IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Hector Castellanos et al.,	)	S279622
Plaintiffs and Respondents,	)	
v.	)	
State of California et al., Defendants and Appellants;	)	
Protect App-Based Drivers and Services et al.	)	
Intervenors and Appellants.	)	

First Appellate District, Division 4, Case No. A163655
Alameda County Superior Court No. RG21088725
The Honorable Frank Roesch, Judge

Application to File Amicus Curiae Brief and Amicus Curiae Brief of Amicus Populi In Support of Appellants

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To the Honorable Patricia Guerrero, Chief Justice, and the Honorable Associate Justices of the Supreme Court:

Amicus curiae Amicus Populi requests permission to file the attached amicus curiae brief in support of appellants, the State of California and Protect App-Based Drivers and Services, pursuant to Rule 8.520(f) of the California Rules of Court.

Amicus Populi represents individuals who worked as prosecutors during the past three decades, when California became much safer. From 1993 to 1998 alone, the state's homicide rate was cut in half. From 1993 to 2014, the homicide rate dropped from 12.9 to 4.4 (per 100,000), its lowest in 50 years. The violent crime rate dropped from 1059

to 393 in 2014, so there were about 3,330 fewer homicides and 256,000 fewer violent crimes in that year than there would have been had crime remained at its 1993 level. The crime rate's decline saved tens of thousands of lives and prevented millions of violent crimes over two decades.

Amicus Populi believes that the people who are most vulnerable to crime and violence deserve a voice in shaping the law, so criminal justice policies should be the product of democratic decisionmaking, as both Justice Scalia observed in his concurrence in *Glossip v. Gross*, 576 U.S. 863, 899 (2015), and Justice Kagan recognized in *Kahler v. Kansas*, 140 S.Ct. 1021, 1037 (2020). Amicus Populi therefore has a vital interest in the continued vitality of California's initiative process, and the popular self-government it fosters.

Amicus curiae certifies that no party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

If this Court grants this application, amicus curiae requests the Court permit the filing of this brief which is attached to the application.

Mitchell Keiter

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Counsel for Amicus Curiae
Amicus Populi

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Introduction

This Court considered work scheduling in its very first decade. Justice Peter Burnett denied the state needed a blunderbuss ban on Sunday work to ensure adequate rest for workers because, he insisted, "Free agents must be . . . . trusted to regulate their own labor." (*Ex parte Newman* (1858) 9 Cal. 502 (conc. opn. of Burnett, J.) But Justice Stephen Field treated such self-regulation as naively aspirational. (*Id.* at p. 520 (dis. opn. of Field, J.)

> The position . . . that all men are independent, and at liberty to work whenever they choose. . . . is contradicted by every day's experience. The relations of superior and subordinate, **master and servant**, principal and clerk, always have and always will exist.

(*Ibid*, emphasis added.)

Proposition 22 was an effort to refute Field's pessimism. It expanded the class of people who were neither masters nor servants, but independent, self-determining agents with some say about where, when, and how they provide their labor. The measure re-adjusted the border between employee and independent-contractor status. It essentially restored the common law "control" test, and extended the opportunity for independence to people whose work does not necessarily involve "imaginative, aesthetic, or intellectual content." (See Lab. Code, § 2778, subd. (b)(2)(F)(ii).)

The initiative's core is Business and Professions Code section 7451, which furthers AB 2257 in expanding the opportunity for independent-contractor status. This Court

has long recognized that the independent-contractor and employee classifications are not static, but may expand or contract over time. (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 352, fn. 6.) Notwithstanding plaintiffs' contention that only the Legislature may redefine the criteria separating these two classes, some of the tests that have restricted independent-contractor status came from judicial decisions of sister states (see *Borello*, at p. 353); wage orders of the Industrial Welfare Commission (*Martinez v. Combs* (2010) 49 Cal.4th 35, 42); and the Restatements issued by the American Law Institute (see *Perguica v. Industrial Accident Com.* (1947) 29 Cal.2d 857, 860). If out-of-state academics may determine who is an employee and who is an independent contractor, so too may the California electorate.

Though employee status has expanded over the past century, Proposition 22 derived from the premise that employee status is not universally desirable, or desired, so the needle may move in both directions. Employee status is a double-edged sword, which may harm the "very persons it is paternalistically intended to help." (*Borello*, *supra*, 48 Cal.3d at p. 360 (dis. opn. of Kaufman, J.).) Injured employees receive relatively swift and certain compensation without having to prove fault, but forfeit the wider range of damages available in tort (*Gund v. County of Trinity* (2020) 10 Cal.5th 503, 507), so workers have challenged their classification as employees because it restricted their relief. (E.g. *McFarland v.*

Voorheis-Trindle (1959) 52 Cal.2d 698, 702.) Independent-contractor status provides benefits of its own. While employees who are paid for their *time* may receive overtime pay, which is unavailable to contractors who are paid for their *work*, the latter can work at their own pace, shape their day, and attend to personal/family needs. (*Dynamex Operations W., Inc. v. Superior Court* (2018) 4 Cal.5th 903, 918.)

And changing social priorities have produced a new statutory purpose, which guides the classification of workers. (*Laeng v. WCAB* (1972) 6 Cal.3d 771, 777.) When workers' compensation began more than a century ago, workers faced hazardous conditions in mines and railroads; worked twelve hours a day, six days a week; and had no control over their working conditions; so the law sought to protect workers from the *special risks* of their employment. (*Id*. at p. 782.) Now that app-based drivers take breaks whenever they want, use and maintain their own vehicles, and engage in an activity that most Californians do every day, safety concerns have receded. But there are new challenges: Fewer families have a parent devoted full-time to childcare and household tasks, so "Parents . . . need flexible work around kids' schedules" as do "families caring for sick or aging loved ones, and students earning around classes." (Ballot Pamp., Gen. Elec. (Nov. 3, 2020) Rebuttal to Argument Against Proposition 22, p. 59.) The voters adopted a new statutory imperative: to "protect the individual right of every . . . driver to have the *flexibility to set their own hours* for when, where, and how they work." (Bus.

& Prof. Code, § 7450, subd. (b), emphasis added.) The measure resonated with the voters because more than three-quarter of workers will accept a lower salary for a job with flexible working hours,[1] as "People's sense of control . . . account[s] for 74% of the association between income and experienced well-being.[2]

As the Legislature could expand the class of independent contractors, a fortiori, so could the electorate. *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, forecloses SEIU's argument. *McPherson* held the legislative power generally "include[s] the people's reserve right to legislate through the initiative power." (*Id*. at p. 1043.) In other words, whatever the Legislature could do, so too could the electorate. This is axiomatic, as the "people's power to propose and adopt initiatives is at least as broad as the legislative power wielded by the Legislature and local governments." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 935.) Indeed, the initiative power "*is* greater." (*Rossi v. Brown* (1995) 9 Cal.4th 688,

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[1] Karthik Kashyap, *Job Seekers Prioritize Pay, Will Settle for Less To Work Remotely* (Jan. 22, 2022) https://www.spiceworks.com/hr/benefits-compensation/news/job-seekers-prioritize-pay-will-settle-for-less-to-work-remotely-study/

[2] Matthew A. Kllingsworth, *Experienced well-being rises with income, even above $75,000 per year*, Proceedings of the National Academy of Sciences (Jan. 18, 2021) 4, https://www.pnas.org/doi/full/10.1073/pnas.2016976118

715.)

McPherson reserved the question of whether the voters could *limit* the authority of the Public Utilities Commission (PUC) because it was uncertain whether the Legislature could. (*Id*. at p. 1044, fn. 9.) As the provision authorized "confer[ring] additional authority" on the PUC, it could mean, according to the negative implication canon, that the Legislature lacked authority to reduce its authority. But there are no negative-implication concerns here. The Legislature is empowered to create and enforce a "complete system" of workers' compensation, but that has never meant one in which every worker, or any minimum number, must participate. It certainly does not preclude the Legislature from shrinking the class of employees and expanding the class of independent contractors—as it did two months before voters passed Proposition 22. (See Stats. 2020, ch. 38 (A.B. 2257).)

The Court of Appeal dissent doubly mischaracterized Proposition 22 as "creat[ing] *new* social hierarchies." (Dissent 61.) To the contrary, it flattened the social hierarchy by enabling independence for not just the elite professionals whose work relies on "invention, imagination, or talent" or is "predominantly intellectual"—but also those who work with their hands. (Lab. Code, § 2778, subd. (b)(2).) No longer is attending a child's afternoon baseball game a privilege for those with advanced degrees. And it flattened the political hierarchy by ensuring involving voters are not second-class citizens, subordinate to legislators whose opinions "must

prevail" because only they took an oath of office (Dis. 24, 62.) It is the voters themselves, not the representatives to whom they delegate authority, who have the "final legislative word." (*Rossi, supra,* 9 Cal.4th at p. 715.)

The initiative power is among the most precious of our democratic rights. (*California Cannabis*, *supra*, 3 Cal.5th 924, 948.) This Court does not construe provisions to constrain this power unless that purpose is unambiguous. (*Ibid*.) Article XIV, section 4, is not such a provision.

Argument

I. The border separating employees from independent contractors is not frozen but may shift over time.

Business and Professions Code section 7451 redrew the border separating employees from independent contractors. It provides, in part, that workers are independent contractors and not employees of a company if: (a) the company did not unilaterally prescribed dates, times, or minimum number of hours to work; (b) the company did not require the worker to accept any particular request for service; (c) the worker could work for other rideshare/delivery services; and (d) the worker could work in other lawful occupations. These new elements establishing an independent-contractor relationship revised the status of many workers.

Therefore, a threshold question is whether the definitions of "employee" and "independent contractor" can expand or contract, or whether they were frozen in place when Article XIV, section 4 was enacted in 1918. Justice Streeter dissented below on the theory that the 1918 definitions are unalterable. (Dis. 24.) Citing *Pacific Gas & Elec. Co. v. Industrial Accident Com.* (1919) 180 Cal. 497, he opined that revising the elements for independent contractor status would amount to an invalid constitutional amendment: the revised "definition of 'independent contractor' in Proposition 22 'would, in effect, be an amendment of the Constitution . . . ." (Dis. 24.)

It is true that some decisions more than a century ago "suggested" Article XIV, section 4 precluded "any expansion or contraction" of the common law definitions of "employer" and "independent contractor." (See *Borello*, *supra*, 48 Cal.3d 341, 352, fn. 6, citing *Fidelity and Casualty Co. v. Industrial Acc. Com.* (1923) 191 Cal. 404, 406; *Flickenger v. Industrial Acc. Com.* (1919) 181 Cal. 425, 432; see also *Provensano* v. *Division of Industrial Accs.* (1930) 110 Cal.App. 239, 242: "any attempt by the Legislature to extend the scope of the Workmen's Compensation Act by new definitions of [the terms 'employee' or 'independent contractor'] is unconstitutional.")

The short answer to this claim is that this Court rejected any "confinement" to prior definitions. (*Borello*, *supra*, 48 Cal.3d at p. 352, fn. 6.) Needless to say, if there could not be "any expansion or contraction" of those terms, it would compel the invalidation of *Dynamex*, *supra*, 4 Cal.5th 903. If "any attempt by the Legislature to extend the scope of the Workmen's Compensation Act by new definitions" were unconstitutional, it would invalidate AB 5.

In fact, the current legislative version of Labor Code section 3353 rests on the very "expansion" of independent contractor status that Justice Streeter's dissent deemed unconstitutional. In 1917, the Legislature excluded manual laborers from independent contractor status, as it reached workers who "render service '**other than manual labor**, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to

the means by which such result is accomplished.' " (*Id.* at p. 432, emphasis added.) But two decades later, the Legislature defined "independent contractor" with the same terms but did not exclude manual labor from its reach. (Stats.1937, ch. 90, p. 267, § 3353.) This expanded classification, codified in Labor Code section 3353, has remained unchanged ever since, and establishes that **the Legislature may redraw the boundary between employees and independent contractors to expand the latter classification**.

And there is likewise authority permitting independent contractor status to shrink (and employee status to expand correspondingly). Even without the Legislature's changing section 3353, the border between the two classifications has shifted. (See Argument II, *post*.)

Though it seems counterintuitive in a case where plaintiffs claim the Legislature has *exclusive* authority, the dissent found that the Legislature may not adjust the boundary between the two classifications because that is a task for only the *judiciary*. "[W]hether or not a person is an employee or independent contractor is a judicial question and not a legislative or executive one." (Dis. 52, quoting *Drillon v. Industrial Accident Comm.* (1941) 17 Cal.2d 346, 355.) This substantially misreads *Drillon*.

As Argument II, *post*, will show, the issue in *Drillon* was whether a jockey was an independent contractor or an employee of the trainer. (*Drillon*, *supra*, 17 Cal.2d at p. 348.) Although the extant test supported the commission's finding

that he was an employee, the trainer cited regulations of the California Horse Racing Board (an executive agency), created through the Horse Racing Act (a legislative act), which supposedly established the jockey's independent status. (*Id.* at p. 352.) The court found these legislative and executive authorities were not dispositive: "Legislative and administrative regulations . . . cannot control the judicial branch of the government in its determination" of the jockey's status. (Id. at p. 355.) But *Drillon* left no doubt that the Legislature could reshape who qualified as an employee and who as an independent contractor—if it wished.

> [W]e do not believe it was the **purpose or intention of the legislature** in adopting the Horse Racing Act . . to make jockeys independent contractors rather than employees, or . . . to exempt the jockeys . . . from the workmen's compensation laws. To say such was the intent of the legislature would be fanciful and unreasonable.

(Id. at p. 354, emphasis added.)

Of course, determining an individual's status is a judicial task. But choosing the criteria that inform the determination is a prerogative of the legislature—or the electorate. Courts determine whether a criminal defendant was an aider or abettor, but the legislature may revise the elements of accomplice liability. (*People v. Gentile* (2020) 10 Cal.5th 830.)

The definitions of employees and independent contractors are evolving. Notwithstanding the Legislature's "plenary authority," it has played little role in this evolution.

II. The border has shifted due to non-legislative sources.

The test(s) for distinguishing employees from independent contractors has multiplied in the past century, even though the statutory definition of an independent contractor has not changed. These tests came not from the Legislature or the voters, but sister state and federal courts, administrative agencies, and the American Law Institute.

A. Early cases followed the statutory "control" test.

Initially, the central question was: "Who has the power of control, not as to the result of the work only, but as to the means and method by which such result is accomplished?" (*Fidelity, supra,* 191 Cal. 404, 407.) An employer-employee relationship existed only where the "master" could direct "not only **what** shall be done but **how** it shall be done." (*Ibid,* emphasis added.)

> [An employer] is deemed to be the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, not merely in the **ultimate results** of the work but in **all the details**. . . . "An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished."

(*Ibid.*, emphasis added, internal citation omitted.)[3]

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[3] "There is no necessary distinction between the terms 'servant' and 'employé. The term 'employé' may sound more euphonious than the term 'servant,' but there is no

Fidelity's facts resembled *Dynamex's*, and show that the *Dynamex* court would have reached a different outcome if it had applied the *Fidelity* test. The law shifted.

Haydis engaged decedent Edwards to transport freight between San Diego and Los Angeles, making one trip (in either direction) every 24 hours (absent wrecks, breakdowns, or other unexpected delays). (*Fidelity*, *supra*, 191 Cal. at p. 405.) Edwards used his own truck, kept it in repair, and paid all operating expenses. Haydis paid Edwards a rate based on the weight of the freight transported, with Haydis guaranteeing a monthly minimum. (*Ibid*.) Haydis arranged for all billing and collecting from customers, for which Edwards paid him 15 percent of his gross receipts. (*Id*. at p. 406.) After the two contracted, Edwards did not provide services for anyone else. (*Ibid*.) Within weeks of their agreement, Edwards died in an accident. (*Id*., at p. 405.)

This Court concluded Edwards was an independent contractor, not an employee, as Haydis had control over *what* Edwards did but not *how* he did it. (*Fidelity*, *supra*, 191 Cal. at p. 412.) If Haydis had directed Edwards to start driving every morning by 7:00, and not drive faster than ten miles per hour, or not to start before 10:00 in the morning and then finish within eight hours, or to follow a particular route, these directions would have supported employee status. The Court contrasted the case with *Eng-Skell Co. v. Industrial Accident*

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substantial difference . . . ." (*Flickenger*, *supra*, 181 Cal. 425, 429, internal citation omitted.)

Com. (1919) 44 Cal.App.10, where the driver was paid for his *time*; he was to drive every day from 8:00 a.m. until 6:00 p.m. (*Fidelity*, *supra*, 191 Cal. at p. 408.) During those hours he had to follow the company's direction, and would get paid regardless of whether there was any work for him to do. (*Ibid*.) Edwards, by contrast, was paid not for his time but for results; it made no difference if he spent five hours driving or fifteen, as he was paid for completing his delivery. So long as he delivered the freight, he would get paid. (*Ibid*.)[4]

In 1937, the Legislature codified this definition in Labor Code section 3353 (emphasis added).

> "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as **to the result of his work only and not as to the means** by which such result is accomplished.

Under this test, there was adequate control to establish employee status in *Drillon, supra,* 17 Cal.2d 346. Hooper was a jockey whom Metzger hired on a monthly basis to race Metzger's horses, though Hooper could also ride elsewhere if it did not conflict with his racing for Metzger. (*Id*. at p. 348.) (Hooper was not, as SEIU asserts, retained "for a single race lasting a few minutes." (OBM 37).) On the day of the race in which Hooper suffered injury, the trainer Drillon provided instructions about how Hooper should proceed:

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[4] A dissenting opinion disputed that Edwards' choice of route sufficed to render him independent of Haydis' control. (*Id*. at p. 416 (dis. opn. of Lawlor, J.)

> [L]et [the horse] run his own race until the last quarter of a mile and then do the best I could from there on . . . . Mr. Drillon told me to hit him (the horse) four or five times and if he responded, all right, and if not, not to whip him no more.

(*Id.* at p. 349.)

This Court rejected Drillon's argument that he instructed Hooper only as to the result, and thus found Hooper was his employee rather than an independent contractor. The trainer's "instructions advised Hooper precisely how to ride"; Drillon directed Hooper to "permit the horse to run his own race to the last quarter mile and then to whip him three or four times but if that amount of whipping were not effective to whip him no more." (*Drillon*, *supra*, 17 Cal.2d at p. 350.) These directions showed the trainer maintained control as to not just what Hooper was to do but how he was to do it. (*Id.* at pp. 348, 355-356.)

This Court would later cite another factor that further accounts for the disparate results of *Fidelity*, *supra*, 191 Cal. 404, and *Drillon*, *supra*, 17 Cal.2d 346. Characterizing a worker as an independent contractor serves the purpose of the Workers' Compensation Act where he "has the primary power over work safety." (*Borello*, *supra*, 48 Cal.3d 341, 354.) Edward used his own truck and maintained it, so he, not Haydis, was in the best position to ensure it was safely operable. (*Fidelity*, at p. 405.) By contrast, the jockey raced a horse maintained by the trainer, so it was he who had the "primary power over work safety." (*Borello*, at p. 354.)

B. Later cases expanded the class of employees through non-statutory tests.

Determinations regarding workers' classifications began to encompass other factors, including a set designed by the Restatement on Agency. (*Perguica v. Industrial Accident Comm.* (1947) 29 Cal.2d 857, 860, quoting *Empire Star Mines Co. v. California Empl. Com.* (1946) 28 Cal.2d 33, 43-44.). *Perguica* involved three parties (as app-based driving involves the passenger(s), the company, and the driver). Perguica was building a house on his farm, and hired Witmer to perform the plastering, but Witmer could not proceed until netting was attached to serve as a lathing for the plaster, and so on Perguica's behalf he brought in Walker for that task. (*Id*, at p. 858.)[5] As to the timing of the work, Perguica indicated Walker could "work as he pleased" and did not discuss any of the details of the work with Walker. (*Ibid*.) Walker was deemed to have been an independent contractor when he fatally fell, based on the usually conclusive factor of whether the employer "exercise[d] complete and authoritative control of the mode and manner" in which the work is performed. (*Perguica*, *supra*, 29 Cal.2d at p. 859.) Further justifying Walker's independent status was that Perguica paid " 'for the job' done" rather than for workers' time. (*Perguica*, *supra*, 29 Cal.2d at p. 861.) He had found that paying workers for their

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[5] Witmer's role in arranging Walker's service to Perguica resembles how app-based companies arrange for drivers to assist passengers.

time led to "loafing around," so he switched to paying for the workers' results to avoid time-wasting practices. (*Ibid.*) But this Court also listed eight factors prescribed by the Restatement on Agency. These included:

> (a) Whether or not the one performing services is engaged in a distinct occupation or business;
>
> (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
>
> (c) the skill required in the particular occupation;
>
> (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (e) the length of time for which the services are to be performed;
>
> (f) the method of payment, whether by the time or by the job;
>
> (g) whether or not the work is a part of the regular business of the principal; and
>
> (h) whether or not the parties believe they are creating the relationship of employer-employee.

(*Id.* at p. 860, internal citation omitted.)

One of the most important cases in shrinking independent-contractor status did not even involve the classification. In *Laeng v. WCAB* (1971) 6 Cal.3d 771, plaintiff Laeng participated in an agility test as part of a tryout to become a municipal "refuse crew worker," and suffered

injury. (*Id*. at p. 774.) Though the formal element of employment had not yet occurred, this Court looked beyond the "technical contractual" conceptions of employment, to the "history and fundamental purposes" underlying workers' compensation. (*Id*. at p. 777.) One such purpose was to protect workers from any "special risk of employment"; as the the tryout involved "arduous and potentially hazardous tasks prescribed by the employer," the Court authorized compensation. (*Id*. at p. 783.) The statutory purpose test would later have an effect on independent contractor determinations.

The Court in *Borello*, *supra*, 48 Cal.3d 341, further incorporated federal factors into the determination:

> 1) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> 2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
>
> 3) whether the service rendered requires a special skill;
>
> 4) the degree of permanence of the working relationship; and
>
> 5) whether the service rendered is an integral part of the alleged employer's business.

(*Id*. at p. 355, citing *Real v. Driscoll Strawberry Associates*, *Inc.* (9th Cir. 1979) 603 F.2d 748, 754.)

Although *Borello* emphasized it did not adopt any "detailed new standards" for determining whether workers were

employees or independent contractors (at least not beyond those federal ones) (*id*. at. 354), it denigrated the significance of the statutory test, which asked whether the principal controlled the worker "as to the result of his work only" or also "as to the means by which such result is accomplished." (Lab. Code, § 3353.) The statutory " 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements." (*Id*. at p. 350.) *Borello* thus cited opinions from over a dozen states and four federal circuits in finding the California Legislature's test was not determinative. (*Id*. at pp. 353, 355-356.)

It further applied the "control" factor in a manner more likely to find workers were employees than prior courts had applied it.

Borello owned land and invited workers to act as "Share Farmers." (*Borello*, *supra*, 48 Cal.3d at p. 346.) His company would prepare the land, plant and spray the crop of cucumbers, and furnish boxes for the cucumbers' loading and transport to the buyer. (*Ibid*.) The farmers were paid not for their time but for their work, as they and Borello would share the gross proceeds equally. (*Borello*, *supra*, at p. 346.) Workers preferred this payment arrangement because " 'they ma[d]e a lot more money.' " (*Id*. at p. 347.) They also worked unsupervised and could set their own hours. (*Ibid*.) They decided when to pick each cucumber at the correct size to maximize profit. (*Id*. at pp. 347-348.)

Under many precedents, these facts would have established independent contractor status. As in *Fidelity*, *supra*, 191 Cal. 404, the farmers were paid for their work (according to their productivity) and not for their time—which they could spend as they saw fit, resting (or arriving and leaving) as they saw fit. Under the test of *Drillon*, *supra*, 17 Cal.2d at p. 350, Borello's instructions did not advise the workers "precisely how" to do their work; they were "totally responsible" for the care of the plants in their assigned plots and decided for themselves when was the optimal time to pick each crop. (*Borello*, at pp. 347-348.) This "result" method of compensation and the lack of control over the work, among other factors, had led the Court of Appeal to classify the farmers as independent contractors. (*Id.* at pp. 348-349.)

But *Borello* applied the old standard in a new way. The Court of Appeal had carefully distinguished the "larger undertaking" of the overall cucumber business from the severable work of harvesting performed by the farmers. (See *Borello*, *supra*, 48 Cal.3d at p. 368 (dis. opn. of Kaufman, J.).) The Supreme Court instead followed the U.S. Court of Appeals, Seventh Circuit, which evaluated whether "control applies to the entire pickle-farming operation, not just the details of harvesting." (*Sec'y of Labor, U.S. Dept. of Labor v. Lauritzen* (7th Cir. 1987) 835 F.2d 1529, 1536, cert. denied (1988) 488 U.S. 898.) In other words, though the farmers exercised control over the pickle-harvesting, Borello maintained control over the "operation as a whole." (*Borello*,

supra, 48 Cal.3d at p. 356.)

This differed from how the Court applied the control test in *Perguica*, *supra*, 29 Cal.2d 857, where the Court considered whether the owner exercised control over only the specific task for which the worker was recruited. Borello owned the land, as did Perguica. Borello decided how to use his land (to cultivate cucumbers), just as Perguica decided how to use his land (to build a house). (*Borello*, *supra*, 48 Cal.3d at p. 356; *Perguica*, at p. 858.) And Perguica hired workers to do carpentry, and made arrangements with another to do plastering, and thus exercised control over the "operation as a whole." But the only question that *Perguica* considered in evaluating whether Walker was an employee or contractor was whether Perguica exercised control over Walker's *specific task* of "the lathing of [Perguica's] house," which he did not. (*Perguica*, at p. 860.)

The Court construed its decision as helping labor by ensuring employers do not shirk their obligation to provide protections. (*Borello*, supra, 48 Cal.3d at p. 359.) Still, *Borello* reached a different outcome from *Perguica*'s based on the characterization of the farmers in question. *Perguica* cited contractors' "knowledge and skill," but *Borello* denied the farmers had any. (*Perguica*, *supra*, 29 Cal.2d at p. 862.) Justice Kaufman's dissent noted the evidence showed that farmers were responsible for making decisions about weeding, hoeing, and irrigation; that experienced farmers earned more money than inexperienced ones; and that "considerable skill"

was required to care for and then harvest the cucumbers. (*Borello*, *supra*, 48 Cal.3d at p. 362 (dis. opn. of Kaufman, J.).) The majority instead denied the farmers could be independent contractors because their work was so simple.

> [T]he cucumber harvest involves **simple manual labor** which can be performed in only one correct way. Harvest and plant-care methods can be learned quickly. . . . It is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision . . . unnecessary.

(*Borello*, at pp. 356-357, emphasis added.)

Though the Legislature had removed the exclusion of manual labor from section 3353 (and thus rendered manual laborers eligible for independent contractor status), *Borello* reinstated their exclusion.

This Court broadened the elements of the test for employment even further in *Martinez v. Combs*, *supra*, 49 Cal.4th 35. It adopted three tests of the Industrial Welfare Commission, a body with "quasi-legislative authority" (*id.* at p. 61), and found that a worker qualified as an employee if *any* of them were satisfied. To employ (and thereby create employee status) meant either to "(a) to exercise control over the wages, hours **or** working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship. (*Id.* at p. 64, boldface added.) Under this test, if an employer directed where (but not when) a worker should work, or when (but not where) a worker should work (which could now mean remotely attending a Zoom meeting at a certain hour), or allowed the worker to

work anywhere at anytime but prescribed the amount to be paid, the worker would not be considered independent.

The facts of *Dynamex*, *supra*, 4 Cal.5th 903, closely resembled those of *Fidelity*, *supra*, 191 Cal. 404. That this Court found independent contractor status in the earlier case and employee status in the later one demonstrates how the law had shifted in the intervening 95 years.

This Court recalled that Dynamex is a delivery service whose drivers use and maintain their own vehicles (*Dynamex*, supra, 4 Cal.5th at p. 917), as driver Edwards used and maintained his own in *Fidelity*. As in *Fidelity*, drivers are paid for their work, not their time. Whether they work five or fifteen hours does not affect their pay; what matters is how many packages they deliver, as they receive for each package delivered either a flat fee or a share of the delivery fee paid by the customer. (4 Cal.5th at p. 917.) As in *Fidelity*, Dynamex drivers may choose the route(s) they take in their driving. (*Id.* at p. 918.) They have even more flexibility than Edwards in scheduling. Edwards could choose at what time to make the drive from Los Angeles to San Diego or from San Diego to Los Angeles, but he was expected to make the trip every day. (*Fidelity*, *supra*, 191 Cal. at p. 405.) Dynamex drivers, by contrast, can decide when they work, and skip any day(s) they choose. (*Dynamex*, at p. 918.) And they can make deliveries for other companies or for their own personal delivery business, which Edwards did not do. (*Dynamex*, at p. 918; *Fidelity*, *supra*, at p. 406.)

Dynamex applied the "ABC" test. A worker was an employee absent affirmative proof that (A) she was free from control and direction both under the contract and in fact; *and* (B) she performed work outside the usual course of the hiring entity's business; *and* (C) she was customarily engaged in an independently established trade or business of the same nature as the work performed for the hiring entity. (*Dynamex*, *supra*, 4 Cal.5th at p. 957.) The (B) factor precluded anyone from working "in-house" and the (C) factor required drivers like Edwards to offer services for multiple clients to preserve his independent status.[6]

The employee and independent contractor classifications have evolved over time, and sources other than the California Legislature have been primarily responsible for this evolution. The Legislature has not exercised exclusive authority.

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[6] See *Dynamex*, *supra*, 4 Cal.5th at p. 903, fn. 31, citing three sister state cases analyzing whether the worker had business cards.

III. Independent-contractor status protects work-life balance and worker safety.

Though *Dynamex* directly addressed only wage orders, the Legislature extended its reach through AB 5. (*American Soc'y of Journalists and Authors, Inc. v. Bonta* (9th Cir. 2021) 15 F.4th 954, 958.) This further constriction of independent contractor status was not universally welcomed. Though the Court characterized the injured "tryout" worker in *Laeng*, *supra*, 6 Cal.3d 771, as an employee to enable compensation, employee status is not always an unalloyed blessing, and many workers wish to retain their independence.

There are economic downsides to employee status. Injured employees receive relatively swift and certain compensation without having to prove fault, but there is a "catch": they forfeit the wider range of damages available in tort. (*Gund, supra,* 10 Cal.5th 503, 507; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.) Workers have therefore challenged their classification as employees because it restricted their relief. (E.g. *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1066; *McFarland, supra,* 52 Cal.2d 698, 702; *Umsted v. Scofield Engineering Const. Co.* (1928) 203 Cal. 224, 225.)

Many workers today also want some control over when, where, and how they work. They may wish to be home when their children return from school (or attend and enable their extracurricular activities); attend a mid-day exercise class; work in certain neighborhoods near their home or at certain times of the day only. They also may wish to observe a

sabbath or religious holiday, for which employees may request time off but are not guaranteed to receive it. (*Groff v. DeJoy* (2023) 600 U.S. 447.) The pandemic amplified the demand for worker autonomy, with 70 percent of workers indicating they would forfeit health insurance or retirement benefits to continue working from home.[7] It might be "no different" to the Vermont Supreme Court whether workers "knitted at home at midnight" or at a factory from to nine to five (see *Dynamex*, *supra*, 4 Cal.5th at p. 958, quoting *Fleece on Earth v. Dept. of Empl. & Training* (2001) 181 Vt. 458 [923 A.2d 594, 599-600]), but it probably matters to them.

The Legislature consequently reversed course after AB 5 and in AB 2257 provided more opportunities for independent contractor status. But the ensuing provisions have a heavy class bias. Workers can escape *Dynamex*'s restrictions if their work is "original and creative" and depends primarily on their "invention, imagination, or talent"; if their work is "predominantly intellectual"; or if their art are appreciated for "imaginative, aesthetic, or intellectual content." (Lab. Code, § 2778, subd. (b)(2).)

The voters thus adopted Proposition 22 to extend the opportunity for independent contractor status beyond the professional class. It "protect[s] the individual right of every . .

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[7] Sara Korolevich, *The State of Remote Work in 2021: A Survey Of The American Workforce* (Aug. 24, 2021), GoodHire.com https://www.goodhire.com/resources/articles/state-of-remote-work-survey/

. driver to have the *flexibility to set their own hours* for when, where, and how they work." (Bus & Prof. Code, § 7450, subd. (b), emphasis added.) Just as the imperative a century ago was protecting against special risks, section 7451 furthered the imperative of work-life balance and family care.

App-based drivers fit comfortably within the section 3353 definition of independent contractors, if not the AB 5 one. They are under the company's control for the result of their work, not how it is accomplished. They are paid for their the number of rides, not the amount of time they spend in the car. They use their own vehicles, which enables independent work beyond the network company, whereas workers a century ago did not own their own coal mine for personal use. Because they maintain those vehicles, they have the "primary power over work safety." (*Borello*, *supra*, 48 Cal.3d 341, 354.) They do risk "ergonomic harm" (OBM 37), but so does every other driver in the state. In contrast to World War I-era laborers, today's drivers are not working under especially hazardous conditions over which they have minimal control. Indeed, nothing promotes their safety (and that of other drivers with whom they share the road) than their right to turn down a request and take some time off whenever they need it. Section 7451 will not only reduce the number of drivers formally covered by the system compensating them for accidents, it also will likely reduce the number of drivers who suffer from them.

IV. As the Legislature may adjust the border between employee and independent contractor status, a fortiori, so may the electorate.

The Legislature may, and has, revised the border between employee and independent contractor status. Through Business and Professions Code section 7451, the electorate has done the same. Because "the people's power to propose and adopt initiatives is at least as broad as the legislative power wielded by the Legislature and local governments," a fortiori, the voters had the authority to enact section 7451 and readjust the border. (*California Cannabis*, *supra*, 3 Cal.5th 924, 935.)

This Court has further noted "The people's reserved power of initiative *is* greater than the power of the legislative body." (*Rossi*, *supra*, 9 Cal.4th 688, 715.) The people can bind future legislatures, but the legislature may not, nor can the people bind themselves. (*Ibid.*) A majority of legislators needs the governor to enact legislation, but a majority of the electorate can enact laws on its own. Legislative statutes can be modified by future legislatures, but initiatives cannot, unless the "measure expressly provides otherwise," and even then only by strict compliance with its own terms. (*Ibid.*)

As noted above, the holding of *McPherson*, *supra*, 38 Cal.4th 1020, that "the authority of the Legislature to enact specified legislation" generally includes "the people's reserved right to legislate through the initiative power" controls this case. (*Id.* at p. 1043.) The provision there, which authorized the Legislature to "confer additional authority and

jurisdiction" on the PUC, thereby enabled the voters to do the same. (*Id*. at pp. 1043-1044.) This Court reserved the question of whether the voters could limit the PUC"s authority only because it was uncertain whether the Legislature had that authority. That is not a concern here.

Plaintiffs read Article XIV, section 4 too broadly in contending it is violated whenever some (more?) workers are classified as independent contractors. Section 4 authorized application only to disputes between "an employer *and his employees*." (*Commercial Casualty Ins. Co. v. Industrial Accident Com.* (1930) 211 Cal. 210, 214, emphasis added; see also *Yosemite Lumber Co. v. Industrial Accident Com* (1922) 187 Cal. 774, 780.) The provision has never applied to everyone performing services in California, only to employees. Nothing in the section 4 requires any proportion of the workforce to be designated as "employees" rather than "independent contractors." *Yosemite Lumber* further makes clear that the Legislature's plenary power does not exclude the voters': "Nothing is added to the force of the provision by the use of the word 'plenary.' If the Legislature has power to do a certain thing, its power to do it is always plenary. It is merely surplus verbiage." (*Id*. at p. 780.)

"Plenary" thus does not mean "unlimited." It was unconstitutional for the Legislature to use its power to authorize payments to deceased workers' *estates*, because they were not encompassed within section 4 of Article XIV. (*Six Flags, Inc. v. Worker's Comp.* (2006) 145 Cal.App.4th 91,

94.) It is not enough for a program to further the *concept* of workers' compensation; it must actually conform to the voters' delegation of authority in section 4.

Moreover, who is defined as an employee, and who is an independent contractor, has changed over time, as Argument I, *ante*, demonstrated. Accordingly, who is subject to the workers' compensation program over time also will change. For example, voters approved Proposition 7 in 1978 to increase punishment for murder. (See e.g. *People v. Nash* (2020) 52 Cal.App.5th 1041, 1057.) The Legislature more recently revised the definition of murder, so that some defendants who would have been guilty in the past will not be guilty under the current definition. (*Id.* at p. 1055.) This re-definition, however, did not take away from Proposition 7; every defendant convicted of murder under current law will still face the punishment prescribed by Proposition 7, just as any employee today will receive the same workers' compensation treatment as always. Enacting Proposition 7 did not freeze the definition of murder (*id.* at p. 1061), just as Article XIV, section 4 did not freeze the definition of an employee or independent contractor. *How* a person is treated by a provision and *who* is covered by the provision are separate questions.

This Court should reject the dissent's belief that the voters are not "the people" unless they enact constitutional initiatives. (Dis. 19.) The people have a right to enact statutory as well as constitutional provisions, and it would be

highly undesirable to force the electorate to constitutionalize every policy preference.

In its tradition of self-government, California is like America, "only more so . . . the national culture at its most energetic end." (Wallace Stegner, "California Rising" in *Unknown California* (1967) Eisen, Fine, & Eisen (eds.) 8.) More than any other state, California entrusts its voters with more authority to shape state law than any other state, by restricting the Legislature from overriding its decisions. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1030.) Initiatives rank among our most precious rights, and this Court will not enforce a limitation on this power unless its purpose is unambiguous. (*California Cannabis*, *supra*, 3 Cal.5th 924, 948.) Article XIV, section 4, which authorizes the establishment of a workers' compensation system and not its universal reach, produces no such unambiguous limitation.

Conclusion

There is a tight connection between the substance of this case (workers' right to shape their daily lives), and its procedure (voters' right to shape state policy). Proposition 22 provides an opportunity to ensure workers are free to "regulate their own labor. (*Newman*, supra, 9 Cal. 502 (conc. opn. of Burnett, J.).) Proposition 22 rejects the hierarchical work format, in which "superior and subordinate, master and servant, principal and clerk, always have and always will exist" (*id.* at p. 520 (dis. opn. of Field, J.), just as the initiative power rejects the hierarchical relationship between government and the governed. It is thus surprising that Justice Streeter objected to its supposedly creating hierarchies or "second-class citizenship." (Dis. 61.) To the contrary, it spreads the benefits of independence to a broader cross-section of the community than AB 2257.

The dissent would actually impose second-class citizenship on the electorate, who would be forced to defer to the Legislature and give it the "last word" on the issue because "none of [the voters] took any oath to uphold the Constitution when they entered the voting booth." (Dis. 24.) But even on its own terms, revising the definition of "independent contractor" would not amend the Constitution. (Dis. 24, citing *PG&E*, *supra*, 180 Cal. 497, 500.)

Not only has the Legislature revised the border dividing employees from independent contractors, both through contraction and expansion, but so have other bodies with less

constitutional authority than the voters. Returning the reach of independent contractor status to the definition of section 3353 won the support of nearly ten million voters, and deserves implementation.

Respectfully submitted,

Dated: April 3, 2024

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Counsel for Amicus Curiae
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(Cal. Rules of Court, rule 8.520, subdivision (c).)

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