



May 22, 2023

Hon. Patricia Guerrero
Chief Justice of California

Associate Justices of the
California Supreme Court

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amici Curiae Letter in Support of Petition for Review – Castellanos v. State of California, Cal. Supreme Ct. No. S279622

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

Pursuant to California Rule of Court 8.500(g), Rideshare Drivers United, Gig Workers Rising, Asian Americans Advancing Justice - Asian Law Caucus, PowerSwitch Action, Worksafe, Legal Aid at Work, and the National Employment Law Project (collectively, *amici curiae*), submit this letter in support of the Petition for Review, and urge this Court to consider the critically important constitutional issues presented by California Proposition 22. Statements of Interest of *Amici Curiae* are attached here as Attachment A.

Our letter will focus on the following points:

1. Ridehail and Delivery Drivers Across California, Harmed by Prop. 22, Urge the Court to Resolve the Constitutional Issues Presented.
 - a. Ridehail and Delivery Drivers Work in Dangerous Conditions Requiring Real Health and Safety Protections.
 - b. Prop. 22's Private Accident Insurance System, Largely Controlled by Ridehail and Delivery Companies, Substitutes California's Constitutionally Protected Workers' Compensation with a Mirage.
 - c. Prop. 22 Cuts Drivers off from State Health and Safety Regulation, and its Healthcare Subsidy is Unavailable to Most Drivers.
 - d. Prop. 22's "Guaranteed Earnings" Guarantees a Subminimum Wage to a Workforce Composed Predominantly of Immigrants and People of Color

2. This Court’s Silence Would Encourage Other Employers to Follow Prop. 22’s Troubling Roadmap, Harming Low-Wage Workers Across the State and the Public Welfare.
 - a. Workplace Protections Serve a Fundamental Public Purpose.
 - b. Prop. 22 Offers a Roadmap for Other Employers in other Industries to Carve their Workers out of Constitutionalized Workplace Protections.
 - c. Ridehail and Delivery Work Is Not Meaningfully Different from Most Other Low Wage Work; Allowing an End-Run around Employment Law for these Workers Portends an Uncertain Future for Workers Across California.

I. Introduction

Ridehail and delivery drivers in California, like other workers in the state, are presumptively entitled to the rights and protections long ago enshrined in state employment law. Under the ABC test—adopted by this Court as the standard for determining employment status under wage and hour law in *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903 (2018), and codified as the universal test by Assembly Bill 5¹—ridehail and delivery drivers are employees fully entitled to the guarantees of California employment law.

Yet Proposition 22 purports to strip covered app-based drivers—and only app-based drivers—of *all* of the rights and protections afforded to other employees under state law. Bus & Prof. Code, §§ 7448-7467 (“Prop. 22”).² In its place, the industry-sponsored ballot initiative enacts a uniquely weak and corporate-friendly regime of worker (non)protection: stripping driver access to workers’ compensation and replacing it with much less protective private accident insurance; establishing a “minimum wage” that in fact guarantees a wage far below the state wage floor, and cutting these workers off from access to overtime pay, paid sick days, unemployment insurance, and anti-discrimination protections. In one fell swoop, Uber and Lyft successfully codified their business model of misclassification and exploitation, to try and ensure that their predominantly immigrant, Black & brown workforce would continue to work long hours for subminimum wages without any legal floor.

Amici, who include organized groups of ridehail and delivery drivers in California who have been directly and negatively impacted by Prop 22, write to urge this Court to grant review and resolve the fundamental constitutional question presented in this case: can large corporations, armed with a venture-capital war chest of hundreds of millions of dollars, fund a ballot initiative to carve their labor force out of constitutionalized workplace protections? More specifically, we seek a determination that Prop. 22’s provision exempting drivers from workers’ compensation is unconstitutional. This Court’s failure to act threatens to leave hundreds of thousands of drivers in California stripped of state

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

² Covered workers under Proposition 22 include those for whom the hiring entities can show that certain conditions are met, as set forth at Cal. Bus. & Prof. Code § 7451.

employment law protections and unconstitutionally deprived of legal protections that apply to other workers for the sole reason that their work is mediated by their employer's smartphone app.

Amici also write on behalf of other low-wage workers in California to point out the pernicious precedent the Court of Appeals' decision will set. Allowing the decision to stand offers a roadmap to other employers in the state: fund a ballot initiative campaign, and you can buy your way out of workplace protections. Like the taxi and food-delivery companies here, other employers can mount aggressive misinformation campaigns to convince voters or policymakers that bedrock minimums—even those enshrined in the constitution—are unnecessary, and that workers should bear the economic risks of these jobs.³ Nothing in the decision below limits the further erosion of the basic architecture of the workers' compensation system. Nothing separates ridehail and delivery drivers from other low paid workers in the state in need of safety net protections except that their bosses choose to manage them via an app. This Court's silence would open the door to unchecked corporate power bent on undermining basic workplace protections and—as Plaintiffs-Petitioners point out—California's constitutional system.

For these reasons, this Court should grant review of the decision below and hear arguments on the major constitutional problems presented by Prop. 22.

II. Ridehail and Delivery Drivers Across California, Harmed by Prop. 22, Urge the Court to Resolve the Constitutional Issues Presented.

The Court should grant the Petition to resolve the serious questions presented regarding the constitutionality of Prop. 22. This case is critically important to the hundreds of thousands of drivers across California who suffer daily under its provisions. As detailed in this section, Prop. 22 enshrines a second-tier system of precarious work fueled predominantly by immigrants and workers of color by stripping them of access to bedrock minimums—including constitutionally protected workers' compensation benefits—and by authorizing companies to pay their workers poverty wages without establishing any meaningful wage floor.

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

The app-based driving economy is plagued by a markedly high degree of occupational health hazards that make it one of the most dangerous jobs in America.⁴ From violence and harassment on the job to fatal car accidents and musculoskeletal disorders, app-based

³ See Caroline O'Donovan, *Uber and Lyft Spent Hundres of Millions to Win Their Fight Over Workers' Rights. It Worked*, BuzzFeed News (Nov. 21, 2020), <https://www.buzzfeednews.com/article/carolineodonovan/uber-lyft-proposition-22-workers-rights>.

⁴ App-based driving (along with taxi driving) has one of the highest fatal occupational injury rates. See U.S. Bureau of Labor Statistics Beyond the Numbers Publication, *Fatal Occupational Injuries to Independent Workers*, Vol. 8, No. 10 (Aug. 2019), <https://www.bls.gov/opub/btn/volume-8/fatal-occupational-injuries-to-independent-workers.htm>.

drivers face a host of physical and mental challenges due to unsafe and hazardous working conditions.

According to a recent and comprehensive nationwide study of safety conditions in the industry, two-thirds of all ridehail drivers were threatened, harassed, or assaulted in the last year.⁵ A majority of those surveyed had been verbally abused, more than a quarter verbally threatened with physical harm, and 14 percent had been grabbed, groped, or hit.⁶ Not surprisingly, workers of color experienced these dangers at higher rates than white drivers: almost three quarters had been threatened or harassed, and almost one-in-five reported being grabbed, groped or hit.⁷ In addition, drivers also face sexual harassment at the hands of riders, with one in five gig workers experiencing multiple instances of unwanted sexual advances in the workplace.⁸ Another study of worker safety between 2017 and 2022 found over 350 carjackings or attempted carjackings of delivery and ridehail drivers in the US while on the job.⁹ And some drivers paid the ultimate price for trying to earn a living: from 2017 to 2022, at least fifty app-based workers in the US were murdered while on the job.¹⁰

In the face of this worker safety crisis, app-based companies have consistently downplayed the health and safety concerns of their workforce,¹¹ and denied responsibility. *See, e.g., Tchakounte Petone et al. v. Uber Tech. Inc.*, Memorandum, Case No. 20-cv-03028 CCB, 2022 WL 326727 *4 (D. Md. Feb. 3, 2022) (Uber arguing that it owes no common law duty to driver killed by passenger). They have also structured work on their platforms so as to incentivize drivers to override their own safety concerns, using the threat of deactivation (app-speak for “termination”) to prevent drivers from avoiding unsafe rides.¹² Drivers who cancel rides because they believe a prospective passenger might be a fake

⁵ *Driving Danger: How Uber and Lyft Create a Safety Crisis for their Drivers*, Strategic Organizing Center at 3 (Apr. 2023), https://thesoc.org/wp-content/uploads/2023/04/SOC_RideshareDrivers_rpt-042023.pdf.

⁶ *Id.*

⁷ *Id.*

⁸ Monica Anderson, Coleen McClain, Michelle Faverio & Risa Gelles-Watnick, *The State of Gig Work in 2021*, Pew Research Center (Dec. 8, 2021). *See also* Uber, *US Safety Report, 2017-2018*, 58 (Dec. 5, 2019), <https://www.uber.com/us/en/about/reports/us-safety-report/>; Garcia, *Uber Releases Safety Report Revealing 5,891 Incidents of Sexual Assault*, CNN (Dec. 6, 2019), at <https://www.cnn.com/2019/12/05/tech/uber-safety-report/index.html>.

⁹ Dara Kerr, *More Than 350 Gig Workers Carjacked, 28 Killed, Over the Last Five Years*, The Markup (Jul. 28, 2022), <https://themarkup.org/working-for-an-algorithm/2022/07/28/more-than-350-gig-workers-carjacked-28-killed-over-the-last-five-years>.

¹⁰ *Death and Corporate Irresponsibility in the Gig Economy: An Urgent Safety Crisis*, Gig Workers Rising (2022), https://www.gigsafetynow.com/_files/ugd/af5398_e1b49d831a0149a08df4be57c612ae88.pdf.

¹¹ *Driving Danger*, *supra* note 5, at 19 (“Both [Uber and Lyft] have resisted public safety disclosure, even when it has required lengthy legal battles or expensive settlement. In 2020, Uber engaged in an 18-month legal battle in California to resist the disclosure requirements regarding sexual assault and harassment cases before ultimately acquiescing and paying \$9 million in penalties. In 2022, Lyft agreed to a \$25 million settlement after shareholders alleged that they hid safety problems on their app prior to its public offering in 2019.”).

¹² *Id.* at 12.

account, or those who end rides early because they feel threatened, face employment consequences: if either their platform acceptance rate (the rate at which they accept rides offered to them) or their driver rating fall below a certain level, they may be deactivated and lose their primary source of income.¹³

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

Because dangerous work for unscrupulous employers is not a new phenomenon, California law contains a number of protections safeguarding workplace health and safety: workers’ compensation, occupational health and safety protections, paid sick leave, and state disability insurance.¹⁴ Prop. 22, however, carves out covered app-based workers from each and every one of these state programs, purporting to exempt ridehail and delivery companies from complying with basic health & safety protections alongside other employers statewide.¹⁵ In its place, the initiative sets up a private accident insurance requirement that is much less protective of driver safety than even just workers’ compensation alone.¹⁶

Under the workers’ compensation regime—in place and constitutionally protected in California for over a hundred years—if a worker gets injured on the job, they are entitled to medical and disability coverage as well as lost wages.¹⁷ But Prop. 22 exempts covered ridehail and delivery drivers, not only abrogating the plenary authority of the state legislature to “create and enforce” a “complete system of workers’ compensation,” Cal. Const. art. XIV § 4, but also deepening the health and safety crisis facing California drivers. As the dissent below puts it: “No one disputes that the effect of the ‘independent contractor’ definition in Proposition 22 is to expel app-based drivers, as a class, from the ‘complete system of workers compensation’ established by the Legislature more than a century ago.” Dis. opn. at 3.

In its place, Prop. 22 requires app-based companies to offer occupational accident insurance coverage that is inferior and incomplete compared to what they were required to

¹³ Id.; see also *Fired by an App: The Toll of Secret Algorithms and Unchecked Discrimination on California Rideshare Drivers*, Advancing Justice – Asian Law Caucus & Rideshare Drivers United (Feb. 2023), <https://www.advancingjustice-alc.org/media/Fired-by-an-App-February-2023.pdf>.

¹⁴ See, e.g., A.B. No. 1522, Healthy Workplaces, Healthy Families Act, 2014 Cal. Legis. Serv. Ch. 317 (2014) (“Paid sick days will have an enormously positive impact on the public health of Californians...”); *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 3d 341, 354 (1989) (one purpose of workers compensation act is “to insure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society”).

¹⁵ Bus & Prof. Code, §§ 7448-7467.

¹⁶ Bus & Prof. Code, § 7455.

¹⁷ See Cal. Const., art. XIV § 4; see also Ray Fuentes, Rebecca Smith & Brian Chen, *Rigging the Gig: How Uber, Lyft, and DoorDash’s Ballot Initiative Would Put Corporations Above the Law and Steal Wages, Benefits, and Protections from California Workers*, Nat’l Emp. L. Project, at 13 (Jul. 2020), https://s27147.pcdn.co/wp-content/uploads/Rigging-the-Gig_Final-07.07.2020.pdf.

provide under the law prior to Prop. 22’s enactment. Bus & Prof. Code, §§ 7451, 7455, subd. (a). For instance, the occupational accident insurance under Prop. 22 is silent as to whether it is offered on a strict liability, no-fault basis. In other words, unlike coverage under California’s workers’ compensation program, companies argue that coverage can be denied—or left in doubt—if a company says a driver was at fault.¹⁸ Moreover, Prop. 22 only requires coverage to extend to accidents occurring while the driver is actively engaged with a passenger or in making a delivery. It exempts accidents that occur while the driver is “online but outside of engaged time, where the injured app-based driver is in engaged time on one or more network company platforms, or where the app-based driver is engaged in personal activities.” Cal. Bus. & Prof. Code §7455(d). Coverage under California workers’ compensation, by contrast, is much more extensive, and would ordinarily cover all working time.¹⁹

Further, companies under Prop. 22 are permitted to cap medical expenses, are not required to provide vocational training, and need only pay disability payments for up to 104 weeks. Under California workers’ compensation, however, there is no medical expense cap, and workers can access vocational training and permanent disability benefits for life.²⁰ Prop. 22 also offers extremely limited (and in practice, non-existent) compensation for families and dependents for loss of life.²¹ Amicus Rideshare Drivers United, who has worked closely with the families of drivers killed on the job, has never heard of a family successfully receiving death benefits under Prop. 22’s accident insurance. Without Prop. 22, workers would be eligible to receive death benefits under workers’ compensation, Lab. Code. §§ 4700 et seq., and companies would have the legal responsibility to provide a safe and healthful place of employment, including preventing and addressing workplace violence.²²

Finally, if disputes arise, drivers will have to bear the costs of litigating in court or in arbitration under Prop. 22 and will not have the protections of the no-cost administrative process under the Labor Code. Lab. Code §§ 4621, 5811. The state’s workers’ compensation system places the risk and cost of work-related injuries on employers and not on workers. Prop. 22 shifts much of that burden back from app-based companies to the drivers themselves and the public by allowing substandard coverage, with gaping

¹⁸ See Fuentes et al., *Rigging the Gig*, *supra* note 17 at 2.

¹⁹ See, e.g., *Pac. Indem. Co. v. Indus. Acc. Comm’n*, 26 Cal. 2d 509, 513 (1945) (“mere fact that employee is performing a personal act when injured does not *per se* bring him without the purview of the compensation law”); *Mason v. Lake Delores Group, LLC*, 117 Cal. App. 4th 822, 830, 834, 838 (2004) (confirming the principles that an injury must arise out of employment to be covered by workers’ compensation; that if this is in dispute the question is a matter of fact; that workers’ compensation law be liberally construed in favor of coverage; and that coverage is not broken even if the worker is engaged in “certain acts necessary to the life, comfort, and convenience of the employee while at work”).

²⁰ *Id.* at 14-15.

²¹ Cal. Bus. & Prof. Code §7455.

²² See Lab. Code § 6400; Cal/OSHA Guidelines for Workplace Security (1995), https://www.dir.ca.gov/dosh/dosh_publications/worksecurity.html (“workplace violence has become a serious occupational health problem....”).

loopholes. In effect, app-based companies used their ballot measure to relieve themselves of any duty to provide a healthy and safe working environment, leaving drivers and the public to bear the full costs of this dangerous work.

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

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

App-based companies also uniformly fail to provide their workers with health insurance coverage, in spite of their requirements under the Affordable Care Act (ACA).²³ Prop. 22 does in theory guarantee drivers a minimal health care stipend, but in practice, vanishingly few drivers can actually access it. Drivers are required to meet a narrow and difficult set of qualifying criteria to receive the stipend. Bus. & Prof. Code § 7454. Compounding this, the vast majority of California app-based drivers surveyed in the spring of 2021 did not have enough information about how the health care stipend worked or how to receive it.²⁴ Latinx drivers were less likely to know about the health stipends and more likely to be uninsured.²⁵ And almost 86 percent of drivers surveyed would not qualify for the stipend under the restrictive definition of "qualifying health plan" even if they knew how to apply.²⁶

²³ Internal Revenue Service, *Affordable Care Act Tax Provisions for Large Employers*, at <https://www.irs.gov/affordable-care-act/employers/affordable-care-act-tax-provisions-for-large-employers>.

²⁴ Eliza McCullough & Brian Dolber, *Most California Rideshare Drivers Are Not Receiving Healthcare Benefits Under Proposition 22*, National Equity Atlas (Aug. 19, 2021), <https://nationalequityatlas.org/prop22>.

²⁵ Tulchin Research, *New Poll Finds Most App Drivers Not Informed and at Risk of Missing Out On Healthcare Benefits Promised Under Prop. 22* (Apr. 30, 2021), <https://tulchinresearch.com/2021/04/new-poll-finds-most-app-drivers-not-informed-and-at-risk-of-missing-out-on-healthcare-benefits-promised-under-prop-22/>.

²⁶ *Id.*

Almost six months after the passage of Prop. 22, nearly half of app-based drivers were either uninsured entirely or relying on Medi-Cal.²⁷ The drivers' uninsured rate under Prop. 22 is now double the national average.²⁸ Given the occupational hazards of app-based driving, including on-the-job violence and harassment, Prop. 22 imperils the already precarious health of drivers and further burdens public resources by making health insurance virtually inaccessible.

D. Prop. 22's "Guaranteed Earnings" Guarantees a Subminimum Wage to a Workforce Composed Predominantly of Immigrants and People of Color.

Just like in other low-wage industries, app-based ridehail and delivery workers are predominantly immigrants and people of color. Lyft estimates that 69 percent of their U.S. workforce identifies as racial minorities.²⁹ Another study estimates that in the San Francisco Bay Area in 2019, immigrants and people of color comprised 78 percent of Uber and Lyft drivers.³⁰ Further, contrary to the fiction weaved by the Intervenor-Respondents of app-based driving as a flexible, entrepreneurial, "side hustle" for profit, the work is no different than other low-wage jobs: low pay, long hours, and hazardous conditions. As a recent report notes: "For many app-based drivers, driving on platforms like Uber and Lyft is their primary source of income, and their ability to earn a living is precariously dependent on secret algorithms and a customer complaint process that is inaccessible to them."³¹ Unlike other low-wage workers who at least have the force of worker-protective laws to combat exploitation, however, ridehail and delivery drivers in California are trapped by Prop. 22 in an inferior system of illusory protections.

²⁷ McCullough & Dolber, *Most California Drivers Not Receiving Healthcare Benefits Under Proposition 22*, *supra* note 24.

²⁸ *Id.*

²⁹ In addition to the nationwide Lyft data, we know that in New York City, 9 out of 10 ride-hail drivers are immigrants, and in Seattle 72 percent are immigrants and 50 percent Black. Gina Bellafante, *Uber and the False Hopes of the Sharing Economy*, N.Y. Times (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/nyregion/uber-nyc-vote-drivers-ride-sharing.html>; James A. Parrot & Michael Reich, *A Minimum Compensation Standard for Seattle TNC Drivers* (July 2020), https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf.

³⁰ See Benner et al., *On-Demand and On-the-Edge: Ride-Hailing and Delivery Workers in San Francisco*, U.C. Santa Cruz Inst. for Social Transformation, at 8 (May 2020) (56 percent of San Francisco app-based drivers are immigrants), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf; Saba Waheed, Lucero Herrera et al., *More Than a Gig: A Survey of Ride-Hailing Drivers in Los Angeles*, UCLA Labor Ctr, 51 (May 30, 2018) (50 percent of Los Angeles full-time drivers foreign-born), <https://irle.ucla.edu/publication/more-than-a-gig-a-survey-of-ride-hailing-drivers-in-los-angeles/>. Women also make up an increasing share of ridehail and delivery drivers in California. See Musadiq Bidar, *Women Who Lost Jobs Due to COVID Turn to Food Delivery Platforms*, CBS News (Feb. 25, 2021), at <https://www.cbsnews.com/news/women-unemployment-covid-food-delivery-doordash-instacart-ubereats-jobs>.

³¹ *Id.*

Prop. 22 was billed in public messaging as setting a generous wage floor of 120 percent of state minimum wage.³² In practice, however, that wage floor wildly underestimates the costs of driving, and fluctuates with consumer demand. First, drivers are only guaranteed to earn for “engaged time”—time spent between accepting a ride or delivery request until completion of the ride or delivery. In other words, using a definitional sleight of hand, Prop 22 enables companies to deny drivers the promised minimum for all of the time they work.³³ The loophole is significant. According to several studies of how app-based drivers spend their time, almost a third of driver time is spent returning from longer trips or waiting between passengers—logged on to the platform to work, but not covered by Prop. 22’s minimum wage.³⁴ It’s easy to do the math: a wage floor of 120 percent of the California minimum wage that only applies to drivers for 66 percent of the time they work is actually a *sub*minimum wage.

Even more importantly, Prop. 22’s guaranteed earnings provision underestimates the substantial expenses of app-based driving by almost \$5 an hour, requiring drivers to bear the costs of owning and operating a vehicle.³⁵ The ballot initiative provides that drivers will be reimbursed at 30 cents per mile during engaged time.³⁶ But the IRS estimates that the real per-mile costs of owning and operating a vehicle are 65.5 cents per mile in 2023.³⁷ Moreover, drivers also incur per-mile costs for one-third of their time spent between rides. As already noted, drivers are required to drive many more miles than those driven with a passenger in the backseat as part of their job: they have to drive back from drop-off locations and head to busy areas to pick up new passengers, all the while waiting for a new trip request to come in. Under Prop. 22, this time is not only unpaid, but driver expenses are not reimbursed.

The upshot of Prop. 22’s guaranteed earnings promise is that drivers are guaranteed a “minimum wage” of only about \$5 an hour, after expenses and non-driving wait times are

³² Camiel Irving & Sarfraz Maredia, *Prop 22: Improving the Lives of California Drivers and Couriers*, Uber Newsroom (Dec. 8, 2022), <https://www.uber.com/newsroom/prop-22-benefits/>.

³³ “Not paying for that time would be the equivalent of a fast food restaurant or retail store saying they will only pay the cashier when a customer is at the counter. We have labor and employment laws precisely to protect workers from that kind of exploitation.” Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour*, U.C. Berkeley Labor Ctr, (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/>

³⁴ Eliza McCullough, Brian Dolver et al., *Prop 22 Depresses Wages and Deepens Inequities for California Workers*, National Equity Atlas (Sep. 21, 2022), <https://nationalequityatlas.org/prop22-paystudy> (study conducted alongside amicus Rideshare Drivers United, estimating that “nearly a third” of driver time is uncompensated under this formula); see also Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour*, U.C. Berkeley Labor Ctr, (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/> (estimating that 33 percent of driver time is spent waiting between passengers or returning from trips to outlying areas).

³⁵ Jacobs & Reich, *supra*.

³⁶ Bus. & Prof. Code § 7453(d)(4)(B)(ii) (\$0.30 figure is inflation-pegged).

³⁷ *Standard Mileage Rates*, Internal Revenue Service (2023), <https://www.irs.gov/tax-professionals/standard-mileage-rates>.

accounted for.³⁸ By contrast, state wage and hour law guarantees all workers in the state a minimum wage of \$15.50 for *all* of the time they work. Cal. Labor Code § 1182.12. It also guarantees delivery drivers overtime at “time-and-a-half” (150 percent of their regular hourly wage) for all time worked over 40 hours in a week or 8 hours in a day. Cal. Labor Code § 510. And, unlike Prop. 22, California employment law requires employers to reimburse their employees for costs incurred in connection with their performance of their work. Cal. Labor Code § 2802. In other words, under state law as interpreted by this Court in *Dynamex*, 4 Cal. 5th 903 (2018), and as codified in AB5, ridehail and delivery drivers would be entitled to reimbursement for the costs of driving—costs drivers currently bear that are the difference between earning a good living and earning poverty wages.

III. This Court’s Silence Would Encourage Other Employers to Follow Prop. 22’s Troubling Roadmap, Harming Low-Wage Workers Across the State and the Public Welfare.

A. Workplace Protections Serve a Fundamental Public Purpose.

As this Court has noted, minimum labor standards serve a fundamental public purpose because “the public will often be left to assume responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions.” *Dynamex*, 4 Cal. 5th 903, 953 (2018). Prop. 22 lets big corporations like Uber and Lyft off the hook: rather than contribute the basic minimums for their workers that all other businesses must, they pass the costs of doing business, paying fair wages and providing healthy and safe conditions on to workers, their communities and the government. Their failure to pay payroll taxes deprives state and federal government of billions of dollars that fund vital social insurance programs.³⁹

B. Prop. 22 Offers a Roadmap for Other Employers in Other Industries to Carve Their Workers out of Constitutionalized Workplace Protections.

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

³⁸ One 2021 study found that Prop. 22’s wage floor was just **\$4.10 per hour**. See Eliza McCullough, Brian Dolver et al., *Prop 22 Depresses Wags and Deepens Inequities for California Workers*, National Equity Atlas (Sep. 21, 2022), <https://nationalequityatlas.org/prop22-paystudy>. Another study found a wage floor of **\$5.64 an hour**. Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour*, U.C. Berkeley Labor Ctr. (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/> (note: this figure is based on the 2021 minimum wage of \$13 per hour; the math is slightly different now that CA minimum wage is \$15.50).

³⁹ Elizabeth Bauer, *Is Uber Cheating On Social Security/FICA Taxes?*, Forbes (Dec. 16, 2019), at <https://www.forbes.com/sites/ebauer/2019/12/16/is-uber-cheating-on-social-securityfica-taxes/?sh=63fcf7163ce4>.

Already, since the passage of Prop. 22, a number of employers in the state are moving away from sourcing labor from their traditional (and often unionized) employee workforce towards using misclassified independent contractors. For example, Albertsons Companies, which includes Vons and Pavilions grocery outlets, announced, on the heels of the election, that it would discontinue its delivery driving services in favor of third-party app-based drivers.⁴⁰ They followed through on the threat: only one month after the election, Southern California Albertsons’ drivers were notified that they would lose their jobs.⁴¹ During the campaign, proponents of Prop. 22 told voters that voting “yes” would save jobs.⁴² In reality, however, it has already displaced employee delivery drivers and stands to eliminate other employee jobs in favor of an app-based model of contract workers.

And in sectors beyond ridehail and food delivery, corporate employers may heed Uber’s example. By tweaking their business models to use the internet to locate or dispatch workers, they can classify large swathes of their workforce as independent contractors, even when they are plainly not running a separate independent business.⁴³ Faced with any pushback from labor agencies or the courts, they could buy their own ballot initiative to carve further categories of workers out of constitutionalized protections like workers’ compensation, and otherwise undercut the basic protections of California employment law. In fact, the same law firm that worked on Prop. 22 submitted a petition to the California Attorney General for a copycat measure to strip employee rights from healthcare workers—including nurses, dental hygienists, occupational therapists, and others who secure work online or through apps.⁴⁴ While the initiative there was subsequently withdrawn, the roadmap is clear.

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

Ridehail and delivery companies maintain that their employment model, based on a technological revolution that provides “unprecedented autonomy,” see Intervenor-Respondents Opening Brief, at 22, distinguishes them from other employers past and

⁴⁰ Jelisa Castrodale, *California Supermarkets Fire Union Delivery Drivers and Replace them with Gig Workers as Proposition 22 Takes Effect*, Food & Wine (Jan. 5, 2021), at <https://www.foodandwine.com/news/california-supermarkets-fire-union-drivers-prop-22>; Michael Hiltzik, *In Wake of Prop. 22, Albertsons is Converting its Home Delivery to Gig Work*, L.A. Times Opinion (Jan. 5, 2021), at <https://www.latimes.com/business/story/2021-01-05/prop-22-albertsons-home-delivery>.

⁴¹ *Id.*

⁴² Faiz Siddiqui & Nitashu Tiku, *Uber and Lyft Used Sneaky Tactics to Avoid Making Drivers Employees in California, Voters Say*, Wash. Post (Nov. 17, 2020), at <https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation>.

⁴³ *Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It*, Nat’l Emp. L. Project (Apr. 2019), <https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2019.pdf>.

⁴⁴ See Levi Sagaysay, *‘Uber for Nurses?’: Initiative Targets Healthcare for a ‘Gig Work’ Law*, MarketWatch (Jan. 31, 2022), <https://statics.teams.cdn.office.net/evergreen-assets/safelinks/1/atp-safelinks.html>.

present. Voters were repeatedly told that to preserve this independence, they needed to support Prop. 22.

But this narrative is in stark contrast to the actual control that these companies leverage over drivers and the legal standard for determining employee status. The reality of working as an app-based driver is that your work is tightly controlled. Companies set customer fare rates without any input from drivers, *see, e.g., People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266, 280 (2022), and in fact use complex algorithms to set individualized wages: two workers may get paid different amounts for identical trips, solely based on granularized data the company collects.⁴⁵ The companies also control how much drivers earn per fare, what their cut of the fare will be, what rides the drivers receive, how many and which job assignments the drivers receive and even how drivers conduct themselves when driving a customer.⁴⁶ According to a 2022 study by the UCLA Labor Center, Uber and Lyft take on average 21 percent of each customer fare as a commission, and took more than 30 percent on almost a third of rides.⁴⁷ Only the companies know how those numbers are calculated.⁴⁸

Furthermore, companies screen and select the drivers and regulate and monitor their performance. Those who fail to meet the companies' standards are disciplined or deactivated.⁴⁹ Uber's algorithm tracks the drivers' acceptance rates, time on trips, speed, and customer ratings, among other things—ratings that are then the basis for “deactivation” from the platform.⁵⁰ As a federal district court judge noted, app-based companies exert real pressure through their algorithms and bonus system: “Drivers are theoretically free to reject any ride they would like, but those attempting to make a living understand the precarious nature of that freedom in the face of a power imbalance and information asymmetry favoring Uber.” *Tchakounte Petone et al. v. Uber Tech. Inc.*, Memorandum, Case No. 20-cv-03028 CCB, 2022 WL 326727 at *4 (D. Md. Feb. 3, 2022).

⁴⁵ See Veena Dubal, *On Algorithmic Wage Discrimination*, UC San Francisco Research Paper (Forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4331080.

⁴⁶ See, e.g., Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, *International Journal of Communication*, 10 Int'l J. of Comm. 3758, 3762 (2016), at <https://ijoc.org/index.php/ijoc/article/viewFile/4892/1739>; *O'Conner*, 82 F. Supp. 3d at 1136-37.)

⁴⁷ *Analysis of High-Volume For-Hire Vehicle Data for New York City, Selection Months, 2019-2022*, UCLA Labor Center (Feb. 2023), <https://www.labor.ucla.edu/wp-content/uploads/2023/02/Taxi-Commission-policy-brief-2.9.23.pdf>.

⁴⁸ See Dubal, *Algorithmic Wage Discrimination*, *supra* note 45.

⁴⁹ See *Fired by an App*, *supra* note 30.

⁵⁰ Lawrence Mishel & Celine McNicholas, *Uber Drivers Are Not Entrepreneurs: NLRB General Counsel Ignores the Realities of Driving for Uber*, Econ. Pol'y Inst. (Sep. 20, 2019), at <https://files.epi.org/pdf/176202.pdf>.

And once the drivers accept a ride, the companies continue to control how they work. In an ethnographic survey conducted in San Francisco, one Uber driver responded: “What flexibility? I sleep in my car; I eat in my car; I work in my car. That is not freedom.”⁵¹

IV. Conclusion

Prop. 22 threatens to strip hundreds of thousands of ridehail and delivery drivers across California of the basic rights extended to other workers in California, including a basic minimum wage and access to the constitutionally-guaranteed system of workers’ compensation. This issue is of critical and urgent importance to drivers across the state, as well as to other workers at risk of similar harms, and to the public finances. For these reasons, *amici* respectfully request that this Court grant the petition to review the Court of Appeals decision, and finally resolve the constitutionality of Prop. 22.

Respectfully submitted,

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⁵¹ Veena Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, and Regulation in the Gig Economy*, U.C. Hastings Law, Legal Studies Research Paper Series, Research Paper No. 381, at 18 (Nov. 2019), <https://files.epi.org/pdf/176202.pdf>.

ATTACHMENT A
STATEMENTS OF INTEREST OF *AMICI CURIAE*

Founded in 2018, **Rideshare Drivers United-California (“RDU”)** is an organization started by app-based drivers in the parking lot of Los Angeles International Airport in response to wage cuts. RDU is a democratic drivers’ organization, with a driver-elected Board of Directors, who have advocated for full labor rights for all app-based workers through protest, strikes and advocacy such as assistance in securing unemployment benefits and wage theft claims. RDU was also key to providing drivers’ voices during the consideration and passage of Assembly Bill 5 in California. With more than 20,000 driver members across the state of California, RDU membership includes many full-time drivers who have driven for Lyft, Uber, and other app-based ride-hail companies, for nearly as long as many of them have been companies.

Gig Workers Rising (“GWR”) is a campaign supporting and educating app and platform workers who are organizing for better wages, working conditions, and respect. GWR has a network of nearly 10,000 gig workers across California. Launched in 2018, GWR supports workers in their organizing – from an international day of action protesting Uber’s initial public offering to lobbying for the successful passage of California Assembly Bill 5. In addition to supporting worker organizing, GWR hosts regular educational workshops and trainings, including a recent series of workshops for gig workers navigating state benefits and resources during the COVID-19 pandemic.

Asian Americans Advancing Justice - Asian Law Caucus (“Advancing Justice - ALC”) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. Advancing Justice - ALC is part of a national affiliation of Asian American civil rights groups, with offices in Los Angeles, Chicago, Atlanta, and Washington, DC. Advancing Justice - ALC has a long history of advocating for low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. Advancing Justice - ALC’s clients regularly include rideshare and other gig drivers.

PowerSwitch Action (formerly the Partnership for Working Families) is a community of leaders, organizers, and strategists forging multi-racial feminist democracy and economies in our cities and towns. Our network of 20 grassroots affiliates weaves strategic alliances and alignments amongst labor, neighborhood, housing, racial justice, faith, ethnic-based, and environmental organizations. All too often, workers face abuse and exploitation on the job. Those experiences are made more harmful when employers evade their responsibilities through worker misclassification. Our affiliates witness and

confront the direct and daily impact of misclassification, which encompasses not only loss of wages, but also the loss of vital protections of the basic dignity, safety and health of individuals at work.

Worksafe has an interest in the outcome of this case because we advocate for the workplace rights of low wage vulnerable workers. Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California's most vulnerable low-wage workers. We know that it is imperative that all workers are protected from workplace hazards, injuries, illnesses and fatalities. Worksafe considers it vitally important these employees not be misclassified as independent contractors and as a result left outside the protections of occupational safety and health laws.

Legal Aid at Work (formerly the Legal Aid Society – Employment Law Center) (“LAAW”) is a public interest legal organization founded in 1916 that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. Since 1970, LAAW has represented low-wage clients in both individual and class action cases involving a broad range of employment-related issues, including wage theft, labor trafficking, retaliation, and discrimination. LAAW frequently appears in federal and state courts to promote the interests of clients from wage theft both as counsel for plaintiffs and as amicus curiae. In addition to litigating cases, LAAW advises thousands of low-wage workers, including misclassified workers, on their employment rights through its Workers’ Rights Clinics and helplines, and represents misclassified workers in their appeals for unemployment insurance benefits before the California Unemployment Insurance Appeals Board and in claims for wages at the California Labor Commissioner’s Office. Supporting low-income workers, including ride-hail drivers, who are misclassified as independent contractors is a core part of LAAW’s work.

The National Employment Law Project (NELP) is a non-profit legal organization with more than 50 years of experience advocating for the employment and labor rights of underpaid and unemployed workers. For decades, NELP has focused on the ways in which various work structures, such as calling workers “independent contractors,” exacerbate income and wealth inequality, the segregation of workers by race and gender into poor quality jobs, and the ability of workers to come together to negotiate with business over wages and working conditions.