

No. S279622

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HECTOR CASTELLANOS; JOSEPH DELGADO; SAORI OKAWA;
MICHAEL ROBINSON; SERVICE EMPLOYEES INTERNATIONAL
UNION CALIFORNIA STATE COUNCIL;
SERVICE EMPLOYEES INTERNATIONAL UNION,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA; KATIE HAGEN, in her official
capacity as Director of the California Department of Industrial
Relations,

Defendants and Respondents,

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

Intervenors and Respondents.

After a Decision by the Court of Appeal,
First Appellate District, Division Four, Case No. A163655
Alameda County Superior Court, Case No. RG21088725
The Honorable Frank Roesch, Presiding

**APPLICATION OF DAVID R. HENDERSON AND OTHER ECON-
OMISTS AND ACADEMICS FOR PERMISSION TO FILE *AMICI
CURIAE* BRIEF AND *AMICI CURIAE* BRIEF
IN SUPPORT OF RESPONDENTS**

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**APPLICATION OF DAVID R. HENDERSON AND OTHER
ECONOMISTS AND ACADEMICS FOR PERMISSION TO FILE
AN *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENTS**

To the Honorable Patricia Guerrero, Chief Justice:

David R. Henderson and the other economists and academics listed in Exhibit A respectfully move for leave to file a brief as *amici curiae* in this matter in support of respondents.*

Amici are economists and other academics who believe that invalidating California Proposition 22 will harm workers and both California's and the nation's economies by limiting the availability of flexible work arrangements and by reducing the capacity of the labor market to respond to changing worker and consumer demands. *Amici* can assist the Court by providing important context about the economic harms that would follow from forcing app-based drivers and other independent workers to be classified as traditional employees.

Amici have a strong interest in this case. Many of the same *amici* participated in prior litigation involving California Assembly Bill 5 to provide their perspective on the economic harms involved in enforcing that statute. See Brief for David R. Henderson et al., *Olson v. California* (9th Cir. filed May 14, 2020) No. 20-55267. The aim of the challenge to Proposition 22 in this case is to threaten a return to the very adverse consequences that a substantial majority of California voters sought to avoid by adopting Proposition 22.

* Pursuant to Rule 8.520(f)(4), *amici* affirm that no party or counsel for a party in the pending appeal authored the proposed *amici* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amici curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

The Court should grant this application and accept the attached *amici curiae* brief for filing.

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Exhibit A – Identities of *Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*

Amici are economists and other academics who believe that invalidating California Proposition 22 will harm workers and both California's and the nation's economies by limiting the availability of flexible work arrangements and by reducing the capacity of the labor market to respond to changing worker and consumer demands.

Amici have a strong interest in this case. Many of the same *amici* participated in prior litigation involving California Assembly Bill 5 to provide their perspective on the economic harms involved in enforcement of that statute. *See* Brief for David R. Henderson et al., *Olson v. California* (9th Cir. filed May 14, 2020) No. 20-55267. The aim of the challenge to Proposition 22 in this case is to threaten a return to the very adverse consequences that a substantial majority of California voters sought to avoid by adopting Proposition 22.

INTRODUCTION AND SUMMARY OF ARGUMENT

By a substantial margin, the California voters approved Proposition 22 to preserve the flexibility of work opportunities that have been voluntarily structured as independent contracting relationships. The aim of the challengers seeking to invalidate Proposition 22 in this case is to transform those opportunities into traditional employer-employee relationships—with devastating consequences.

If Proposition 22 were invalidated, that would not only overturn the democratic process—troubling in itself—but would also threaten to harm workers and the economy. The vast majority of independent workers prefer being independent workers. For many, independent contracting provides a secondary source of income. Perhaps more important, independent contracting offers flexibility, which benefits those who prefer not to work traditional jobs—or cannot work traditional jobs—because of other commitments or life circumstances.

That flexibility cannot be replicated in traditional employer-employee relationships because the incentives created by California's employment laws will effectively compel employers to control the schedules of their employees and limit their ability to pursue other work opportunities.

By making it more difficult to classify countless workers as independent contractors instead of employees, invalidating Proposition 22 would also limit the flexibility of the labor market to efficiently allocate labor to its most productive uses and to provide workers with emergency income.

In short, upholding Proposition 22 is good both for the democratic process and for economic policy.

ARGUMENT

A. Invalidating Proposition 22 Would Harm Workers By Limiting Their Ability To Choose The Type Of Work Structure That Best Suits Their Individual Preferences And Needs.

1. Different workers have different preferences and needs for how to structure their work.

Traditional employer-employee relationships typically involve a schedule determined by the employer. Many independent contracting relationships, by contrast, allow workers to set their own schedule. *See* Sarah Donovan et al., Cong. Research Serv., R44365, *What Does the Gig Economy Mean for Workers?* 1-2 (updated Apr. 2017), <https://bit.ly/3U32CiU>.

An employer's rigidly set schedule works for many employees. A 2017 federal government survey found that about 90% of workers have traditional employment arrangements. Jay Shambaugh et al., *Independent Workers and the Modern Labor Market*, Brookings Inst. (June 7, 2018), <https://brook.gs/3dMc3LL>. But many other workers prefer—or even require—the flexibility of an independent contractor relationship. Indeed, the same 2017 federal government survey found that 79% of independent contractors who perform independent work as their main source of income

prefer their work arrangement to traditional, less-flexible jobs. News Release, U.S. Bureau of Labor Stat., *Contingent and Alternative Employment Arrangements* (June 7, 2018), <https://www.bls.gov/news.release/conemp.htm>.

Workers have confirmed this preference again and again. A survey of California app-based drivers following California voters' approval of Proposition 22 reported that 81% of the drivers say that a major reason they drive is "to have flexibility in my schedule." Joel Benenson et al., Benenson Strategy Group, *Key Findings from Prop 22 Survey with CA Drivers and Delivery People* 1 (May 2021), <https://bit.ly/3IWVAds>. A 2019 survey found that 51% of freelance workers say there is *no* amount of money that would make them definitely take a traditional job, and 46% say that freelancing gives needed flexibility because they are unable to work for a traditional employer due to personal circumstances. Upwork, *Freelancing in America: 2019*, LinkedIn: SlideShare (Oct. 2019), <https://bit.ly/2WqwmZ8>. Likewise, a 2016 study found that for every independent worker who would prefer a traditional job, more than two traditional workers hope to shift in the opposite direction. James Manvika et al., McKinsey Glob. Inst., *Independent Work: Choice, Necessity, and the Gig Economy* 7 (Oct. 2016), <https://mck.co/3bdqOFx>.

Still other workers prefer a mix of traditional and flexible work. A 2021 study found that 68% of the workers who earned money from app-based platforms in the 12 months preceding August 2021 did so as a "side job" to supplement other income. Monica Anderson et al., Pew Research Center, *The State of the Gig Work in 2021* 25 (2021), <https://bit.ly/3TswtFM>. Another study from 2018 similarly found that 53% of gig economy workers consider the gig economy a secondary source of income used to supplement their earnings as employees. Edison Research, *The Gig Economy* 5 (2018), <https://bit.ly/2Wr6Rag>.

2. Invalidating Proposition 22 would reduce the opportunities for flexible work.

The goal of the challengers in this case is to invalidate Proposition 22 and return to the regime imposed by California’s Assembly Bill 5 (“AB 5”). If that goal succeeds, it would make it far more difficult to structure work opportunities as independent contractor relationships instead of employer-employee relationships. The consequence is that the number of flexible-schedule work opportunities is likely to decrease substantially.

It is not economical for companies to maintain the flexible nature of the independent contractor work they provide if the work must instead be performed by traditional employees. The hallmark of app-based driving is the driver’s ability to work whenever and as often as the driver would like. As one recent report summarized, “an employment model will inevitably require the network platforms to eliminate the flexibility that drivers find so attractive about working as independent contractors. The companies will have little choice but to discontinue this flexibility in order to assure compliance with the many legal requirements that apply to employees and to control operating costs.” David Lewin et al., Berkeley Research Group, *Analysis of California App-Based Driver Job Losses If Network Platforms Are Required To Reclassify Drivers As Employees Rather Than Independent Contractors 2* (2023), <https://bit.ly/3PGI9Pz> (“*Analysis of California App-Based Driver Job Losses*”). Another report recognized that, prior to Proposition 22, transportation network companies (like Uber and Lyft) “face[d] a strong incentive under A.B. 5 to decrease the level of flexibility they currently afford their drivers in terms of which cars they may use, how they maintain their cars, how many hours they may work, and when and where they work.” Ryan Radia, Competitive Enterprise Institute, *California Ride Share Contracting Legislation Is a Solution in Search of a Problem 1-2* (2019), <https://bit.ly/2WFE11v>.

This reduced flexibility can manifest in many ways. For example:

- California requires that employers pay a minimum wage and may consider time spent waiting for active work to be compensable. *See Augustus v. ABM Security Servs., Inc.* (2016) 2 Cal. 5th 257, 272. Therefore, an employer has an incentive to schedule shifts for when and where the employer believes the shift will be the most productive and require a minimum level of productivity, rather than letting the worker decide when, where, or how much he or she will work.

- California provides that during the term of employment, “an employer is entitled to its employees’ ‘undivided loyalty,’” *Techno Lite, Inc. v. Emcod, LLC* (2020) 44 Cal. App. 5th 462, 471 (citation omitted), so an employer has an incentive not to permit its employees to work simultaneously for other competing employers. The incentive to demand undivided loyalty is particularly strong because permitting an employee to work for a competitor may lead to disputes about which employer is required to pay for time spent waiting for active work. *See Seth Harris & Alan Krueger, Hamilton Project, A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker”* 13 (Dec. 2015), <https://bit.ly/3be628Y>.

In the gig economy context, this means that “multi-apping” (using two or more apps at the same time—like Uber and Lyft, or UberEats and GrubHub—to reduce wait times between gigs) may become a thing of the past. But as one analysis has explained, “it is possible that restricting driver [multi-apping] can *reduce* total surplus, by affecting both equilibrium price and wait time.” Kevin A. Bryan & Joshua S. Gans, *A Theory of Multihoming in Rideshare Competition* 13, *Journal of Economics and Management Strategy* (2018), <https://bit.ly/3TQBR0u>.

- California requires that daily and weekly overtime hours be compensated at an enhanced rate, *see* Cal. Code Regs. tit. 8, § 11090(3)(A)

(2001), so an employer has an incentive not to accommodate employees who wish to leave work early one day and make up that time the following day or week.

- California requires that if an employee works a split shift (a work schedule interrupted by a nonpaid nonworking period), the employer may have to pay an extra hour of wages, *see* Cal. Code Regs. tit. 8, § 11090(4)(C) (2001), so an employer has an incentive not to allow employees to come and go as they wish.

In short, forcing the reclassification of independent workers as employees can be expected to lead to widespread loss of flexible work opportunities, to the detriment of those workers and the economy more broadly. Indeed, one recent study found that AB 5 “may have reduced overall employment and labor force participation” in California, with the decrease in independent work unaccompanied by any evidence that AB 5 “increased traditional employment.” Liya Palagashvili et al., George Mason University Mercatus Center, *Assessing the Impact of Worker Reclassification: Employment Outcomes Post-California AB5 5-6* (2024), <https://bit.ly/3TB46Q7>.

B. Invalidating Proposition 22 Would Harm The Economy And Workers By Limiting Labor Market Flexibility.

1. Classifying app-based drivers and other gig-economy workers as employees diminishes the capacity of the labor market to respond to changing worker and consumer needs.

A well-functioning independent labor market provides massive benefits to the economy and consumers. One study estimated that the forty-one million Americans who worked as consultants, freelancers, contractors, temporary, or on-call workers generated \$1.28 trillion of revenue for the U.S. economy in 2018. MBO Partners, *The State of Independence in America: 2019 2* (2019), <https://bit.ly/2YVkBm6>.

This segment of the economy continues to grow rapidly, with one study estimating that it is growing at a rate approximately three times as fast as the overall economy. See Freelancers Union & Upwork, *Freelancing In America: 2017* 3 (2017), <https://bit.ly/3xaOpHI>. Another recent study reports that over 72 million Americans performed independent work in 2023, a number equal to about 45% of the workforce. MBO Partners, *The State of Independence in America: 2023* 4 (2023), <https://bit.ly/3PCfREs>.

App-based drivers in California are a meaningful portion of this labor market. One recent study reported that in 2021, more than 1.4 million California app-based drivers earned income from using DoorDash, Instacart, Lyft, or Uber. *Analysis of California App-Based Driver Job Losses, supra*, at 2. Another study estimated that approximately “400,000 Californians provide rides or deliveries through app-based platforms each month,” earning “income totaling over \$6 billion in 2018.” Brad Williams, *Impacts of Eliminating Independent Contractor Status for California App-Based Rideshare and Delivery Drivers* 2 (July 2020), <https://bit.ly/3xebc5u>.

A key benefit the independent workforce provides to the economy is the ability to respond flexibly to fluctuations in the needs of both workers and consumers.

In part because of the lower fixed costs for companies to engage independent contractors, many companies that engage them make it relatively easy to start this type of work. See, e.g., *Driver Requirements*, Uber, <https://ubr.to/2TipUSj> (last visited March 27, 2024); *Driver and Vehicle Requirements*, Lyft, <https://www.lyft.com/driver-application-requirements> (last visited March 27, 2024); *Drivers*, GrubHub, <https://careers.grubhub.com/drivers> (last visited March 27, 2024).

This ease of engagement is especially helpful to allow workers who experience acute financial distress, such as from job loss or an unexpected expense, to supply additional labor and be compensated for it. Indeed, a 2019

study concluded that many households have outside income and assets that deteriorated rapidly in the quarter before they started a gig economy job and partially recovered in the quarter afterward. See Dmitri K. Koustas, *What Do Big Data Tell Us About Why People Take Gig Economy Jobs?*, 109 Am. Econ. Ass'n Papers & Proc. 367, 367 (2019), <https://bit.ly/2WdUU7C>.

Companies that engage independent workers are also especially capable of scaling the availability of their services to respond to fluctuations in consumer demand. For example, the compensation paid to drivers using Uber or Lyft increases when the demand is high, which incentivizes additional drivers to work more where and when consumer demand surges. One study of the Uber platform found that this dynamic pricing does indeed appear to successfully induce drivers to provide additional labor at times when consumers demand it, which boosts the overall efficiency of the system. M. Keith Chen & Michael Sheldon, *Dynamic Pricing in a Labor Market: Surge Pricing and Flexible Work on the Uber Platform 2* (2015), <https://bit.ly/2T3CiWb>.

When companies and workers are able to efficiently respond to the shifting needs of consumers, the economy thrives. Yet forcing flexible independent contractor relationships to become less flexible employer-employment arrangements (*see* Part A.2) would wipe out such efficiencies.

2. The reduction of flexible work opportunities would harm the vast majority of independent workers who value those opportunities.

The beauty of a relatively free market in labor is that those who value an inflexible work schedule can choose to be employees, as most workers do, while those who value flexibility can choose to be independent workers. In other words, there is heterogeneity in workers' valuations—meaning different workers value scheduling flexibility differently.

As discussed above (at Part A.1), the vast majority of workers engaged in independent work prefer that type of arrangement, including for the flexibility it provides. Similarly, a study found that drivers using the Uber platform earn more than double the economic “surplus” (the difference between what they are paid and the lowest amount they would accept) than they would in less flexible work arrangements. *See* M. Keith Chen et al., *The Value of Flexible Work: Evidence from Uber Drivers 1* (National Bureau of Economic Research, Working Paper No. 23296, 2019), <https://bit.ly/3bsNUZ3>.

By diminishing companies’ incentives to provide flexible working arrangements (*see* Part A.2), invalidating Proposition 22 therefore would impose enormous harm on independent workers—who by and large prefer or require flexible work arrangements.

CONCLUSION

The Court should affirm the judgment of the Court of Appeal.

Respectfully Submitted,

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(California Rule of Court 8.520(c)(1))

According to the word count facility in Word for Microsoft 365, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3), contains 2,406 words, and therefore complies with the 14,000-word limit contained in Rule 8.520(c)(1).

Dated: April 3, 2024

Respectfully submitted.

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I, Antonia Siebert, declare as follows: I am a resident of the Commonwealth of Virginia, I am over the age of eighteen years, and I am not a party to the within action. My business address is: 1999 K Street NW, Washington, District of Columbia 20006. On April 3, 2024, I served the foregoing document on the parties stated below, by the following means of service:

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Case Number: **S279622**

Lower Court Case Number: **A163655**

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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/Archis Parasharami

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