the policy limits and premium rates. Under Proposition 22, the statute sets the policy limits, and the network companies negotiate the premium rates. And, unlike traditional occupational accident policies, the premiums for these Proposition 22 policies are usage based. In other words, the premium for any given app-based driver correlates with that driver's use of the network company's app. For example, Uber's nationwide premiums are charged on a per mile basis—the more miles an app-based driver logs, the higher the premium

charged. (*Get Peace of Mind While You Drive*, Uber, https://tinyurl.com/483vec54 [last visited Apr. 2, 2024].) Across the country, Uber drivers pay "$0.024 per mile only when on-trip," with this premium going directly to the insurer. (*Ibid.*) Thus, the premiums for a driver using Uber's app will be lower for someone who drives only a few hours per day—or only a few days per week—than for someone who uses the app every day for several hours.

In California, many (perhaps most) app-based drivers do not even pay the nominal premium for occupational accident insurance themselves because network companies often subsize the premiums of their Proposition 22 policies. (See, e.g., *Ibid.* [Uber subsidizes premiums]; *Delivering for California Shoppers: New Trainings & Protections*, Instacart, https://tinyurl.com/m8fxzcs6 [Instacart subsidizes premiums] [last visited Apr. 2, 2024].) The usage-based pricing model keeps premiums low, which affords network companies the flexibility to provide more lucrative opportunities for drivers, allowing them to earn more, to lower prices to customers, or both. To the extent this arrangement makes app-based driving more financially lucrative, it incentivizes people to provide transportation and delivery services through the network companies' apps, which ultimately benefits the end users who depend on these services.

These policies are especially well-suited to the gig economy because a given policy purchased by a network company will cover an app-based driver when he or she is using that company's app. Although the policies themselves are not portable—*i.e.*, Lyft's policy does not cover an app-based driver that has the Lyft app turned off and is making deliveries for Instacart—app-drivers are always covered under one policy

or another. On any given day, an app-based driver could be covered under numerous policies. At no time will an app-based driver performing a covered activity be without protection. And app-based drivers need not pay for unnecessary coverage for the many hours per day or week when they are *not* working.

Like workers' compensation insurance, occupational accident insurance under Proposition 22 provides "no fault" coverage, meaning that drivers are covered even if their own negligence may have contributed to their injuries.

In short, the occupational accident insurance required under Proposition 22 is an efficient solution for the gig economy because it allows individuals to obtain generous coverage for injuries suffered while performing transportation and delivery services without requiring them to pay for expensive policies they do not need.

C. Occupational accident insurance is a better fit for app-based drivers than workers' compensation.

Given the unique nature of the gig economy and the flexible way in which app-based drivers use the apps provided by network companies, occupational accident insurance is a better fit for app-based drivers than workers' compensation. As explained above, the two types of insurance provide effectively identical medical payments, temporary disability, and accidental death benefits within the coverage limit. And both provide "no fault" coverage that applies regardless of the workers' negligence. But occupational accident insurance can be provided to app-based drivers at lower cost because it is priced based on usage, with rates tailored to suit the economics of each network company. Workers' compensation insurance, by contrast, is typically charged by estimating the payroll for

each classification of worker and multiplying (per $100 of payroll) by the applicable industry rating. (*Workers Compensation*, California Department of Insurance (Oct. 4, 2023), http://tinyurl.com/2uptxxfm.) As a result, workers' compensation costs significantly more than occupational accident insurance. (*Occupational Accident vs. Workers' Compensation*, Ryan Specialty (Aug. 7, 2023), http://tinyurl.com/2ufj6m5e [explaining occupational accident insurance generally costs 30 percent less than workers' compensation].) That increased price may be worthwhile for an employee working in a manufacturing plant or warehouse, where the risks of injury are numerous and varied. A factory worker, for example, faces the risk of injury from heavy equipment, slippery floors, toxic chemicals, falling fixtures, violent coworkers, and more. A workers' compensation policy will need to cover potential injuries arising from each of these sources. By contrast, app-based drivers face a few well-defined—though non-trivial—risks. Most significantly, they face the risk of being in an automobile crash while transporting a passenger or making a delivery. They also face the less common risk of being assaulted by a passenger or other bad actor. These risks are well understood and can be accurately priced to ensure robust protection at affordable rates.

Occupational accident insurance is also more flexible than workers' compensation because app-based drivers can switch seamlessly from one network company to the next while maintaining coverage under each company's policy. This flexibility ensures that app-based drivers remain covered without forcing the network companies to shoulder insurance costs disproportionate to the drivers' time on their platforms—a burden that might prompt the network companies to limit the

flexibility currently enjoyed by app-based drivers. After all, a network company forced to incur a sizeable workers' compensation premium for each app-based driver might understandably be reluctant to let drivers work minimal hours or use its competitors' apps. The economic incentives produced by requiring network companies to provide workers' compensation would thus likely undermine the very flexibility that Proposition 22 sought to preserve.

Respondents note that unlike workers' compensation, which is uncapped, occupational accident insurance must provide only $1 million of coverage. (see Op. Br. at 37–38; Bus. & Prof. Code § 7455(a).) But the distinction between capped and uncapped policies is illusory here. Nearly 100 percent of the claims filed under Proposition 22 policies are below the $1 million coverage limit. Indeed, nationwide from 2019 to the present, Crum & Forster has paid over 17,000 occupational accident claims for gig workers (including app-based drivers) covering medical appointments, imaging, physical therapy, surgery, hospitalization, temporary disability, as well as death, burial and death benefits to dependents. And during that period of 2019 to the present, only *two* of those nationwide claims exceeded $1 million (and even those two claims exceeded that threshold by only by a few thousand dollars). Nearly 90 percent of occupational accident claims for gig economy workers were for less than $10,000. And 99 percent of these claims were for less than $100,000. Respondents' suggestion that the $1 million minimum coverage is insufficient and thus will saddle taxpayers with residual liability has no factual basis.

It would make little sense to require each network company to purchase costly workers' compensation coverage for each app-based

driver using its app to protect against the vanishingly small risk of claims exceeding $1 million. As Crum & Forster's own data confirms, the occupational accident insurance required by Proposition 22 provides more-than-adequate coverage for app-based drivers at affordable levels.

Respondents point to this Court's decision in *Drillon v. Industrial Accident Commission* (1941) 17 Cal.2d 346, which held that a jockey employed for a single race qualified as an employee. (Op. Br. at 36.) But Respondents do not suggest that an occupational accident insurance policy of at least $1 million would not be adequate to cover the overwhelming number of injuries that arise even in that high-risk context. If a jockey is the "quintessential gig worker," he is also a clear example of where occupational accident insurance would be preferable to workers' compensation. Although a tiny minority of app-based drivers—like jockeys—may suffer catastrophic injuries while using a network company's app, the state is not going to be overwhelmed with medical or disability claims from app-based drivers because the $1 million policies required under Proposition 22 are sufficient in almost every case.

Occupational accident insurance is also effective because claims are paid quickly and with minimal logistical hassle. Crum & Forster's agents work tirelessly to make sure that app-based drivers injured on the job receive the treatment they need and that their wages are replaced while they recover. Crum & Forster has already paid over $30 million in claims in California since Proposition 22 was enacted. Crum & Forster's agents routinely receive thank you notes from app-based drivers who received benefits promptly after their injuries. This is especially true when a driver suffers serious injuries. For example, Crum & Forster

provided coverage to a 27-year-old man who was seriously injured while making a delivery. He was hospitalized for two months to address injuries to his head, brain, spine, shoulder, lungs, heart, ribs, and jaw. He underwent multiple surgeries. His occupational accident insurance policy covered his hospitalization, surgeries, and rehabilitation with a specialist. He also received temporary total disability benefits while he worked his way back.

In another example, a pregnant 33-year-old independent contractor was hit by street racers while completing a delivery and sustained fractures to her neck, leg, arm, skull, lumbar spine, pelvis, and sacrum as well as injuring her lungs and suffering a miscarriage. She suffered a serious traumatic brain injury and will be permanently disabled. In addition to covering hospital stays and surgeries, she has received temporary total disability and, once 104 weeks have been paid, will receive continuous total disability under SSDI.

There are many more such examples of app-based drivers who have received substantial assistance as a result of the occupational accident policies required under Proposition 22. In short, although workers' compensation provides appropriate and necessary coverage in some contexts, occupational accident insurance is a sound choice for protecting app-based drivers in the dynamic gig economy. Respondents are thus simply incorrect when they contend that the occupational accident policies required by Proposition 22 fail to sufficiently protect app-based drivers against on-the-job injuries.

II. THE CONSTITUTION DOES NOT PREVENT THE PEOPLE FROM DECIDING THAT APP-BASED DRIVERS ARE BETTER PROTECTED BY OCCUPATIONAL ACCIDENT INSURANCE THAN BY WORKERS' COMPENSATION

Through Proposition 22, the People decided that it was better for app-based drivers, their customers, and the state's economy, to afford app-based drivers the flexibility and autonomy that comes with being an independent contractor while protecting those drivers through mandatory occupational accident insurance with generous coverage limits. This case is ultimately about whether to respect that choice. Although Respondents may have their own reasons for wishing to nullify Proposition 22, the California Constitution provides no basis overriding the People's decision.

The core of Proposition 22 is section 7451, which classifies app-based drivers as independent contractors, not employees. (Bus. & Prof. Code § 7451.) Respondents contend that this section violates Article XIV, Section 4 of the California Constitution, which vests the Legislature with "plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation." (Cal. Const. art. XIV, § 4.) But adopting that argument would undermine the bedrock principle that the People's power is (and must be) co-extensive with the Legislature's power.

Respondents do not dispute that *the Legislature* has authority to relieve app-based drivers from workers' compensation laws, and the term "Legislature" when used "in the California Constitution" is generally "interpreted to include the people's reserved right to legislate through the initiative power." (*Indep. Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020, 1043 [*McPherson*]; *see also Manduley*

v. Superior Court (2002) 27 Cal.4th 537, 552 ["[T]he power of the people through the statutory initiative is coextensive with the power of the Legislature."]; *Gallivan v. Walker* (Utah 2002) 54 P.3d 1069, 1080 [citing California as an example of a state where "[t]he power of the legislature and the power of the people to legislate through initiative are coequal, coextensive, and concurrent and share 'equal dignity'"].) Because the People have "reserved the legislative power to themselves as well as having granted it to the Legislature, there is no reason to hold that the people's power is more limited than that of the Legislature." (*Fair Political Practices Comm'n v. Superior Court* (1979) 25 Cal.3d 33, 42.) On the contrary, the "language in the California Constitution recognizing the authority of the Legislature to take specified action generally is interpreted to encompass the exercise of such legislative power either by the Legislature or by the people through the initiative process." (*McPherson*, 38 Cal.4th at 1025.)

Accordingly, if the Legislature has the power to classify app-based drivers as independent contractors—and there is no dispute that it does—so do the People. The People thus plainly have the authority to decide that app-based drivers should not be classified as employees covered by workers' compensation but should instead be classified as independent contractors and covered by affordably priced occupational accident insurance.

Respondents contend that Proposition 22 unconstitutionally limits the Legislature's "plenary" and "unlimited" power to create a comprehensive workers' compensation scheme. (Op. Br. at 24.) But even if the words "plenary" and "unlimited" somehow exalted the Legislature

above the People (which they do not, as Defendants explain),[3] Article XIV, Section 4 does not give the Legislature exclusive authority to determine which workers are employees and which are not. Instead, Article XIV, Section 4 gives the Legislature plenary authority to create and enforce liabilities on the part of employers "to compensate any or all of *their workers* for injury or disability . . . incurred or sustained by the said workers in the *course of their employment*." (Cal. Const. art. XIV, § 4 [italics added].) In other words, the plenary authority to create a workers' compensation system applies only where an employer-employee relationship already exists.

Given the provision's focus on the existence of an employment relationship, it is unsurprising that this Court has held that Article XIV, Section 4 does not authorize the Legislature to create "a liability on the part of any person to compensate the workmen of other persons, nor the dependents of workmen of other persons." (*Commercial Cas. Ins. Co. v. Indus. Acc. Comm'n* (1930) 211 Cal. 210, 217.) This is because the "phrase 'their workmen' necessarily confines the persons to be

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[3] Respondents read far too much into the word "plenary." "Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature," which is otherwise "plenary." (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) Accordingly, "all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action.'" (*Ibid.*) A constitutional provision that removes constitutional "restrictions" that would otherwise limit the Legislature's ability to act "thereby restore[s] to the Legislature its plenary power to fashion" legislation as it deems necessary. (*Ibid.*) But the Legislature always exercises this "plenary" power subject to the Constitution's procedural requirements.

compensated to workmen who are *in the employ* of the person who is made liable." (*Ibid.* [italics added]; *see also People v. Standard Oil Co. of Cal.* (1933) 132 Cal.App. 563, 570 [holding that because article XX, section 21 "mention[ed] and describe[d] but one kind of liability: the liability of 'any or all persons' to compensate 'any or all of *their workmen*,'" the "constitutional amendment limits the liability that may be imposed by legislative action to that of an employer in connection with his own employees"].) In short, workers' compensation is afforded only to employees. (Labor Code § 3600(a).) And nothing in the California Constitution prevents the People from deciding where to draw the line between employees and independent contractors.

To be sure, the Legislature has authority under the police power to classify workers as employees or independent contractors irrespective of the "plenary" clause in Article XIV, Section 4—but so do the People using their initiative power. Accordingly, even if Article XIV, Section 4 gave the Legislature authority that the People cannot exercise (which it does not), Proposition 22 does not run afoul of that provision because it does not curb the Legislature's power to create and enforce liabilities for employers vis-à-vis their employees. Indeed, Proposition 22 is silent as to the Legislature's power over true employer-employee relationships. It merely clarifies that there *is no employment relationship* between app-based drivers and the network companies whose apps they use.

However, while the People decided that app-based drivers should not be considered employees, they did not leave app-based drivers unprotected in the event of injuries sustained while providing transportation and delivery services. Instead, they crafted an innovative solution requiring network companies to provide generous occupational

accident insurance for those drivers. That solution has worked well for several years, and the Court should not disturb it.

CONCLUSION

For these reasons, amicus urges the Court to affirm the decision below.

Dated: April 2, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the attached amici curiae brief consists of 6,093 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: April 2, 2024

/s/ Robert E. Dunn
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DECLARATION OF SERVICE

I, Robert E. Dunn, declare:

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CASTELLANOS v. STATE OF CALIFORNIA (PROTECT APP-BASED DRIVERS AND SERVICES)**
Case Number: **S279622**
Lower Court Case Number: **A163655**

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