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Supreme Court of California
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Case No. S279622

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

PROTECT APP-BASED DRIVERS AND SERVICES, DAVIS WHITE, and KEITH YANDELL,
Intervenors and Appellants.

After Opinion by the Court of Appeal, First Appellate District, Case No. A163655
Appeal from the Alameda County Superior Court, Case No. RG21088725, Hon. Frank Roesch

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REPLY IN SUPPORT OF PETITION FOR REVIEW

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*Robin B. Johansen (SBN 79084)
Richard R. Rios (SBN 238897)
Deborah B. Caplan (SBN 196606)
Benjamin N. Gevercer (SBN 322079)
OLSON REMCHO, LLP
1901 Harrison Street, Suite 1550
Oakland, California 94612
Telephone: (510) 346-6200
rjohansen@olsonremcho.com

Stephen P. Berzon (SBN 46540)
Scott A. Kronland (SBN 171693)
Stacey M. Leyton (SBN 203827)
Juhyung Harold Lee (SBN 315738)
Robin Tholin (SBN 344845)
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
skronland@altber.com

Attorneys for Plaintiffs and Respondents

(Additional counsel on next page)

Nicole G. Berner (SBN 187415)
Steven K. Ury (SBN 199499)
SERVICE EMPLOYEES
INTERNATIONAL UNION
1800 Massachusetts Avenue, NW
Washington, DC 20036
Telephone: (202) 730-7383
steven.ury@seiu.org
Attorneys for Plaintiff and Respondent
Service Employees International Union

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INTRODUCTION[1]

The State "agrees … that the constitutionality of an initiative statute creating an alternative regulatory scheme for California's over 1.3 million app-based drivers is … an important question." (State Ans. at 11.) Intervenors also do not dispute the immense practical importance of the question for more than 1.3 million workers and their families. Respondents contend that review nonetheless should be denied because this Court already has resolved the pertinent legal issue. That contention is simply wrong. This case presents the important legal issue that this Court left open in *Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020 (*McPherson*). (See maj. opn. at 19; dis. opn. at 17; AA 903-904.) As such, Respondents' erroneous contention that the Court already settled the legal issue provides no basis for denying review.

Intervenors (but not the State) also assert that the Court should deny review to see if a conflict develops in the lower courts about the constitutionality of Proposition 22. (Intervenors Ans. at 27-28.) But whether app-based drivers are "employees" entitled to workers' compensation, state disability insurance, unemployment insurance, minimum wages, overtime, etc.—and whether app-based companies must pay employer taxes—affects so many people and social insurance programs that this Court has a

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[1] This Reply addresses the Answers filed by the State of California, et al. ("State Ans.") and by Proposition 22's proponents ("Intervenors Ans."). Unless otherwise indicated, the State and Intervenors are referred to collectively as "Respondents."

responsibility to settle the issue whether Proposition 22 is constitutional without unnecessary delay. The four judges who have heard this case were evenly divided about whether Proposition 22 is constitutional; judges and arbitrators will face the same issue again and again *for years* until this Court settles the issue; and nothing would be gained by delay.

ARGUMENT

I. This case presents an important and unsettled issue of constitutional law.

A. *McPherson* expressly left open the issue presented here.

Respondents' principal contention is that "[t]he Court in *McPherson* already answered the … question" presented here. (State Ans. at 11; see also Intervenors Ans. at 27 [asserting that this case "does not present any question that *McPherson* did not already resolve"].) To the contrary, all the judges below correctly recognized that this case presents the legal issue that the *McPherson* court expressly left open. (See maj. opn. at 19 [recognizing that *McPherson* stated that it was not resolving "a challenge like the one in this case"]; dis opn. at 17 ["This Case Presents the Conflict of Legislative Powers Issue Anticipated in Footnote 9 of … *McPherson.*"]; AA 903-904 [trial court decision recognizing that *McPherson* is distinguishable].)

1. *McPherson* addressed an initiative statute that did not conflict with the Legislature's unlimited constitutional authority to grant additional jurisdiction to the Public Utilities Commission (PUC). This Court explained that its "holding is limited to a determination that" a statutory initiative can also "confer[]

additional authority upon the PUC." (*McPherson*, *supra*, 38 Cal.4th at 1044, fn. 9.) This Court "emphasize[d]"—so as "[t]o avoid any potential misunderstanding"—that it was not foreclosing a claim that an initiative statute "improperly conflicts with the Legislature's exercise of *its* authority" to confer jurisdiction on the PUC, and that such a claimed conflict must be "resolved through application of the relevant constitutional provision … to the terms of the specific legislation." (*Ibid.,* emphasis in original.)

The State erroneously contends that "the interpretive question that plaintiffs seek to" present here is the same question resolved in *McPherson,* i.e., whether the Legislature's "plenary" power is "exclusive, thereby precluding the voters' constitutional power to legislate by initiative on that subject." (State Ans. at 11-12.) But plaintiffs have never claimed that the Legislature's power to protect workers with a complete system of worker's compensation is exclusive, such that an initiative statute cannot address "that subject." Plaintiffs' claim is that a statutory initiative cannot take away the Legislature's unlimited article XIV power to protect workers with a complete workers' compensation system and leave the workers stuck with incomplete accident insurance instead. (See Petition at 30-31.)

As such, this case presents the exact issue the Court left open in *McPherson*. Moreover, *McPherson's* directive for how to resolve the claimed conflict—"application of the relevant constitutional provision … to the terms of the specific legislation"—shows that Proposition 22 must yield to the plain

language of article XIV, section 4. (Petition at 27-29.) This Court should therefore grant review to settle the important legal issue that this Court "emphasize[d]" that it was leaving open. (*McPherson*, *supra*, 38 Cal.4th at 1044, fn. 9.)

2. The State argues that "[t]his case does not squarely implicate the Legislature-voter 'conflict' situation" left open in *McPherson* "because Proposition 22 is not a workers' compensation law. Rather, it is a worker classification law that at most only indirectly affects the Legislature's workers' compensation scheme." (State Ans. at 13, fn. 6; see also Intervenors Ans. at 25 [same assertion].) That reasoning makes no sense at all.

Respondents do not dispute that, under the statutes adopted by the Legislature, app-based drivers are "employees" entitled to the protections of a complete workers' compensation system.[2] By contrast, Proposition 22 provides that the drivers are not employees for purposes of workers' compensation and need only be offered inferior private accident insurance. (Petition at 15.) That is a conflict regardless of whether Proposition 22 also provides that app-based drivers are not employees for purposes of other laws. A statute that made 21 the age of majority for all purposes, thereby raising the voting age to 21, would conflict with

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[2] Employee-protective laws can and do use different tests for classifying workers as "employees" depending on the policy served by the law. (See, e.g., *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350-354.)

a constitutional provision that guarantees 18-year-olds the right to vote.

Moreover, this Court already rejected the State's reasoning in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 (*County of Los Angeles*). That case addressed a constitutional amendment providing that local government costs mandated by the State must be funded by the State. This Court recognized that, if the amendment applied to increases in workers' compensation costs, the amendment would conflict with the Legislature's "unlimited" article XIV power to enforce the workers' compensation system even though the amendment was "seemingly unrelated to workers' compensation." (*Id.* at 58-62.) Accordingly, this Court construed the constitutional amendment in *County of Los Angeles* narrowly so as to avoid conflict with article XIV. (*Ibid.*) As such, the State's erroneous reasoning provides no basis for denying review.

3. Intervenors seek to avoid review by proffering an interpretation of *McPherson's* footnote 9 that is creative but entirely unpersuasive. (Intervenors Ans. at 21-27.) Intervenors assert—apparently through the exercise of supernatural powers—that what was "top of mind" when the Court said it was not holding that an initiative statute could "limit the PUC's authority" was the PUC's "baseline" authority granted by the Constitution, rather than the PUC's authority granted by the Legislature in the exercise of the Legislature's unlimited power to grant additional authority to the PUC. (*Id.* at 21.) No such reference to baseline authority appears in footnote 9 itself.

Moreover, if an initiative statute cannot limit the PUC's baseline authority, as Intervenors acknowledge, it is not clear why an initiative statute could limit the Legislature's "baseline" power to grant authority to the PUC when the Constitution makes *that* baseline power "unlimited."

In any event, *McPherson*'s footnote 9 goes on to explicitly state that the Court was not addressing a claim that an "initiative measure … improperly conflicts with the Legislature's exercise of *its* authority to expand the PUC's jurisdiction or authority." (*McPherson*, *supra*, 38 Cal.4th at 1044, fn. 9, emphasis in original.) According to Intervenors, the analogous question is not presented here because Proposition 22 is not "improper[]." (Intervenors Ans. at 25.) Intervenors contend that Proposition 22 is not "improper" because—in their view—an initiative statute can limit the Legislature from exercising power that the Constitution states is unlimited by any provision of the Constitution. (Intervenors Ans. at 25-27.) But that is exactly the issue the *McPherson* Court emphasized it was *not* deciding, and Intervenors' interpretation of footnote 9 is both circular and nonsensical.

4. Finally, the State argues that this case does not present the important issue *McPherson* left open, and that review of whether Proposition 22 impermissibly conflicts with article XIV should be "reserved for another day," because the Court of Appeal addressed only a "facial challenge." (State Ans. at 14.) According to the State, the Court of Appeal did not decide whether article XIV gives the Legislature the power, notwithstanding Proposition

22, to enact "future legislation" that provides app-based drivers with a complete system of workers' compensation. (*Id.* at 5, 14.)

As an initial matter, there is no reason to delay review to "another day," because it is undisputed that existing statutes adopted by the Legislature already include the drivers in the existing workers' compensation system. This case thus squarely presents the issue whether Proposition 22 "improperly conflicts with the Legislature's exercise of *its* authority." (*McPherson*, *supra*, 38 Cal.4th at 1044, fn. 9, emphasis in original.)

Equally to the point, the Court of Appeal did *not* leave open the possibility of future legislation to provide app-based drivers with a complete system of workers' compensation. Proposition 22—on its face—precludes such legislation. Although the Court of Appeal struck down portions of Proposition 22's amendment provision as unconstitutional, the remaining parts of that provision allow amendments only to further the initiative's purposes. (Bus. & Prof. Code, § 7465, subd. (c)(1).) The provision goes on to state that any statute that amends the section of Proposition 22 that removes drivers from the workers' compensation system does not further the initiative's purposes. (*Id.*, subd. (c)(2).) The Court of Appeal held that, notwithstanding article XIV, "Proposition 22 can … bind the Legislature," and "reject[ed] th[e] argument" that Proposition 22 is unconstitutional insofar as it "restrict[s]" the Legislature's "future power." (Maj. opn. at 26; see also Intervenors Ans. at 25-

26 [acknowledging that Proposition 22 restricts the Legislature's future exercise of its article XIV authority].)[3]

To the extent the State is confused about the meaning of the Court of Appeal decision, the State's confusion provides an additional reason for granting review.

B. Other cases do not resolve the issue presented here.

Intervenors urge that review should be denied because, even if *McPherson* expressly left open the issue presented here, the "Court of Appeal's decision addresses no question of law this Court has not already resolved" in other cases. (Intervenors Ans. at 21.) Intervenors' argument depends upon misreading the Court's decisions and, therefore, provides no basis for denying review.

1. Intervenors rely on cases holding that constitutional grants of authority to the Legislature are not interpreted as a limitation on initiative statutes absent a "clear statement" and an "unambiguous indication." (Intervenors Ans. at 20-21.) But

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[3] Even if Proposition 22 allowed the Legislature to provide complete workers' compensation protections to drivers with an essentially impossible seven-eighths vote of both houses (and it does not), the supermajority requirement still would be an impermissible limitation on the Legislature's "unlimited" article XIV authority. In *County of Los Angeles*, this Court recognized that a "supermajority vote" requirement "would place workers' compensation legislation in a special classification of substantive legislation" and thereby "restrict the power of the Legislature over workers' compensation" in conflict with article XIV. (*County of Los Angeles*, *supra*, 43 Cal.3d at 60.) The same is true of the State's observation that an initiative statute can be amended with voter approval. (State Ans. at 13-14, fn. 7.)

the "clear statement" cases address a different issue from the one presented here. They address whether procedural constraints on how a legislative body may exercise its authority (e.g., a constitutional provision permitting a legislative body to raise taxes only by two-thirds vote) also implicitly apply to or foreclose voter initiatives.[4] In those circumstances, a clear statement rule makes sense because, among other things, "the electorate does not generally follow 'legislative' procedures when exercising the initiative power." (*Kennedy Wholesale*, *supra*, 53 Cal.3d at 252, fn. 5.)

Article XIV is not a procedural constraint on the Legislature or a general reference to the Legislature's power. Rather, it is an affirmative and specific *grant* to the Legislature of "plenary" and "unlimited" power to protect workers with a complete system of workers' compensation. Article XIV also *does* contain a "clear statement" and "unambiguous indication" that the Legislature's power to provide a complete workers' compensation system is "unlimited by *any* provision of this Constitution." (Emphasis supplied.)

This Court has never held that the phrase "unlimited by any provision of th[e] Constitution" is not clear enough, such that

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[4] See, e.g., *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249-251 (*Kennedy Wholesale*) [constitutional provision requiring two-thirds vote of Legislature to raise taxes did not implicitly prohibit adoption of taxes by voter initiative]; *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 948 [requirement that local governments submit special taxes to vote at general election did not implicitly preclude tax initiative's enactment at special election].

the Constitution must go on to identify every individual provision that does not limit the Legislature's power. The voters who adopted the 1918 constitutional amendment certainly would have been unaware of such a strange rule, and it would be a betrayal of those voters' intent to ignore the plain meaning of the constitutional amendment they adopted. (Cf. maj. opn. at 14 [admittedly reading article XIV "as though it said" something else].) At the least, the application of the clear-statement caselaw to this context does not, as Intervenors claim, present a "settled" issue.

2. Intervenors also point to cases holding that, as a general matter, "the People possess the same legislative power as the Legislature." (Intervenors Ans. at 19.) But *McPherson* recognized that "the right of the people through the initiative process to exercise similar legislative authority" as the Legislature does not decide the issue presented here: whether an initiative statute may "improperly conflict[] with the Legislature's exercise of its [constitutional] authority" where the Constitution provides that the Legislature's authority is plenary and unlimited. (*McPherson*, *supra*, 38 Cal.4th at 1033, 1044, fn.9, emphasis omitted.) As such, the cases Intervenors rely upon do not resolve the issue left open in *McPherson*.[5]

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[5] Aside from *McPherson*, none of the cases Intervenors rely upon involve a grant of power to the Legislature that is unlimited by the other provisions of the constitution. Those cases hold that "plenary" power need not be exclusive, not that "unlimited" power can be limited by an initiative statute. (See *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th

Moreover, because Proposition 22 restricts the Legislature's future authority, the initiative does not simply do what the Legislature also could have done. A "legislative body cannot limit or restrict its own power." (*Ex parte Collie* (1952) 38 Cal.2d 396, 398.) Intervenors claim that the "structure of the Constitution" makes clear that a statutory initiative can always restrict the Legislature's future authority. (Intervenors Ans. at 25.) But that is simply the general rule, not the rule where the constitutional language shows a contrary intent. (See, e.g., *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 328-329 [holding that an initiative statute could not limit the constitutional authority of future Legislatures to adopt annual budget bills].)

Here, article XIV grants the Legislature power "unlimited by the other provisions of th[e] constitution" to create and enforce a complete workers' compensation system for "any or all" workers. Under the "structure of the Constitution," such power can be withdrawn or limited only by another constitutional amendment, not a mere initiative statute. (See Petition at 26-27.) Thus, Intervenors' cases do not settle the issue presented here.

3. Finally, Intervenors are wrong in suggesting that this Court has held that the words "the Legislature" in the Constitution mean the electorate acting through the initiative power. (Intervenors Ans. at 19-20.) The cases that Intervenors

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1016, 1042; *Consulting Engineers & Land Surveyors of California, Inc. v. Professional Engineers in California Government* (2007) 42 Cal.4th 578, 587-588.)

rely upon harmonize constitutional grants of authority to the Legislature with the constitutional provision that reserves the power of initiative. They do not hold that the *words* "the Legislature" mean something other than "the Senate and Assembly." (Cal. Const., art. IV, § 1.) Indeed, Intervenors' "clear statement" cases recognize that procedural limitations on the authority of governing bodies generally do *not* apply to the exercise of the initiative power. (See, e.g., *Kennedy Wholesale*, *supra*, 53 Cal.3d at 249-251.)

Here the electorate approved a constitutional amendment that vested "the Legislature"—a deliberative body—with "plenary power, unlimited by any provision of th[e] Constitution, to create, and enforce a complete system of workers' compensation" for "any and all workers." Under Respondents' logic, the entirety of the Legislature's power could be removed—effectively repealing the constitutional provision—without another constitutional amendment. Whether Respondents are correct is not an issue settled by this Court's decisions.

II. Because of Proposition 22's immense practical significance, there is a substantial, statewide interest in this Court resolving whether Proposition 22 is constitutional.

Intervenors (but not the State) urge that the Court should deny review here and wait to see if a conflict develops. (Intervenors Ans. at 27-28.) But the issue whether Proposition 22 is constitutional has such practical significance, affects so many people, and will be presented in so many different fora *for years* until this Court settles the issue, that the Court should grant review to settle the issue now.

Intervenors state that they are aware of only one other pending lawsuit challenging Proposition 22's constitutionality.[6] The constitutionality of Proposition 22 will be raised as a defense, however, every time an app-based driver seeks compensation for a workplace injury. (See, e.g., *Murguia v. Lyft, Inc.* (Cal.W.C.A.B. July 20, 2022) 2022 WL 7921377, at *2 [considering Lyft's defense that an injured driver's workers' compensation claim must be dismissed because of Proposition 22].) Proposition 22's private accident insurance has a cap on medical benefits (so it will be insufficient for catastrophic injuries), and it provides no money for vocational retraining or permanent disability. (See Petition at 25.)

The constitutionality of Proposition 22 also will be put at issue by inevitable wage claims filed by or on behalf of the more than one million app-based drivers. Intervenors state that Proposition 22 provides a "minimum earnings guarantee" of "20% *above* the minimum wage … plus compensation for mileage." (Intervenors Ans. at 11, emphasis in original.) But app-based companies carefully drafted Proposition 22 so the earnings guarantee and mileage apply only to "engaged" time. (Bus. &

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[6] Even that challenge could lead to a conflict. "[T]here is no 'horizonal stare decisis' within the Court of Appeal" so the decision below is not "binding on a different panel of the appellate court." (*In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409; see also 9 Witkin, Cal. Procedure (6th ed.), § 519.) That case may come before a different division of the First District and, even within Division Four, the justice who cast the deciding vote below has retired.

Prof. Code, § 7453, subd. (d)(4).) A University of California study not sponsored by the app-based companies concluded that, when waiting time and other mileage and expenses are considered, the earnings guarantee is equivalent to only $5.64 per hour.[7]

Because of the amount of money at stake, the state and federal courts will see multiple putative class action lawsuits that include claims for post-Proposition 22 back wages. The app-based companies' defense to those claims is that Proposition 22 forecloses them, so courts must decide whether Proposition 22 is unconstitutional in its entirety because of its conflict with article XIV and non-severability provision. If the app-based companies compel drivers into individual arbitrations, there will be thousands of such arbitrations. (See, e.g., *Adams v. Postmates, Inc.* (N.D. Cal. 2019) 414 F.Supp.3d 1246, 1248 [5,257 individual arbitrations]; *Abernathy v. DoorDash, Inc.* (N.D. Cal. 2020) 438 F.Supp.3d 1062, 1064 [2,250 individual arbitrations].) The issue also will be presented in multiple lawsuits under the Private Attorneys General Act. (See, e.g., *Gregg v. Uber Technologies, Inc.* (2023) 89 Cal.App.5th 786; *Adolph v. Uber Technologies*, *review granted* July 20, 2022, S274671.)

The app-based companies also will challenge any future legislation adopted to benefit app-based drivers as an impermissible amendment of Proposition 22. And they will refuse to make employer contributions for unemployment and state

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[7] Jacobs & Reich, U.C. Berkeley Labor Center, The Uber/Lyft Ballot Initiative Guarantees only $5.64 an hour (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/>.

disability benefits because of Proposition 22. Only this Court can settle the issue whether Proposition 22 is constitutional.

CONCLUSION

The Court should grant the Petition for Review.

Dated: May 22, 2023

Respectfully submitted,

ALTSHULER BERZON LLP

OLSON REMCHO, LLP

SERVICE EMPLOYEES
INTERNATIONAL UNION

By: /s/ Scott A. Kronland

Attorneys for Plaintiffs-Respondents
Hector Castellanos et al.

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, the undersigned hereby certifies that this Reply in Support of Petition for Review is produced using 13-point Century Schoolbook type and contains 3,455 words, according to the word count generated by the computer program used to produce the brief.

Dated: May 22, 2023 By: /s/ Scott A. Kronland

PROOF OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On May 22, 2023, I served the following document(s):

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on the parties for service as designated below:

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Rob Bonta
Attorney General of California
Thomas S. Patterson
Senior Assistant Attorney General
Mark Beckington
Supervising Deputy Attorney General
Jose A. Zelidon-Zepeda
Deputy Attorney General
Office of the Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102
Jose.ZelidonZepeda@doj.ca.gov
Attorneys for Defendants-Appellants State of California and Katie Hagen

Arthur G. Scotland
Sean P. Welch
David J. Lazarus
Kurt R. Oneto
Nielsen Merksamer Parrinello Gross & Leoni, LLP
1415 L Street, Suite 1200
Sacramento, CA 95814
swelch@nmgovlaw.com
Attorneys for Intervenors-Appellants
Protect App-Based Drivers and Services; Davis White;
and Keith Yandell

Jeffrey L. Fisher
O'Melveny & Myers LLP
2765 Sand Hill Road
Menlo Park, CA 94025
Telephone: (650) 473-2633
Facsimile: (650) 229-7520
jlfisher@omm.com
Attorneys for Intervenors-Appellants
Protect App-Based Drivers and Services; Davis White;
and Keith Yandell

By First-Class Mail: I am familiar with Altshuler Berzon LLP's practice of collection and processing correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business pursuant to Code of Civil Procedure section 1013a.

The Hon. Frank Roesch
Alameda County Superior Court
Administration Building, Dept. 17
1221 Oak Street
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed May 22, 2023, at San Francisco, California.

J Perley

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Jean Perley