Case No. S279622

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

HECTOR CASTELLANOS, ET AL.,

Plaintiffs-Respondents,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants-Appellants,

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

Intervenors-Appellants.

First Appellate District, No. A163655
Alameda County Superior Court, No. RG21088725
Hon. Frank Roesch, Judge

APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF and [PROPOSED] BRIEF OF AMICI CURIAE LABOR LAW PROFESSORS IN SUPPORT OF PLAINTIFFS AND RESPONDENTS CASTELLANOS ET AL.

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(California Rules of Court, Rule 8.208)

Pursuant to California Rules of Court, Rule 8.208, Amicus Curiae Labor Law Professors, by and through its undersigned counsel of record, hereby certifies that there are no interested entities or persons to list in this Certificate pursuant to California Rules of Court, Rule 8.208(e)(3).

Dated: April 2, 2024

Respectfully submitted,

/s/ Veena Dubal

Counsel for *Amicus Curiae* Employment & Labor Law Professors

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APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF AND STATEMENT OF INTEREST OF *AMICI*

Amici Curiae Law Professors Sameer Ashar, Veena Dubal, Catherine Fisk, Charlotte Garden, Joseph Grodin, William B. Gould IV, Stephen Lee, Leticia Saucedo, Reuel Schiller, Katherine Stone, and Noah D. Zatz respectfully submit this Application for Leave to File Amici Curiae Brief in Support of the Plaintiffs and Respondents Hector Castellanos, et al. The proposed Amici Curiae Brief is attached.

For the reasons provided below, the proposed Amici Curiae Brief will assist the Court in deciding the matter currently set for hearing. *Cf.* Cal. Rules of Court, Rule 8.200(c)(2) ("The application [for leave] must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter.").

Amici Curiae are the following labor and employment law professors who study low-wage and gig work and the federal and California laws that regulate it. Each joins this amicus brief in a personal capacity; institutional affiliations are for identification purposes only.

Sameer Ashar is a Clinical Professor of Law at the University of California, Irvine School of Law. He teaches and writes on issues low-wage workers face and, with his clinics, has regularly represented low-wage workers in litigation and other advocacy to address structural causes of labor exploitation.

Veena Dubal is a Professor of Law at the University of California, Irvine School of Law. She conducts research and writes about how digital technology affects workers, including ride hail and food delivery workers in California. She also regularly advises regulators and policymakers on misclassification and work law protections for workers in the platform economy and other emerging labor markets.

Catherine Fisk is the Barbara Nachtrieb Armstrong Distinguished Professor of Law at University of California, Berkeley Law. She researches and writes on the intersections between employment and labor law and technology and on the labor and antitrust regulation of collective representation frameworks in gig economy jobs at both the low-wage and the high-wage ends of the labor market.

Charlotte Garden is a Professor of Law at the University of Minnesota Law School. She conducts research and writes on

labor and employment law issues related to technology, including low-income labor platform work.

Joseph Grodin is an Emeritus Professor of Law at the University of California Law, San Francisco. He was formerly Presiding Justice of the California Court of Appeal and an Associate Justice of the Supreme Court of California. Professor Grodin's writing focuses on the intersection of labor and civil rights law.

William B. Gould IV is Charles A. Beardsley Professor of Law Emeritus at Stanford Law School. He is a scholar of many facets of both federal and California labor law and was the Chairman of the National Labor Relations Board and the California Agricultural Labor Relations Board.

Stephen Lee is a Professor of Law at the University of California, Irvine School of Law. His work focuses on immigration law and its intersections with the law of the workplace and explores how regulatory frameworks enable or thwart effective protection of low wage and immigrant workers.

Leticia Saucedo is the Martin Luther King Jr. Professor of Law at the University of California, Davis School of Law. Her research is at the intersections of employment, labor, and

immigration law, with particular focus on the situation of low-wage immigrant workers.

Reuel Schiller is the Honorable Roger J. Traynor Chair and Professor of Law at the University of California, San Francisco School of Law. He writes on constitutional and administrative law and on labor and civil rights law.

Katherine Van Wezel Stone is the Distinguished Research Professor of Law at the University of California, Los Angeles School of Law. She has written a number of books and articles on adapting employment regulation to technologically driven changes in the structure of work.

Noah D. Zatz is a Professor of Law at the University of California, Los Angeles School of Law. He researches and writes on employment and labor law, with particular focus on how the legal regulation of work structures inequality and social citizenship.

No party or any counsel to a party in the pending appeal, or any other person other than amici and their counsel, authored this proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief.

Based on their belief that their collective expertise as scholars, teachers, agency heads, and judges may assist this court in the resolution of the issues in this case, Amici Labor Law Professors respectfully request that this court accept and file the attached amicus curiae brief.

Dated: April 2, 2024 Respectfully submitted,

/s/ Veena Dubal

Counsel for *Amicus Curiae*
Labor Law Professors

AMICUS CURIAE BRIEF

INTRODUCTION

Proposition 22 divests drivers (such as those who work for Uber and Lyft) and couriers (such as those who work for DoorDash and Instacart) of worker protections that exist for employees in California, especially workers' compensation. (§7451, Appellants' Appendix ("AA").)

The companies that wrote Proposition 22 and defend it here frame this as preserving driver "freedom to work" without the protections of law. (§7449(f), AA at 19-20). This "freedom to work" is no freedom at all, as it is work with zero net income guaranteed, and no workers' compensation, no unemployment insurance, no sick leave, nor any of the myriad protections that the California Legislature has found to be essential to protect worker dignity and prevent abject poverty.

A law protecting this the kind of "freedom" is one that "in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." (Anatole France, *The Red Lily* (1894).) This kind of illusory freedom was repudiated after courts disavowed the so-called "liberty of

contract" of *Lochner v. New York* (1905) 198 U.S. 45, 53. This court should not revive it now.

Amici, labor and employment law professors who have studied low-wage and gig work, submit this brief in support of Plaintiffs-Respondents urging reversal of the Appeals Court opinion and affirmance of the judgment of the Superior Court. We specifically address whether Proposition 22 conflicts with article XIV, section 4 of the California Constitution, therefore requiring that Proposition 22 be deemed invalid in its entirety. In doing so, we demonstrate the deleterious impact of Proposition 22 on the safety and health of drivers in derogation of the Legislature's constitutional responsibility to maintain a complete and adequate system of workers' compensation. We explain how Proposition 22 divests the Legislature of its constitutional power to legislate in the area of workers' compensation.

First, the Superior Court correctly determined that Proposition 22 violates Article XIV, section 4 of the California Constitution, which grants to the Legislature "plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation." The Court of Appeal wrongly concluded that Proposition 22 did not interfere

with the Legislature's plenary authority. The effect of Proposition 22 is to create an *incomplete* system of liability for drivers and couriers, which are occupations with high rates of injury and death. Contrary to state constitutional requirements for the system of workers' compensation, the initiative impermissibly denies hundreds of thousands of low-income app-based workers access to on-the-job safety measures, adequate medical reimbursement and wage replacement in the case of injury, vocational rehabilitation training, and an administrative system to adjudicate disputes. Moreover, by substituting an inadequate partial private insurance program for the "complete" and "adequate" system of workers' compensation that the California Legislature is required to create, Proposition 22 unconstitutionally infringes the authority of the Legislature. This constitutional infirmity renders Proposition 22 invalid in its entirety because it goes to the core of the proposition's purpose to circumvent the Legislature's authority to regulate employment relationships.

DISCUSSION

I. Proposition 22 Strips TNC Drivers and DNC couriers of Basic Health and Safety Protections, Jeopardizing the Lives and Well-being of Vulnerable Workers.

Due to high occupational rates of injury and fatality, "transportation network company" (TNC) drivers and "delivery network company" (DNC) couriers are among those workers in California who are most in need of a complete and effective workers' compensation system. By carving them out of the protections of the workers' compensation system, Proposition 22 deprives TNC and DNC workers adequate medical reimbursements, comprehensive disability insurance, and complete wage replacements if they are injured on the job. It also detrimentally impacts the health, safety, and financial security of low-income workers and their families who are forced to bear much of the risk and liability associated with work-related death and injury. The law even denies TNC and DNC workers access to workplace safety provisions which would otherwise mandate that the companies take measures to lower and prevent occupational health hazards and deaths.

The National Bureau of Labor Statistics has recently found that app-mediated labor, including work completed by TNC workers, is one of the most fatally hazardous occupations for workers treated as independent contractors. (U.S. Bureau of Labor Statistics Beyond the Numbers Publication, Fatal

Occupational Injuries to Independent Workers Vol. 8, No. 10, August 2019.) According to federal data, taxi and livery workers are sixty times more likely than other workers to be murdered on the job. (U.S. Department of Health and Human Services, National Institute for Occupational Safety and Health, Current Intelligence Bulletin 57: Violence in the Workplace-Risk Factors and Prevention Strategies, Publication No. 96-100, Cincinnati, OH, 1996.) These workers also experience some of the highest rates of nonfatal assault of any occupational group, exceeded only by police and private security guards. (Greg Warchol, Ph.D., "Workplace Violence, 1992-96," in Bureau of Justice Statistics Special Report, U.S. Department of Justice, Office of Justice Programs, Washington, DC, July 1998, p. 3.) A 900-person national survey of Uber and Lyft drivers conducted in 2023 by the Solidarity Organizing Center (SOC) found that 67% of drivers reported violence, harassment, and/or abuse on the job. Ten percent had been robbed or carjacked, 3% had been sexually assaulted or raped, and 2% had been stabbed. (Driving Danger: How Uber & Lyft Create a Safety Crisis for Their Drivers, April

2023[1]). The federal Occupational Safety and Health Administration has even issued regulatory guidance urging employers of taxi and livery drivers to take specific efforts to protect their workers' safety. (Occupational Safety and Health Administration, U.S. Department of Labor, Risk Factors and Protective Measures for Taxi and Livery Drivers, May 2020.)

The launch of ride-hailing companies in U.S. cities has been associated with a two to three percent increase in the number of fatal accidents and motor vehicle fatalities. (John Barrios, Research Brief: The Cost of Convenience: Ridesharing and Traffic Fatalities, March 2019.[2]) Indeed, a 2017 joint study by the California Public Utilities Commission and the California Department of Insurance found that ride-hailing accidents alone had generated 9,388 claims that resulted in $185.6 million losses in 2014, 2015, and 2016. (http://www.insurance.ca.gov/0400-news/0200-studies-reports/upload/TNC_REPORT_AS_OF_010518.pdf.)

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[1] Available at https://thesoc.org/wp-content/uploads/2023/04/SOC_RideshareDrivers_rpt-042023.pdf

[2] Available at https://bfi.uchicago.edu/wp-content/uploads/BFI_RB_Barrios_The-Cost-of-Convenience_Ridesharing-and-Traffic-Fatalities.pdf.

An empirical study of DNC couriers in an urban environment similarly found that one out of every two workers reported being in an accident or crash while doing a delivery. Of those surveyed, seventy-five percent had to pay out of pocket for medical expenses associated with their injuries—expenses that would have otherwise been paid through workers' compensation benefits. (Maria Figueroa et al., Essential but Unprotected (2021).)

In addition to vehicular accidents, TNC workers have also suffered high rates of sexual and physical assault—sometimes fatal. In 2019, Uber self-reported that they received approximately 6000 complaints of sexual assault in the previous two years. (https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf.) Two years later, Lyft reported that from 2017-2019, they received approximately 4000 complaints of sexual assault. (https://www.lyft.com/blog/posts/lyfts-community-safety-report.) The companies' data indicates that drivers experienced sexual violence—including rape—at roughly the same rate as riders. DNC couriers report similarly violent on-the-job experiences.

(Cyrus Farivar, Gig Workers Fear Carjacking, Other Violence Amid Spike in Crimes, NBC News (April 24, 2021), https://www.nbcnews.com/business/business-news/gig-workers-fear-carjacking-other-violence-amid-spike-violence-crimes-n1264987.)

The Covid-19 pandemic highlighted the dangerous consequences of depriving TNC and DNC workers basic state health and safety protections. Though workers were owed these protections leading up to the passage of Proposition 22, the companies maintained that their workers—all of whom were considered "essential workers"—were independent contractors. As workers struggled to obtain personal protective equipment, at least one company opted to open an online store to sell masks and cleaning equipment to drivers instead of providing them for free, as they were required to do under state employment laws. (Kari Paul, Lyft Sparks Uproar After Opening Store to Sell Masks to Its Drivers, The Guardian, (July 17, 2020), https://www.theguardian.com/technology/2020/jul/17/lyft-drivers-masks-ppe-store-covid-19.) Early in the pandemic, Uber, Lyft, Instacart, and DoorDash said they would assist workers with two weeks of lost income if they were infected with Covid-19.

Investigative reporting, however, revealed that many workers who applied for this assistance received less than what they were owed and others received nothing at all. (Dara Kerr, Gig Workers with Covid-19 Say It's Hard to Get Sick Leave from Uber, Lyft, Instacart, CNET (Mar. 26, 2020), https://www.cnet.com/tech/mobile/features/gig-workers-with-covid-19-symptoms-say-its-hard-to-get-sick-leave-from-uber-lyft-instacart/. The families of drivers and couriers who worked on front lines of the pandemic and died after contracting the virus were denied the death benefits guaranteed by California's workers' compensation laws. (Suhauna Hussain, This Uber Driver Died of Covid-19. Proposition 22 Will Sway His Family's Fate, Los Angeles Times (Nov. 1, 2020), https://www.latimes.com/business/technology/story/2020-11-01/prop-22-uber-driver-covid-19-death-benefits-workers-comp; Joshua Emerson Smith, A Covid-19 Death Renews Questions of Responsibility of Uber and Lyft to Drivers, Los Angeles Times (July 25, 2020), https://www.latimes.com/california/story/2020-07-25/covid-19-death-uber-lyft-drivers.)

TNC and DNC workers also face invisible workplace hazards that are exacerbated by Proposition 22. For example,

research on the daily experiences of TNC and DNC workers reflects the common problem of lack of access to toilets and bathroom breaks. (Alexandrea Ravenelle. Hustle and Gig (2019); Maria Figueroa et al., Essential but Unprotected (2021).) But under Proposition 22, companies are not legally obligated to provide bathroom breaks—or to provide bathrooms—which can lead to what doctors call "Taxi Cab Syndrome." This syndrome, which is caused by infrequent voiding due to a lack of toilet access and the stress of working long hours without access to a wage floor, is associated with genitourinary pathologies including voiding dysfunction, infertility, urolithiasis, bladder cancer, and urinary infections. Alon Mass, et al. "Taxi Cab Syndrome: A Review of the Extensive Genitourinary Pathology Experienced by Taxi Cab Drivers and What We Can Do to Help," Reviews in Urol. (2014) 16(3): 99–104.

The companies that put Proposition 22 on the ballot and defend it here insist that app-based drivers supported the initiative and embrace the freedom to work without the protections of workers' compensation or other California labor laws. (Intervenors' Op. Br. at 22, 24.) Empirical research, however, suggests this is false. Qualitative research on the daily

experiences of workers not only reveals the extraordinary health and safety hazards borne by app-deployed workers, but also shows how these workers *want* the health and safety protections associated with employment—including workers' compensation. (Veena Dubal. "An Uber Ambivalence." Beyond the Algorithm (2020).) Ethnographic research has troubled the findings of industry-sponsored studies that most of these workers want to be independent contractors. A long-term study of San Francisco Bay Area drivers, for example, found that even drivers who indicated that they preferred to stay independent contractors on a survey instrument later stated that they needed and wanted the basic benefits of employment rights, including health and safety protections. (Veena Dubal. "An Uber Ambivalence." Beyond the Algorithm (2020).)

II. Proposition 22 Violates Article XIV of the California Constitution, Which Grants the Legislature Plenary Power to Create a Complete Workers' Compensation System

Proposition 22 transgresses the specific constitutional constraints placed on the Legislature to create and enforce a complete workers' compensation scheme for all workers in the state of California. Article XIV, §4 of the California Constitution

grants the Legislature the "plenary power, *unlimited by any provision in this Constitution*, to create, and enforce a *complete* system of workers' compensation." (Art. XIV, §4, emphasis added.) The Constitution specifically empowers the Legislature to create a system covering "any or all persons to compensate *any or all of their workers* for injury or disability." (*Id.*, emphasis added).) The Legislature used this plenary power in Assembly Bill (AB) 5, enacted in 2019, to clarify that app-dispatched drivers and couriers are included within the existing workers' compensation and occupational health and safety systems. (Assem. Bill No. 5 (2019-2020 Reg. Sess., codified at Labor Code §§2750.3, 2775.)

By seeking to overturn AB 5 through a legislative initiative, Proposition 22 violates Article XIV in at least two ways. First, the proposition renders the state's workers' compensation system *incomplete* by purporting to remove hundreds of thousands of low-income, immigrant, and racial minority "transportation network company (TNC) drivers" and "delivery network company (DNC) couriers" from the protections of workers' compensation and other occupational safety and health laws. (§7463 (defining drivers and couriers carved out

from protections of state law), §7455 (describing the system of insurance that Proposition 22 substitutes for workers' compensation). Second, Proposition 22 also violates Article XIV, §4 by significantly limiting the Legislature's constitutional power to create and administer a workers' compensation system for these workforces, both of which suffer high rates of occupational injury and death.

A. Proposition 22 Violates Article XIV, Section 4 of the California Constitution by Withdrawing TNC and DNC workers from the State's Workers' Compensation Scheme, Thereby Creating an Incomplete System of Workers' Compensation and Contradicting the Specific Language and Intent of the Section

Proposition 22 carves drivers and couriers out of the state's workers' compensation laws. (§7451, AA 33.) In lieu of comprehensive workers' compensation coverage, Proposition 22 creates a separate, *incomplete* system of "loss and liability" protection through which the costs of work-related injuries and death are mostly displaced upon the workers and their families. (§7455, AA 35). The history and specific language of Article XIV, section 4 of the California Constitution, which mandates that the Legislature create and administer a complete system of workers'

compensation, show that the Proposition 22 carveout is unconstitutional.

Early state efforts to address the problem of workplace accidents leaving workers and their families destitute were declared unconstitutional on the ground that they interfered with employers' property rights and freedom of contract. (Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 Cornell L. Q. 206, 231 (1952); *Ives v. South Buffalo Ry. Co.* (1911) 201 N.Y. 271.) To remove constitutional doubt about the Legislature's authority *and responsibility* to adopt a workers' compensation system, in 1911, by constitutional amendment, California voters clarified the constitutional authority of the Legislature to act and directed the Legislature to adopt a system of workers' compensation. *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1041, n.7. In response, the Legislature passed the Boynton Act, creating the State Workers' Compensation Fund and incentivizing, but not mandating, workers' compensation insurance for employers. Warren L. Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 1, § 1.01[3][d] (rev. 2d ed. 2022). In the event of workplace injury or death, hiring entities that carried workers'

compensation insurance could compensate workers for industrial injuries, irrespective of the fault of either party. *Id.*

Seven years later, to address the inadequacies of this system, the voters again amended the Constitution to expand both the scope of the protections and the Legislature's power and responsibility to create and enforce a "full and complete system of workers' compensation." Workers' Compensation, 1918. P2.[3] These 1918 amendments amplified the authority of the Legislature to grow the workers' compensation scheme so that it included (1) *compulsory* compensation, requiring indemnity and benefits for on-the-job injury and death, regardless of fault; (2) requirements for on-the-job safety provisions; (3) insurance provisions, including state-participation in those provisions; and (4) an administrative system to exercise both judicial and executive functions. *Id.* To reflect these mandates, Article XIV, section 4 specifically defines what constitutes a "complete system":

[3] This is available at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1124&context=ca_ballot_props.

> A *complete system* of workers' compensation includes *adequate provisions* for the comfort, health and safety and general welfare of *any and all workers* and those dependent upon them for support to the extent of relieving 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; also *full provision* for securing safety in places of employment; *full provision* for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; *full provision* for adequate insurance coverage against liability to pay or furnish compensation… (emphasis added).

The terms "complete system," "any and all workers," and "adequate" and "full provision" are unequivocal in their intention: The workers' compensation system created by the Legislature exercising its plenary power under Article XIV must adequately cover *all* workers. The California voters and legislators who amended the Constitution and created the workers' compensation system likely envisioned every worker to be covered because the

modern category of independent contractor did not exist; the problem of industrial accidents affected all who worked for a living, and the compulsory, no-fault compensation system must be equally comprehensive in coverage to eliminate the crisis of "crippled workingmen and destitute widows" that motivated the reform. (John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (2014).

California has long recognized that people working on short-term gigs are covered by workers compensation. Freelance jockeys hired for a single race and whose compensation depends on the outcome of the race have been held to be employees for both workers' compensation and unemployment insurance purposes. (*Drillon v. Industrial Accident Comm'n* (1941) 17 Cal.2d 346, 352; *Isenberg v. Calif. Emp. Stabiliz. Comm'n* (1947) 30 Cal.2d 34, 39-40.) Taxi drivers who leased vehicles from taxi companies and who received payment directly from customers also have been found to be employees for these purposes (*Tracy v. Yellow Cab Cooperative* (1997) Super. Ct. Cal. No. 938786, slip op. 2).

The Legislature, in crafting a complete system of workers' compensation through its constitutional authority, specifically sought to address the health and safety issues faced by workers who drove automobiles in the course of their employment. Workers' compensation laws were intended to address skyrocketing rates of occupational injury and death brought about by industrialization, railroads, and, especially, automobiles. (Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 11 J. Tort. L. 71 (2018).) Automobile injuries, especially to drivers for hire, were a particular source of concern. By the 1920s, "the increasing use and speed of automobiles … made our streets more dangerous than our factories." (Robert Marx, Compulsory Compensation Insurance, 25 Columbia Law Review 167 (1925).) In 1929, automobile accidents accounted for 29% of all accidental deaths. (Jonathan Simon, Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941, 4 Conn. Ins. L.J. 521, 530 (1998).) In the last two decades, a majority of all tort claims arose from automobile accidents, as did seventy-five percent of the aggregate

compensatory payments for tort claims. (Nora Freeman Engstrom, When Cars Crash: The Automobile's Tort Law Legacy, 53 Wake Forest Law Review 293, 295 (2017).) To suggest that California's constitutional command that the Legislature maintain a complete and adequate workers' compensation system can be reconciled with an initiative carving out one of the largest and most hazardous occupations in the state is to make "complete" and "adequate" mean the opposite of their plain meaning.

Indeed, most recently, in passing Assembly Bill 5, the California Legislature specifically made clear its mandate to provide workers' compensation in industries designated by the Division of Occupational Safety and Health [DOSH] as "high hazard industries," pursuant to a statutory mandate (https://www.dir.ca.gov/dosh/high-hazard-unit.html). AB5's referral agency exemption enumerates and excludes from exemption ten categories of services which are considered particularly hazardous (janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, and construction services) (See Cal. Lab. Code § 2777(b)(2)(C)). This list both reflects the DOSH's high hazard

industry list and is broader than it. We can infer, then, that the Legislature meant to codify this enumerated list to ensure that employment protections—including those provided through the state's workers' compensation scheme—specifically applied to *dangerous industries*. Most relevantly here, these industries include "delivery," "courier" and "transportation" work.

Thus, Proposition 22 contravenes the constitutional requirement that the state workers' compensation system be complete and adequate in several ways. It is inconsistent with the People's intent that the California's workers' compensation system reduce avoidable hazards and compensate for injuries and fatalities caused by unavoidable hazards of work as a driver and courier. To be complete, the system must provide in addition to wage replacement for injured and deceased workers and their families, provisions for workplace safety, medical treatment, and adequate insurance coverage against liability. For a number of reasons enumerated below, the elimination of app-dispatched drivers and couriers from workers' compensation and the private and partial insurance system that the proposition adopts in its place fail to adhere to the constitutional requirements of completeness and adequacy.

First, Proposition 22's occupational and accidental death insurance requirement (§7455(d), AA 35) does not cover workers for one-third or more of the time they spend working.[4] (Ken Jacobs and Michael Reich, The Uber/Lyft Initiative Guarantees Only $5.64 an Hour, UC Berkeley Labor Center, October 31, 2019.[5]) Drivers and couriers are uninsured for the time when they are parked or driving around waiting to be called and for the times when they have dropped off a delivery or a passenger and are driving back to where they think they will next be called or be most likely to be hailed. For example, a driver who picks up passengers at the airport and drives them 50 miles to their home will be uninsured for the entire time spent driving back to the airport to wait for another passenger. A courier who drops off a

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[4] Proposition 22 provides that TNCs and DNCs must maintain occupational accident and accidental death insurance that provide coverage for up to one million dollars. According to research commissioned by Uber in 2019, the amount of time that drivers spend unengaged is roughly 33 percent of overall time spent working. https://drive.google.com/file/d/1FIUskVkj9lsAnWJQ6kLhAhNoVLjfFdx3/view. Anecdotally, drivers estimate this time period to be much longer, especially during periods of low demand. Workers are not covered by occupational accident insurance while unengaged if they are "on one or more other network company platforms" or "engaged in personal activities."

[5] Available at https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/.

package is uninsured while walking back through a dark alley to her vehicle, which can be the most dangerous part of the job. During particularly hazardous times when drivers and couriers are working, such as when waiting to be summoned or when pulling into traffic after dropping off a passenger or delivery request, workers are left unprotected and uncovered.

Second, even if a driver is injured during the specified, narrow period of engaged time, Proposition 22's insurance requirement only provides medical coverage up to one million dollars. (§7455(a)(1), AA 35.) In contrast, under the state's complete workers' compensation system, injured workers receive full reimbursement for treatment, medication, procedures, travel, and out of pocket expenses. (Lab. Code §3209 *et seq.*, §21155.)

Third, Proposition 22 does not grant workers adequate wage replacement in the event of temporary or permanent disability. The proposition's wage replacement benefits last for only two years and often fall below those required under the state's minimum wage, overtime, and vehicle reimbursement laws. (§7455(a)(2)(A), AA 35.) Thus, a worker rendered quadriplegic or permanently cognitively impaired in an auto accident will lose wage replacement after two years regardless of

whether the worker is so disabled as to be unable to work. In contrast, the Legislature has provided for permanent disability benefits when needed. Lab. Code §4658.

Fourth, if the injuries are so severe that the worker can no longer drive or make deliveries, Proposition 22 provides no vocational training, in contrast to the state system. Lab. Code §§4650(b), 4658. Glaringly, Proposition 22 also provides no provisions for securing safety at work or provisions for health and safety protection. Cal Const., Article XIV, section 4; Lab. Code §6300 *et seq*. In the context of the global coronavirus pandemic, this meant that despite the drivers' and couriers' high rates of exposure to the virus, local laws mandating that essential workers wear masks, and the workers' vocal demands for safety equipment, the TNCs and DNCs failed to provide adequate personal protective equipment.
https://www.cnet.com/tech/mobile/uber-and-lyft-drivers-give-us-safety-gear-to-protect-us-from-covid-19/

Finally, contravening the specific language of the California Constitution, Proposition 22 provides no provision for an administrative body or system to adjudicate claims or disputes. Instead, as is well-known, they are consigned to

asserting their claims in the companies' secret arbitration system.

In sum, under Proposition 22, drivers and couriers are impermissibly denied access to a complete system of workers' compensation, which is replaced by an inadequate loss and liability system that frustrates the purposes of Article XIV, section 4 of the California Constitution.

B. Proposition 22 Violates the California Constitution by Countermanding the Authority of the Legislature and Using the Initiative Process to Make the State's System of Workers' Compensation Incomplete

Proposition 22 improperly uses the state's initiative system to countermand the Legislature's constitutionally-granted plenary power to legislate in the arena of workers' compensation. Article XIV, section 4 of the California Constitution grants the Legislature "plenary power unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation…." Cal. Const. Art. XIV, sec. 4. The Legislature exercised that plenary power in AB 5 to enact Labor Code sections 2750.3 and 2775, which ensured that TNC and DNC workers were protected by workers' compensation.

Proposition 22 stripped those protections in derogation of the powers conferred on the Legislature.

In *Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, the California Supreme Court considered the constitutionality of a proposed ballot initiative that would grant additional authority to the California Public Utilities Commission (CPUC). Per Article XII, section 5 of the Constitution, "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, *to confer additional authority and jurisdiction* upon the commission…." (Emphasis added.) Although Article XII, section 5 gives the Legislature plenary power to confer additional authority on the CPUC, it is silent and therefore ambiguous on the initiative system's power to do the same. Having stated this ambiguity, the Court held that "in light of the background and purpose of the relevant language of article XII, section 5, … this constitutional provision does not preclude the people, through their exercise of the initiative process, from conferring *additional powers or authority* upon the [CPUC]." *Independent Energy Producers*, 38 Cal.4th at 1043-44 (emphasis added). Thus, where the Constitution grants such plenary power to the Legislature,

the California Supreme Court has held that initiative statutes may be used to *expand,* but not necessarily limit, the regulatory authority conferred to the Legislature.[6]

In contrast to the initiative evaluated in *Independent Energy Producers*, Proposition 22 runs afoul of the California Constitution because it improperly limits the authority of the Legislature to create a complete system of workers' compensation. It does this in two specific ways. First, Proposition 22's workers' compensation carveout for DNC and TNC workers undermines the authority of the Legislature to create and enforce a complete system of workers' compensation by overriding the decision of the Legislature to include these workers in the scheme. Second, Proposition 22 also limits the constitutional authority of the Legislature to create and enforce the workers' compensation through the provision calling for a seven-eighths vote by both houses to legislate in the area in the future. "Particularly when this language is read in

[6] The Supreme Court noted that it did not have occasion to rule on whether or not an initiative that limited the authority of the CPUC would be constitutional. *Independent Energy Producers*, 38 Cal.4th at 1044 n.9.

light of the origin and purpose of the provision" (*id.* at 1025), as the Court calls upon the lower courts to do, Proposition 22 runs afoul of Article XIV, section 4.

The State of California argues that the power and responsibility Article XIV, section 4 confers on the Legislature to maintain a "complete system of workers' compensation … to compensate any or all of [an entity's] workers for injury or disability" can be stripped away by an initiative statute defining certain workers to be "independent contractors" rather than "employees" because the initiative process of Art. IV, §1 existed before the 1918 constitutional amendment added Art. IV, §4. (Op. Br. of State at 28-24.) This is wrong, for at least two reasons. First, as noted above, California first amended its Constitution to ensure workers' compensation protections would not be stripped away (by either hostile courts, as happened a century ago, or by special-interest funded ballot measures like Proposition 22) both before and after California adopted the initiative process. If the People of California amend the Constitution to create an inadequate and incomplete system of workers' compensation, that is one thing. But Proposition 22 is an initiative statute and it contravenes Art. XIV, §4.

Second, an initiative statute must be consistent with the California Constitution. Imagine if Proposition 22 had stripped workers' compensation protections only from Black drivers or female couriers. There is no question that such an initiative statute would be unconstitutional because it would contravene Art. I, §7 and §8, which prohibit discrimination on the basis of race, sex, and other traits. Thus, although it is true that courts "jealously guard the precious initiative power," (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501), it is equally true that an initiative statute must be consistent with other provisions of the Constitution. As we have explained, Proposition 22 is not.

The Appellees argue that carving out some of the most dangerous jobs in California from workers' compensation is consistent with the requirement to maintain a "complete and adequate" system because initiatives, like the Legislature itself, can carve out some groups of workers from the protection of the workers' compensation statute. (Op. Br. of Appellees at 19-20). But on this analysis, the Legislature or the voters could enact statutes eliminating workers' compensation coverage from one group after another until no worker remained, and the system would still be "complete and adequate" even though it covered no

one. This reading contravenes the purpose of Article XIV, §4, which was to cover "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." (*Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 739.) Moreover, the California Supreme Court has held for over half a century that the Legislature can exclude workers from coverage of the system *only where there is a reasonable basis* for the decision to exclude. (*Id.*at 739-40.) There is no such reasonable basis here.

The difference between an initiative that adds rights or protections and one that strips them away is crucial. It explains the logic behind the California Supreme Court's decision in *Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal. 4th 1020 (*IEP*), which upheld an initiative *adding* protections even when the Constitution confers "plenary power" to the Legislature, but suggested that powers and protections cannot be stripped away. *IEP* construed Art. XII, §5 of the Constitution, which grants the Legislature "plenary power, unlimited by the other provisions of this constitution … to confer additional authority and jurisdiction upon the Public Utilities Commission

[PUC]." (38 Cal.4th at 1033, quoting Art. XII, §5.) *IEP* upheld the constitutionality of a statutory initiative that expanded the regulatory authority of the PUC over independent energy producers. (*Id.* at 1043-44.) The court expressly limited its decision to a case in which the initiative *expanded* the power or jurisdiction of the PUC and recognized that a different case would be presented if an initiative attempted to override the Legislature's judgment and to strip protections away. (*Id.* at 1044 n.9.)

The reason why Article XIV, §4 prohibits initiative statutes that strip away workers' compensation protections from particular categories of workers in hazardous occupations lies in the fundamental nature of the workers' compensation bargain: employers gain immunity from tort liability for the injuries suffered by their labor force, injured workers and their dependent families gain no-fault compensation for medical bills, rehabilitation, and partial wage replacement, but the compensation is lower than would be available in tort, and consumers and the community benefit from a system that spreads the cost of injury broadly and equitably across the

companies and the economy. (*New York Central R. Co. v. White* (1917) 243 U.S. 188.)

A famous example of the workers' compensation bargain is *Eckis v. Sea World Corp.* (1976) 64 Cal.App.3d 1, involving a secretary at Sea World who moonlighted as a swimsuit model and was seriously injured while riding Shamu in a bikini for a photo shoot. Because Sea World's head trainer knew, but did not tell Eckis, that Shamu had previously attacked people who had tried to ride her in ordinary bathing suits rather wetsuits, Eckis would have had a tort claim against Sea World and recovered full compensation for disfiguring injuries that was not available under workers' compensation. But the Fourth District Court of Appeal cautioned that "the Workers' Compensation Act must be liberally construed in favor of coverage," in order to protect the system from strategic decisions of particular claimants or their employers to opt out of it in cases when it was to their advantage. (*Id.* at 10.) Obviously, Uber, Lyft, and the other app-based ride-hailing and deliver companies think it is in their interest that their workers are not covered by workers' compensation because they face little threat of expensive tort litigation from their workforce. But if Proposition 22 is upheld, one can expect a host

of similar initiatives to be proposed by other wealthy companies seeking to carve their workforce out of the system. Article XIV, §4 was adopted to prevent exactly the kind of economic hardships suffered by workers, their families, and their communities that Proposition 22 seeks to inflict.

Finally, Proposition 22 not only conflicts with the Legislature's Article XIV, §4 authority and responsibility to maintain a complete and adequate system of workers' compensation, it also strips *future* Legislatures of their Article XIV, §4 authority and responsibility. A statutory initiative cannot divest the power of a future Legislature to exercise its constitutional authority. *Ex Parte Collie* (1952) 38 Cal.2d 396, 398; *Thompson v. Bd. of Trustees of City of Alameda* (1904) 144 Cal. 281, 283.

CONCLUSION

For the reasons stated, Proposition 22 is unconstitutional and invalid in its entirety. This Court should affirm the trial court's judgment.

Dated: April 2, 2024

Respectfully submitted,

/s/ Veena Dubal
Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Century Schoolbook font, including footnotes. The brief contains 7,327 words. Counsel relies on the word count of Microsoft Word, the word processor used to generate this brief.

Dated: April 2, 2024

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Alex Wheeler, declare:

I am over the age of 18 years and not a party to this action. My business address is 520 Capitol Mall, Suite 300, Sacramento, CA 95814.

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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/s/Alex Wheeler

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