

CASE NO. S279622

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**HECTOR CASTELLANOS, JOSEPH DELGADO, SAORI OKAWA,
MICHAEL ROBINSON, SERVICE EMPLOYEES
INTERNATIONAL UNION**

Plaintiffs and Respondents,

VS.

**STATE OF CALIFORNIA, AND KATIE HAGEN, IN HER
OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS**

Defendants and Appellants.

**PROTECT APP-BASED DRIVERS AND SERVICES, DAVIS
WHITE, AND KEITH YANDELL**

Intervenors and Appellants.

**First Appellate District, No. A1635655
Alameda County Superior Court No. RG21088725
Hon. Frank Roesch, Judge**

**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF
AND PROPOSED BRIEF OF AMICI CURIAE RIDESHARE
DRIVERS UNITED, NATIONAL EMPLOYMENT LAW PROJECT,
CALIFORNIA LABOR FEDERATION, ET AL. IN SUPPORT OF
PLAINTIFFS AND RESPONDENTS**

**DAVID A. ROSENFELD, BAR NO. 058163
Weinberg, Roger & Rosenfeld
1375 55th Street
Emeryville, California 94608
Tel: (510) 337-1001**

Daniel Ocampo
Sally Dworak-Fisher
Laura Padin
Catherine Ruckelshaus
National Employment Law Project

Attorneys for Proposed Amici Curiae

TABLE OF CONTENTS

	<u>Page</u>
STATEMENTS OF INTEREST OF AMICI CURIAE	13
I. INTRODUCTION AND STATEMENT OF	19
PURPOSE OF PROPOSED BRIEF.....	19
II. ARGUMENT	21
1. Ridehail and Delivery Drivers Across California Left Without Access to Workers’ Compensation or any Adequate Substitute, Urge the Court to Hold Prop. 22 Invalid.	21
a. Ridehail and Delivery Drivers Work in Dangerous Conditions Requiring Real Health & Safety Protections.	22
b. Prop. 22’s Private Accident Insurance System, Largely Controlled by Ridehail and Delivery Companies, Substitutes California’s Constitutionally Protected Workers’ Compensation with a Mirage.	25
c. Prop. 22 Cuts Drivers off from State Health and Safety Regulations, and its Healthcare Subsidy is Unavailable to Most Drivers.	29
d. Prop. 22’s “Guaranteed Earnings” Guarantees a Subminimum Wage.....	31
III. PROP. 22 LEGALIZES A SECOND-TIER WORKFORCE COMPRISED DISPROPORTIONATELY OF WORKERS OF COLOR, STRIPPING THEM OF BEDROCK RIGHTS WHILE DENYING THEM TRUE INDEPENDENCE.	34
a. California’s Ridehail and Delivery Drivers are Disproportionately Workers of Color Who Depend on the Platforms to Earn a Living.....	34
b. Black Box Algorithms Mask Corporate Control and Subject Drivers to Indecipherable, Hidden Determinations Regarding Pay and ‘Deactivations’	36

TABLE OF CONTENTS (cont'd)

	<u>Page</u>
c. Prop. 22 is a Modern-Day Iteration of Racist Carveouts from Employment Rights.	39
IV. THIS COURT SHOULD UPHOLD ARTICLE XIV SECTION 4 OF THE CALIFORNIA CONSTITUTION AND AVOID FURTHER HARM TO MILLIONS OF LOW-PAID WORKERS AND CALIFORNIA RESIDENTS.	41
a. California’s Workers’ Compensation, Like Other Workplace Protections, Serves Fundamental Public Purposes.	41
b. Prop. 22 Offers a Roadmap for Employers in Other Industries to Strip Their Employees of Workplace Protections.	43
c. Ridehail and Delivery Work Is Not Meaningfully Different from Most Other Low Wage Work, and Allowing an End-Run Around Employment Law for These Workers Portends an Uncertain Future for Workers Across California.	45
V. CONCLUSION	47

TABLE OF AUTHORITIES

Page

Federal Cases

<i>O'Connor v. Uber Technologies, Inc.</i> (2015) 82 F.Supp.3d 1133	47
<i>Tchakounte v. Uber Technologies, Inc.</i> (D. Md. Feb. 3, 2022, Civ. A. No. CCB-20-3028) 2022 WL 326727	26, 47

State Cases

<i>Arriaga v. County of Alameda</i> (1995) 9 Cal.4th 1055	42
<i>Dynamex Operations W v. Superior Court</i> (2018) 4 Cal.5th 903	20, 43
<i>Freni v. Uber Technologies, Inc.</i> (Mass.App.Ct. 2023) 223 N.E.3d 1234	26
<i>Martinez v. Combs</i> (2010) 49 Cal.4th 35	43
<i>Mason v. Lake Dolores Group</i> (2004) 117 Cal.App.4th 822	29
<i>Minish v. Hanuman Fellowship</i> (2013) 214 Cal.App.4th 437	42
<i>Morillion v. Royal Packing Co.</i> (2000) 22 Cal.4th 575	20
<i>Pacific Indem. Co. v. Industrial. Acc. Commission</i> (1945) 26 Cal.2d 509	29
<i>People v. Uber Technologies, Inc.</i> (2020) 56 Cal.App.5th 266	46
<i>S.G. Borello & Sons, Inc. v. Department of Industrial Relations</i> (1989) 48 Cal.3d 341	27, 42, 43

Constitutions

California Constitution Article XIV, § 4	22, 27, 28, 42
--	----------------

TABLE OF AUTHORITIES (cont'd)

Page

State Statutes

Bus. & Prof. Code, §§ 7448-7467 (“Prop.22”)	<i>passim</i>
Bus. & Prof. Code, §§ 7451	20, 28
Bus. & Prof. Code, § 7453, subd. (d)(4)(B)(ii)	34
Bus. & Prof. Code, § 7454	31
Bus. & Prof. Code, § 7455	27, 28, 29
Lab. Code, § 510	35
Lab. Code, § 1182.12	34
Lab. Code, § 2802	35
Lab. Code, § 3207	29
Lab. Code, § 3600, subd. (a)(2).....	29
Lab. Code, §§ 4213, 4659	29
Lab. Code, §§ 4621, 5811	30
Lab. Code, § 4656, subd. (c)	29
Lab. Code, § 4700 et seq.	29
Lab. Code, § 6401.7, subd. (a)	30

Other Authorities

<i>Analysis of High-Volume For-Hire Vehicle Data for New York City, Selection Months, 2019-2022</i> , UCLA Labor Center (Feb. 2023)	47
Anderson et al., <i>The State of Gig Work in 2021</i>	24
Assembly Bill No. 5 (2019-2020 Reg. Sess.).....	20, 35
Assembly Bill No. 1522 (2013-2014 Reg. Sess.) Healthy Workplaces, Healthy Families Act	26

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
Bardhan & Walker, <i>California, Pivot of the Great Recession</i> , Institute for Research on Labor & Employment, University of California, Berkeley Working Paper #203- 10 (Mar. 2010)	41
Bauer, <i>Is Uber Cheating On Social Security/FICA Taxes?</i> , Forbes (Dec. 16, 2019).....	44
Benner et al., <i>On-Demand and On-the-Edge: Ride-hailing and Delivery Workers in San Francisco</i> , U.C. Santa Cruz, Institute for Social Transformation (May 5, 2020).....	23, 24
Bidar, <i>Women Who Lost Jobs Due to COVID Turn to Food Delivery Platforms</i> , CBS News (Feb. 25, 2021).....	36
Burd-Sharps & Rasch, <i>Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations</i> , Social Science Research Council (June 2015).....	41
Cal. Dept. of Industrial Relations, Workers Compensation Benefits	29
Cal. Dept. of Industrial Relations, Workplace Violence Prevention in General Industry	30
Castrodale, <i>California Supermarkets Fire Union Delivery Drivers and Replace them with Gig Workers as Proposition 22 Takes Effect</i> , Food & Wine (Jan. 5, 2021).....	44
<i>Death and Corporate Irresponsibility in the Gig Economy: An Urgent Safety Crisis</i> , Gig Workers Rising (2022)	25
Dixon, <i>From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act</i> , Testimony before U.S House of Representatives Education and Labor Committee, National Employment Law Project (May 3, 2021)	41
<i>Drive When You Want, Make What You Need</i> , Uber	37
<i>Driving Danger: How Uber and Lyft Create a Safety Crisis for their Drivers</i> , Strategic Organizing Center (Apr. 2023)	25, 26

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
Dubal, <i>An Uber Ambivalence: Employee Status, Worker Perspectives, and Regulation in the Gig Economy</i> (Nov. 2019) U.S. Hastings Law, Legal Studies Research Paper Series, Research Paper No. 381	48
Dubal, <i>New Radical Wager Code</i> (2022) 15 Harv. L. & Pol'y Rev. 512	41
Dubal, <i>On Algorithmic Wage Discrimination</i> (2023) 123 Columbia L. Rev. 1929	38, 46, 47
Fairwork, <i>Fair Work United States Ratings 2023: A Crisis of Safety and Fair Work in a Racialized Platform Economy</i> (2023)	35
<i>Fired by an App: The Toll of Secret Algorithms and Unchecked Discrimination on California Rideshare Drivers</i> , Advancing Justice - Asian Law Caucus & Rideshare Drivers United (Feb. 2023)	31, 36, 47
Fuentes et al., <i>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</i> , National Employment Law Project (July 2020)	27
Garcia & O'Brien, <i>Uber Releases Safety Report Revealing 5,981 Incidents of Sexual Assault</i> , CNN (Dec. 6, 2019)	24
Gelles-Watnick & Anderson, <i>Racial and Ethnic Differences Stand Out in the U.S. Gig Workforce</i> , Pew Research Center (Dec. 15, 2021)	35
Griswold, <i>The Devilish Change Uber and Lyft Made to Surge Pricing</i> , Slate (Aug. 23, 2023)	38
Hiltzik, <i>In Wake of Prop. 22, Albertsons is Converting its Home Delivery to Gig Work</i> , L.A. Times (Jan. 5, 2021)	44
Holder, <i>The Human Costs of Calling an Uber Right Now</i>	25
<i>How Much Can You Make with Uber?</i> , Uber	37
Internal Revenue Service, <i>Standard Mileage Rates</i>	34

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
<i>Inventory of California City and County Current Minimum Wages</i> , U.C. Berkeley Labor Center (Jan. 1, 2024)	34
Irving & Maredia, <i>Prop. 22: Improving the Lives of California Drivers and Couriers</i> , Uber Newsroom (Dec. 8, 2022)	32
Jacobs & Reich, <i>Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage</i> , U.C. Berkeley Institute for Research on Labor and Employment (Sept. 2021)	33
Jacobs & Reich, <i>The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour</i> , U.C. Berkeley Labor Center (Oct. 31, 2019)	33
Kerr, <i>More Than 350 Gig Workers Carjacked, 28 Killed, Over the Last Five Years</i> , The Markup (July 28, 2022)	24
<i>Make Every Day Payday</i> , Lyft	37
McCullough & Dolber, <i>Most California Rideshare Drivers Are Not Receiving Healthcare Benefits Under Proposition 22</i> , National Equity Atlas (Aug. 19, 2021)	32
Mishel & McNicholas, <i>Uber Drivers Are Not Entrepreneurs: NLRB General Counsel Ignores the Realities of Driving for Uber</i> , Economics Policy Institute (Sept. 20, 2019).....	47
Moore, <i>Make Misclassification a Violation of the FLSA</i> , National Employment Law Project (Oct. 24, 2023)	38
<i>Murdered Behind the Wheel: An Escalating Crisis for App Drivers</i> , Gig Workers Rising, PowerSwitch Action, and ACRE (2023)	25
National Institutes of Health National Library of Medicine, <i>Health and Safety Risk Perceptions and Needs of App-Based Drivers During COVID-19</i> (Sept. 14, 2021)	25
Ockenfels-Martinez & Farhang, <i>Driving Away Our Health: The Economic Insecurity of Working for Lyft and Uber</i> , Human Impact Partners & Gig Workers Rising (Aug. 2019)	23

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
O'Donovan, <i>Uber and Lyft Spent Hundreds of Millions to Win Their Fight Over Workers' Rights. It Worked</i> , BuzzFeed News (Nov. 21, 2020)	22
Office of the N.Y. State Atty. Gen., Press Release, <i>Attorney James Secures \$328 Million from Uber and Lyft for Taking Earnings from Drivers</i> (Nov. 2, 2023)	44
<i>Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It</i> , National Employment Law Project (Apr. 2019)	45
Rosenblat & Stark, <i>Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers</i> , <i>International Journal of Communication</i> (2016) 10 Internat'l J. of Communication 3758	47
Sagaysay, ' <i>Uber for Nurses?</i> ' : Initiative Targets Healthcare for a 'Gig Work' Law, MarketWatch (Jan. 31, 2022)	45
Saktinil & Kemme, <i>The Run-Up to the Global Financial Crisis: A Longer Historical View of Financial Liberalization, Capital Inflows, and Asset Bubbles</i> (May 2020) Vol. 69, <i>International Review of Financial Analysis</i>	41
Schwartz et al., <i>Deactivation with & without Representation: The Role of Dispute Arbitration for Seattle Rideshare Drivers</i> , SocArXiv (July 13, 2023).....	39, 40
Sherman, <i>Uber CEO Hides Driver Pay Cuts to Boost Profits</i> , Forbes (Dec. 15, 2023).....	37
Siddiqui & Tiku, <i>Uber and Lyft Used Sneaky Tactics to Avoid Making Drivers Employees in California, Voters Say</i> , Washington Post (Nov. 17, 2020).....	45
Tulchin Research, <i>New Poll Finds Most App Drivers Not Informed and at Risk of Missing Out On Healthcare Benefits Promised Under Prop. 22</i> (Apr. 30, 2021)	32
Uber, <i>US Safety Report</i> (Dec. 5, 2019)	24

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
<i>Uber Finally Owns up to Discrimination in Personalised Pay and Task Allocation for Workers</i> , Worker Info Exchange (Feb. 7, 2024).....	38
U.S. Dept. of Labor, Bureau of Labor Statistics, <i>Electronically Mediated Work: New Questions in the Contingent Worker Supplement</i> , Monthly Labor Review (Sept. 2018).....	36
U.S. Dept. of Labor, Bureau of Labor Statistics, News Release, National Census of Fatal Occupational Injuries in 2022 (Dec. 19, 2022)	23
<i>Unchecked Discrimination and Secret Algorithms Fuel Deactivation Crisis Among CA Rideshare Drivers, First-Time Survey Finds</i> , Advancing Justice - Asian Law Caucus (Feb. 28, 2023)	39
Waheed et al., <i>More Than a Gig: A Survey of Ride-Hailing Drivers in Los Angeles</i> , UCLA Labor Center (May 30, 2018)	28, 36
Wells & Stratta, <i>The Instant Delivery Workplace in D.C.</i> , Georgetown University (Apr. 19, 2023).....	24
White, <i>The Recession's Racial Slant</i> (June 24, 2015) The Atlantic.....	41

**APPLICATION FOR PERMISSION TO FILE
BRIEF *AMICI CURIAE***

Pursuant to California Rules of Court, rule 8.520(f), the National Employment Law Project, California Labor Federation, Rideshare Drivers United, Gig Workers Rising, Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing Justice Southern California, PowerSwitch Action, Worksafe, Action Center on Race & the Economy, the Economic Policy Institute, Bet Tzedek, and the California Immigrant Policy Center respectfully request permission to file the attached amici curiae brief in support of Petitioners Hector Castellanos, Joseph Delgado, Saori Okawa, Michael Robinson, and the Service Employees International Union.

No party or attorney for a party drafted this brief or participated in our decision to file it. Other than amici and their representatives, no person or entity, including any party or party’s counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: April 3, 2024

Respectfully submitted,

/s/ *DAVID A. ROSENFELD*

David A. Rosenfeld
(CA State Bar No. 58163)
Weinberg Roger and Rosenfeld
1375 55th St.
Emeryville, CA 94608
Tel.: (510) 337-1001
Fax: (510) 337-1023
drosenfeld@unioncounsel.net

Attorney for Amici Curiae

STATEMENTS OF INTEREST OF AMICI CURIAE

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.

The **California Labor Federation, AFL-CIO (“Federation”)** is a labor federation that consists of more than 1,300 unions that represent 2.3 million union members in the manufacturing, retail, construction, hospitality, public sector, health care, entertainment and other industries. The Federation is dedicated to promoting and defending the interests of working people and their families for the betterment of California’s communities. From legislative campaigns to grassroots organizing, its affiliates are actively engaged in every aspect of California’s economy and government. The Federation’s three main areas of work include: legislative action, political action and economic action. The Federation’s achievements have included restoring daily overtime pay, raising the minimum wage, passing the nation’s first paid family leave law and passing AB 5 codified at Labor Code section 2750.3 and Unemployment Insurance Code section 621. The Federation has also been centrally involved in legislative action involving the reform of workers’ compensation for many decades. It is therefore particularly familiar with the impact of Proposition 22 on workers’ compensation and other provisions of the law related to workers.

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.

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 training, including a recent series of workshops for gig workers navigating state benefits and resources during the COVID-19 pandemic.

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 Southern California (AJSOCAL)** 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 Southern California 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, struggle with poverty and about one-third experience wage theft or other unfair workplace practices every year. Advancing Justice Southern California'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.

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.

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. Currently, gig workers are being excluded from health and safety rights, with Uber & Lyft actively pursuing litigation against individual drivers who exercised their health and safety rights with the California Occupational Safety and Health Division. 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 are not misclassified as independent contractors and as a result left outside the protections of occupational safety and health laws.

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[1]based companies like Uber and DoorDash, intentionally sacrifice their Black and Brown workforce's safety, well-being, and financial stability to pursue profit.

The **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. 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.

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.

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.

I. INTRODUCTION AND STATEMENT OF PURPOSE OF PROPOSED BRIEF

App-based ridehail and delivery drivers in California, like other workers in the state, are presumptively entitled to the rights and protections long ago enshrined in state employment law. As has long been the case in California, employment law applies wherever a worker is subject to the employer’s control. (See, e.g., *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575.) And under the ABC test—adopted by this Court as the standard for determining employment status under wage and hour law in *Dynamex Operations W v. Superior Court* (2018) 4 Cal.5th 903, and codified as the universal test by Assembly Bill 5¹—ridehail and delivery drivers are employees fully entitled to the guarantees of California employment law.

Yet Proposition 22 strips covered app-based drivers—and only app-based drivers—of *all* of the rights and protections afforded to other employees under state law. (Bus. & Prof. Code, §§ 7448-7467 (“Prop. 22”).)² In its place, the industry-sponsored ballot initiative enacts a uniquely weak and corporate-friendly regime of worker (non)protection: stripping driver access to workers’ compensation and replacing it with inferior private accident insurance; establishing a “minimum wage” far below the state wage floor; and cutting these workers off from access to overtime pay, paid sick days, unemployment insurance, state safety regulation, and anti-discrimination protections. It does so while ensuring that power inures to the corporations, enabling them to peddle a false narrative equating scheduling flexibility with independence while masking the myriad ways they

¹ Assembly Bill No. 5 (2019-2020 Reg. Sess.).

² Covered workers under Proposition 22 include those for whom the hiring entities can show that certain conditions are met, as set forth at Business and Professions Code section 7451. We use the term app-based drivers as shorthand, even though these conditions are not met for all app-based drivers.

weaponize black box algorithms and information asymmetries to control their workforce. In one fell swoop, Uber, Lyft and others successfully codified their business model of misclassification and exploitation, ensuring that their predominantly immigrant, Black and Brown workforce continues to work long hours in dangerous conditions for subminimum wages without any legal floor or adequate health and safety protections.

Amici, who include organized groups of app-based ridehail and delivery drivers in California who have been directly and negatively impacted by Prop. 22, write to urge this Court to reverse the Court of Appeal and resolve the fundamental constitutional question presented in this case: can large corporations, armed with a venture-capital war chest of hundreds of millions of dollars, fund a ballot initiative to carve their labor force out of constitutionalized workplace protections? More specifically, we support petitioners' request for a determination that Prop. 22's provision exempting drivers from workers' compensation is unconstitutional. This Court's failure to hold Prop. 22 unconstitutional would leave hundreds of thousands of drivers in California stripped of state employment law protections and unconstitutionally deprived of legal protections that apply to other workers for the sole reason that their work is mediated by their employer's smartphone app.

Amici also write on behalf of other low-wage workers and workers of color in California to point out the pernicious precedent this Court would set by upholding Prop. 22. Such a decision would lay out a roadmap to other employers in the state: fund a ballot initiative campaign, and you can buy your way out of workplace protections like workers' compensation. Like the taxi and food-delivery companies here, other employers can mount aggressive misinformation campaigns to convince voters or policymakers that bedrock minimums—even those enshrined in the constitution—are

unnecessary, and that workers should bear the economic risks of these jobs.³ Nothing in the decision below limits the further erosion of the basic architecture of the workers’ compensation system. Nothing distinguishes ridehail and delivery drivers from other low paid workers in the state in need of safety net protections except that their bosses choose to manage them via an app. This Court’s acceptance of Prop. 22’s bait-and-switch would open the door to unchecked corporate power bent on undermining basic workplace protections and—as Plaintiffs-Respondents point out—California’s constitutional system.

For these reasons, this Court should reverse the decision below and strike down Prop. 22 as a violation of article XIV, section 4 of the California Constitution.

II. ARGUMENT

1. **Ridehail and Delivery Drivers Across California Left Without Access to Workers’ Compensation or any Adequate Substitute, Urge the Court to Hold Prop. 22 Invalid.**

For drivers in California, Prop. 22 was a massive and catastrophic bait-and-switch: the app corporations spent hundreds of millions of dollars promising workers a meaningful set of worker protections, including a minimum wage and benefits, but instead left them permanently without employment rights. As detailed in this section, Prop. 22 enshrines a second-tier system of precarious and dangerous work performed predominantly by immigrants and workers of color by carving them out of bedrock statutory minimums—including constitutionally protected workers’ compensation benefits—and by authorizing companies to pay their workers poverty wages

³ (See 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>> [as of Mar. 27, 2024].)

without establishing any meaningful wage floor.

a. Ridehail and Delivery Drivers Work in Dangerous Conditions Requiring Real Health & Safety Protections.

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 in America.⁴ From violence and harassment on the job to fatal car accidents and musculoskeletal disorders, app-based drivers face a host of physical and mental challenges due to unsafe and hazardous working conditions. Drivers in California report experiencing musculoskeletal disorders and chronic pain in their backs and knees.⁵ Additionally, more than half of drivers suffer from headaches, sleep deprivation and depression because of their work.⁶ Drivers also suffer from dehydration, kidney issues, and hypertension, because they do not drink enough water due to lack of convenient bathroom access.⁷

According to a recent and comprehensive nationwide study of safety conditions in the industry, two-thirds of all ridehail drivers were threatened,

⁴ App-based driving (along with taxi driving) has one of the highest fatal occupational injury rates. (See U.S. Dept. of Labor, Bureau of Labor Statistics, News Release, National Census of Fatal Occupational Injuries in 2022 (Dec. 19, 2022) USDL-23-2615 <<https://www.bls.gov/news.release/pdf/cfoi.pdf>> [as of Mar. 27, 2024].)

⁵ (Ockenfels-Martinez & Farhang, *Driving Away Our Health: The Economic Insecurity of Working for Lyft and Uber*, Human Impact Partners & Gig Workers Rising (Aug. 2019) p.12 <https://humanimpact.org/wp-content/uploads/2019/08/DrivingAwayHealthReport_2019.08final-compressed.pdf> [as of Mar. 27, 2024].)

⁶ (*Id.* at pp. 12-15.)

⁷ (*Ibid.*) More than three-fourths of respondents to a survey app-based drivers in San Francisco said they often or sometimes had to use the bathroom but had no nearby access to one. (See Benner et al., *On-Demand and On-the-Edge: Ride-hailing and Delivery Workers in San Francisco*, U.C. Santa Cruz, Institute for Social Transformation (May 5, 2020) p. 35 <https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf> [as of Mar. 27, 2024].)

harassed, or assaulted in the last year.⁸ A majority of those surveyed had been verbally abused, more than a quarter verbally threatened with physical harm, and 14 percent had been grabbed, groped, or hit.⁹ Not surprisingly, workers of color experienced these dangers at higher rates than white drivers: almost three quarters had been threatened or harassed, and almost one-in-five reported being grabbed, groped or hit.¹⁰ In addition, drivers also face sexual harassment at the hands of riders, with one in five app-based workers experiencing multiple instances of unwanted sexual advances in the workplace.¹¹ Another study of worker safety between 2017 and 2022 found over 350 carjackings or attempted carjackings of delivery and ridehail drivers in the United States while on the job.¹² And some drivers paid the ultimate price for trying to earn a living: from 2017 to 2022, at least 50 app-based

⁸ (*Driving Danger: How Uber and Lyft Create a Safety Crisis for their Drivers*, Strategic Organizing Center (Apr. 2023) p. 3 <https://thesoc.org/wp-content/uploads/2023/04/SOC_RideshareDrivers_rpt-042023.pdf> [as of Mar. 27, 2024] (hereafter *Driving Danger*).

⁹ (*Ibid.*)

¹⁰ (*Ibid.*)

¹¹ About one in five app-based drivers “say they have often (7%) or sometimes (12%) experienced unwanted sexual advances while completing jobs.” (Anderson et al., *The State of Gig Work in 2021*, Pew Research Center (Dec. 8, 2021).) Another survey of app-based food delivery drivers in DC found that 41 percent had experienced assault or harassment. (Wells & Stratta, *The Instant Delivery Workplace in D.C.*, Georgetown University (Apr. 19, 2023) <<https://beeckcenter.georgetown.edu/wp-content/uploads/2023/04/Instant-Delivery-DC-Report.pdf>> [as of Mar. 27, 2024]. See also Uber, *US Safety Report, 2017-2018* (Dec. 5, 2019) p. 58 <https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf> [as of Mar. 27, 2024]; Garcia & O’Brien, *Uber Releases Safety Report Revealing 5,981 Incidents of Sexual Assault*, CNN (Dec. 6, 2019) <<https://www.cnn.com/2019/12/05/tech/uber-safety-report/index.html>> [as of Mar. 27, 2024].)

¹² (Kerr, *More Than 350 Gig Workers Carjacked, 28 Killed, Over the Last Five Years*, The Markup (July 28, 2022) <<https://themarkup.org/working-for-an-algorithm/2022/07/28/more-than-350-gig-workers-carjacked-28-killed-over-the-last-five-years>> [as of Mar. 27, 2024].)

workers in the United States were murdered while on the job.¹³ In 2022 alone, at least 31 app-based workers, primarily people of color, were murdered while working.¹⁴

The COVID-19 pandemic laid bare many of these health and safety risks that app-based ridehail and delivery workers face. Workers had to navigate the risks of contracting the virus without access to critical benefits like workers' compensation, unemployment insurance, paid sick leave, and employer-provided PPE.¹⁵

In the face of this worker safety crisis, app-based companies have consistently downplayed the health and safety concerns of their workforce, worked to limit public disclosure of basic information about safety incidents,¹⁶ and denied responsibility for workers killed on the job. (See, e.g.,

¹³ (*Death and Corporate Irresponsibility in the Gig Economy: An Urgent Safety Crisis*, Gig Workers Rising (2022) <https://www.gigsafetynow.com/_files/ugd/af5398_e1b49d831a0149a08df4be57c612ae88.pdf> [as of Mar. 27, 2024].)

¹⁴ (See *Murdered Behind the Wheel: An Escalating Crisis for App Drivers*, Gig Workers Rising, PowerSwitch Action, and ACRE (2023) <https://8585d5f5-3bf9-4ca9-81f2-26dce6d9e662.usrfiles.com/ugd/8585d5_aa7df6dcafeb4363b0fa70f1d1cd80ef.pdf> [as of Mar. 27, 2024].)

¹⁵ (See, e.g., National Institutes of Health National Library of Medicine, *Health and Safety Risk Perceptions and Needs of App-Based Drivers During COVID-19* (Sept. 14, 2021) [a survey of 100 app-based drivers in Seattle found 86 – 97 percent were very concerned about exposure and infection, and only 31 percent had received an appropriate mask from the company for which they drive]; Holder, *The Human Costs of Calling an Uber Right Now*, Bloomberg News (Mar. 24, 2020) [noting that, for ridehail drivers during the pandemic, because they are independent contractors and lack benefits, “the risks of staying on the job are higher; so are the risks of stopping”].)

¹⁶ (*Driving Danger, supra*, at p. 19 [“Both [Uber and Lyft] have resisted public safety disclosure, even when it has required lengthy legal battles or expensive settlement. In 2020, Uber engaged in an 18-month legal battle in California to resist the disclosure requirements regarding sexual assault and harassment cases before ultimately acquiescing and paying \$9 million in penalties. In 2022, Lyft agreed to a \$25 million settlement after shareholders alleged that they hid safety problems on their app prior to its public offering in 2019.”].)

Tchakounte v. Uber Technologies, Inc. (D. Md. Feb. 3, 2022, Civ. A. No. CCB-20-3028) 2022 WL 326727, *4 [Uber arguing that it owes no common law duty to driver killed by passenger]; *Freni v. Uber Technologies, Inc.* (Mass.App.Ct. 2023) 223 N.E.3d 1234 [finding Uber owed no duty of care to a driver who was assaulted by a passenger.] In fact, labor platform corporations have structured work on their platforms in a way that incentivizes drivers to override their own safety concerns, using the threat of “deactivation” to prevent drivers from avoiding unsafe rides.¹⁷

b. Prop. 22’s Private Accident Insurance System, Largely Controlled by Ridehail and Delivery Companies, Substitutes California’s Constitutionally Protected Workers’ Compensation with a Mirage.

Because dangerous work for unscrupulous employers is not a new phenomenon, California law contains a number of protections safeguarding workplace health and safety: workers’ compensation, occupational health and safety protections, paid sick leave, and state disability insurance.¹⁸ Prop. 22, however, carves out covered app-based workers from each and every one of these state programs, purporting to exempt ridehail and delivery companies from complying with basic health and safety regulations

¹⁷ Drivers who cancel rides because they feel threatened or unsafe, face potential employment consequences: if either their platform acceptance or cancellation rate (the rate at which they accept or cancel rides) or their driver rating fall below a certain level, or if the customer files a complaint, they may be deactivated and lose their primary source of income. (See *Fired by an App: The Toll of Secret Algorithms and Unchecked Discrimination on California Rideshare Drivers*, Advancing Justice – Asian Law Caucus & Rideshare Drivers United (Feb. 2023) <<https://www.advancingjustice-alc.org/media/Fired-by-an-App-February-2023.pdf>> [as of Mar. 27, 2024] (hereafter *Fired by an App*); see also *Driving Danger, supra*, at p. 12.)

¹⁸ (See, e.g., Assem. Bill No. 1522 (2013-2014 Reg. Sess.) Healthy Workplaces, Healthy Families Act [“Paid sick days will have an enormously positive impact on the public health of Californians...”].)

alongside other employers statewide.¹⁹ In its place, Prop. 22 sets up a private accident insurance requirement that is much less protective of driver safety than even just workers' compensation alone.²⁰

California's workers' compensation regime, which has been in place and constitutionally protected for over a hundred years, "is a complete system of workers' compensation [that] includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent on them from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party."²¹ This broad language—which entitles a worker injured on the job to medical and disability coverage as well as lost wages²²—is designed "to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society." (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354.) As the *Borello* court laid out clearly, assessments of employee and independent contractor status should be made "with deference to the purposes of the protective legislation," and that the Workers' Comp Act "intends comprehensive coverage of injuries in employment." (*Id.* at pp. 353-354.)

But Prop. 22 exempts covered app-based ridehail and delivery drivers, not only abrogating the plenary authority of the state legislature to

¹⁹ (Bus. & Prof. Code, §§ 7448-7467.)

²⁰ (Bus. & Prof. Code, § 7455.)

²¹ (Cal. Const., art. XIV, § 4.)

²² (*Ibid.* See also Fuentes et al., *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*, National Employment Law Project (July 2020) p. 13 <https://s27147.pcdn.co/wp-content/uploads/Rigging-the-Gig_Final-07.07.2020.pdf> [as of Mar. 27, 2024] (hereafter *Rigging the Gig*).)

“create and enforce” a “complete system of workers’ compensation,” (Cal. Const. art. XIV, § 4) but also deepening the health and safety crisis facing California drivers. As the dissent below puts it: “No one disputes that the effect of the ‘independent contractor’ definition in Proposition 22 is to expel app-based drivers, as a class, from the ‘complete system of workers compensation’ established by the Legislature more than a century ago.” (Dis. opn. at p. 3.)

In its place, Prop. 22 requires app-based companies to offer occupational accident insurance coverage that is inferior and incomplete compared to what they were required to provide under the law prior to Prop. 22’s enactment. (Bus. & Prof. Code, §§ 7451, 7455, subd. (a).)

For instance, the occupational accident insurance under Prop. 22 is silent as to whether it is offered on a strict liability, no-fault basis. Unlike coverage under California’s workers’ compensation program, the platform companies argue that coverage can be denied—or left in doubt—if a company says a driver was at fault.²³ 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.²⁴ 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 driver is engaged in personal activities.” (Bus. & Prof. Code, § 7455, subd. (d).) Coverage under California workers’ compensation, by contrast, is much more extensive, applying without regard

²³ (*Rigging the Gig, supra*, at p. 2.)

²⁴ The companies limit all protections for drivers by assuming that work time only includes time on dispatch to a trip, or with a passenger/delivery in the car. In reality, workers spend much of their time online and actively seeking another work assignment, but not “engaged,” per the company’s definition. See *infra*, section 1(d) for further discussion of the concept of “engaged time.”

to negligence,²⁵ and would ordinarily cover all working time.²⁶

Further, companies under Prop. 22 are permitted to cap medical expenses, are not required to provide vocational training, and need only pay disability payments for up to the first 104 weeks following injury.²⁷ Under California workers' compensation law, however, there is no medical expense cap, and workers can access temporary disability payments for up to 240 weeks during the first five years following injury,²⁸ and vocational training and permanent disability benefits for life.²⁹ Prop. 22 also offers extremely limited (and in practice, non-existent) compensation for families and dependents for loss of life.³⁰ Without Prop. 22, workers would be eligible to receive death benefits under workers' compensation (Lab. Code, § 4700 et seq.), and companies would have the legal responsibility to provide a safe and healthful place of employment, including preventing and addressing

²⁵ (Lab. Code, § 3207.)

²⁶ (Lab. Code, § 3600, subd. (a)(2) [coverage applies when the employee is “performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment”]. See also, e.g., *Pacific Indem. Co. v. Industrial. Acc. Commission* (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”]; *Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 830, 834, 838 [confirming the principles that an injury must arise out of employment to be covered by workers' compensation; that if this is in dispute the question is a matter of fact; that workers' compensation law be liberally construed in favor of coverage; and that coverage is not broken even if the worker is engaged in “certain acts necessary to the life, comfort, and convenience of the employee while at work”].)

²⁷ (Bus. & Prof. Code, § 7455, subd. (a)(2)(A).)

²⁸ (Lab. Code, § 4656, subd. (c).)

²⁹ (Lab. Code, §§ 4213, 4659; Cal. Dept. of Industrial Relations, Workers Compensation Benefits <<https://www.dir.ca.gov/dwc/workerscompensationbenefits.htm>> [as of Mar. 27, 2024].)

³⁰ (Bus. & Prof. Code, § 7455.) Amicus Rideshare Drivers United, who has worked closely with the families of drivers killed on the job, has never heard of a family successfully receiving death benefits under Prop. 22's accident insurance.

workplace violence.³¹

Finally, if disputes arise, drivers will have to bear the costs of litigating in court—or in arbitration, if forced to sign an arbitration agreement—under Prop. 22 and will not have the protections of the speedy, applicant-friendly, and 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 back from app-based companies to the drivers themselves and the public by allowing substandard coverage, with gaping loopholes.³² In effect, app-based companies used their ballot measure to relieve themselves of any duty to provide a healthy and safe working environment, leaving drivers and the public to bear the full costs of this dangerous work.

c. Prop. 22 Cuts Drivers off from State Health and Safety Regulations, and its Healthcare Subsidy is Unavailable to Most Drivers.

In addition to carving app-based ridehail and delivery drivers out of workers’ compensation, Prop. 22 also strips covered drivers of the protection

³¹ (Lab. Code, § 6401.7, subd. (a) [requiring every employer to “establish, implement, and maintain an effective injury prevention program”].) Furthermore, “Cal/OSHA is developing a new regulation on Workplace Violence Prevention that will apply to employees in most workplaces in California. (See Cal. Dept. of Industrial Relations, Workplace Violence Prevention in General Industry <<https://www.dir.ca.gov/dosh/doshreg/Workplace-Violence-in-General-Industry/>> [as of Mar. 27, 2024].)

³² Prop. 22 diminishes or omits entirely every single compensation benefit that app-based drivers would be entitled to in the workers’ compensation system, thereby impermissibly shifting the burden onto the general public from the employer due to government assistance programs having to pick up the slack.

of the California Division of Occupational Safety and Health (Cal/OSHA).³³ Cal/OSHA has jurisdiction to enforce compliance with health and safety regulation over employers in the state and exercised that authority to force Uber and Lyft to improve their substandard health and safety practices. In response to complaints filed by drivers who were left to fend for themselves and administer COVID safety guidelines on their own during the pandemic, it has issued several citations to both Uber and Lyft for failure to adequately train workers, failure to inspect worksites, failure to communicate with workers about health and safety, and a number of other violations. In response, the companies have appealed the citations and taken refuge behind Prop. 22's independent contractor language, claiming that as non-employers they owe their workers none of these obligations. *Amici Rideshare Drivers United and Advancing Justice – Asian Law Caucus* are representing drivers who are parties in those proceedings.

App-based companies also uniformly fail to provide their workers with health insurance coverage, in spite of the requirements under the Affordable Care Act (ACA).³⁴ Prop. 22 does in theory guarantee drivers a minimal health care stipend, but in practice, remarkably few drivers can actually access it. Drivers are required to meet a narrow and difficult set of qualifying criteria to receive the stipend. (Bus. & Prof. Code, § 7454.) Compounding this, the vast majority of California app-based drivers surveyed in the spring of 2021 did not have enough information about how

³³ As noted above, Prop. 22's coverage does not extend to *all* app-based drivers in California; only those whose work relationship meets certain conditions laid out in the enacted text of the initiative. Those app-based drivers for whom the conditions are not met are still eligible for employment protections under state law, including OSHA.

³⁴ (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>> [as of Mar. 27, 2024].)

the health care stipend worked or how to receive it.³⁵ Latinx drivers were less likely to know about the health stipends and more likely to be uninsured.³⁶ And 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.³⁷

Almost six months after the passage of Prop. 22, nearly half of app-based drivers were either uninsured entirely or relying on Medi-Cal.³⁸ The drivers’ uninsured rate under Prop. 22 is now double the national average.³⁹ 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.

**d. Prop. 22’s “Guaranteed Earnings”
Guarantees a Subminimum Wage.**

Prop. 22 was billed in public messaging as setting a generous wage floor of 120 percent of state minimum wage.⁴⁰ In practice, however, that wage floor wildly underestimates the costs of driving, and fluctuates with

³⁵ (McCullough & Dolber, *Most California Rideshare Drivers Are Not Receiving Healthcare Benefits Under Proposition 22*, National Equity Atlas (Aug. 19, 2021) <<https://nationalequityatlas.org/prop22>> [as of Mar. 27, 2024] (hereafter McCullough & Dolber).)

³⁶ (Tulchin Research, *New Poll Finds Most App Drivers Not Informed and at Risk of Missing Out On Healthcare Benefits Promised Under Prop. 22* (Apr. 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/>> [as of Mar. 27, 2024].)

³⁷ (*Ibid.*)

³⁸ (McCullough & Dolber, *supra.*)

³⁹ (*Ibid.*)

⁴⁰ (Irving & Maredia, *Prop. 22: Improving the Lives of California Drivers and Couriers*, Uber Newsroom (Dec. 8, 2022) <<https://www.uber.com/newsroom/prop-22-benefits/>> [as of Mar. 27, 2024].)

consumer demand. First, drivers are only guaranteed to earn for “engaged time”—time spent between accepting a ride or delivery request until completion of the ride or delivery. In other words, using a definitional restriction, Prop. 22 enables companies to deny drivers the promised minimum for all of the time they work.⁴¹ The loophole is significant. According to several studies of how app-based drivers spend their time, almost a third of driver time is spent returning from longer trips or waiting between passengers—logged on to the platform to work, but not covered by Prop. 22’s minimum wage.⁴² It’s easy to do the math: a wage floor of 120 percent of the California minimum wage that only applies to drivers for 66 percent of the time they work is actually a *sub*minimum wage.⁴³

Even more importantly, Prop. 22’s guaranteed earnings provision underestimates the substantial expenses of app-based driving by almost \$5

⁴¹ “Not paying for that time would be the equivalent of a fast-food restaurant or retail store saying they will only pay the cashier when a customer is at the counter. We have labor and employment laws precisely to protect workers from that kind of exploitation.” (Jacobs & Reich, *The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour*, U.C. Berkeley Labor Center (Oct. 31, 2019) <<https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/>> [as of Mar. 28, 2024] (hereafter Jacobs & Reich).)

⁴² (*Ibid.* [estimating that 33 percent of driver time is spent waiting between passengers or returning from trips to outlying areas]; see also McCullough et al., *Prop. 22 Depresses Wages and Deepens Inequities for California Workers*, National Equity Atlas (Sept. 21, 2022) <<https://nationalequityatlas.org/prop22-paystudy>> [as of Mar. 28, 2024] [study conducted alongside amicus Rideshare Drivers United, estimating that “nearly a third” of driver time is uncompensated under this formula] (hereafter McCullough et al.).)

⁴³ A study of Massachusetts app-based driver pay under a copycat ballot initiative came to similar conclusions, finding that the guaranteed pay equal to 120% of minimum wage could actually come out to a pay floor of only \$4.82 an hour. (Jacobs & Reich, *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage*, U.C. Berkeley Institute for Research on Labor and Employment (Sept. 2021) <<https://laborcenter.berkeley.edu/wp-content/uploads/2021/09/Massachusetts-Uber-Lyft-Ballot-Proposition-Would-Create-Subminimum-Wage-1.pdf>> [as of Mar. 28, 2024].)

an hour, requiring drivers to bear the costs of owning and operating a vehicle.⁴⁴ The ballot initiative provides that drivers will be reimbursed at 30 cents per mile during engaged time.⁴⁵ But the IRS establishes that the real per-mile costs of owning and operating a vehicle are 67 cents per mile in 2024.⁴⁶ And, like the minimum wage in general, the reimbursement only applies to miles driven during engaged time, failing to account for the costs incurred during the rest of time worked. As already noted, drivers are required to drive many more miles than those driven with a passenger in the backseat as part of their job: they have to drive back from drop-off locations and head to other areas where they will be closer to picking up new passengers, all the while waiting for a new trip request to come in. Under Prop. 22, this time is not only unpaid, but driver expenses are not reimbursed, and the driver has no accident protection.

The upshot of Prop. 22's guaranteed earnings promise is that drivers are guaranteed a "minimum wage" of only about \$5 an hour, after expenses and non-driving wait times are accounted for.⁴⁷ By contrast, state wage and hour law guarantees all workers in the state a minimum wage of \$16 for *all* of the time they work. (Lab. Code, § 1182.12.) It also guarantees workers

⁴⁴ (Jacobs & Reich, *supra*.)

⁴⁵ (Bus. & Prof. Code, § 7453, subd. (d)(4)(B)(ii) [\$0.30 figure is inflation-pegged].)

⁴⁶ (Internal Revenue Service, *Standard Mileage Rates* <<https://www.irs.gov/tax-professionals/standard-mileage-rates>> [as of Mar. 28, 2024].)

⁴⁷ One 2021 study found that Prop. 22's wage floor was just **\$4.10 per hour**. (See McCullough et al., *supra*.) Another study found a wage floor of **\$5.64 an hour**. (Jacobs & Reich, *supra* [note: this figure is based on the 2021 minimum wage of \$13 per hour; the math is slightly different now that California minimum wage is \$16.00].) The minimum wage is higher in many jurisdictions. (See *Inventory of California City and County Current Minimum Wages*, U.C. Berkeley Labor Center (Jan. 1, 2024) <<https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/#s-2>> [as of Mar. 28, 2024].)

overtime at “time-and-a-half” (150 percent of their regular hourly wage) for all time worked over 40 hours in a week or 8 hours in a day. (Lab. Code, § 510.) And, unlike Prop. 22, California employment law requires employers to reimburse their employees for costs incurred in connection with the performance of their work. (Lab. Code, § 2802.) In other words, under state law as codified in Assembly Bill 5, ridehail and delivery drivers would be entitled to reimbursement for the costs of driving—costs drivers currently bear that are the difference between earning a sustainable living and earning poverty wages.

III. PROP. 22 LEGALIZES A SECOND-TIER WORKFORCE COMPRISED DISPROPORTIONATELY OF WORKERS OF COLOR, STRIPPING THEM OF BEDROCK RIGHTS WHILE DENYING THEM TRUE INDEPENDENCE

a. California’s Ridehail and Delivery Drivers are Disproportionately Workers of Color Who Depend on the Platforms to Earn a Living

Like workers in other heavily misclassified industries, app-based drivers are predominantly immigrants and people of color. According to data from a national survey by Pew Research, Black (20%) and Hispanic (30%) adults are significantly more likely to have done app-based work than white (12%) adults.⁴⁸ Another study estimates that in the San Francisco Bay Area in 2019, immigrants and people of color comprised

⁴⁸ (Gelles-Watnick & Anderson, *Racial and Ethnic Differences Stand Out in the U.S. Gig Workforce*, Pew Research Center (Dec. 15, 2021) <<https://www.pewresearch.org/short-reads/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/>> [as of Mar. 28, 2024]; see also Fairwork, *Fair Work United States Ratings 2023: A Crisis of Safety and Fair Work in a Racialized Platform Economy* (2023) <<https://fair.work/wp-content/uploads/sites/17/2023/08/Fairwork-US-Ratings-2023.pdf>> [as of Mar. 28, 2024].)

78 percent of Uber and Lyft drivers.⁴⁹ These numbers are consistent with research on platform workers generally. According to a Bureau of Labor Statistics survey on the on-demand economy, Black and Latino workers make up almost 42 percent of workers for “electronically mediated work,” which includes companies like Uber and Lyft, although they comprise less than 29 percent of the overall U.S. workforce.⁵⁰ Thus, the impact of Prop. 22 is strikingly racialized.

Further, contrary to the fiction weaved by the Intervener-Appellants of app-based driving 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. As a recent report notes: “For many app-based drivers, driving on platforms like Uber and Lyft is their primary source of income, and their ability to earn a living is precariously dependent on secret algorithms and a customer complaint process that is inaccessible to them.”⁵¹

Unlike other low-wage workers who at least have the force of worker-protective laws to combat exploitation, however, Black, Brown, and immigrant ridehail and delivery drivers in California are trapped by

⁴⁹ (See Benner et al., *supra*, at p. 8 [56 percent of San Francisco app-based drivers are immigrants]; Waheed et al., *More Than a Gig: A Survey of Ride-Hailing Drivers in Los Angeles*, UCLA Labor Center (May 30, 2018) <<https://irle.ucla.edu/wp-content/uploads/2018/05/Final-Report.-UCLA-More-than-a-Gig.pdf>> [as of Mar. 28, 2024] [50 percent of Los Angeles full-time drivers foreign-born].) Women also make up an increasing share of ridehail and delivery drivers in California. (See Bidar, *Women Who Lost Jobs Due to COVID Turn to Food Delivery Platforms*, CBS News (Feb. 25, 2021) <<https://www.cbsnews.com/news/women-unemployment-covid-food-delivery-door-dash-instacart-ubereats-jobs>> [as of Mar. 28, 2024].)

⁵⁰ (See U.S. Dept. of Labor, Bureau of Labor Statistics, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, Monthly Labor Review (Sept. 2018) <<https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>> [as of Mar. 28, 2024].)

⁵¹ (*Fired by an App, supra*, at p. 2.)

Prop. 22's inferior system of illusory protections.

b. Black Box Algorithms Mask Corporate Control and Subject Drivers to Indecipherable, Hidden Determinations Regarding Pay and 'Deactivations'

Ridehail and delivery corporations like Uber and Lyft, entice workers with an appealing image of independence, purporting to offer flexible “earning opportunities”⁵² on an easy-to-access platform that enables workers to “be their own boss.”⁵³ Yet beneath a superficial veneer of independence are corporate policies and hidden algorithms that tightly control the work and the workforce—ensuring sufficient numbers of workers are logged on and at the companies’ disposal to provide services at a moment's notice in order to meet the companies’ advertised promises. Meanwhile, drivers are paid according to black-box algorithms that are opaque to both workers and consumers.⁵⁴ Indeed, the companies profit from information asymmetries that keep workers entirely in the dark and deny them the promised “independence”. As app-based driver and President of amicus Rideshare Drivers United, Nicole Moore, explains:

[T]he algorithms behind these apps are basically 21st century robot bosses: they determine how much we earn, if we earn at

⁵² (See, e.g., *Drive When You Want, Make What You Need*, Uber <<https://www.uber.com/us/en/drive/driving-opportunities>> [as of Mar. 26, 2024] [promoting a “flexible earning opportunity” for drivers]; *How Much Can You Make with Uber?*, Uber <<https://www.uber.com/us/en/drive/how-much-drivers-make/>> [as of Mar. 26, 2024]; *The Driver’s Guide to Pay – Earnings You Can Count On*, Lyft <<https://www.lyft.com/driver/earnings#driving-smarter>> [as of Mar. 26, 2024].)

⁵³ (*Drive When You Want, Make What You Need*, Uber <<https://www.uber.com/us/en/drive/>> [as of Mar. 26, 2024]; *Make Every Day Payday*, Lyft <<https://www.lyft.com/driver>> [as of Mar. 26, 2024].)

⁵⁴ (See, e.g., Sherman, *Uber CEO Hides Driver Pay Cuts to Boost Profits*, Forbes (Dec. 15, 2023) <<https://www.forbes.com/sites/lensherman/2023/12/15/ubers-ceo-hides-driver-pay-cuts-to-boost-profits/>> [as of Mar. 28, 2024].)

all, and really, when we can earn. Those same algorithms can even fire us, and we don't have the right to an explanation or opportunity to defend ourselves to the algorithms that fire us.⁵⁵

More troublingly, driver pay is not fixed according to any set of objective and transparent criteria. Uber, for example, now sets wages according to an opaque and unpredictable algorithm, in which driver pay is decoupled from the fares riders pay, and different drivers are likely getting paid different amounts for the same work.⁵⁶ Because those algorithms are tightly held, the basis for the different fares is a mystery. But Uber's CEO gave a clue in a recent earnings call, admitting that Uber is offering "different trips to different drivers based on their preferences or based on behavioral patterns" and "offering the right trip at the right price to the right driver."⁵⁷ Because workers have very few legal protections in the face of these increasingly powerful, algorithmically-driven pay systems, "the possibility remains," in the words of one scholar, that on-demand companies like Uber are "offer[ing] vulnerable workers lower wages based on their willingness to accept work at lower prices."⁵⁸

⁵⁵ (Moore, *Make Misclassification a Violation of the FLSA*, National Employment Law Project (Oct. 24, 2023) <<https://www.nelp.org/blog/make-misclassification-a-violation-of-the-flsa/>> [as of Mar. 28, 2024].)

⁵⁶ (Griswold, *The Devilish Change Uber and Lyft Made to Surge Pricing*, Slate (Aug. 23, 2023) <<https://slate.com/technology/2023/08/lyft-uber-surge-prime-time-upfront-pricing.html>> [as of Mar. 28, 2024].)

⁵⁷ (*Uber Finally Owns up to Discrimination in Personalised Pay and Task Allocation for Workers*, Worker Info Exchange (Feb. 7, 2024) <<https://www.workerinfoexchange.org/post/uber-finally-owns-up-to-personalised-pay-and-work-allocation>> [as of Mar. 28, 2024].)

⁵⁸ (Dubal, *On Algorithmic Wage Discrimination* (2023) 123 Columbia L. Rev. 1929, 1935 ["As a labor management practice, algorithmic wage discrimination allows firms to personalize and differentiate wages for workers in ways unknown to them, paying them to behave in ways that the firm desires, perhaps as little as the system determines that they may be willing to accept."].)

In other words, corporations like Uber and Lyft may use individualized worker data to identify the lowest wage a particular worker will likely accept. Such control over pay, and potential manipulation of compensation based on vulnerability, raises concerns about whether workers in financially difficult circumstances—who are disproportionately Black, Brown, and immigrant workers—will be paid less for performing the same work as workers whom the algorithm predicts will demand more, exacerbating racial inequities.

Yet concerns about potential algorithmic wage discrimination are not the only issues of concern. Ridehail and delivery drivers are daily denied access to the platforms on which they depend for income through unexplained and inscrutable suspensions and terminations –euphemistically called ‘deactivations.’ The companies’ power over access to work makes a mockery of their advertised ‘independence,’ but it is also concerning for another reason. Multiple studies of Uber and Lyft’s deactivation practices point to significant racial disparities in driver deactivations. A 2023 survey of California ridehail drivers showed that 69% of drivers of color experienced some form of deactivation, compared to only 57% of white drivers.⁵⁹ And a more recent study in Seattle evaluating the impacts of a citywide ordinance instituting protections against deactivation came to similar conclusions.⁶⁰ In addition to finding that over half of all driver deactivations were for minor, easily resolvable issues, and that 80% of drivers had their deactivations overturned when they qualified for

⁵⁹ (*Unchecked Discrimination and Secret Algorithms Fuel Deactivation Crisis Among CA Rideshare Drivers, First-Time Survey Finds*, Advancing Justice – Asian Law Caucus (Feb. 28, 2023) <<https://www.advancingjustice-alc.org/news-resources/news/deactivation-crisis-among-ca-rideshare-drivers-first-time-survey>> [as of Mar. 28, 2024].)

⁶⁰ (Schwartz et al., *Deactivation with & without Representation: The Role of Dispute Arbitration for Seattle Rideshare Drivers*, SocArXiv (July 13, 2023) <<https://osf.io/preprints/socarxiv/w6z8e>> [as of Mar. 28, 2024].)

representation under the city ordinance, the study also found that drivers of color were reactivated at a higher rate than their peers.⁶¹ In their view, this suggests that drivers of color were more likely to be deactivated unfairly, and points to a racially biased practice of driver deactivation.

Yet Prop. 22 undercuts the ability of California rideshare drivers to seek redress where they are adversely impacted by such discriminatory practices, replacing California’s robust statutory protections against workplace discrimination with an inferior and illusory substitute. For example, under Prop. 22, immigration status is not treated as a protected characteristic despite the sizeable portion of the app-based workforce consisting of immigrant workers.⁶² Prop. 22 also creates various “processes” for harassment or discrimination reporting, without detailing how a worker could seek or obtain remedies, and it strengthens the defenses app-based companies can rely on to justify discrimination.

c. Prop. 22 is a Modern-Day Iteration of Racist Carveouts from Employment Rights.

Prop. 22’s exclusion of app-based drivers from the bedrock employment rights to which they are presumptively entitled treads a well-worn groove. In the wake of the Great Depression, policymakers enacted New Deal legislation to ensure decent wages and working conditions. But not for all workers. These laws were riddled with facially neutral yet racist exclusions of sectors comprised of Black workers: domestic, agricultural,

⁶¹ (*Ibid.*)

⁶² (*Rigging the Gig, supra*, at pp. 17-18.)

and tipped workers.⁶³ While neutral on their face, these exclusions denied many Black workers minimum protections, legalized lower wages, and restricted economic mobility.⁶⁴ The legacy of those exclusions continues today in a highly segregated labor market marked by significant racial wage and wealth gaps.⁶⁵

Prop. 22 capitalizes on this ugly history, perpetuating and legitimizing a second-tier workforce comprised predominantly of workers of color. As one worker poignantly explained:

Prop. 22 plain and simple puts all of us app-based workers in a second-class worker status. Permanently. Historically, who else hasn't been covered by the minimum wage? Domestic Workers. Farm Workers. And now App-Based workers. And just like domestic and farm workers, we're a majority people of color and immigrant workforce – and somehow people make up lies that it's OK for us to not have access to the same protections and wage floors as everyone else.⁶⁶

⁶³ (Dixon, *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act*, Testimony before U.S House of Representatives Education and Labor Committee, National Employment Law Project (May 3, 2021) <<https://www.nelp.org/wp-content/uploads/NELP-Testimony-FLSA-May-2021.pdf>> [as of Mar. 28, 2024].)

⁶⁴ (See Dubal, *New Racial Wage Code* (2022) 15 Harv. L & Pol'y Rev. 512, 525.)

⁶⁵ (Dixon, *supra*.) [It is no coincidence that Uber first emerged in the wake of the 2008 financial crisis, in which Black Americans suffered disproportionately, and in California, where the crisis was particularly widespread.](#) (See, e.g., Bardhan & Walker, *California, Pivot of the Great Recession*, Institute for Research on Labor & Employment, University of California, Berkeley Working Paper #203-10 (Mar. 2010); Saktinil & Kemme, *The Run-Up to the Global Financial Crisis: A Longer Historical View of Financial Liberalization, Capital Inflows, and Asset Bubbles* (May 2020) volume 69, International Review of Financial Analysis <<https://doi.org/10.1016/j.irfa.2019.101377>> [as of Mar. 28, 2024]; White, *The Recession's Racial Slant* (June 24, 2015) The Atlantic; Burd-Sharps & Rasch, *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*, Social Science Research Council (June 2015) <aclu.org/sites/default/files/field_document/discrimlend_final.pdf> [as of Mar. 28, 2024].)

⁶⁶ (Dubal, *supra*, 15 Harv. L & Pol'y Rev. at p. 516.)

Having been excluded from decent jobs with livable wages and benefits for generations, many workers of color have no choice but to accept work with challenging and unfavorable terms, including the unilateral removal of employee benefits. Their exclusion from good jobs makes the tradeoff unfortunately simple—they take the job because they need the income it provides. Thus, it is no accident that workers of color disproportionately perform precarious ridehail and delivery work. Likewise, it is no accident that Prop. 22 reinforces and legalizes a second-tier workforce comprised disproportionately of people of color.

IV. THIS COURT SHOULD UPHOLD ARTICLE XIV SECTION 4 OF THE CALIFORNIA CONSTITUTION AND AVOID FURTHER HARM TO MILLIONS OF LOW-PAID WORKERS AND CALIFORNIA RESIDENTS.

a. California’s Workers’ Compensation, Like Other Workplace Protections, Serves Fundamental Public Purposes.

As reflected in Article XIV section 4 of the state constitution, California’s workers’ compensation system constitutes “an important and beneficial social policy in California.” (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 461.) It protects workers “against the special risks of employment [Citations.]” by providing for “comprehensive coverage of injuries in employment.” (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1061.)

However, “the protections conferred by the Act have a public purpose beyond the private interests of the workers themselves.” (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 358.) Chief among them, “the statute represents society’s recognition that if the financial risk of job injuries is not placed upon the businesses which produce

them, it may fall upon the public treasury.” (*Ibid.*) Simply put, California has recognized the social costs incurred when workers lack workers’ compensation: “they themselves, and society at large...assume the entire financial burden when such injuries occur.” (*Ibid.*)⁶⁷

California’s workers’ compensation system is not the only social policy intended to benefit the public as well as individual impacted workers. As this Court has noted, other 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, supra*, 4 Cal.5th at p. 953.) Indeed, the state’s wage protections were motivated in part by concerns about the impact of low wages on public health and the desire to ensure workers are guaranteed wages sufficient for shelter, food, and clothing,—i.e., to avoid the social costs of oppressive wages. (See, e.g., *Martinez v. Combs* (2010) 49 Cal.4th 35, 54 [tracing history of protections].)

Prop. 22 lets big corporations like Uber and Lyft off the hook: rather than contribute the basic minimums for their workers that all other businesses must, they pass the costs of doing business, paying fair wages and providing healthy and safe conditions on to workers, their communities and the government. Their failure to pay payroll taxes deprives state and federal

⁶⁷ Such a policy makes particular sense in the context of a system that confers only future and uncertain benefits. Because such benefits are only available in the event of a qualifying injury, individual low-paid workers may be unlikely to sacrifice wages in exchange for workers’ compensation coverage.

government of billions of dollars that fund vital social insurance programs.⁶⁸

b. Prop. 22 Offers a Roadmap for Employers in Other Industries to Strip Their Employees of Workplace Protections.

The harms of Prop. 22 to ridehail and delivery drivers in California are indisputable and, as noted above, well documented. But its logic is not limited just to this category of workers. Nothing stands in the way of other corporate employers in California following the path that Uber, Lyft, and DoorDash have mapped out.

Already, since the passage of Prop. 22, a number of employers in the state are moving away from sourcing labor from their traditional (and often unionized) employee workforce towards using misclassified independent contractors. For example, Albertsons Companies, which includes Vons and Pavilions grocery outlets, announced, on the heels of the 2020 election, that it would discontinue its delivery driving services in favor of third-party app-based drivers.⁶⁹ They followed through on the threat: only one month after the election, Southern California Albertsons' drivers were notified that they would lose their jobs.⁷⁰ During the campaign, proponents of Prop. 22 told

⁶⁸ (See, e.g., Office of the N.Y. State Atty. Gen., Press Release, *Attorney James Secures \$328 Million from Uber and Lyft for Taking Earnings from Drivers* (Nov. 2, 2023) <<https://ag.ny.gov/press-release/2023/attorney-general-james-secures-328-million-uber-and-lyft-taking-earnings-drivers>> [as of Mar. 28, 2024]. See also 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>> [as of Mar. 28, 2024].)

⁶⁹ (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>> [as of Mar. 28, 2024]; Hiltzik, *In Wake of Prop. 22, Albertsons is Converting its Home Delivery to Gig Work*, *L.A. Times* (Jan. 5, 2021) <<https://www.latimes.com/business/story/2021-01-05/prop-22-albertsons-home-delivery>> [as of Mar. 28, 2024].)

⁷⁰ (Hiltzik, *supra*.)

voters that voting “yes” would save jobs.⁷¹ In reality, however, it has already displaced employee delivery drivers and stands to eliminate other employee jobs in favor of an app-based model of contract workers.

And in sectors beyond ridehail and food delivery, corporate employers may adopt the example of these app corporations. By tweaking their business models to use the internet to locate or dispatch workers, they can classify large parts of their workforce as independent contractors, even when those workers are plainly not running a separate independent business.⁷² Faced with pushback from their workers, labor agencies or the courts, they could buy their own ballot initiative to carve further categories of workers out of constitutionalized protections like workers’ compensation, and otherwise undercut the basic protections of California employment law.⁷³

⁷¹ (Siddiqui & Tiku, *Uber and Lyft Used Sneaky Tactics to Avoid Making Drivers Employees in California, Voters Say*, Washington Post (Nov. 17, 2020) <<https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation>> [as of Mar. 28, 2024].)

⁷² (*Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It*, National Employment Law Project (Apr. 2019) <<https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2019.pdf>> [as of Mar. 28, 2024].)

⁷³ In fact, the same law firm that worked on Prop. 22 submitted a petition to the California Attorney General for a copycat measure to strip employee rights from healthcare workers—including nurses, dental hygienists, occupational therapists, and others who secure work online or through apps. (See Sagaysay, *‘Uber for Nurses?’: Initiative Targets Healthcare for a ‘Gig Work’ Law*, MarketWatch (Jan. 31, 2022) <<https://www.marketwatch.com/story/uber-for-nurses-initiative-targets-healthcare-for-a-gig-work-law-11643404860>> [as of Mar. 28, 2024].) While the initiative there was subsequently withdrawn, the roadmap is clear.

c. Ridehail and Delivery Work Is Not Meaningfully Different from Most Other Low Wage Work, and Allowing an End-Run Around Employment Law for These Workers Portends an Uncertain Future for Workers Across California.

Ridehail and delivery companies maintain that their employment model, based on a technological revolution that provides “unprecedented autonomy,” see Intervener-Appellants’ Opening Brief, at 22, distinguishes them from other employers past and present. Voters were repeatedly—but falsely—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. Although app-based workers admittedly enjoy some limited scheduling ‘flexibility’ where they can log on and off to seek work, such ‘flexibility’ is mediated, managed, and moderated, and it is a far cry from independence. Rather, the reality of working as an app-based driver is similar to that in other low-wage and dangerous jobs: your work is well controlled. Companies set customer fare rates without any input from drivers (see, e.g., *People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 280), and in fact use complex algorithms to set individualized wages: two workers may get paid different amounts for identical trips, solely based on granularized data the company collects.⁷⁴ The companies also control how much drivers earn per fare, what their cut of the fare will be, how many and which job assignments the drivers receive, and even how drivers conduct themselves

⁷⁴ (See generally Dubal, *supra*, 123 Columbia L. Rev. 1929.)

when driving a customer.⁷⁵ According to a 2022 study by the UCLA Labor Center, Uber and Lyft take on average 21 percent of each customer fare as a commission, and took more than 30 percent on almost a third of rides.⁷⁶ More recent data suggests that Uber’s take rate has now risen as high as 40%.⁷⁷ Only the companies know how those numbers are calculated.⁷⁸

Furthermore, companies screen and select the drivers and regulate and monitor their performance. Those who fail to meet the companies’ standards are disciplined or deactivated.⁷⁹ Uber’s algorithm tracks the drivers’ acceptance rates, time on trips, speed, and customer ratings, among other things—ratings that are then the basis for “deactivation” from the platform.⁸⁰ 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, supra*, 2022 WL 326727, at *4.) And once the drivers accept a ride, the companies continue to control how they work. In an ethnographic

⁷⁵ (See, e.g., Rosenblat & Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers*, *International Journal of Communication* (2016) 10 *Internat’l J. of Communication* 3758, 3762 <<https://ijoc.org/index.php/ijoc/article/viewFile/4892/1739>> [as of Mar. 28, 2024]; *O’Connor v. Uber Technologies, Inc.* (2015) 82 F.Supp.3d 1133, 1136-1137.)

⁷⁶ (*Analysis of High-Volume For-Hire Vehicle Data for New York City, Selection Months, 2019-2022*, UCLA Labor Center (Feb. 2023) <<https://www.labor.ucla.edu/wp-content/uploads/2023/02/Taxi-Commission-policy-brief-2.9.23.pdf>> [as of Mar. 28, 2024].)

⁷⁷ (Sherman, *supra*.)

⁷⁸ (See Dubal, *supra*, 123 *Columbia L. Rev.* 1929.)

⁷⁹ (See *Fired by an App, supra*.)

⁸⁰ (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>> [as of Mar. 28, 2024].)

survey conducted in San Francisco, 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.”⁸¹

Workers in other low-wage and dangerous industries in California also experience similarly severe forms of employer control. But at least those workers enjoy the benefit of California’s robust statutory labor protections. If Prop. 22 is allowed to pave the road ahead, California’s workers may lose their freedom as well as their safety and security.

V. CONCLUSION

Prop. 22 has stripped hundreds of thousands of app-based ridehail and delivery drivers across California of the basic rights extended to other workers, including access to the constitutionally guaranteed system of workers’ compensation and a basic minimum wage. Allowing Prop. 22 to stand inflicts ongoing harm on app-based drivers across the state, as well as to other low-wage workers and to the public finances. For these reasons, *amici* respectfully request that this Court reverse the decision below and hold Prop. 22 unconstitutional in its entirety.

Respectfully submitted,

DATED: APRIL 3, 2024 WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld

David A. Rosenfeld
(CA State Bar No. 58163)
Weinberg Roger & Rosenfeld
1375 55th St.
Emeryville, CA 94608

⁸¹ (Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, and Regulation in the Gig Economy* (Nov. 2019) U.C. Hastings Law, Legal Studies Research Paper Series, Research Paper No. 381, at p. 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3488009> [as of Mar. 28, 2024].)

Tel.: (510) 337-1001
Fax: (510) 337-1023
drosenfeld@unioncounsel.net

Daniel Ocampo
Sally Dworak-Fisher
Laura Padin
Catherine Ruckelshaus
NATIONAL EMPLOYMENT LAW PROJECT
Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

I certify that the attached Application for Leave to File Amici Curiae Brief and Proposed Brief of Amici Curiae, National Employment Law Project, California Labor Federation, et al. in Support of Plaintiffs and Respondents uses 13-point type, Times New Roman font and contains 12,375 words, according to Microsoft Word program.

Dated: April 3, 2024

Respectfully submitted,

/s/ DAVID A. ROSENFELD

David A. Rosenfeld
(CA State Bar No. 58163)
Weinberg Roger and Rosenfeld
1375 55th St.
Emeryville, CA 94608
Tel.: (510) 337-1001
Fax: (510) 337-1023
drosenfeld@unioncounsel.net

CERTIFICATE OF SERVICE

I, Marie Montoya, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 1375 55th Street, Emeryville, California 94506. On April 3, 2024, I served the following document:

- **Application for Leave to File Amici Curiae Brief and Proposed Brief of Amici Curiae, National Employment Law Project, California Labor Federation, et al. in Support of Plaintiffs and Respondents.**

On all parties in the action **BY ELECTRONIC SERVICE THROUGH TRUEFILING**. The document is being submitted for filing through the California Supreme Court's TrueFiling service, with designation that an electronic copy be served through a link provided by email from TrueFiling to the attorneys who are registered with TrueFiling for this case.

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

Executed on April 3, 2024, in Emeryville, California.

/s/ Marie Montoya

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **drosenfeld@unioncounsel.net**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	Application for Leave to File Amici Curiae Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Brendan Begley Weintraub Tobin 202563	bbegley@weintraub.com	e-Serve	4/3/2024 3:35:12 PM
Michael Mongan Office of the Attorney General 250374	Michael.Mongan@doj.ca.gov	e-Serve	4/3/2024 3:35:12 PM
Arthur Scotland Nielsen Merksamer Parrinello Gross Leoni LLP	ascotland@nmgovlaw.com	e-Serve	4/3/2024 3:35:12 PM
David Lazarus NIELSEN MERKSAMER PARRINELLO GROSS & LEONI 304352	dlazarus@nmgovlaw.com	e-Serve	4/3/2024 3:35:12 PM
Andrew Lockard HEWGILL COBB & LOCKARD, APC 303900	contact@hcl-lawfirm.com	e-Serve	4/3/2024 3:35:12 PM
Kurt Oneto Nielsen Merksamer, LLP	kurt.oneto@gmail.com	e-Serve	4/3/2024 3:35:12 PM
Jeffrey L. Fisher O'Melveny & Myers LLP 256040	jlfisher@omm.com	e-Serve	4/3/2024 3:35:12 PM
Sean Welch Nielsen Merksamer 227101	swelch@nmgovlaw.com	e-Serve	4/3/2024 3:35:12 PM
Ryan Guillen California State Legislature	Ryan.guillen@asm.ca.gov	e-Serve	4/3/2024 3:35:12 PM
Courtnotices Unioncounsel Weinberg, Roger & Rosenfeld	courtnotices@unioncounsel.net	e-Serve	4/3/2024 3:35:12 PM
Michael Reich University of California Berkeley	mreich@econ.berkeley.edu	e-Serve	4/3/2024 3:35:12 PM

David Carrillo UC Berkeley School of Law, California Constitution Center 177856	carrillo@law.berkeley.edu	e-Serve	4/3/2024 3:35:12 PM
Scott Kronland Altshuler Berzon LLP 171693	skronland@altber.com	e-Serve	4/3/2024 3:35:12 PM
Marshall Wallace Allen Matkins Leck Gamble Mallory & Natsis LLP 127103	mwallace@allenmatkins.com	e-Serve	4/3/2024 3:35:12 PM
Jean Perley Altshuler Berzon LLP	jperley@altber.com	e-Serve	4/3/2024 3:35:12 PM
Robin Johansen Olson Remcho, LLP 79084	rjohansen@olsonremcho.com	e-Serve	4/3/2024 3:35:12 PM
Erwin Chemerinsky UC Berkeley School of Law 3122596	echemerinsky@berkeley.edu	e-Serve	4/3/2024 3:35:12 PM
David Rosenfeld Weinberg, Roger & Rosenfeld 058163	drosenfeld@unioncounsel.net	e-Serve	4/3/2024 3:35:12 PM
Janill Richards Office of the Attorney General 173817	janill.richards@doj.ca.gov	e-Serve	4/3/2024 3:35:12 PM
Molly Alarcon San Francisco City Attorney's Office 315244	Molly.Alarcon@sfcityatty.org	e-Serve	4/3/2024 3:35:12 PM
Mitchell Keiter Keiter Appellate Law 156755	Mitchell.Keiter@gmail.com	e-Serve	4/3/2024 3:35:12 PM
Janet Martorano Allen Matkins Leck Gamble Mallory & Natsis LLP	jmartorano@allenmatkins.com	e-Serve	4/3/2024 3:35:12 PM
Samuel Harbourt California Department of Justice 313719	samuel.harbourt@doj.ca.gov	e-Serve	4/3/2024 3:35:12 PM
VEENA Dubal 249268	VDUBAL@GMAIL.COM	e-Serve	4/3/2024 3:35:12 PM
Julie Gutman Dickinson Bush Gottlieb, a Law Corporation 148267	JGD@bushgottlieb.com	e-Serve	4/3/2024 3:35:12 PM
George Warner Legal Aid at Work 320241	gwarner@legalaidatwork.org	e-Serve	4/3/2024 3:35:12 PM
Kimberly Macey Allen Matkins Leck Gamble Mallory & Natsis LLP 342019	kmacey@allenmatkins.com	e-Serve	4/3/2024 3:35:12 PM
Kenneth Trujillo-Jamiso Willenken LLP 280212	ktrujillo-jamison@willenken.com	e-Serve	4/3/2024 3:35:12 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with

TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

4/3/2024

Date

/s/David Rosenfeld

Signature

Rosenfeld, David (058163)

Last Name, First Name (PNum)

Weinberg, Roger & Rosenfeld

Law Firm