

No. A163655

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR**

HECTOR CASTELLANOS, et al.,
Petitioners and Respondents,

v.

STATE OF CALIFORNIA, et al.,
Defendants and Appellants,

PROTECT APP-BASED DRIVERS AND SERVICES, et al.,
Intervenors and Appellants

On Appeal from the Superior Court of Alameda County
Case No. RG21088725
The Honorable Frank Roesch

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND
BRIEF OF AMICUS CURIAE MARKETPLACE INDUSTRY
ASSOCIATION, INC. IN SUPPORT OF DEFENDANTS AND APPELLANTS
STATE OF CALIFORNIA, ET AL., AND INTERVENORS AND
APPELLANTS PROTECT APP-BASED DRIVERS AND SERVICES, ET AL.**

*Albert Giang (SBN 224332)
Jeffrey Hammer (SBN 264232)
agiang@kslaw.com
jhammer@kslaw.com
KING & SPALDING LLP
633 W. 5th Street, Suite 1600
Los Angeles, California 90071
+1 213 443 4355
+1 213 443 4310 (fax)

Ramon A. Miyar (SBN 284990)
rmiyar@kslaw.com
KING & SPALDING LLP
50 California Street, Suite 3300
San Francisco, CA 94111
+1 415 318 1200
+1 415 318 1300 (fax)

Attorneys for Amicus Curiae
MARKETPLACE INDUSTRY ASSOCIATION, INC.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Marketplace Industry Association, Inc. (the “Association”) respectfully applies for leave to file as amicus curiae the following brief in support of Defendants and Appellants State of California and Katie Hagen, in her official capacity as Director of the California Department of Industrial Relations, and Intervenors and Appellants Protect App-Based Drivers and Services, Davis White, and Keith Yandell.

The Association is the first and only trade association representing technology-enabled marketplace platforms, also known as internet marketplaces, digital marketplaces, and app-based platforms. The mission of the Association is to represent, educate and advocate for the benefit of the digital marketplace industry, and to better serve those who exchange goods, services and property through such marketplaces. An important function of the Association is to represent the interests of its members in matters before courts and legislatures throughout the country. To that end, the Association files amicus briefs in cases that raise issues of concern to digital marketplace platforms operating in the United States.

The Association represents a wide variety of digital marketplaces and app-based platforms transacting for a multitude of goods and services, including rideshare and delivery services, home services, used goods, childcare (babysitters and nannies), senior care, information technology support, coaching, and tutoring, among many others. In all, the Association’s members have facilitated transactions for more than 300 million customers and have provided economic opportunities for more

than 60 million workers.

The Association's members include app-based platforms that operate in California and benefit from the independent contractor classification for app-based drivers enshrined into law by Prop 22. It thus has a clear interest in the issues raised by this case and is uniquely placed to speak to Prop 22's impact on California workers, consumers, and business alike.

This brief will assist the Court in deciding this matter by providing an overview of the app-based gig economy, and identifying the economic value that it generates for workers, consumers, and businesses in California. For these reasons, the Association respectfully requests leave to file as amicus curiae the brief that follows.

No party or any counsel for a party in the pending appeal (i) authored the proposed amicus brief in whole or in part, or (ii) made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the Association, its members, or its counsel in the pending appeal. (See Cal. Rules of Court, rule 8.200(c)(3).)

Dated: June 1, 2022

Respectfully submitted,

By: /s/ Albert Giang
Albert Giang

Attorney for Amicus
Curiae Marketplace
Industry Association,
Inc.

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**BRIEF OF AMICUS CURIAE
MARKETPLACE INDUSTRY ASSOCIATION, INC. IN SUPPORT OF
DEFENDANTS AND APPELLANTS STATE OF CALIFORNIA AND
KATIE HAGAN, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, AND
INTERVENORS AND APPELLANTS PROTECT APP-BASED DRIVERS
AND SERVICES, DAVIS WHITE, AND KEITH YANDELL**

I. INTRODUCTION

Proposition 22 (“Prop 22”) was approved and enacted by an overwhelming (58-percent) majority of California voters, and represented a valid exercise of the people’s legislative power of initiative and referendum under Article IV, Section 1 of the California Constitution. Passed in response to the California Supreme Court’s adoption of the ABC test in *Dynamex Operations West, Inc. v. Sup. Ct.* (2018) 4 Cal. 5th 903 and the California Legislatures’ subsequent codification of that decision in Assembly Bill 5 (“AB 5”), Prop 22 enshrines into law the independent contractor status that had long applied to the hundreds of thousands of California rideshare and delivery drivers (“app-based drivers”) who provide services to consumers through web- and application-based platforms (“app-based platforms”).

As set forth in detail below, the gig-economy model employed by app-based platforms is premised on the dual pillars of flexibility and autonomy, which enable app-based drivers to choose when to drive, for whom to drive, and for how long. This flexibility is enormously popular with app-based drivers and is one of the chief reasons why they voluntarily choose to work as independent contractors.

The flexible nature of gig work makes it possible for groups that are underrepresented or otherwise unable to participate in the workforce within the strictures of traditional full-time employment—such as parents of young children unable to afford childcare, persons with elder-care responsibilities, students, veterans and military families—to join the labor pool and earn much-needed income. It also enables workers who have traditional full-time or part-time jobs to cover gaps in or supplement their income by picking up gig work at times that fit their unique scheduling needs. In many cases, the supplemental income is either essential or important to gig workers in covering necessary life expenses. And the beneficiaries of these enhanced income opportunities disproportionately identify with a minority racial or ethnic group (*i.e.*, Hispanic, Black, or Asian).

The advent of the gig economy also has resulted in tremendous benefits to consumers and small businesses, by connecting them to a much larger, affordable, and responsive workforce capable of efficiently delivering services on demand. Therefore, it is not surprising that (a) entirely new businesses and innovative technologies—including members of Amicus Curiae’s industry group—have emerged to respond to this consumer demand; and (b) a wide margin of California voters passed Prop 22 to protect these consumer benefits. The reduction in search costs facilitated by the online marketplace created by app-based platforms and the reduction in fixed labor costs resulting from the independent contractor classification of gig workers makes it possible to provide services to consumers and small businesses more nimbly and at more competitive prices.

This opens up the reach of the services to lower and middle-income consumers and thus increases the net welfare of the public.

For the reasons stated above and more fully explained below, Amicus Curiae Marketplace Industry Association, Inc. (“Amicus Curiae”) respectfully requests that this Court honor the legislative will of an overwhelming majority of California voters, vacate the trial court’s judgment issuing a writ of mandate, and affirm the constitutionality of Prop 22.

II. THE GIG ECONOMY

A. An Overview of the Gig Economy

Broadly speaking, the “gig economy” refers to the segment of the labor market premised on contingent, freelance, or contract-based work.¹ This stands in contrast to traditional employment, which is characterized by a worker performing services on an indefinite, full- or part-time basis for a single employer.² Whereas traditional employees are typically subject to the control of one employer over their performance, working conditions, and hours, independent or “gig” work is characterized by flexibility and autonomy—that is, the freedom to set one’s own

¹ See PeiChin Tay, et al., *Making It Work: Understanding the Gig Economy’s Shortcomings and Opportunities* (Apr. 12, 2022) Tony Blair Institute for Global Change <<https://institute.global/policy/making-it-work-understanding-gig-economys-shortcomings-and-opportunities>> (as of May 25, 2022).

² James Manyika et al., *Independent Work: Choice, Necessity, and the Gig Economy* 8 (Oct. 2016) McKinsey Global Institute <<https://tinyurl.com/yc2zkyyk>> (as of May 25, 2022).

hours, choose which clients to work with, and which assignments to accept based on a constellation of individualized factors, including personal preference and economic need.³ Indeed, workers not bound by traditional employment strictures can consider a wider variety of work opportunities from multiple companies, including competitors—*e.g.*, individuals can toggle between various rideshare apps and food delivery apps, or between childcare and eldercare apps, in search of preferred work—because of technological innovation in the gig economy.

A critical component of the U.S. economy, roughly 59 million Americans performed some type of gig work in 2020, generating a combined \$1.21 trillion (or roughly 5.7% of U.S. GDP).⁴ This includes both (a) independent and freelance workers in traditional fields such as construction and household and personal services, as well as certain highly skilled professionals such as lawyers, architects, interior designers, writers, and many healthcare professionals, and (b) persons who use online or application-based (“app-based”) platforms, such as Uber, Doordash, and TaskRabbit, to connect with, render services to, and obtain payment from customers for discrete jobs.⁵

³ *Id.* at p. 20.

⁴ Upwork, *Freelance Forward Economics Report* (2020), <<https://www.upwork.com/press/releases/freelance-forward-economics-report>> (as of May 25, 2022). Matthew Mottola, *What Is the Trillion Dollar Freelance Economy?* (Mar. 19, 2021) FORBES <<https://www.forbes.com/sites/matthewmottola/2021/05/19/what-is-the-12-trillion-dollar-freelance-economy/?sh=7a8fcfd16a88>>; Chris Kolmar, Zippia, *23 Essential Gig Economy Statistics [2022]: Definitions, Facts, and Trends on Gig Work* (Feb. 6, 2022) <<https://tinyurl.com/mtzesjek>> (as of May 25, 2022).

⁵ Manyika et al., *supra* n.2, at pp. 55-57.

Since the onset of the COVID-19 pandemic, and the sudden changes it imposed on where and how Americans work, the attractiveness of gig work only has continued to grow dramatically, with one study estimating a 34-percent surge in the size of the independent workforce in 2021 alone.⁶ This growth was distributed across all types of gig workers, including those who perform gig work on a full-time, part-time, or only occasional basis.⁷ And this trend looks likely to continue: at least 17 percent of traditional employees say they will definitely or probably join the ranks of gig workers in the next two or three years.⁸

In recent years, the relative sizes of the traditional versus app-based segments of the gig economy have also been changing rapidly. The online/application-based segment of the gig economy has grown dramatically as a proportion of the overall gig economy and is one of the great economic success stories of the last decade.⁹ According to one study, in 2011, just 3 percent of freelance and independent workers (“gig workers”) reported using an app-based platform in the previous 12 months, and as recently as 2019, only 24 percent did.¹⁰ But in 2021, this figure jumped to 40 percent of independent workers who said they had done so in the past year.¹¹ And an even higher number—43

⁶ MBO Partners, *Research Report: The Great Realization* 7 (Dec. 2021), <https://info.mbopartners.com/rs/mbo/images/MBO_2021_State_of_Independence_Research_Report.pdf> (as of May 31, 2022).

⁷ *Id.*

⁸ *Id.* at p. 21.

⁹ *Id.* at p. 18.

¹⁰ *Id.*

¹¹ *Id.*

percent—said they planned to do so in the coming 12 months.¹²

B. The App-Based Sector of the Gig Economy

While contingent and project-based work existed prior to the advent of the internet and smartphones, the gig economy has become synonymous with online and app-based platforms, which function as virtual marketplaces for connecting consumers with independent workers capable of providing on-demand services.¹³ One can therefore distinguish between contingent work in its broadest terms (*i.e.*, independent contractors generally), on the one hand, and the app-based gig economy, on the other, which refers to a subcategory of contingent work facilitated by online platforms, such as Lyft, Instacart or Postmates. For clarity, in this brief, “gig economy” refers specifically to online or mobile-application-based platforms and marketplaces through which consumers may (a) request on-demand services (such as ride-hailing, food delivery, grocery shopping, car-leasing, etc.) and (b) be paired with and pay gig workers who choose to provide those on-demand services.

According to Pew Research Center, 16 percent of Americans have, at some point, earned money on an app-based platform by: (1) driving for a ride-hailing application; (2) shopping for or delivering groceries or household items; (3) performing household tasks; (4) making deliveries from a restaurant or store for a delivery app; (5) using a personal vehicle to deliver packages to

¹² *Id.*

¹³ Monica Anderson et al., *The State of the Gig Work in 2021* 3 (Dec. 8, 2021) Pew Research Center <<https://tinyurl.com/mr2pnjy2>> (as of May 25, 2022).

others via an app-based platform or website such as Amazon Flex; or (6) providing a similar service along these lines.¹⁴ According to the same study, within the last year alone, approximately one in 10 Americans have earned money by performing the foregoing tasks via app-based platforms.¹⁵

In terms of the specific tasks performed by gig workers, seven percent of those surveyed have at some time “made deliveries from a restaurant or store for a delivery app, 6% have performed household tasks or ran errands via a gig platform and 5% have driven for a ride-hailing app.”¹⁶ Four percent report shopping for groceries or household items at the behest of a platform customer and three percent report “using a personal vehicle to deliver packages to others via an app or website.”¹⁷ As of 2018, J.P. Morgan Chase estimates that San Francisco had the highest concentration of gig workers of any major U.S. city, and that three of the next seven highest concentrations in the United States were in California metropolitan areas (Los Angeles, San Jose, and San Diego).¹⁸

C. The Gig Economy Is Premised on Worker Autonomy

The central pillars of the gig economy are worker autonomy and flexibility, particularly the freedom to choose when and for

¹⁴ *Id.* at p. 4.

¹⁵ *Id.* at p. 16.

¹⁶ *Id.*

¹⁷ *Id.* at p. 16-17.

¹⁸ The JP Morgan Chase Institute, *The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessors* 20 (Sept. 2018).

how long to work (temporal autonomy); where to work (locational autonomy); and for or with whom to work (affiliative autonomy).¹⁹

In general, gig workers enjoy both temporal and locational autonomy—that is, they have the flexibility to work at any time (not just within the confines of an employer-designated workday) and anywhere (not just from an office or other employer-designated space).²⁰ With an abundance of online platforms through which to provide their services, gig workers also enjoy affiliative autonomy in that they can choose both (a) which platform(s) resonate best with their preferences and (b) which jobs to accept within the platform(s) of their choosing.²¹

The flexible nature with which gig workers complete jobs on app-based platforms underscores this autonomy. According to Pew Research Center, for an overwhelming 68-percent majority of gig workers who have earned money via app-based platforms in the 12 months preceding August 2021, “gig work” is not their primary job—rather, it is a supplemental source of income or “side job.”²² Out of the same sample of gig workers, 23 percent “don’t do [gig jobs] most weeks”; 41 percent do less than 10 hours of gig work per week; and 29 percent do 10-30 hours of gig work

¹⁹ Arvind Malhotra et al., *A Future of Work and Organizations* (Spring 2021) Management and Business Review <<https://mbrjournal.com/2021/11/01/a-future-of-work-and-organizations/>> (as of May 31, 2022).

²⁰ *Id.*

²¹ *Id.*

²² Anderson et al., *supra* n.13, at p. 25.

per week.²³ By contrast, just eight percent do gig work on anything approaching a full-time basis (*i.e.*, 30 or more hours per week).²⁴ Indeed, technological innovation in the app-based gig economy even permits individuals to consider and accept work opportunities *from competitors* in the same space (e.g., different rideshare companies, various food delivery companies).

III. PROP 22 BENEFITS WORKERS, CONSUMERS, AND BUSINESSES

Prop 22 was approved by California voters by a wide margin of 58.6 percent to 41.4 percent,²⁵ with the stated purpose of “protect[ing] the legal right of app-based drivers to choose to work as independent contractors” with app-based platforms, to “have the flexibility to set their own hours for when, where, and how they work,” and “[t]o require rideshare and delivery network companies to offer new protections and benefits for app-based rideshare and delivery drivers” Cal. Bus. & Prof. Code § 7450, subds. (a)-(c).

In approving Prop 22, the voters codified a number of factual findings and declarations about the importance of the gig economy, including that hundreds of thousands of Californians choose to work as independent contractors using app-based rideshare and delivery platforms “as a means of earning income

²³ *Id.*

²⁴ *Id.*

²⁵ Cal. Secretary of State, *Official Declaration of the Vote Results on Nov. 3, 2020, State Ballot Measures*, <<https://elections.cdn.sos.ca.gov/sov/2020-general/sov/official-dec-vote-results-bm.pdf>> (as of May 25, 2022).

while maintaining the flexibility to decide when, where, and how they work,” *id.*, § 7449, subd. (a); that such drivers include “parents who want to work flexible schedules while children are in school; students who want to earn money in between classes; retirees who rideshare or deliver a few hours a week to supplement fixed incomes and for social interaction; military spouses and partners who frequently relocate; and families struggling with California’s high cost of living that need to earn extra income,” *id.*, § 7449, subd. (b); and that “[m]illions of California consumers and businesses, and our state’s economy as a whole, also benefit from the services of people who work as independent contractors using app-based rideshare and delivery platforms,” *id.*, § 7449, subd. (c). In short, California voters passed Prop 22 in recognition that the gig economy has provided and continues to provide significant benefits to workers, consumers, and businesses.

A. Prop 22 Benefits California Workers

The population of gig workers performing work on app-based platforms overwhelmingly prefers to work as independent contractors and is disproportionately drawn from economically disadvantaged, low-income, and minority communities who rely upon the flexible nature of gig work to supplement their income.

(1) Gig Workers Prefer to Be Independent Contractors and Overwhelmingly Supported Prop 22

Roughly eight in ten gig workers (or 78 percent) who have ever performed gig work in the United States rate their

experiences positively.²⁶ These positive sentiments towards gig work cut consistently across demographic groups, irrespective of race, ethnicity, age, gender, and income group.²⁷ It comes as no surprise, therefore, that large majorities of gig workers consistently report that they are working independently by choice (63 percent),²⁸ and that they are happier (87 percent) and healthier (78 percent) working on their own.²⁹ According to a study by McKinsey, gig workers who are working as independent contractors by choice report greater overall job satisfaction than those working as traditional employees by choice.³⁰ Similarly, persons working as independent contractors out of necessity as opposed to choice, report greater satisfaction than their traditionally employed counterparts, with the most important drivers of increased satisfaction being “the increased autonomy independent workers enjoy and the fact that they tend to find the work they do more interesting.”³¹

Consistent with these studies, in addition to the overwhelming majority of voters that approved Prop 22, ***the overwhelming majority of app-based drivers, themselves, wish to remain independent contractors.*** According to one market survey of Uber and Uber Eats drivers, 82 percent of app-based drivers in California responded that they are “happy Prop

²⁶ Anderson et al., *supra* n.13, at p. 29.

²⁷ *Id.*

²⁸ Storey et al., *Is the Gig Economy a Fleeting Fad or an Enduring Legacy?* 12 (2016) EYGM Ltd.

²⁹ MBO Partners, *supra* n.6, at p. 12.

³⁰ Manyika et al., *supra* n.2, at pp. 55-57.

³¹ *Id.*

22 passed,” while 76 percent agreed that Prop 22 had benefitted them personally.³² The same survey found that 84 percent of app-based Uber and Uber Eats drivers in California prefer being an independent contractor versus just 17 percent who say they would prefer to be an employee.³³ Finally, 54 percent of app-based drivers believe that if Prop 22 had *not* passed and they were treated as employees, they would be *worse off*, while only 12 percent think their lives would improve.³⁴

These overall attitudes extend to communities of color and minorities, who form a disproportionate share of the app-based gig workforce, and likewise supported Prop 22. The Yes on 22 Coalition was endorsed by numerous racial justice groups, including the California Black Chamber of Commerce, 10 chapters of that National Association for the Advancement of Colored People (“NAACP”), the National Asian American Coalition, the Baptist Ministers Conference of Los Angeles and Southern California, and the California branch of the National Action Network, Reverend Al Sharpton’s civil rights organization.³⁵ Consistent with these endorsements, a Los Angeles Times analysis of precinct-level data from the November 2020 election also found that Prop 22 enjoyed broad support in

³² Joel Benenson et al., *Key Findings from Prop 22 Survey with CA Drivers and Delivery People 1* (May 13, 2021) Benenson Strategy Group <<https://tinyurl.com/ycycsarc>> (as of May 25, 2022).

³³ *Id.* at p. 2.

³⁴ *Id.*

³⁵ Jack Ross, *Racial Justice Activists Split Over Prop 22* (Sept. 21, 2020) CAPITAL & MAIN <<https://capitalandmain.com/why-do-some-racial-justice-groups-support-proposition-22-0921>> (as of May 25, 2022).

“in lower income areas including plurality-Black neighborhoods such as Inglewood and Compton, and majority-Latino East Los Angeles.”³⁶

(2) Gig Workers Benefit from the Flexibility of Independent Contractor Status

Surveys consistently show that scheduling flexibility, the desire to be one’s own boss, the need to save up extra money, and needing to cover gaps in income are “major reasons” gig workers accept on-demand work through app-based platforms.³⁷ For 58 percent of gig workers who performed work through an app-based platform in 2020-2021, the income they earned from their gig work was either essential (23 percent) or important (35 percent) for meeting their basic needs.³⁸ And for the remaining 39 percent, the gig-work income was rated as “nice to have, but not needed.”³⁹ Even among those who rate gig-derived income as “essential” or “important” to meeting basic needs, 44 percent list the major reason for doing gig work as wanting to “be their own

³⁶ Suhauna Hussain, Johana Bhuiyan & Ryan Menezes, *How Uber and Lyft Persuaded California to Vote Their Way* (Nov. 13, 2020 6:00 a.m.) LOS ANGELES TIMES <<https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22>> (as of May 25, 2022).

³⁷ In a 2016 study by EY Advisory Services, 80 percent of gig workers stated that they appreciated the flexibility attendant to gig work. Storey et al., *supra* n.28, at p. 13. A 2021 study by Pew Research Center found that given the option to cite multiple “major reasons” motivating their pursuit of gig work, 49 percent identified “being able to control their own schedule,” 35 percent said “wanting to be their own boss,” 56 percent responded “wanting to save up extra money,” and 52 percent said “needing to cover gaps, changes in income.” Anderson et al., *supra* n.13, at p. 30.

³⁸ Anderson et al., *supra* n.13, at p. 31.

³⁹ *Id.*

boss”—twice the proportion of persons identifying gig-derived income as “nice to have, but not needed identified.”⁴⁰

A simple review of the demographic composition of the app-based workforce makes clear why gig workers so overwhelmingly prefer being independent contractors. For the vast majority of gig workers, app-based driving is not their sole livelihood, but rather a side gig on which they spend no more than 10 hours per week.⁴¹ And for those workers who most heavily rely on gig work to fill gaps in their income or cover basic expenses, the independence and flexibility of the gig work is a major reason for pursuing the work.⁴²

When the sample is limited to California app-based drivers, the result is largely the same: data show that app-based drivers overwhelmingly seek out app-based driving opportunities precisely because of the flexibility and independence that the independent contractor classification status affords.⁴³ Seventy-three percent of sampled app-based drivers in California drive part-time and rely on the freedom and flexibility of gig work to fit into their schedule. And 83 percent believe Prop 22 benefits them personally by preserving this flexibility.⁴⁴

The flexibility of gig work is particularly beneficial to groups that are historically disadvantaged by the strictures of the

⁴⁰ *Id.* at p. 32.

⁴¹ *Supra* Section II.C; *see also* Anderson et al., *supra* n.13, at p. 25.

⁴² Anderson et al., *supra* n.13, at p. 30.

⁴³ Benenson et al., *supra* n.32, at p. 2.

⁴⁴ *Id.*

traditional workplace. These groups include:

- Parents of young children (and particularly women who bear a disproportionate share of childcare responsibilities) who cannot afford childcare during regular business/daytime hours and thus cannot work full-time;⁴⁵
- Workers with elderly or disabled family members who depend on them for care during traditional business hours;⁴⁶
- Persons who already have full-time jobs and are in need of flexible part-time work opportunities to supplement their income (e.g., teachers, actors, musicians, authors, artists, retail workers);⁴⁷ and
- Students who want to earn extra cash to make ends meet or help pay for tuition.⁴⁸

In many cases (particularly in the case of parents with child- or elder-care responsibilities and students), these individuals would be unable or unlikely to participate in the workforce but for the availability of gig-type work that matches

⁴⁵ Cal. Bus. & Prof. Code § 7449, subd. (b); *see also* Pagalashvili & Suarez, *Women as Independent Workers in the Gig Economy* 7 (George Mason Univ. 2021) (citing Edelman Intelligence, *Freelancing in America: 2019.*) at pp. 13-14, 33. Flexibility during the pandemic was particularly valuable to working mothers. From 2020 to 2021, the proportion of new gig workers in the United States that were women increased from 46 percent to 55 percent. MBO Partners, *supra* n.6, at p. 7.

⁴⁶ *See* Manyika et al., *supra* n.2, at p. 43.

⁴⁷ Cal. Bus. & Prof. Code § 7449, subd. (b); Anderson et al., *supra* n.13, at p. 31.

⁴⁸ *Id.*

their scheduling needs.⁴⁹ In this respect, Prop 22 ensures that the productive capacity of the population is being maximized at a time when workforce participation rates have yet to reach pre-pandemic levels.⁵⁰

(3) Prop 22 Benefits Racial and Ethnic Minorities

Minority groups participate in the gig economy at a far greater rate than white Americans, relative to their share of the population. Roughly 30 percent of Hispanic American adults have earned money performing gig work on an app-based platform.⁵¹ The same is true of 20 percent of Black American adults and 19 percent of Asian American adults, compared with

⁴⁹ Pagalashvili et al., *supra* n.45, at pp. 13-14, 33. By preserving low-skill app-based driving jobs with low barriers to entry, Prop 22 also benefits various groups who traditionally struggle to reintegrate into society and find work, including formerly incarcerated persons. See Arthur Rizer et al., *Can the On-Demand Economy Open Doors for the Formerly Incarcerated* (Feb. 2018) R Street Policy Study No. 132 at p. 5. Specifically, Prop 22 advances the public policy objectives of the State of California, as embodied by Fair Chance Act, Cal. Gov't Code § 12952, by providing formerly incarcerated persons—a group disproportionately comprised of persons of color—with hard-to-find reintegration opportunities, thus reducing barriers to reemployment. See Cal. Dep't Fair Empl. & Housing, *FAQ: Fair Chance Act: Criminal History and Employment* (Sept. 2020); California Budget & Policy Center, *Report: Racial Disparities in California's State Prisons Remain Large Despite Justice System Reforms* 12 (June 2021); see also Sadé L. Lindsay, *Damned if you do, damned if you don't: How formerly incarcerated men navigate the labor market with prison credentials* (March 11, 2022) Criminology (discussing the challenges of finding employment following incarceration).

⁵⁰ See U.S. Dep't of Labor, "News Release – The Employment Situation – April 2022", at 2 (May 6, 2022) Bureau of Labor Statistics < <https://www.bls.gov/news.release/pdf/empsit.pdf> > (as of May 27, 2022).

⁵¹ Anderson et al., *supra* n.13, at p. 18.

just 12 percent of White Americans.⁵² Similarly, persons born outside of the United States are more likely to have earned money through an app-based platform (21 percent) than their U.S.-born counterparts (16 percent).⁵³ Finally, Americans with lower incomes are also more likely than those with middle or upper incomes to be current or recent gig workers.⁵⁴

App-based platforms provide minority workers and workers of color with critical income-earning opportunities well above comparable opportunities in the traditional labor force, where those communities have historically faced discrimination. For example, drivers of color have earned, on average, more than \$20 per hour (after accounting for expenses such as gas, maintenance, and depreciation, as well as for time spent driving to pick up passengers), far in excess of California's minimum wage of \$15.⁵⁵

In addition to manifold earnings opportunities, app-based platforms also provide enhanced, cost-effective transportation benefits to communities of color who have historically been underserved by and faced discrimination within the California transportation infrastructure.⁵⁶ One study of Lyft ride-hailing

⁵² *Id.*

⁵³ *Id.* at p. 19.

⁵⁴ *Id.* at p. 24.

⁵⁵ Amici Curiae Br. of Communities-of-Color Organizations in Support of Appellants (“Comms. of Color Amici Curiae Br.”), *California v. Lyft, Inc. et al.* (Cal. Ct. App. 1st Dist. Oct. 5, 2020, No. A16071) 2020 WL 5984856, at *7 n.12; Cal. Indus. Welfare Comm’n Min. Wage Order (2022), <<https://www.dir.ca.gov/Iwc/MW-2022.pdf>> (as of May 25, 2022).

⁵⁶ David Z. Morris, *Ride-Hailing Apps May Benefit Poor and Minority Communities The Most, Study Suggests* (June 30, 2018) FORTUNE <<https://fortune.com/2018/06/30/uber-lyft-poor-minority-communities/>> (as of May 25, 2022).

data found that, unlike traditional taxicab companies, drivers using Lyft served 99.8% of Los Angeles, and that users living in low-income areas made more trips per capita than those in middle- and high-income areas.⁵⁷ The same study found that lower car ownership, “which is correlated with lower income and minority status, also correlated to increased Lyft use.”⁵⁸ Furthermore, whereas African American passengers wait up to 15 minutes longer than white passengers when attempting to hail traditional taxicab services, African American passengers do not face the same disparity in service when promptly connected with drivers through on-demand apps like Lyft and Uber.⁵⁹

(4) Prop 22 Codifies Other Important Benefits

Prop 22 offers a balanced approach that preserves the coveted flexibility and autonomy upon which the entire gig economy is premised, while guaranteeing to qualifying app-based drivers certain benefits including: (a) guaranteed minimum compensation; (b) subsidized health benefits, (c) occupational accident insurance, (d) anti-discrimination and harassment protections, (e) maximum hours protections, and (f) mandatory safety training.⁶⁰ This targeted regulatory approach, which is supported by economic modeling, preserves the dynamism and flexibility essential to the gig economy, while providing enhanced

⁵⁷ *Id.*

⁵⁸ *Id.*; Anne Brown, *Redefining Car Access: Ride-Hail Travel and Use in Los Angeles* (2019) *JOURNAL OF THE AM. PLANNING ASS'N* 85:2, 83-95.

⁵⁹ Morris, *supra* n.56.

⁶⁰ Cal. Bus. & Prof. Code §§ 7453-7462

worker benefits and public safety without compromising the public welfare, profitability or viability of app-based platforms.⁶¹

B. Prop 22 Allowed App-Based Platforms to Play a Critical Role During the Pandemic, Confirming How the Gig Economy Benefits Consumers and Small Businesses

Starting in March 2020, with most of the U.S. population in lockdown, the COVID-19 pandemic underscored the critical role app-based platforms play in the economy. The pandemic caused tremendous upheaval in the labor market, prompting mass layoffs and furloughs of more than 20.5 million employees,⁶² spurring early retirements for many baby-boomers, and resulting in the deaths of many hundreds of thousands of working-age persons.⁶³ To make matters worse, with the closure of schools and daycare facilities, parents of young children—and, in particular, women—were in many cases overburdened with family-care responsibilities and left unable to work during traditional business hours.⁶⁴ Underscoring the enduring impact of these structural changes, as of May 6, 2022, the U.S. labor force participation rate—*i.e.*, the labor force as a percentage of the U.S. population—has still not recovered to pre-pandemic

⁶¹ Laura Katsnelson & Felix Oberholzer-Gee, Harvard Business School, *Being the Boss: Gig Workers' Value of Flexible Work*, (2021) Working Paper 21-124, at pp. 15-16; Andrei Hagiu & Julian Wright, *The status of workers and platforms in the sharing economy* (2018) *Journal of Economics and Management Strategy* pp. 104-08.

⁶² U.S. Dep't of Labor, *Employment Situation News Release* (May 8, 2020) Bureau of Labor Statistics <https://www.bls.gov/news.release/archives/empsit_05082020.htm> (as of May 25, 2022).

⁶³ MBO Partners, *supra* n.6, at p. 4.

⁶⁴ Pagalashvili et al., *supra* n.45, at pp. 13-14, 33.

levels.⁶⁵

This situation would be far worse, however, in the absence of Prop 22. App-based platforms served as a mechanism for the safe delivery of essential goods and services to consumers who were confined to their homes or fearful of contracting a life-threatening illness while procuring groceries and other life necessities.⁶⁶ During the pandemic, online food-delivery and grocery platforms such as Instacart, Uber Eats, and DoorDash saw a 78 percent surge in demand over 2017 levels, as consumers sought to procure necessities while also complying with stay-at-home orders and limiting contact with the public.⁶⁷ In a testament to the dynamism of the independent-contractor model employed by app-based platforms, as demand surged, these companies scaled up, enrolling hundreds of thousands of gig workers, with Instacart alone adding at least 300,000 gig workers.⁶⁸ The existence of these app-based platforms thus directly contributed to the safe flow of goods in the economy during the most restrictive phases of the pandemic.

The critical role that app-based drivers played during the pandemic confirmed the rationale underlying Prop 22 and demonstrated the benefits that app-based platforms provide to consumers and small businesses. The independent-contractor

⁶⁵ U.S. Dep't of Labor, *supra* n.50, at p. 2.

⁶⁶ *Id.*

⁶⁷ Faith Ricciardi, *How the Gig Economy Has Accelerated During the Coronavirus* MNI Targeted Media Inc. <<https://www.mni.com/blog/research/how-the-gig-economy-has-accelerated-during-coronavirus/>>(as of May 25, 2022).

⁶⁸ *Id.*

model ensures a consistent and affordable supply of delivery and rideshare workers who can connect small or local brick-and-mortar merchants to consumers at affordable prices.⁶⁹ Because these businesses do not have their own in-house delivery personnel, the existence of app-based platforms capable of pairing merchants, consumers, and independent-contractor drivers substantially reduces fixed operational and labor costs for all parties. These savings are passed on to consumers in the form of discounted delivery and ride-hailing prices.⁷⁰

In addition, the technological ease of being paired with an app-based driver online dramatically reduces search costs and wait times.⁷¹ One study of the Los Angeles-area market reveals that Uber rides cost half as much as taxi-cab rides covering the same distance.⁷² The same study demonstrated that while the average taxi driver took 17 minutes and 42 seconds to respond, the average Uber arrived in just six minutes and 49 seconds—more than twice as fast.⁷³

⁶⁹ See Katsnelson et al., *supra* n. 61, at pp. 10-13; Storey, et al., *supra* n.28, at p. 9.

⁷⁰ John O. McGinnis, *The Sharing Economy as an Equalizing Economy* Northwestern University Pritzker School of Law Public Law and Legal Theory Series No. 18-19, at pp. 5, 35; Rosanna Smart et al., *Faster and Cheaper: How Ride-Sourcing Fills a Gap in Low-Income Los Angeles Neighborhoods* (July 2015) BOTEC Corporation <<http://botecanalysis.com/wp-content/uploads/2015/07/LATS-Final-Report.pdf>>.

⁷¹ McGinnis, *supra* n.70, at p. 15.

⁷² James Sherk, *The Rise of the “Gig” Economy: Good for Workers and Consumers* (2016) The Heritage Foundation <https://www.heritage.org/jobs-and-labor/report/the-rise-the-gig-economy-good-workers-and-consumers#_ftn20> (as of May 25, 2022).

⁷³ *Id.*

Rideshare and delivery platforms that make use of app-based drivers are thus fulfilling a need in the economy that was not previously met, while increasing the profitability of businesses, improving the lives of workers, and lowering costs and improving services for consumers.

IV. CONCLUSION

For the foregoing reasons, this Court should defer to the legislative power of the people of the State of California, vacate the trial court's judgment granting petitioner's request for a writ of mandate, and affirm the constitutionality of Prop 22.

Dated: June 1, 2022

Respectfully submitted,

By: /s/ Albert Giang
Albert Giang

Attorney for Amicus
Curiae Marketplace
Industry Association,
Inc.

Document received by the CA 1st District Court of Appeal.

CERTIFICATION OF WORD COUNT

I certify that the computer program with which the foregoing Brief of Amicus Curiae Marketplace Industry Association, Inc. has been prepared has generated a total count (for headings, main text, and footnotes) of 5,218 words for the portions subject to the length limitation set forth in rule 8.204(c) of the California Rules of Court, excluding the portions referenced in rules 8.204(c) (i.e., the cover information, the table of contents and a table of authorities, this certificate, and the signature block).

June 1, 2022

/s/ Albert Giang

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PROOF OF SERVICE

Hector Castellanos, et al., v. State of California, et al.
Court of Appeal No. A163655
Alameda County Superior Court No. RG21088725

I am a citizen of the United States, over 18 years of age, and not a party to this matter. My business address is: King & Spalding LLP, 633 W. 5th Street, Suite 1600, Los Angeles, California 90071.

On June 1, 2022, I served the within **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE MARKETPLACE INDUSTRY ASSOCIATION, INC. IN SUPPORT OF DEFENDANTS AND APPELLANTS STATE OF CALIFORNIA, ET AL., AND INTERVENORS AND APPELLANTS PROTECT APP-BASED DRIVERS AND SERVICES, ET AL.** on the parties interested in this proceeding, addressed below, as follows:

All Counsel – as listed on TrueFiling Servicing Notifications List.

BY ELECTRONIC SERVICE VIA TRUEFILINGS.COM: I caused the document(s) to be sent to the persons at the electronic notification addresses listed with the TrueFiling Servicing Notification. The transmission was reported as complete without error.

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

Executed on June 1, 2022, at Los Angeles, California.

Dianna Ochoa