No. B310131

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

JANE DOE NO. 1, an individual;
JANE DOE NO. 2, an individual;
JANE DOE NO. 3, an individual,

Plaintiffs and Appellants,

v.

UBER TECHNOLOGIES INC.; RASIER, LLC;
RASIER-CA, LLC,

Defendants and Respondents.

Appeal from a Judgment of the Los Angeles Superior Court,
Case No. 19STCV11874, Hon. Mark H. Epstein, Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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CERTIFICATE OF INTERESTED ENTITIES

In accordance with rule 8.208 of the California Rules of Court, the undersigned certifies that no known person or entities have an ownership interest of 10 percent or more in the Chamber of Commerce of the United States of America. The undersigned knows of no person or entity, other than the amicus curiae and the parties, who has a financial or other interest in the outcome of this proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2) of the California Rules of Court.

Dated: March 23, 2022

By: /s/ James R. Sigel
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APPLICATION TO FILE AMICUS CURIAE BRIEF

The Chamber of Commerce of the United States of America ("Chamber") respectfully seeks leave to file a brief as amicus curiae in support of defendants and respondents Uber Technologies, Inc., Rasier-CA, LLC, and Rasier, LLC (collectively, "Uber").[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 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.

This is just such a case. Plaintiffs (Jane Doe No. 1, Jane Doe No. 2 and Jane Doe No. 3) contend that a business like Uber owes a duty under tort law to prevent criminal acts by third parties outside its control. Creating such a duty would impose a significant burden on the Chamber's members and cause serious policy problems. As the nation's leading business organization, the Chamber is uniquely positioned to explain the importance of adhering to existing law limiting the duty to protect against

[1] No party or counsel for a party in this matter authored the proposed amicus brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. And no person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, and its counsel. (See Cal. Rules of Court, rule 8.200(c)(3).)

third-party harm and the significant policy consequences that would result from expanding that duty.

Dated: March 23, 2022

Respectfully submitted,

MORRISON & FOERSTER LLP

By: /s/ James R. Sigel
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AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

INTRODUCTION

Existing law imposes no duty on businesses to prevent criminal acts carried out by persons outside their control in places outside their control. Establishing such a duty would dramatically expand tort liability and impair important public policies.

A foundational rule of California tort law is that defendants generally owe no duty to protect against acts by third parties. Although Plaintiffs invoke two existing exceptions to that rule, neither applies. First, while common carriers owe their passengers a heightened duty of care, that duty attaches only when the passenger is in transit. Because the attacks here occurred before Plaintiffs entered the vehicle of a driver using the Uber App, no common-carrier duty could apply (regardless of whether or not Uber is a common carrier). Second, no contract-based duty applies here, as Plaintiffs identify nothing in any contract requiring Uber to prevent third-party assailants from impersonating drivers authorized to use the Uber App.

Unable to shoehorn their claims into these settled principles of tort law, Plaintiffs seek a departure from that law. They contend that Uber owed a duty here because the crimes were foreseeable and could be traced to the existence of Uber's business model. Even granting these assumptions (which Uber contests), current precedent provides no basis for such a tort duty. And Plaintiffs' proposed rule would expose a wide range of ordinary businesses to liability for acts by third parties outside the control of those businesses.

That novel duty would also be at odds with important values underlying California tort law. Saddling businesses with tort liability for third-party acts would erect a costly barrier to offering useful everyday commercial services. Even worse, the threat of tort liability would be greatest where commercial activity is most useful. Plaintiffs contend Uber owes a duty because it pioneered the ridesharing industry. They thus propose a rule that would *penalize* innovation. And under Plaintiffs' rule, businesses would face a greater threat of tort suits when they serve consumers who are vulnerable to third-party crime. That would deter businesses from offering or facilitating valuable services where they are needed most.

Not only would these burdens on businesses be heavy, they would also be unpredictable. Plaintiffs' proposal would require businesses to develop measures to somehow prevent third-party harm without providing any certainty about what level of precautions would avoid tort liability. Even Plaintiffs themselves are unable to define what their proposed duty would require of Uber, let alone other businesses facing the possibility of third-party wrongdoing. Tort liability is a particularly inappropriate means of regulating third-party crime associated with commercial activities. The complex technical and policy judgments involved in such regulations should instead be left to legislatures and regulatory agencies—as they are under existing law.

This Court should reject Plaintiffs' attempt to erase the established limits on businesses' duty to protect against third-party harm. The assailants who abducted and assaulted Plaintiffs committed abhorrent crimes, and no one disputes that they should be held accountable. But the question here is whether liability for those crimes should extend to a business with no connection to those assailants. It should not.

The judgment should be affirmed.

ARGUMENT

I. PLAINTIFFS SEEK A CHANGE IN LAW THAT SHOULD BE MADE, IF AT ALL, BY THE LEGISLATURE OR BY REGULATORS

A. There Generally Is No Duty To Protect Others Against The Conduct Of Third Parties

"The existence of a duty is the threshold element of a negligence cause of action." (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463.) That element keeps tort liability fair, predictable, and socially beneficial. "[C]ourts invoke the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act." (*Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 143, citation and alterations omitted.)

A central limit on tort liability is that "there is generally no duty to protect others from the conduct of third parties." (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 627; see 1 Lindahl, *Modern Tort Law: Liability and Litigation* (2d ed. 2021 update) § 3:32; Rest.2d Torts, § 315 (1965).) That is so "no matter how great the danger in which the other is placed, or how easily he could be rescued." (*Clarke v. Hoek* (1985) 174 Cal.App.3d 208, 215.) This no-duty-to-protect rule "is foundational in California tort jurisprudence." (*Eric J. v. Betty M.* (1999) 76 Cal.App.4th 715, 727.)

An "exception to this general rule" arises when there is a "special relationship" between the defendant and either the plaintiff or the third party. (*Regents*, *supra*, 4 Cal.5th at p. 627.) But special relationships

"have defined boundaries"—"[t]hey create a duty of care owed to a limited community, not the public at large." (*Id.* at p. 621.)

These special relationships "involv[e] dependence or control." (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 220.) Generally, they arise where "one party relies to some degree on the other for protection." (*Regents*, *supra*, 4 Cal.5th at p. 620.) And that other party must have "control over the means of protection" (*id.* at p. 621)—such as "the ability to control the third party" who commits the harm. (*Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, 1013, emphasis omitted; see also Rest.2d Torts, *supra*, § 320 [special relationship based on having "custody of another . . . such as to deprive the other of his normal power of self-protection" and "ability to control the conduct of the third persons"]; Prosser & Keeton, Torts (5th ed. 1984) 374.)

"[T]he epitome of such a special relationship exists between a jailer and prisoner." (*Regents*, *supra*, 4 Cal.5th at p. 621, citation and quotation marks omitted.) Courts have also recognized special relationships between "parents and children, colleges and students, employers and employees, common carriers and passengers, and innkeepers and guests." (*Brown*, *supra*, 11 Cal.5th at p. 216.) But even where a special relationship exists, the duty to protect does not extend to scenarios where the defendant "has no significant degree of control." (*Regents*, *supra*, 4 Cal.5th at p. 626.) For example, while a university and its students are in a special relationship for some purposes, the university has no duty regarding aspects of student life "beyond the institution's control." (*Ibid.*)

B. No Previously Recognized Special Relationship Applies Here

Plaintiffs try to shoehorn this case into two judicially recognized special relationships. Neither applies.

First, Uber had no duty based on a relationship between a common carrier and a passenger. (Contra Opening Br. pp. 17-19; Reply Br. pp. 17-18.) Such a duty "is owed only while passengers are *in transitu*"—protecting a passenger "while in actual progress upon his journey." (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1017, citations and quotation marks omitted.) It is inapplicable when the "alleged injury did not occur while [the passenger] was wholly within defendants' charge in actual progress upon her journey." (*Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467, 1474.) Injuries suffered before or after transit are thus outside the scope of the common-carrier duty. (See, e.g., *id.* at pp. 1473-1474 [no duty where passenger was injured before boarding plane]; *McGettigan*, *supra*, 57 Cal.App.4th at pp. 1018-1021 [no duty where intoxicated passenger was injured on train platform after disembarking]; Rest.2d Torts, *supra*, § 314A, cmt. c [because special-relationship-based duties "apply only where the relation exists," a "carrier is under no duty to one who has left the vehicle and ceased to be a passenger"].) Accordingly, regardless of whether or not Uber qualifies as a common carrier, the trial court correctly concluded that no common-carrier duty applied here because Plaintiffs' injuries occurred before Plaintiffs were ever in transit. (AA 311-312.)

Second, Uber had no duty based on any contractual relationship. Plaintiffs cite no case holding that a contract gave rise to a business's tort duty to protect customers against criminal acts by third parties beyond the business's control. (See Opening Br. pp. 19-20 [acknowledging "[t]here is

limited precedent for" their theory].) Indeed, the main case Plaintiffs offer is not a tort case at all—*Kashmiri v. Regents of University of California* is a breach-of-contract case. ((2007) 156 Cal.App.4th 809, 819.) Yet California law does not "convert[] every contract breach into a tort." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 553; see *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1041 ["A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations."].) Rather, contractual breaches yield tort liability only when the defendant's conduct is independently blameworthy, "such as fraud or conversion," "deceit or undue coercion," or "intentionally breach[ing] the contract." (*Erlich*, *supra*, 21 Cal.4th at pp. 553-554, citation and quotation marks omitted.) Plaintiffs have not attempted to meet that standard.

In any event, Plaintiffs' contract-based theory fails on its own terms. Plaintiffs acknowledge that they must locate a duty in "an actual term within the contract." (Opening Br. p. 19; see *McHenry v. Asylum Entertainment Delaware, LLC* (2020) 46 Cal.App.5th 469, 485-486; *Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal.App.5th 617, 634.) Yet as the trial court explained, Plaintiffs identify no relevant contractual term. (AA 313.) Instead, Plaintiffs try to imply a contractual promise from "representations and advertisements" on Uber's website calling Uber's service "safe." (Opening Br. p. 20.) Plaintiffs fail to explain how those advertisements could be treated as binding, consideration-backed contractual obligations. Nor can Plaintiffs meet the standard set forth in their own cited decision, which states that only "a *specific* promise," "not a general statement or declaration," can become an implied contract term. (*Kashmiri*, *supra*, 156 Cal.App.4th at pp. 832-833 [looking to "the definiteness, specificity, or explicit nature of the representation at issue"],

italics added.) Plaintiffs point only to generic statements about safety, not any specific promise to prevent criminal acts by third parties impersonating authorized drivers. If a generic advertisement that a product or service is "safe" were enough to trigger tort liability, businesses could face nearly unlimited liability for any harm experienced by their customers.

C. Plaintiffs Seek To Create A Novel Duty To Protect Against Third-Party Crimes

Unable to fit this case within any existing special relationship, Plaintiffs urge this Court to recognize a new one. Plaintiffs contend that Uber had "a special-relationship-based duty" based on Uber's alleged "actual notice" of the risk of harm and its failure to prevent it. (Opening Br. pp. 21-23.) Plaintiffs cite no decision recognizing any special relationship like the one they assert. (Opening Br. pp. 21-23.) For good reason: none of Plaintiffs' arguments establishes the requisite dependence and control for a special relationship. (See *Regents*, *supra*, 4 Cal.5th at pp. 620-621; *supra* Section I.A.)

1. Foreseeability does not create a duty to protect

Plaintiffs are wrong that "actual notice" of the risk of harm could "create[] a special-relationship-based duty." (Opening Br. p. 21, capitalization altered; see Reply Br. pp. 14-16.) Whether Uber could foresee the risk says nothing about the relationship between Uber and Plaintiffs, let alone establishes the necessary dependence or control.

Regardless of whether Uber had notice of the risk, Plaintiffs were not "wholly within defendants' charge." (*Orr*, *supra*, 208 Cal.App.3d at p. 1474.) Dependence is thus lacking for the same reason there was no passenger-common carrier relationship. (*Ibid.*) Nor does foreseeability

establish the requisite control. Uber still lacked control over the public streets where Plaintiffs were attacked and over the third parties who committed the crimes. Plaintiffs identify nothing about the relationship between Uber and a person waiting for a ride comparable to the jailer-prisoner relationship that is the "epitome" of a special relationship. (See *Regents*, *supra*, 4 Cal.5th at p. 621.)

Accordingly, contrary to Plaintiffs' focus on Uber's alleged notice, "[m]ere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 297.) After all, if foreseeability alone were enough, that would swallow the no-duty-to-protect rule: everyone would have a duty to prevent foreseeable harm from third parties.

2. Uber's passive conduct does not create a special relationship or a misfeasance-based duty to protect

Plaintiffs are equally wrong to assert that a special relationship arises from "Uber's existence as an entity" or Uber's failure to warn of the third-party "Fake Uber Scheme." (Opening Br. pp. 21-22.) Those allegations again say nothing about dependence or control.

Nor do those allegations support a duty based on "misfeasance," as Plaintiffs suggest. (Opening Br. pp. 21-22.) "[M]isfeasance occurs when the defendant's affirmative actions create a risk of harm to the plaintiff," while "nonfeasance involves the failure to save the plaintiff from a peril that was not of the defendant's making." (*Minch v. Department of California Highway Patrol* (2006) 140 Cal.App.4th 895, 908.) Tracking that traditional misfeasance-nonfeasance distinction, California law

imposes no general duty of care where the defendant "has not created a peril." (*Brown*, *supra*, 11 Cal.5th at pp. 214-215.)

This is not a misfeasance case. "[N]ot protecting another from a criminal attack by a third party" is a classic example of "nonfeasance." (*Eric J. v. Betty M.*, *supra*, 76 Cal.App.4th at p. 727; see also *Clarke*, *supra*, 174 Cal.App.3d at p. 215 [nonfeasance includes failure "to take affirmative action to assist or protect another"].) That is what Plaintiffs allege here: "failure to warn," failure to take "affirmative precautions," and "fail[ure] to affirmatively implement any safeguards." (AA 181, 189, 192, 194, 197, 199, 200 [¶¶ 17, 50, 63, 71, 79, 86, 94, 95]; see also Reply Br. p. 12 ["failing to monitor its trade dress"].)

Put another way, Uber did not create the peril here. The assailants who harmed Plaintiffs were third parties outside Uber's control. And the risk of assaults in the locations set forth in the complaint existed independently of Uber.

Plaintiffs try to trace the attacks to Uber's mere "existence as an entity," suggesting that the third-party assailants took advantage of "Uber's business model." (Opening Br. pp. 10, 21-22; see *id.* at p. 8 [Plaintiffs were harmed by criminals "taking advantage of . . . the ease with which people now perceive regular cars emblazoned with an Uber decal as 'safe'"]; Reply Br. pp. 11-13.) But a defendant does not "create the peril" under California tort law simply because a third-party bad actor takes advantage of a situation resulting (at least in part) from the defendant's mere existence. Instead, the defendant creates the peril only if it "engage[s] in active conduct" to "stimulate" the third party's wrongdoing. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 534-535, citation and quotation

omitted.) That active conduct must be so inherently risky that the resulting hazard is "a necessary component" of challenged conduct. (*Ibid.*)

For example, in *Melton*, although the defendant used the social networking site MySpace.com to invite the general public to a party at his home where the plaintiffs "were attacked, beaten, and stabbed by a group of unknown individuals," the court held that the defendant "did not create the peril" and therefore owed no duty based on misfeasance. (*Melton*, *supra*, 183 Cal.App.4th at pp. 527, 533-535.) That was because the defendant "took no action to stimulate the criminal conduct"—he merely hosted a party, without encouraging violence. (*Id.* at p. 535.) And "[t]he violence that harmed plaintiffs here was not 'a necessary component' of defendant's MySpace party"—the party could have occurred without that misconduct. (*Ibid.*)

Similarly, in *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, the plaintiffs were injured in a car crash after the defendant hosted an "all-night rave party" at which "[i]t was foreseeable that the partygoers would attempt to drive home, either while impaired from drug use and/or from fatigue." (*Id.* at pp. 407-409.) The defendant did not create the peril because those hazards—drug use and fatigue—were not "a necessary component" of the party: "[w]hile drugs may have been anticipated, the teenagers did not need to use drugs to attend the party," and "the attendees were not required to stay until they were too tired to drive home." (*Ibid.*) And the drug use was by third parties; the defendant merely hosted the event and had no "ongoing direct involvement in the act that caused the accident and injuries." (*Ibid.*)

Other examples abound, all confirming that a defendant's failure to prevent a third party from taking advantage of a situation that is arguably of

the defendant's making is nonfeasance, not misfeasance. A cell phone manufacturer had no duty to prevent the harm that negligent third-party drivers might cause by using cell phones while driving. (*Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 146-147.) That is because the manufacturer "simply made [the distracted driver's] use of the phone while driving possible"; it "did not put the danger in play." (*Ibid.*) Likewise, a driver whose car needed towing owed no duty to the tow truck operator hit on the side of the road by a third party. (*Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 782.) Even though the driver in some sense "placed decedent in a position to be acted upon by the negligent third party," he did nothing to actively stimulate the third-party act. (*Ibid.*) Similarly, a school had no "affirmative duty" to protect a schoolchild struck by a third-party driver on his way to school. (*Wright v. Arcade School Dist.* (1964) 230 Cal.App.2d 272, 276, 281.) Although going to school required the child to cross the street at "[p]eak flows of traffic," the school had at most engaged in nonfeasance—"failure to take protective action." (*Ibid.*)[2]

[2] (See also, e.g., *Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557, 1559, 1563-1564 [rejecting robbery victim's theory that a "telephone company was liable for his injuries, because the robbers were attracted to [the] neighborhood by a public telephone"]; *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 973, fn. 12 [gun manufacturers have no tort-law "duty to initiate an affirmative program of investigation and sanctioning of wayward retailers"]; *In re Deep Vein Thrombosis* (N.D. Cal. 2005) 356 F.Supp.2d 1055, 1066 [airplane maker had no duty to prevent third-party airlines from harming passengers by improperly placing seats, because "[t]ort law does not impose a duty continuously to look over the purchaser's shoulder to ensure he or she is not harming someone with the manufacturer's product."]; *SFS Check, LLC v. First Bank of Delaware* (6th Cir. 2014) 774 F.3d 351, 357 [collecting authorities indicating the "'near universal disapproval'" for the notion that "a bank owes a duty of care to a person in whose name an account is opened to ensure that the person is not an imposter," citation omitted].)

Plaintiffs' theory would upend this settled law. As these many examples show, courts have recognized—in a wide variety of contexts—that a defendant has no duty to protect a plaintiff simply because a third party might seize upon an opportunity for negligent or criminal behavior in some way related to the defendant's activity. Here, as in those cases, Uber "took no action to stimulate" the third parties' misconduct, and violent assault was of course not "a necessary component" of Uber's service. (*Melton*, *supra*, 183 Cal.App.4th at p. 535.) That is, Uber "did not promote" the third-party crimes; "in fact, it took numerous steps to discourage and prevent" them. (*Sakiyama*, *supra*, 110 Cal.App.4th at p. 408.) For example, Uber provides riders with "the name, picture, and license plate number" of their assigned driver and helps riders find their drivers with GPS technology. (AA 178, 182 [¶¶ 7, 19].) Plaintiffs' complaint is merely that Uber should have done even more.

To impose a duty to protect on a defendant for playing a passive role would expand tort liability to a sweeping range of cases. Any business would have to fear liability for third-party crimes or negligence that could be associated somehow with the business's "existence as an entity." (Opening Br. pp. 22.)

II. THE NOVEL DUTY THAT PLAINTIFFS PROPOSE CONTRAVENES BASIC TORT POLICIES

Creating a duty for a business like Uber to protect against crimes by third parties outside the business's control would also disserve important public policy interests. These policy concerns weigh against Plaintiffs' proposed duty in two independent respects.

First, as explained above (*supra* pp. 12-21), Plaintiffs cannot establish that Uber owed them any duty recognized under current law, and existing duty rules should not be expanded when doing so conflicts with values underlying California tort law. (See *Paz v. State of California* (2000) 22 Cal.4th 550, 559 [duty is "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection"].)

Second, even if Plaintiffs could establish that Uber owed a duty to protect them, "a court must still consider whether the policy considerations set out in *Rowland* [*v. Christian* (1968) 69 Cal.2d 108] warrant a departure from that duty in the relevant category of cases." (*Brown*, *supra*, 11 Cal.5th at pp. 211, fn. 3, 222.) This *Rowland* analysis is not "a freestanding means of establishing duty," but rather "a means for deciding whether to *limit* a duty derived from other sources." (*Id.* at p. 217, italics added.) Plaintiffs could thus impose liability on Uber here only if consistent with the *Rowland* policy considerations, which include the "'consequences to the community of imposing a duty'" and "'the extent of the burden to the defendant.'" (*Id.* at p. 211, fn. 3.) These considerations further militate against the duty Plaintiffs propose.

A. The Duty Plaintiffs Propose Would Penalize Beneficial Commerce

Whether to impose a duty turns in part on "the social utility of the activity out of which the injury arises." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 473, quoting *Wright v. Arcade School Dist.* (1964) 230 Cal.App.2d 272, 278; *Raymond v. Paradise Unified School Dist.* (1963) 218 Cal.App.2d 1, 8.) Courts aim to avoid "the possibility that finding a duty in [a given] case will cause" similarly situated defendants "to stop" conduct that is "socially desirable." (*Vasilenko v. Grace Family*

Church (2017) 3 Cal.5th 1077, 1089-1090.) California tort law thus seeks to promote—not inhibit—ordinary, useful commerce. (See, e.g., *Parsons*, *supra*, 15 Cal.4th at p. 461 ["[A] defendant breaches no duty of care merely by operating socially beneficial machinery in a manner that is regular and necessary."].)

Imposing a duty here would penalize socially beneficial commerce. Plaintiffs contend that Uber's mere "existence as an entity" and its "business model" expose it to tort liability for third-party criminal acts. (Opening Br. pp. 10, 21-22.) But ridesharing services like Uber are a boon to modern society. They have improved access to transportation, as ridesharing is often more convenient and accessible than public transportation and more prevalent and affordable than taxi services. Ridesharing has also boosted local economies. Uber alone generates $17.6 billion per year in benefits, such as cost and time savings, for riders nationwide, along with $1.4 billion per year in additional income for drivers. (EDR Group, *Uber's Economic Impacts in the United States* (2017) pp. 4, 7 <https://tinyurl.com/yj7ee23w>.) And "Uber's contribution to California's economy is $3.2 billion in gross state product" per year. (EDR Group, *Uber's Economic Impacts in California* (2017) pp. 2-4 <https://tinyurl.com/5n6fr7u6>.) Ridesharing has also generated other benefits, such as making transportation more environmentally sustainable by reducing by millions the number of cars on the road. (Lyft, *Economic Impact Report* (2021) p. 20 <https://tinyurl.com/53aw99sv>.)

Plaintiffs' proposed rule would erect a costly barrier to offering such valuable services. "Imposing novel tort theories on economic activity significantly affects the risks of engaging in that activity, and thus alters the cost and availability of the activity within the forum jurisdiction." (*In re*

Firearm Cases, *supra*, 126 Cal.App.4th at p. 991, citation and quotation marks omitted.)

Given the breadth of Plaintiffs' theory, that negative effect would extend far beyond ridesharing to myriad other everyday businesses. Banks would have to fear tort liability for phone scammers impersonating bank representatives. Businesses whose employees travel to customers' homes—from plumbers to cable companies—would owe a duty to protect against burglars impersonating their employees. Event venues would become responsible for third parties selling counterfeit tickets. Social media services would take on liability for fraud or abuse stemming from relationships formed on their platforms. And a wide range of companies active on the internet—from internet service providers to ordinary businesses with websites—would face potential damages for identity theft and fraud from phishing attacks or other third-party wrongdoing perpetrated online.

Worse yet, Plaintiffs' theory would discourage the development of useful commercial services in the first place. Plaintiffs single out Uber for tort liability because it "created an industry," "reshap[ing] the transportation industry" by developing the ridesharing model and "disrupt[ing] existing norms." (Opening Br. pp. 9, 12, 21.) But "[n]ew technologies and constantly evolving systems are a cornerstone of California's global competitiveness." (California State Assembly, Committee on Jobs, Economic Development, and the Economy, *Fast Facts on California's Innovation Economy* <https://ajed.assembly.ca.gov/keyinsightsintoinnovation> [as of March 16, 2022]; see also, e.g., DeVol et al., *California's Innovation-Based Economy* (Dec. 2015) <https://tinyurl.com/4zw4w7f8>).) And imposing greater tort liability on

the first business to introduce a new product or service would deter innovation, depriving society of valuable advances.

Under Plaintiffs' rule, parties that pioneer revolutionary business models risk sweeping tort liability, unmoored from predictable limits, if third parties abuse those new models. A crowdfunding platform that transforms how people raise and donate money would face unbounded tort suits for third-party fraud. Those who develop technology that changes how people form relationships—from dating apps to lodging rental platforms to professional networking sites—would risk unbounded tort liability for third-party misconduct. Even essential elements of modern everyday life—from credit cards to personal computers—once caused "disruption of existing norms." (Opening Br. p. 12.) Plaintiffs' rule would impair such advances, converting innovators into insurers against harms for which they are not responsible.

Moreover, Plaintiffs' proposed duty is especially detrimental because it exposes to tort liability precisely those businesses offering commercial services where they are most needed. Under Plaintiffs' rule, businesses face greater potential liability for offering services in locations where there is greater risk of third-party crime. But tort law should not dissuade ridesharing platforms from offering services to those in high-crime areas. Dangerous areas are already unattractive to many businesses; increasing tort exposure would only make those areas more underserved. And serving vulnerable populations in such areas should be encouraged, not discouraged. Ridesharing providers make it possible for residents to visit their doctors, friends, family members, and innumerable others.

That is particularly true in the situation at issue here: those out late at night in urban neighborhoods are better off when ridesharing is available

as an option. Traditional transportation offerings dwindle at night, when public transportation closes and taxi supply drops. (Uber and Mothers Against Drunk Driving, *More Options. Shifting Mindsets. Driving Better Choices.* (2015) p. 4 <http://newsroom.uber.com/wp-content/uploads/madd/uber_DUI_Report_WIP_12.12.pdf> [finding that taxi availability "*drops* at midnight due to restrictions on supply, leaving many ride-seekers stranded"].) Ridesharing companies fill that need: rideshare usage peaks late at night, and "a disproportionate number of weekend, late-night Uber requests come from businesses with liquor licenses." (*Id.* at p. 3.)

That not only gives bar and nightclub patrons a much-needed way to get home; it makes the roads safer by reducing drunk driving. For example, after Lyft launched in Los Angeles, driving-under-the-influence (DUI) charges fell by 40%. (Casanova Powell Consulting and Ryan C. Smith, Rideshare Volume and DUI Incidents in Target California Communities (2020) p. 12 <https://tinyurl.com/4675jw5k> [also finding 31% reduction in San Francisco and 25% reduction in San Diego, and "strong significant negative correlations between rideshare volume and DUI incidents"].) Alcohol-related crashes dropped by nearly 60 per month following Uber's launch in California markets. (Uber and Mothers Against Drunk Driving, *supra*, at p. 8; see also, e.g., Dills & Mulholland, *Ride-Sharing, Fatal Crashes, and Crime*, 84 S. Econ. J. (2018) 965-991; Morrison et al., *Ridesharing and Motor Vehicle Crashes in 4 US Cities: An Interrupted Time-Series Analysis*, 187 Am. J. Epidemiology (2018) 224, 226-227.)

But Plaintiffs' proposed duty would deter ridesharing businesses from serving patrons late at night in high-crime areas—where ridesharing's benefits are at their greatest. Under existing law, ridesharing has revolutionized transportation access for the underserved. Nearly half of Lyft rides, for example, start or end in low-income areas. (Lyft, Economic

Impact Report, *supra*, at p. 12.) Plaintiffs' proposal threatens to undo that progress.

Nor would the harms be limited to ridesharing. For example, Plaintiffs' proposed duty would threaten greater tort liability for banks that serve senior citizens vulnerable to third-party scams. The deterrent effect resulting from Plaintiffs' proposed duty would ripple across other industries, extending to all circumstances in which a business's consumers are potential targets of third-party crime.

B. The Duty Plaintiffs Propose Would Impose Heavy, Unpredictable Burdens

Before imposing a duty to protect, courts consider "the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1147, citation and quotation marks omitted.) "[I]t is difficult if not impossible in today's society to predict when a criminal might strike." (*Id.* at p. 1150.) And "if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal." (*Ibid.*) Plaintiffs would saddle Uber with that formidable task while providing it with no discernable boundaries on the extent of its duty.

Plaintiffs do not (and cannot) delineate which third-party crimes Uber would be charged with preventing. Plaintiffs contend Uber's duty here arose because a "scheme" of similar crimes previously occurred within a "five-mile radius" of where Plaintiffs were attacked. (Opening Br. p. 22.) But that five-mile figure is arbitrary. Uber had no way of knowing it had a duty for five miles in every direction from past third-party crimes. Nor will Uber have any way of knowing whether future plaintiffs will sue based on a radius of six, seven, or twenty miles. Nor can Uber predict what collection

of past crimes amounts to a "scheme" triggering a duty to protect. How many past incidents before a duty arises? Over what period of time? How similar must the crimes be? How similar must the victims' demographics be? What if past assailants impersonated drivers of other ridesharing providers? Departing from established law—which imposes no duty to protect absent a special relationship based on dependency and control—would leave Uber and other defendants guessing about their exposure to tort suits.

Plaintiffs' rule would also leave Uber in the dark about what protective measures it must take. Plaintiffs have hypothesized various "further safety features," including "an Amber Alert style in app warning system, or a four digit pin number or color coding display." (AA 182 [¶ 19].) Yet Plaintiffs offer no explanation of what these vague proposals mean, let alone give reason to think they would be more effective in "warn[ing] and notify[ing] an inebriated individual" about an imposter driver (*ibid.*) than Uber's existing measures of displaying the real driver's GPS location, name, picture, and license plate number. Nor could Uber have anticipated that these were the measures that tort law would require—nor predict what the next plaintiff will try to invent.

Complying with Plaintiffs' proposed amorphous duty would pose a severe burden. As the trial court explained, protecting against third-party crime would "require Uber and other entities similar to it to constantly and closely monitor crime reports related to use of cars." (AA 314.) Uber would then have to devise ways to prevent crimes with which Uber could be associated—essentially, an obligation to police the public streets wherever Uber operates. And Uber would have to develop the technology to implement every imaginable safety feature that could potentially prevent third-party crime—then likely face suit anyway if a crime occurs.

Imposing such wide-reaching obligations is not the proper role of tort law. Duty rules should be clear and predictable. And judges and juries are ill-suited for devising methods to prevent third-party crime on public streets, or to evaluate the technological feasibility of proposed safety features. Tort law, moreover, is "a peculiarly blunt and capricious method of regulation, depending as it does on the vicissitudes of the legal system, which make results highly unpredictable in probability and magnitude." (*In re Firearm Cases*, *supra*, 126 Cal.App.4th at p. 991, citation and quotation marks omitted.) Instead, the complex policy and technical judgments involved in defining business's obligations to public safety are best left to legislatures and expert regulatory agencies. (See *ibid.* ["Courts should therefore be chary of adopting broad new theories of liability, lest they undermine the democratic process through which the people normally decide whether, and to what degree, activities should be fostered or discouraged within the state," citation, quotation marks, and emphasis omitted].) This Court should decline Plaintiffs' invitation to create an amorphous new tort duty that would vest courts and juries with the responsibility of defining precisely how businesses must prevent any and all third-party harm somehow related to those businesses' legitimate operations.

CONCLUSION

The judgment should be affirmed.

Dated: March 23, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this brief was produced using at least 13 point font and contains 5,848 words.

Dated: March 23, 2022

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PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 2100 L Street, NW, Suite 900, Washington, D.C. 20037. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on the date hereof, I served a copy of:

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I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct. Executed at Washington, D.C., this 23rd day of March, 2022.

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