No. 22-36038

In the
United States Court of Appeals for the Ninth Circuit

AMIE DRAMMEH, et al.,

Appellants,

v.

UBER TECHNOLOGIES, INC., and RAISER LLC,

Appellees.

On Appeal from the United States District Court for the
Western District of Washington
No. 2:21-cv-00202 BJR
Hon. Barbara J. Rothstein

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Ninth Circuit Rules 26.1 and 29(a)(4)(A), counsel for the Chamber of Commerce of the United States of America states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. *E.g.*, *Doe v. Uber Techs., Inc.*, No. 22-16562, Dkt. 28 (9th Cir. June 14, 2023); *Pharm. Rsch. & Mfrs. of Am. v. Landsberg*, No. 21-16312, Dkt. 12 (9th Cir. Nov. 23, 2021); *Pirani v. Slack Techs., Inc.*, No. 20-16419, Dkt. 20-2 (9th Cir. Nov. 2, 2020); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods* LLC, No. 19-56514, Dkt. 23-2 (9th Cir. May 21, 2020).

[1] All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund to the preparation or submission of this brief.

Many of the Chamber's members provide platforms that facilitate communication or transactions between independent parties (here, drivers and riders). Those businesses depend on longstanding limits on the scope of their potential liability for third parties' crimes and intentional torts. And essentially all of the Chamber's members have an interest in understanding the scope of potential liability for harms caused by others. Predictable, reasonable limits on such liability allow businesses to understand risks and secure insurance against harms that can reasonably be attributed to them. Those limits do not prevent injured parties from seeking compensation from culpable tortfeasors who intentionally injure them, and those tortfeasors should be held fully accountable for their misconduct. Rather, those longstanding limits ensure that businesses are not treated as quasi-insurers strictly liable for the intentional misconduct of unaffiliated third parties. The contrary views Plaintiffs advance would dramatically expand the scope of potential liability, resulting in unintended consequences for businesses and consumers. The Chamber has a strong interest in ensuring that the Court hews to the established tort-liability limits recognized under Washington law and rejects Plaintiffs' efforts to expand liability beyond recognition.

INTRODUCTION

Long-settled rules of tort law make clear that businesses are generally not liable for the intentional criminal acts of unaffiliated third parties. As courts have recognized, prevention of and protection from crime is a job for law enforcement, not private businesses. Courts have likewise recognized that treating businesses as strict-liability insurers against others' criminal acts would disrupt our economy and disproportionately harm poorer and more urban communities by disincentivizing businesses from serving those neighborhoods.

Businesses depend on these well-established limits on tort liability because crime is unpredictable. The traditional rule limiting liability to acts that affirmatively create risks of criminal harm allows businesses to better predict their exposure and to secure insurance against harms. That rule's predictability allows businesses to serve "high-crime" areas, including those where historically disadvantaged groups live and work. As courts have consistently held, the public policy costs of expanding businesses' tort liability for third-party criminal acts far outweigh the benefits of requiring private businesses to compensate victims for the unfortunate consequences of third-party crime.

Businesses that connect independent service providers with customers especially need the predictability of the traditional limits on tort liability because they do not physically control the circumstances in which their clientele interact. Take Uber: Its platform, like many in today's economy, facilitates transactions between consumers and independent contractors. Such platforms benefit both groups by expanding their ability to buy and sell needed services. And in most cases, the transactions between these two groups are completed without any issues. But like *all* businesses, businesses that work to connect service providers with consumers face the problem of crime—including, specifically, the possibility that unaffiliated bad actors will try to misuse their services to commit crime.

This case originated because Olivia Bebic and Devin Wade misused Uber's platform to commit a carjacking that resulted in Cherno Ceesay's murder. All agree that Bebic and Wade committed a horrific criminal act and should be punished accordingly. All likewise agree that Bebic and Wade should and could be required to provide tort compensation to Plaintiffs for their culpable conduct.

The case before this Court involves a different issue—whether Uber should be held responsible for Bebic and Wade's intentional criminal act

simply because they used Uber's platform to connect with their victim. Longstanding tort principles make clear that Uber should not be held liable for these unaffiliated third parties' intentional crimes.

Businesses have a carefully circumscribed duty to guard against third-party crime, which arises only in two limited situations: when the business either (1) has a special relationship with the criminal or the victim or (2) knows (or should know) something ***particular*** about the third party indicating that the third party is likely to commit a crime against the plaintiff and the business nevertheless takes an affirmative step to increase that specific risk.

Uber does not fall into either exception here. As Uber rightly argues and the district court correctly found, Plaintiffs have not identified any recognized "special relationship" between Uber and either the victim Cherno Ceesay or his murderers that would trigger a heightened duty to guard against third-party crimes. *Nivens v. 7-11 Hoagy's Corner*, 943 P.2d 286, 290 (Wash. 1997), *as amended* (Oct. 1, 1997); Restatement (Second) Torts § 315; *see also* Restatement (Second) Torts § 302B cmt.e.

Nor has Uber violated the ordinary standard of care that applies here. Plaintiffs do not allege that Uber affirmatively acted to put Mr. Ceesay in

harm's way knowing specific information about Bebic or Wade that would suggest they were likely to commit a crime against him. Instead, Plaintiffs merely allege that Uber acted negligently by *failing* to implement security measures that purportedly would have protected Mr. Ceesay by deterring crime against drivers, including positively identifying riders, installing security cameras, and placing protective shields in driver's cars. These allegations amount to a claim that Uber had a duty to protect against a generalized risk of crime that affects all businesses and individuals—a claim that well-established tort law squarely forecloses.

Finally, this Court should reject Plaintiffs' attempt to admit evidence that Uber investigated the risk of carjackings and implemented certain safety measures *after* the carjacking occurred. Both actions are subsequent remedial measures undertaken to understand and attempt to prevent future similar tragedies. As a result, this evidence is inadmissible under Federal Rule of Evidence 407, which bars admission of subsequent remedial measures to prove negligence or culpability. The narrow exceptions to that rule do not apply, and this Court should not expand those exceptions because it would deter businesses from investigating and implementing additional safety measures to guard against crime and accidents.

The district court correctly granted summary judgment to Uber based on longstanding tort law barring Plaintiffs' negligence claim. This Court should affirm.

ARGUMENT

I. BUSINESSES GENERALLY ARE NOT LIABLE IN TORT FOR THE CRIMINAL ACTS OF THIRD PARTIES.

The central issue in this appeal is whether and when a business may be held liable in tort for a third party's criminal act. Businesses generally are not liable for such crimes. Private individuals and businesses "may proceed upon the assumption that others will obey the law." *Hutchins v. 1001 Fourth Ave. Assocs.*, 802 P.2d 1360, 1367 (Wash. 1991); *see also* Restatement (Second) Torts § 302B cmt.d ("[U]nder ordinary circumstances it may reasonably be assumed that no one will violate the criminal law."). Businesses and individuals thus have no legal duty to take affirmative steps "to protect others from the criminal acts of third parties." *Hutchins*, 802 P.2d at 1364; *see also Bartlett v. Hantover*, 513 P.2d 844, 848 (Wash. App. 1973) ("As a general proposition, one citizen does not owe a duty to another citizen to protect the other against the criminal acts of a third person."), *rev'd on other grounds*, 526 P.2d 1217 (Wash. 1974).

The exceptions are quite narrow. Businesses have a duty to protect individuals from the criminal acts of third parties where the business takes some affirmative action that "created or exposed the other to a recognizable high degree of risk of harm through such [criminal] misconduct." *Parrilla v. King Cnty.*, 157 P.3d 879, 883 (Wash. Ct. App. 2007) (internal quotation marks omitted); *see also* Restatement (Second) Torts § 302B cmt.e. But for this exception to apply, two things must be true: First, the business must take some *affirmative* act to place the victim in danger; a mere failure to act to protect others from criminal harm (*i.e.*, an omission) is not sufficient to impose liability. And second, the specific criminal act must have been foreseeable; otherwise, the business did not act to put the plaintiff in a situation where there was a "*recognizable high degree of risk of harm*." *Parrilla*, 157 P.3d at 883 (emphasis added).

To prove that a business has a duty to guard against the criminal acts of others, therefore, a plaintiff must show *both* that the business took some affirmative action to expose the plaintiff to harm *and* that the specific criminal act was foreseeable. *See McKown v. Simon Prop. Grp., Inc.*, 344 P.3d 661, 666 n.4 (Wash. 2015). Here, Plaintiffs cannot satisfy either condition to establish that Uber owed a duty of care. And without such a duty, their

negligence claim necessarily fails. *Hurley v. Port Blakely Tree Farms L.P.*, 332 P.3d 469, 479 (Wash. Ct. App. 2014) ("existence of a duty to the plaintiff" is an essential element of a negligence claim in Washington).

A. Plaintiffs Have Not Alleged an Affirmative Act Creating or Exposing Mr. Ceesay to a Recognizable High Risk of Harm.

Washington follows Restatement (Second) Torts § 302B cmt.e, which imposes liability only for an "*affirmative act* [that] has created or exposed the [plaintiff] to a recognizable high degree of risk of harm" from criminal misconduct. *Parrilla*, 157 P.3d at 885 (emphasis added). Under this rule, liability requires misfeasance ("an act") by the defendant rather than mere nonfeasance ("an omission"). *Robb v. City of Seattle*, 295 P.3d 212, 217 (Wash. 2013). A defendant cannot be held liable for negligence if his "*failure* to act exposes another to harm." *Parrilla*, 157 P.3d at 879. Instead, a plaintiff may hold a defendant liable for negligence only if the defendant "undertakes an *affirmative act*" that creates a new risk of harm to the plaintiff. *Id.* at 885.

Plaintiffs' negligence claim rests on the notion that Uber failed to take adequate steps to guard against carjackings by riders. For instance, Plaintiffs contend that Uber could have verified the identity of riders who used anonymous payment methods or could have supplied drivers with

dashcams. Appellant's Opening Brief ("AOB") 38. But all these allegations are claims that Uber could have implemented additional security measures or undertaken additional investigation to protect against crimes. They are alleged *omissions*. Courts have uniformly rejected claims based on such omissions, rightly recognizing that they allege mere nonfeasance or a failure to act. *Veridian Credit Union v. Eddie Bauer, LLC*, 295 F. Supp. 3d 1140, 1157–58 (W.D. Wash. 2017) (retailer's failure to adopt adequate data security measures constituted nonfeasance); *Nivens*, 943 P.2d at 293 (declining to find that "a business … owes a duty to provide security personnel to prevent criminal behavior on the business premises"); *Sourakli v. Kyriakos, Inc.*, 182 P.3d 985, 992 (Wash Ct. App. 2008) (parking lot owner who failed to add more lighting or security cameras despite knowledge that gang members congregated on the lot with guns had failed to take "preventive measures against crime" and did not create "a special temptation to crime"); *Tortes v. King Cnty.*, 84 P.3d 252, 256 (Wash. Ct. App. 2003) (no law required county to provide police presence, driver enclosures, or surveillance cameras to prevent murder of bus driver).

Plaintiffs attempt to reframe Uber's alleged failures as an affirmative act, asserting that Uber created the risk of harm by pairing the victim with

the assailant riders, whose identities Uber did not verify. AOB 19–20. But this is simply an effort to reframe an omission (failing to verify the identities of riders) as an affirmative act (pairing drivers and riders). Other omission cases could easily be reframed the same way. For instance, one could say that a convenience store acted negligently in operating a business without security guards in a high-crime neighborhood. *But see Nivens*, 943 P.2d at 293. Or one could say a retailer acted negligently in accepting credit card payments using an unsecure payment system. *But see Veridian Credit Union*, 295 F. Supp. 3d at 1157–58. Despite the effort to reframe the omission cases as commission cases, the defendant in each of these cases did not increase the risk of harm but instead (at most) failed to decrease or eliminate the risk of harm by taking additional precautions. In other words, the defendants' failures were ones of omission.

An impermissibly reframed nonfeasance case can be identified as such by asking how, according to the plaintiff, the tortfeasor would prevent the same harm from recurring. If the only ways to avoid the alleged harm are to increase security or cease providing the businesses' normal services to some or all its customer base, then the plaintiff in reality alleges mere nonfeasance for failure to provide increased security. Reframing a

business's ordinary operation as an affirmative "act" would impermissibly swallow the nonfeasance category and impose a general duty on all businesses to guard against third-party crime. The narrow exceptions would become the rule. That is not the law.

In contrast to nonfeasance, affirmative misfeasance involves situations where an individual encounters a particular person who appears imminently likely to commit a crime and nevertheless takes some action that obviously increases the likelihood of that person committing a harmful criminal act. A contrast of Washington cases helpfully illustrates this point. In two cases, Washington courts concluded that individuals engaged in misfeasance when they left a parked and running vehicle on the side of the road, knowing that a particular person who seemed poised to commit a crime was in or near the vehicle. *Parrilla*, 157 P.3d at 886; *Adgar v. Dinsmore*, 2023 WL 3730409, at *6 (Wash. Ct. App. May 31, 2023). By contrast, other Washington cases have found that a defendant merely committed nonfeasance when she left keys in a parked car without any reason to believe that a particular, dangerous person was nearby and poised to take it. *Kim v. Budget Rent A Car Sys., Inc.*, 15 P.3d 1283, 1285 (2001); *see also Sailor v. Ohlde*, 430 P.2d 591, 592 (Wash. 1967); Restatement (Second) Torts § 302B,

illustration 2. The key distinction between these cases is the defendant's knowledge of an imminent and concrete threat that a specific person would take the vehicle and use it to commit a crime when they decided to leave the vehicle running and unattended. Put simply, Washington courts find misfeasance only where the defendant acts with knowledge of "the dangerous propensities *of the individual responsible for the crime*." *Raider v. Greyhound Lines, Inc.*, 975 P.2d 518, 519 (Wash Ct. App. 1999) (emphasis added).

The cases and examples cited by Plaintiffs reaffirm the distinction described above and thus show that Plaintiffs have *not* alleged an affirmative misfeasance claim. All the misfeasance cases involve circumstances where an individual acted to increase the threat of harm based on specific knowledge about a particular individual. AOB 35–37. In *Washburn v. City of Fed. Way*, for instance, a police officer served an antiharassment order on the victim's boyfriend and then knowingly left the boyfriend alone in the house with the victim, even though the order itself warned "that the boyfriend had a history of assault and would likely react violently to service of the antiharassment order." 310 P.3d 1275, 1290 (Wash. 2013). Similarly in *Parrilla*, a bus driver abandoned a running bus on the side of the road even

though he knew "a severely impaired individual" who "had displayed a tendency toward criminal conduct" and was "acting in a highly volatile manner" remained on board.[2] 157 P.3d at 886. Plaintiffs have not alleged that Uber knew any specific information about the particular carjackers that would transform its conduct from nonfeasance to misfeasance.

In short, Plaintiffs have not alleged that Uber affirmatively acted to create a new and specific risk of harm from particular third-party assailants. The district court thus properly granted summary judgment to Uber for failure to establish a duty of care.

[2] Plaintiffs argue that failure to take precautions can constitute misfeasance because a driver is negligent when he "fails to apply his or her brakes as a pedestrian crosses in front of the car." *Robb*, 295 P.3d at 218. But this example does not illustrate the distinction between misfeasance and nonfeasance in cases involving *criminal* conduct; it involves the distinct question of when an actor must anticipate and protect against *negligent* conduct—a question subject to different standards of care. *See generally* Restatement (Second) Torts § 302A (describing the duty to guard against the negligent or reckless conduct of others). In any event, this example still involves a driver confronted with a specific risk that a specific individual's conduct imminently created. It does not involve a driver's duty to, for instance, stop whenever she crosses a high-pedestrian-traffic intersection on the theory that it is more likely a pedestrian might step into the street to cross at those intersections. Plaintiffs' allegation that rider anonymity increases the risk of crime is more akin to this example.

B. Merely Offering a Service that Pairs Third Parties Does Not Expose Them to a Recognizable High Degree of Risk of Crime.

Even if Plaintiffs could show that their allegations of negligence were based on an affirmative act rather than an omission, their claims still would fail because the risk of harm here was not foreseeable as a matter of law.

To trigger a duty of care to guard against third party crimes, the defendant's "affirmative act [must] create[] or expose[] the [plaintiff] to a *recognizable high degree of risk of harm*." Restatement (Second) of Torts § 302B cmt.e (emphasis added). In other words, "the question of duty depends on the reasonable foreseeability of the attack." *Crill v. WRBF, Inc.*, 189 Wash. App. 1052, 2015 WL 5166363, at *8 (2015). Because the foreseeability of the crime determines the existence of a duty, that foreseeability question is one of law for the courts. *McKown*, 344 P.3d at 664–65.[3]

[3] A second type of foreseeability—whether the injury or "harm sustained is reasonably perceived as being within the general field of danger covered by the duty owed by the defendant"—is a question of fact for the jury. *McKown*, 344 P.3d at 665. Plaintiffs appear to argue that the question here is about the scope of the duty owed and whether *the harm* suffered was foreseeable—a jury question—but that is not the case. *See* AOB 40. The question here is whether Plaintiffs have sufficiently shown that *the crime* causing the harm was foreseeable, and thus whether Uber owed a duty of care at all, which is a pure question of law. *McKown*, 344 P.3d at 664–65.

In determining whether the risk of crime was foreseeable, Washington courts have been careful to "emphasize[] that section 302B applies only when an *unusual* risk of harm was created." *McKown*, 344 P.3d at 666 n.4 (emphasis added). Showing just "*any* risk of harm" does not "give[] rise to a duty." *Kim*, 15 P.3d at 1285 (emphasis added). Nor is it sufficient to show that certain circumstances increase the statistical likelihood that a crime will occur. *Crill*, 2015 WL 5166363, at *5–16; *Kim*, 15 P.3d at 1287 (rejecting "utilization of high crime rates as a basis for imposing a tort duty"). Though the general risk of crime is "invariably foreseeable everywhere," *McKown*, 344 P.3d at 669 (quoting *MacDonald v. PKT, Inc.*, 628 N.W.2d 33 (Mich. 2001)), an actor is ordinarily entitled to presume "that no one will violate the criminal law." Restatement (Second) Torts § 302B cmt.d.

The rule that comes of all of this is a requirement that the alleged tortfeasor must know or have reason to know of some ***peculiar*** reason that criminal conduct is likely to occur when he acts. Here, Plaintiffs complain about Uber's pairing of the victim as a driver with riders whose identity was not verified. Thus, the relevant standard here is whether Uber "brought [Mr. Ceesay] into contact or association with … a person whom the actor knows or should know to be *peculiarly* likely to commit intentional misconduct,

under circumstances which afford a *peculiar* opportunity or temptation for such misconduct." Restatement (Second) Torts § 302B cmt.e.D (emphasis added).

Courts applying the "peculiar likelihood" requirement have consistently interpreted it to require the alleged tortfeasor to know (or have reason to know) information about the specific person that they put into contact with the tort victim that makes it seem likely they will commit a crime. *James v. Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002) (defendant must be "specifically aware of the peculiar tendency of a particular person to commit a criminal act with the defendants' materials"). For instance, courts have found liability where the defendant knew that the person who harmed the plaintiff had a history of criminal violence before placing them in contact with the plaintiff. *Compare Waldon v. Housing Authority,* 854 S.W.2d 777, 779 (Ky. App. 1991) (third-party assailant's murder of tenant was reasonably foreseeable to landlord who knew that the assailant had repeatedly threatened to kill the victim, that the assailant was living in the complex, and that crimes had frequently occurred there); *Jupin v. Kask,* 849 N.E.2d 829, 837 (Mass. 2006) (defendant should have foreseen that third-party assailant might use his gun to commit violent

crime because defendant knew the assailant had a history of violence, incarceration, and psychiatric institutionalization); *Golden Spread Council, Inc., No. 562 of the Boy Scouts of America v. Akins,* 926 S.W.2d 287, 291 (Tex. 1996) (scoutmaster's wrongdoing was foreseeable to defendant, where defendant was aware of similar, prior allegations against scoutmaster), *with Fedie v. Travelodge International, Inc.*, 782 P.2d 739, 742 (Ariz. App. 1989) (third party's crimes were unforeseeable because defendants did not have any specific knowledge about the third party's "dangerous propensities"); *Newton v. Tinsley,* 970 S.W.2d 490, 494 (Tenn. App. 1997) (murder was unforeseeable to defendant who knew that the assailant "was being treated for depression" but also knew that he had "never committed violent acts toward another"). And courts have found liability where the defendant observed the third-party assailant behaving in a manner suggesting that the assailant was about to commit a crime. *See supra* pp. 12-13 (describing contrast between Washington cases finding negligence where keys are left in a vehicle).

By contrast, courts have declined to find liability where the plaintiff's allegations of foreseeability depend on generalized knowledge that individuals who meet a certain description or fall into a certain category are,

as a group, more likely to commit crimes. *Schwartz v. Elerding*, 270 P.3d 630, 637 (Wash. App. 2012) (defendants did not violate ordinary duty of care under Restatement (Second) §302B by giving their teenage son a gun because they had no "special knowledge about [their son] that would give them reasonable cause for concern" that he would assault someone and mere knowledge that he was a minor did not create a foreseeable risk of misconduct); *Errico v. Southland Corp.*, 509 N.W.2d 585, 586–88 (Minn. Ct. App. 1993) (assault was not foreseeable merely because 24-hour "convenience stores are characteristically dangerous places with high risks of violent crime to employees and customers" or because particular convenience store was in "a high crime neighborhood"); *see also Ngo v. Hearst Corp.*, 97 Wash. App. 1046, 1999 WL 760274, at *4 (1999) ("Merely establishing the relatively high incidence of crime . . . is insufficient to establish an employer's duty to protect employees from becoming victims of crime when they are sent into that area.").

Plaintiffs' allegations fall into this latter camp. They argue that Uber should have reasonably foreseen the crime that occurred here based on a purported nationwide increase in carjackings during 2020. AOB 41–43. But Plaintiffs' general statistical evidence does not prove the essential fact

necessary for foreseeability here—namely, that Uber knew specific facts about Bebic or Wade that would have alerted Uber that they were peculiarly likely to commit a crime.

Plaintiffs assert that the district court's decision on remand in *McKown v. Simon Property Group*, No. C08-5754 BHS, 2018 WL 3971960, at *3 (W.D. Wash. Aug. 20, 2018), allows them to establish foreseeability with generalized statistical evidence. However, Plaintiffs' reliance on *McKown* is misplaced for two reasons. First, *McKown* is a premises-liability case governed by Restatement (Second) Torts § 344, not a misfeasance case governed by § 302B. Because the crux of Plaintiffs' claim is that Uber brought Mr. Ceesay into contact with a person who then committed a crime against him—and not that Uber had control over the place where the crime was committed—cases addressing foreseeability in the introduction-of-dangerous-persons context, and not the landowner context, are more relevant. *Compare* Restatement (Second) Torts § 302B cmt.eD, *with id.* cmt. eB. And those cases do not permit plaintiffs to establish foreseeability based solely on a generalized risk of crime. *McKown*, therefore, does not allow Plaintiffs to circumvent the normal requirement that they present

evidence that Uber knew Bebic or Wade posed specific risks. *Supra* pp. 17-19; Answering Br. 40–41.

Second, even if *McKown*'s premises-liability foreseeability rules could be extended to this case, Plaintiffs fail to allege the three requirements necessary to satisfy the prior-similar-incidents test that the Washington Supreme Court has articulated, as Uber's brief explains. *See* Answering Br. 45-49 (explaining that under prior-similar-incidents test, "prior act(s) of violence" must be: (1) "sufficiently similar in nature and location to the" crime against the plaintiff, (2) "sufficiently close in time to the act in question," and (3) "sufficiently numerous").

In sum, where liability is predicated on the defendant having brought the plaintiff into contact or association with someone who commits a crime, foreseeability of that crime depends on the alleged tortfeasor knowing some specific fact about the criminal—and specifically on the critical distinction between the alleged tortfeasor knowing that the particular individual has criminal tendencies and knowing that people of a certain type are statistically more likely to commit crime. In the former case, the third party's crime may be foreseeable, but in the latter circumstance, knowledge that a third party falls into a certain "type" does not. Plaintiffs' allegations—that

people who use anonymous payment methods are more likely to commit crimes and that, as a result, Uber should have foreseen that the specific assailants here would attempt to carjack their driver—fall into the latter category and thus cannot establish foreseeability as a matter of law.

C. Imposing Liability on Businesses for Third-Party Crime Based Merely on Heightened Statistical Risk Will Harm the Economy and Poor, Disadvantaged Communities.

Plaintiffs' contention that businesses should presume that customers with certain characteristics are more likely to commit crimes—and that businesses must therefore implement special safeguards when dealing with individuals who exhibit those particular characteristics—is not only contrary to law but also harmful public policy.

Courts have been extremely reluctant to impose a duty on businesses to presume that all people who share a particular characteristic are more likely to commit crime—even when that characteristic is statistically correlated with higher crime rates. With good reason: For starters, requiring businesses to make presumptions based on circumstances correlated with higher crime would negatively impact historically disadvantaged groups. For example, concluding crime is foreseeable in inner cities merely because there is generally a "high incidence of crime in an urban area," will have the

"undesirable result" of causing "the departure of businesses from urban core areas." *Hutchins*, 802 P.2d at 1370; *see also Stafford v. Church's Fried Chicken, Inc.*, 629 F. Supp. 1109 (E.D. Mich. 1986) (rejecting argument that business knew security was necessary because it was in a high-crime area, as requiring the business to provide police protection against criminal third parties may drive businesses out of those neighborhoods); *Irby v. St. Louis Cnty. Cab Co.*, 560 S.W.2d 392, 395 (Mo. App. 1977) (taxi company's "knowledge [that it was dispatching a taxi driver to] a "high crime area'" was not sufficient to make the driver's murder foreseeable and thus to "give[] rise to a duty to take precautions against intentional criminal acts"); *Koch v. Lind*, 121 Ohio App. 3d 43, 54-56 (1997) (fact that delivery driver's route took him through high-crime areas during early morning hours did not make his murder foreseeable). As one court explained, "it would [not] be appropriate as a matter of policy to impose a higher duty on business owners who are willing to provide their services in 'high crime areas' or 'near a housing project'—most commonly the areas in which low and moderate income residents are to be found." *Boren v. Worthen Nat'l Bank of Ark.*, 921 S.W.2d 934, 941-42 (Ark. 1996); *see also, e.g.*, *McNeal v. Henry*, 266 N.W.2d 469, 470 n.1 (Mich. App. 1978) ("[S]ome of our big cities have more

than their share of destructive and violent persons, young and old, who roam through downtown department stores and other small retail businesses stealing and physically abusing legitimate patrons …. We fear that to hold businessmen liable for the clearly unforeseeable third-party torts and crimes incident to these activities would eventually drive them out of business.").[4]

Like these previously rejected rules, Plaintiffs' proposed rule would harm traditionally underserved and disadvantaged groups. Plaintiffs argue that Uber should assume that individuals who use anonymous prepaid cards are statistically more likely to commit crimes and should impose additional security protocols when those riders use Uber's services. But users of prepaid cards are "demographically different from the general population in several ways"; they are disproportionately poor and lack

[4] It would be exceedingly odd to impose a tort duty that effectively required businesses to make presumptions about an individual's risk of committing crime based only on the fact that they live in a certain area or possess a certain characteristic given that the *police* who are charged with the primary duty of preventing crime are *prohibited* from making these same assumptions. *See, e.g.*, *United States v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006) ("[T]o establish reasonable suspicion, an officer cannot rely solely on generalizations that, if accepted, would cast suspicion on large segments of the lawabiding population.").

access to traditional banks and credit cards. Pew Charitable Trusts, *Why Americans Use Prepaid Cards: A Survey of Cardholders' Motivations and Views*, at 3–4, 7 (Feb. 2014). Many of these individuals use prepaid cards because they must; the prepaid cards are the only form of payment that they can access that would allow for the kinds of online payments that Uber and many other businesses require. *Id.* at 13–14. Thus, the implication is that these businesses must assume that poorer, unbanked individuals are statistically more likely to commit crimes and must, accordingly, impose additional security measures when interacting with those individuals or (if the risk becomes too great) stop serving these individuals altogether.

Nor is there any reason to think that Plaintiffs' proposed liability-expanding duty rule would remain confined to classifying individuals based on their banking status. There is no principled way to prevent Plaintiffs' proposed rule from extending to other characteristics that may be statistically correlated with increased rates of crime, including prior criminal history, socioeconomic status, neighborhood, age, race, and gender. Nor is there any principled way to limit Plaintiffs' proposed rule to ridesharing services, when there are numerous other businesses that connect independent contractors and customers. *Tchakounte v. Uber Techs., Inc.*, 2022

WL 326727, at *8 (D. Md. Feb. 3, 2022) (rejecting duty to screen passengers for prior criminal history based on the theory that they pose an increased risk of harm because "it is unclear why such a duty would not creep outward").

Expanding tort liability for third-party crime would discourage businesses from serving the poor and marginalized living in statistically "high crime" areas, denying them equal economic opportunity by reducing their access to goods, services, and jobs. This Court should not accept Plaintiffs' invitation to alter longstanding tort principles in a way that numerous courts have rejected because it risks such detrimental effects.

* * *

Crime is an unfortunate, but inevitable, risk in any society. As the Washington Supreme Court has observed, even police, who are trained to deal with crime, are often unable to prevent it; "[t]his is a testament to the arbitrary nature of crime." *McKown*, 344 P.3d at 669. "The inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to a business owner." *Nivens*, 943 P.2d at 293 (quoting *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381, 384–85 (Mich. 1988)). "[I]t is unjustifiable to make merchants, who not

only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties." *McKown*, 344 P.3d at 669.

II. EVIDENCE THAT UBER TOOK STEPS TO PREVENT FUTURE CARJACKINGS IS INADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 407.

The district court excluded evidence regarding steps Uber took in 2021 to prevent future carjackings because this evidence is prohibited evidence of subsequent remedial measures inadmissible under Federal Rule of Evidence 407. The Court need not address that evidentiary ruling to decide this case. Even if this additional evidence is considered, Plaintiffs cannot show that Uber owed a duty to protect its drivers from the risk of carjacking because the evidence presented does not show that Uber knew or should have known anything particular about the attackers that would create a duty of care. *See supra* Part I.

In any event, the district court correctly excluded the evidence. Rule 407 provides that "[w]hen measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove" either "negligence" or "culpable

conduct." Fed. R. Evid. 407. The only exceptions are narrow. Evidence of subsequent remedial measures may be used for "impeachment" or "if disputed—proving ownership, control, or the feasibility of precautionary measures." *Id.*

Before this Court and the district court, Plaintiffs appear to give three reasons why some or all this evidence should be admitted.[5] All these arguments should be rejected.

First, Plaintiffs argue the evidence is admissible to prove that Uber had control over the information it required from riders. AOB 32–35. This argument fails because Uber did not dispute that it had control over the information it required riders to input. AOB 32 (evidence of control over rider input "undisputed"). Under Rule 407, evidence of subsequent remedial measures is admissible to prove "control" only if control is "disputed." Fed. R. Evid. 407. Moreover, as Uber rightly argued before the district court, this "control" evidence is irrelevant, as control over rider input does not show any control over how Mr. Ceesay performed his work or the

[5] Because the Chamber does not have access to the contents of sealed documents, this brief does not attempt to explain why specific documents are inadmissible, but instead responds to Plaintiffs general theories of admissibility.

jobsite where the work was performed, which is the relevant information for purposes of the duty inquiry. *See* 1-SER-34.

Second, Plaintiffs argue that these documents are admissible evidence of foreseeability under the Advisory Committee notes to Rule 407, which specify that evidence of remedial measures is admissible to show the "existence of duty." 1-ER-18 & n.7. This argument fails, too. Rule 407's broad prohibition on the admission of subsequent remedial measures has express exceptions, which do not include either "foreseeability" or the "existence of duty." If the Rule and the notes conflict, the text of the rule controls, as "the notes cannot add to the [r]ule." *Hamilton v. Wal-Mart Stores, Inc.*, 39 F.4th 575, 590 n.7 (9th Cir. 2022) (citing *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988)).

But the Advisory Committee notes do not conflict with the rule. Contrary to Plaintiffs' interpretation, the phrase "existence of duty" in the notes is simply a synonym for "control" or "ownership"—both of which are explicit exceptions found in the rule. The phrase "existence of duty" was likely included to make clear that Rule 407's textual exceptions for "ownership" and "control" should be interpreted to cover certain pre-1972 cases that described disputes about ownership and control as disputes about

the existence of a "duty."[6] The Advisory Committee notes, therefore, offer no reason for this Court to add an atextual exception to Rule 407.

Third, and finally, Plaintiffs argue that the evidence is not subsequent remedial evidence at all, but rather pre-incident evidence that Uber should have known about the risk of carjackings prior to the attack. AOB 43–46. This argument is also wrong. Rule 407 squarely prohibits admitting post-incident analyses "to establish what was knowable" prior to the incident. *Rosa v. Taser Int'l, Inc.*, 684 F.3d 941, 948 (9th Cir. 2012). A defendant's post-

[6] In identifying the exceptions to Rule 407, the Advisory Committee notes cite a section of Wigmore on Evidence that explains that subsequent remedial measures are admissible "when the defendant's liability depends upon whether a landlord or tenant was in control of premises, or upon whether a municipal corporation was exercising authority over a highway." 1 Wigmore § 283 pp. 365-367 (1904). This Wigmore section, in turn, cites certain pre-1972 cases that allowed evidence of subsequent remedial measures to prove ownership or control over a piece of land where two parties (*e.g.*, landlord and tenant) disputed it. In these cases, courts described the subsequent-remedial evidence as circumstantial proof that the defendant (as opposed to another potential possessor) was the entity with the "*duty* to maintain and keep the [property] in repair." *Vill. of Ashtabula v. Bartram*, 1888 WL 262, at *1 (Ohio Cir. Ct. Feb. 1, 1888) (emphasis added); *see also Readman v. Conway*, 126 Mass. 374, 375-77 (1879) (evidence that owner, rather than tenants, repaired platform admissible as "admission[]" that it was owner's "duty to keep the platform in repair"); *Spurr v. LaSalle Const. Co.*, 385 F.2d 322, 328 (7th Cir. 1967) (evidence regarding subsequent remedial measure admissible to show "whether it was the duty" of contractor or subcontractor to install chain-barrier).

incident efforts to gather and analyze information to understand how best to prevent future similar incidents *are* a subsequent remedial measure. *Complaint of Consolidation Coal Co.*, 123 F.3d 126, 136 (3d Cir. 1997) (evidence of post-accident investigation inadmissible under Rule 407); *Specht v. Jensen*, 863 F.2d 700, 701–02 (10th Cir. 1988) (upholding exclusion of press release detailing city investigation of incident and response to problem discovered); *Alimenta v. Stauffer*, 598 F. Supp. 934, 940 (N.D. Ga. 1984) (excluding post-incident report and recommendations for improvement). This interpretation makes perfect sense, as understanding the risks that may have led to a problem is a necessary precursor to preventing it.

This Court should not accept Plaintiffs' invitation to expand the exceptions to Rule 407 to include evidence of foreseeability or evidence of post-incident investigations designed to improve safety, as such an expansion would inevitably result in the exception swallowing the rule. When the exception in Rule 407 is strictly limited to "ownership, control, or the feasibility of precautionary measures," the exception is confined to answering specific questions about the concrete realities of the world at the time the harm occurred—namely, who owned a piece of property, who controlled it, and what safety measures they could implement.

By contrast, Plaintiffs' proposed expansion of the rule permits plaintiffs to use evidence of subsequent remedial measures to answer a *predictive* question—what the defendant should have foreseen at the time of the accident. This use is particularly susceptible to the danger of hindsight bias, which is one reason why the rules of evidence have not permitted subsequent remedial measures to be used as evidence of foreseeability. *See* Kimberly Eberwine, *Hindsight Bias and the Subsequent Remedial Measures Rule: Fixing the Feasibility Exception*, 55 CASE W. RES. L. REV. 633, 639 (2005) (scientific studies prove that hindsight bias is "most palpable" when evidence of subsequent remedial measures is admitted to prove "the foreseeability of the wrongful behavior").

The prohibition on subsequent remedial evidence reflects not just a concern about hindsight bias, moreover, but also a policy concern about disincentivizing people and businesses from investigating the causes of an incident and adopting safety precautions after the fact. The purpose of Rule 407 "is to encourage tortfeasors to remedy hazardous conditions without fear that subsequent measures will be used as evidence against them." *Gauthier v. AMF, Inc.*, 788 F.2d 634, 637 (9th Cir. 1986). Effectively reversing the default rule and admitting evidence of subsequent remedial measures—

including evidence of subsequent investigations undertaken to understand what remedial measures might be used—would disincentivize individuals and businesses from taking proactive steps to prevent future similar harms.

This Court should reject Plaintiffs' misinterpretation of Rule 407 because it contradicts the rule's text and purpose.

CONCLUSION

For these reasons and the reasons explained by Appellees in their brief, this Court should affirm the decision below.

July 7, 2023

Respectfully submitted,

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9th Cir. Case Number(s) 22-36038

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