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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

BENJAMIN VALDEZ, HECTOR CASTELLANOS, WORKSAFE, AND CHINESE PROGRESSIVE ASSOCIATION,

Plaintiffs,

v.

UBER TECHNOLOGIES, INC., a Delaware corporation; UBER USA, LLC, a Delaware limited liability company; RASIER, LLC, a Delaware limited liability company; and RASIER-CA, LLC, a Delaware limited liability company,

Defendants.

CASE NO. CGC-20-587266

DEFENDANTS' OPPOSITION TO PLAINTIFFS' *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER

HEARING:
Date: October 28, 2020
Time: 11:30 a.m.
Dept: 302
Judge: Hon. Richard B. Ulmer

Action Filed: October 22, 2020
Trial Date: None Set

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I. INTRODUCTION

Plaintiffs' request for a temporary restraining order is a naked political ploy—a frivolous and blatant attempt to censor Uber's political speech on a monumentally important issue and force Uber to express Plaintiffs' contrary political views in the middle of an election. And to make matters worse, this meritless political stunt is orchestrated by conflicted counsel committing an ethical breach.[1]

The relief Plaintiffs seek is unconstitutional, unlawful, and unprecedented. Plaintiffs' effort to silence speech they dislike with a temporary restraining order is a paradigmatic "prior restraint," and *categorically prohibited* except in exceptionally rare circumstances—like disclosure of troop locations in wartime—which are obviously not present here. *See*, *e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). Indeed, the Supreme Court has *never* upheld a prior restraint, even when faced with the "competing interest of national security or the Sixth Amendment right to a fair trial." *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996). Uber's speech is truthful and accurate, but regardless, a prior restraint *cannot* issue based on a plaintiff's assertion that speech is misleading, "coercive," or purportedly violates state law. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418–19 (1971) (reversing restraining order that was based on the rationale that the restrained speech was "coercive and intimidating, rather than informative"). If Plaintiffs think they have a claim for violation of Labor Code Sections 1101 or 1102, they are free to bring those claims and litigate them. But Plaintiffs do not even *attempt* to identify an exception to the prohibition on prior restraints that would allow them to suppress political speech in the middle of an election—where "[t]he First Amendment has its fullest and most urgent application." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010).[2]

In any event, Plaintiffs' claims that Uber is making misleading statements to the drivers that use its app are completely baseless. Prop 22—the ballot measure at issue—concerns classification of the drivers who use Uber's app, and Uber's firm position is that Prop 22 is vital to the continued availability of ridesharing as it exists today. If drivers were found not to be independent contractors,

[1] Uber's concurrent Motion to Disqualify must be decided prior to Plaintiffs' TRO, as the TRO was impermissibly signed by conflicted counsel and thus must be struck (along with Plaintiffs' Complaint). *See*, *e.g.*, *Ahn v. Scarlett*, 2017 WL 6326693, at *2 (N.D. Cal. Dec. 11, 2017).

[2] Plaintiffs' assault on Uber's speech violates the California Constitution, too, as its "free speech clause …[is] even broader and greater." *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720, 735 (2000).

they would lose the flexibility and independence they value, and the vast majority of drivers who use the app would not be hired and would lose their ability to earn income. Uber's message—pure political speech during an election—to the public, drivers, and everyone else is that Prop 22 would avoid these calamities. Uber's position has been presented to multiple courts, and is based on admissible and reliable evidence, sworn testimony, independent surveys and analysis, testimony from economic experts, and more.

But again, regardless of the ultimate *merits* of Plaintiffs' claims, a *prior restraint* can *never* be used to adjudicate the "truth or validity" of speech or a claim that the speech is "coercive." *Keefe*, 402 U.S. at 418. Plaintiffs cannot silence speech by demanding "emergency" relief, especially after they lay in wait for months while Uber shared this consistent message, *as they admit*. Plaintiffs' last-minute attempt to radically *alter* a months-long status quo by stifling core political speech on an issue of tremendous public concern is an affront to the First Amendment and the political process. No court has *ever* issued such radical relief under the guise of a TRO, and this Court must deny Plaintiffs' improper request for a prior restraint during a heated election based on manufactured "exigency."

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Uber's Multi-Sided Platform and the Immense Benefits of Independent Work

Uber's Rides Platform is a digital marketplace that connects individuals in need of transportation ("riders") with individuals who can provide it ("drivers"). Declaration of Brad Rosenthal ¶¶ 6–9. To date, no court in California—or anywhere else in the country—has reached a final merits ruling that these drivers are employees. Independent work using Uber offers immense benefits. Drivers work whenever they want—there are no set schedules, territories, minimum hours, or requirement to use *only* Uber and not other apps. Rosenthal Decl. ¶¶ 10–11, 17. Drivers highly value their independence and flexibility, and independent studies show the vast majority (often more than 72%) do not want to be employees. *See*, *e.g.*, Rideshare Guy Survey, https://bit.ly/2HCOnhZ.

Nonetheless, Plaintiffs lawsuit is premised on a demand that Uber hire *all* drivers as employees. This blinks reality. An employment model could not accommodate the flexibility that drivers value (*e.g.*, Evangelis Decl. Ex. R ¶¶ 45–56), and Uber could not hire as employees anywhere near the number of drivers who currently use its apps (Rosenthal Decl. ¶ 22). The costs and other

challenges of operating the Rides Platform under an employment model would cause prices for rides to rise by 20-120%, rider demand to plummet by 20-60%, and the number of drivers who could use the app to fall from 209,000 to 51,000. *Id.* ¶¶ 21–22. The small subset of drivers who would be hired as employees would lose the independence and flexibility they value and often require. *Id.* ¶ 23. A similar fate befell gig workers in Switzerland this year when a court ordered app-based food delivery drivers be classified as employees. *See, e.g.*, Alison Stein, *Independent Couriers' Reaction to Employee Reclassification*, Medium (Sept. 22, 2020), https://bit.ly/2G6OD8I.

Uber's projections are supported by economic analysis from experts and sworn testimony. Evangelis Decl., Exs. R–T, V, X. And Uber's concerns and analyses are shared and supported by a multitude of other voices—all of whom have warned legislators, courts, and voters of the extreme harm that will come from forcing platform companies to hire independent workers as employees.[3]

The adverse effects of turning drivers into employees would especially harm women and people of color. As the NAACP and a dozen others have explained: "Lyft and Uber provide critically needed income-earning opportunities to workers of color who have faced discrimination in the traditional labor force." Evangelis Decl. Ex. Z at 6–7. Employment would also disproportionately harm women, who "make up a large, and perhaps even dominant, share of the gig economy," due in large part to its flexibility. *Id.* Ex. AA at 8–20. And the broader public would also be harmed, as, for example, Mothers Against Drunk Driving and the California State Sheriffs' Association attest, because "numerous empirical studies have confirmed that the widespread use of ridesharing services decreases alcohol-related crashes and fatalities" by up to 60%. *Id.* Ex. AB at 10–12.

B. Proposition 22 Would Preserve and Ensure Driver Independence and Freedom While Providing Important New Benefits to Drivers

Prop 22 was designed to clarify the law and provide benefits to drivers, while allowing them to maintain their independence and flexibility. It is a solution designed for the unique economics of multi-sided platforms and ensures that workers receive protections while preserving gig economy innovation and the flexibility drivers want and need. If approved by California voters, Prop 22 will save hundreds of thousands of jobs and improve the quality of app-based work by providing significant new minimum-earnings, health, and insurance benefits to drivers, such as;

[3] *See also*, *e.g.*, Evangelis Decl., Exs. AE-AQ.

- a "net earnings floor" of "***120 percent*** of the applicable minimum wage" for engaged time;
- "per-mile compensation" at the rate of thirty cents per engaged mile;
- healthcare benefit payments "greater than or equal to 100 percent of the average [Affordable Care Act] contribution for the applicable average monthly Covered California premium" for drivers who average 25 hours per week of engaged time, and 50 percent of that payment for drivers who average "at least 15 but less than 25 hours per week of engaged time";
- occupational accident insurance with at least $1 million in coverage for medical expenses and disability payments equal to 66 percent of average weekly earnings; and
- accidental death insurance for the benefit of spouses, children, or other dependents.

Sec'y of State, Text of Proposed Laws, https://tinyurl.com/yy4yybca (last visited Oct. 26, 2020).

Prop 22 would also implement a new employment classification test for drivers who use a "network company's online-enabled application or platform," where a driver is deemed an "independent contractor … if the following conditions are met," including that drivers remain free to set their own hours, decline ride requests, and work using other apps or otherwise. *Id.* § 7451(a)–(d).

Drivers overwhelmingly support Prop 22. More than 75,000 drivers actively participated in the campaign to pass Prop 22 before Uber even published the speech at issue. *See* https://bit.ly/3jsfhX8. In addition, scores of community advocates (e.g., NAACP chapters, MADD), veterans groups, public safety organizations, business associates, and many others support passage of Prop 22, based on the enormous benefits independent work provides to the communities they represent. *See, e.g.,* Yes on 22, http://yeson22.com/coalition; Evangelis Decl. Exs. Z–AD.

C. Uber's Messaging on Prop 22 to Drivers and the Public

In August 2020, Uber began making information available to drivers regarding the benefits of Prop 22 and the potential consequences for drivers, riders, and others if Prop 22 is not adopted by California voters (the "Prop 22 Guide"). At various places in the App, drivers can view a hyperlink that states: "Prop 22: Get the facts." Rosenthal Decl., ¶ 27 & Ex. 3. Uber does not require drivers to follow the link or review the Prop 22 Guide, and most drivers have never accessed it. *Id.* ¶ 27.

Drivers who choose to follow the hyperlink are taken to a menu of content, including: (1) summaries of the earnings guarantees and healthcare benefits offered by Prop 22; (2) a comparison of the flexibility and freedom drivers now enjoy to the likely loss of that flexibility under an employment model; and (3) links to "drivers' voices heard," a collection of video testimonials. *Id.* ¶ 28 & Exs. 5–7. In addition to descriptions of the benefits offered by Prop 22, drivers are informed

that under an employment model that might apply if Prop 22 does not pass, only "3 out of 10 drivers would be hired as higher prices and longer wait times reduce demand for rides," drivers would likely be scheduled for shifts with limited days off, and drivers would lose the discretion to accept or reject ride requests under most circumstances. *See id.* ¶ 29.

Between September 17 and October 23, 2020, Uber also gave drivers the option to participate in an online poll of drivers' views on Prop 22. *Id.* ¶ 30 & Ex. 9; Compl. ¶ 56. Uber informed drivers that if they chose "yes, we'll let your customers know you support Prop 22," and Uber allowed drivers who voted "yes" to send a thank you message to riders following the completion of a ride. *Id.* ¶ 30 & Exs. 8–9. Plaintiffs claim Uber "bullied" or "coerced" drivers into taking the survey and providing "positive answers" (Mot. at 1, 4–5, 10–11), but the survey was voluntary, drivers had to *navigate to* the survey, and Uber explicitly informed drivers that their "answer will in no way impact [their] experience on" the Driver App. Rosenthal Decl. ¶ 30. Approximately 18,000 drivers chose to participate (less than 9% of drivers). *Id.* And Uber has *not* taken—and will *never* take—any action against drivers because they did not participate, disagree with Prop 22 or did not read materials made available to them. *Id.* ¶ 31.[4] Tellingly, Plaintiffs proffer no evidence that any driver was treated adversely based on their response to the poll; no such adverse action has been (or ever will be) taken.

III. LEGAL STANDARD

"A temporary restraining order or permanent injunction—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints" (*Alexander v. U.S.*, 509 U.S. 544, 550 (1993)), and are "the most serious and the least tolerable infringement on First Amendment Rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The prior restraint is *categorically impermissible* unless the plaintiff demonstrates that the case involves "exceptional" issues, such as particularly "urgent national security" interests, and that "the evil" of the speech "is both great and certain and cannot be mitigated by less intrusive measures." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (citing *Nebraska Press*, 427 U.S. at 559, 562).

IV. ARGUMENT

A. Plaintiffs' Request for a Prior Restraint Censoring Political Speech in the Middle of an Election Is Patently Unconstitutional

[4] Nor is it true that Uber can deactivate drivers for any reason. *See id.* Rosenthal Decl., Ex. 1 § 5.3.

Under bedrock First Amendment law, a prior restraint is *never* appropriate to correct the "truth or validity" of speech or in response to a claim that the speech is "coercive." *Keefe*, 402 U.S. at 418–19 (reversing restraining order that was based on the rationale that the restrained speech was "coercive and intimidating, rather than informative"). Plaintiffs' request for such a restraint must be rejected.

1. Plaintiffs Demand an Unprecedented Prior Restraint on Protected Political Speech Subject to the Highest Possible Scrutiny

Plaintiffs seek a TRO that would prohibit Uber from continuing to make political statements supporting Prop 22, and, at the same time, would require Uber to broadcast Plaintiffs' message suggesting that Uber's own political speech was somehow unlawful. *See* Compl. at 40–41. This order would be an unprecedented prior restraint on Uber's speech that simultaneously muzzles Uber and forces it to become a mouthpiece for its political opponents.

"The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Alexander*, 509 U.S. at 550. Plaintiffs' demand that Uber broadcast Plaintiffs' message or include a "disclaimer" is also a prior restraint on speech. *In re Dan Farr Prods.*, 874 F.3d 590, 591 (9th Cir. 2017) (requiring a "disclaimer" was an unconstitutional "prior restraint"); *see Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988) (despite differences "between compelled speech and compelled silence, . . . in the context of protected speech, the difference is without constitutional significance."). TROs directed at a particular party are an even more disfavored from of prior restraint than general laws: "When a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases." *Metro. Opera Ass'n, Inc. v. Local 100*, 239 F.3d 172, 176 (2d Cir. 2001) (citing *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994)).

Prior restraints are *presumptively* invalid, and a plaintiff can overcome that presumption only in exceptionally rare circumstances. *Nebraska Press*, 427 U.S. at 558. This is because prior restraints prohibit speech without a trial and "appellate review"; unlike a final judgment, "[a] prior restraint, by contrast and by definition, has an immediate and irreversible sanction." *Id.* at 559. In fact, the Supreme Court has identified only *two* circumstances in which prior restraints *might* be permissible: "to prevent the dissemination of information about troop movements during wartime or to suppress information that would set in motion a nuclear holocaust." *Freedom Commc'ns, Inc. v. Superior*

Court, 167 Cal. App. 4th 150, 153 (2008) (citations omitted) (reversing prior restraint). If a case does not "fall[] into that 'single, extremely narrow class of cases,'" any restraint must be denied. *Procter & Gamble*, 78 F.3d at 225 (quoting *New York Times*, 403 U.S. at 726 (Brennan, J., concurring)).

Here, Plaintiffs seek to restrain *the most protected* class of speech: campaign speech.[5] "No form of speech is entitled to greater constitutional protection" than "political" speech regarding an upcoming ballot referendum. *McIntyre*, 514 U.S. at 347 ("That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded [it]."). "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340 (quotations omitted).

Plaintiffs' attempt to compel Uber to disseminate *Plaintiffs'* message is subject to the same scrutiny as their attempt to suppress Uber's political speech. "[A] law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus v. Am. Fed'n*, 138 S. Ct. 2448, 2464 (2018) (quoting *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)). Even outside the prior restraint context, Plaintiffs' compelled speech demand fails unless Plaintiffs can show compelling their message is "a narrowly tailored means of serving a compelling state interest." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19 (1986) (plurality op.); *Riley*, 487 U.S. at 795.

2. Plaintiffs Cannot Justify a Prior Restraint on Political Speech by Asserting the Speech is Incomplete, Misleading, or Even False

Plaintiffs' demand for a TRO fails for the simple reason that they have not identified *any* exception to the categorical presumption against prior restraints that would apply here. Instead, Plaintiffs assert that Uber's speech is "misleading" or "coercive." Mot. at 12. As set forth below, Uber's messaging is sound and supported by a wealth of evidence, including surveys and economic analysis. *See infra*, §D. But even if it were not, a prior restraint is *never* appropriate to correct the veracity of speech—especially political speech subject to the highest possible protection.

[5] This is not to say that *other* speech could be restrained. Under California's Constitution, even purely *commercial* speech cannot be subject to a prior restraint. *Parris v. Superior Court*, 109 Cal. App. 4th 285, 297 (2003) ("[U]nder the California Constitution imposition of a prior restraint on commercial speech bears the same presumption of unconstitutionality and carries the same heavy burden of justification as does a prior restraint on other forms of protected expression.").

If a plaintiff demands a prior restraint, "the courts do not concern themselves with the truth or validity of the publication." *Keefe*, 402 U.S. at 418; *Wilson v. Superior Court*, 13 Cal. 3d 652, 658 (1975) (explaining that the Supreme Court's precedents "leave no doubt that the truth or falsity of a statement on a public issue is irrelevant to the question whether it should be repressed in advance of publication"). Thus, in *Wilson*, the California Supreme Court rejected an injunction against apparently defamatory speech by one political candidate against his opponent, explaining that *even if* the speech was false, "[t]he concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in a most pernicious form." *Wilson*, 13 Cal. 3d at 659.

That rule applies with full force here: Plaintiffs' claim that Uber's speech is "misleading" or "coercive" is *categorically* insufficient to justify the extreme remedy of a prior restraint. *See*, *e.g.*, *id.*; *Keefe*, 402 U.S. at 418–19 (the plaintiffs' claim that the speech was "intended to exercise a coercive impact on [him]" could *not* justify a prior restraint). Similarly, Plaintiffs cannot use a TRO to force Uber to "prominently and ubiquitously articulate a 'disclaimer' that, at the very least, incriminates and disparages their previously expressed opinions." *Dan Farr*, 874 F.3d at 596.

Plaintiffs argue that Uber's political messaging in support of Prop 22 is subject to lesser constitutional protections because Uber is—in their view—an "employer" of drivers who are recipients of Uber's messages. Mot. at 12–14. As explained below, Uber does *not* employ drivers. But setting that aside, *no* case has *ever* held that an employer's speech can be subject to a prior restraint merely because it allegedly violates labor laws. Indeed, *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516 (2002), held that the "protection from prior restraints" applies to NLRB actions ostensibly intended to protect employees from retaliation—and even prohibits the NLRB from enjoining retaliatory *lawsuits*, not just pure speech. *Id.* at 530. And in *Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199 (9th Cir. 2005), the court held that a preliminary labor injunction that prohibited speech would amount "to a preliminary prior restraint on the [speakers'] speech" and be "presumptive[ly]" invalid. *Id.* at 1218. If labor laws are violated, the proper remedy is money damages after final judgment—not suppression of speech *ex ante* in a "preliminary" order. *See id.*

In short, Plaintiffs do not cite *any case* allowing a prior restraint based on claims of "coercive"

speech—and no case exists. *Keefe*, 402 U.S. at 418 (reversing restraint on "coercive" speech).

B. Plaintiffs Claims' Do Not Satisfy Strict Scrutiny

Plaintiffs' demand for a prior restraint thus fails *regardless* of the merits of their claims. But in fact, their labor law claims are barred on the *merits* by the First Amendment as well. Even if Uber is deemed to be the Plaintiffs' employer—and it is not—employers retain their "right of free speech" and are free to "publish[] [their] political beliefs or views among [their] employees." *Lockheed Aircraft Corp. v. Superior Court of L.A. Cty.*, 28 Cal. 2d 481, 486 (1946). Uber thus obviously has "a right of free speech" to communicate its political views, including to drivers, unless Plaintiffs' proposed limitation on Uber's speech satisfies strict scrutiny. *Id.* And it does not. Plaintiffs cannot sue under the Labor Code to attack speech they do not like, just as someone who opposes any of Uber's other speech—like its in-app messages about racial justice, taking COVID precautions, or getting out the vote—cannot sue Uber to take down that speech either.

Unsurprisingly, Plaintiffs do not cite *any* case holding that an employer loses its free speech rights when it speaks to its employees about an upcoming general election. Plaintiffs rely heavily on *Gay Law Students Association v. Pacific Tel. & Tel. Co*., 595 P.2d 592 (Cal. 1979), but that case merely addresses *discrimination* against employees. *See id.* at 611. Here, there is no evidence that Uber discriminates against drivers for their views on Prop 22—in fact, Uber tells drivers that their views on Prop 22 *will not have any effect* on their use of the Rides app. Rosenthal Decl. ¶¶ 25–31.

Plaintiffs also cite caselaw regarding speech made during *union* elections governed by the NRLA. *See* Mot. at 7 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) and cases following it).[6] But *Gissel* made clear that the standard it created was *uniquely* applicable to speech made in union elections, and that it did *not* govern speech regarding "the election of legislators ***or the enactment of legislation***." *Gissel*, 395 U.S. at 617–18 (emphasis added). *Gissel* thus does not apply outside of the "union elections" context. *White v. Lee*, 227 F.3d 1214, 1236–37 (9th Cir. 2000) (rejecting application of *Gissel* to speech that did not involve "union elections"). When speaking about a *general* election, an employer's speech rights are unfettered. *See Lockheed*, 28 Cal.2d at 486.

[6] Plaintiffs ignore that the General Counsel of the National Labor Relations Board opined that drivers are not covered by the NLRA. https://apps.nlrb.gov/link/document.aspx/09031d4582bd1a2e.

Therefore, Plaintiffs' attempt to control Uber's speech—and compel it to repeat their own message—fail unless they can satisfy strict scrutiny. *See Citizens United*, 558 U.S. at 340; *Pac. Gas & Elec.*, 475 U.S. at 19 (same requirements before speech can be compelled). And they cannot. "Political speech is indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Citizens United*, 558 U.S. at 349 (quotations omitted). There is thus "no basis" for Plaintiffs' argument that "in the context of political speech, the Government may impose restrictions on certain disfavored speakers" using the Labor Code. *Id.* at 341. This forecloses Plaintiffs' claim that Uber's political speech may be silenced—and their own speech prioritized—because of who the speaker is. *Id.* Plaintiffs' demand that Uber make certain purported disclosures is equally impermissible; speakers are not obligated to recite the statements of their opponents, regardless of the statements' content. *See NIFLA v. Becerra*, 138 S. Ct. 2361, 2375–76 (2018); *Dan Farr*, 874 F.3d at 596.

The proper response to political speech that an opponent claims is misleading is not *censorship*, but rather *debate* and *more speech*. *United States v. Alvarez*, 567 U.S. 709, 728 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society.") (plurality op.). And there is a great deal of that here. Labor organizations have spent millions of dollars opposing Prop 22, and Prop 22's opponents have pushed press releases and mailers urging "no" votes, and attacking Uber and other gig companies. *Hundreds Protest at Lyft To Say No on Prop 22*, The L.A. Fed (Oct. 2, 2020), https://thelafed.org/news/hundreds-protest-at-lyft-to-say-no-on-prop-22/. They have organized anti-Prop 22 activist campaigns, such as Gig Workers Rising (https://gigworkersrising.org/). AB5's legislative sponsors have coordinated with them to tweet false and inflammatory statements about the meaning of a "yes" vote, even describing Prop 22 as "slavery." *See, e.g.*, https://tinyurl.com/y2wq3y35; @ShamannWalton, https://tinyurl.com/y57ku2zm.

Nonetheless, Plaintiffs seek to stop Uber from speaking *and* demand that Uber become their own mouthpiece. These are the precise evils the First Amendment was ratified to prevent. *See*, *e.g.*, *Janus*, 138 S. Ct. at 2464; *McIntyre*, 514 U.S. at 346–47. Plaintiffs' claims must be rejected.

C. Plaintiffs Have Not Stated a Labor Code Claim

Even setting aside the insurmountable *First Amendment* obstacle to Plaintiffs' claims, they

have not stated any claim under Labor Code sections 1101 and 1102—which prohibit *retaliation* against employees, *not* employer speech. *See Couch*, 656 F. App'x at 843 (no section 1101 or 1102 violation because employee was not *fired* for political reasons).

As an initial matter, Plaintiffs' claims are premised on the assumption that Uber employs them—but this is wrong. Uber has never treated or classified drivers who use its Rides App as its employees (Rosenthal Decl. ¶¶ 13, 18), and courts, arbitrators, and agencies over nearly a decade have affirmed that drivers are not Uber's employees.[7] To support their claim that drivers are Uber's "employees," Plaintiffs point to a *preliminary* determination in a pending action. That interim order has never gone into effect, is still subject to appeal, and is not even the law of the case within that litigation—much less binding in a different action. *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) ("decisions at the preliminary injunction phase do not constitute the law of the case"). Plaintiffs must *prove* that drivers are employees at trial. They cannot obtain a TRO based on the un-litigated *assumption* that drivers are employees. *Shepard v. United Healthcare Ins.*, 2009 WL 10692153, at *1 (E.D. Cal. Apr. 3, 2009) (request to "compel[] Defendant to provide coverage for services it has at all times denied" improper as it would alter status quo).

Moreover, Plaintiffs' cases all involve employees who *suffered adverse employment action* as a result of their political views. *Gay Law Students*, holds that sections 1101 and 1102 apply where the employee has an actual policy of *discriminating* against persons based on politics. 24 Cal. 3d at 488–89. So, too, does *Lockheed Aircraft Corp*., which involved employees who were *discharged* for their political beliefs. 28 Cal. 2d at 486. ***None*** of Plaintiffs' cases held an employer liable for violating sections 1101 or 1102 due to ***its own political speech***—indeed, *Lockheed* holds exactly the opposite. 28 Cal. 2d at 487 (Labor Code does not prohibit speech to employees).

Uber's *speech* does not constitute a *policy* that "directs" or "controls" drivers' political activities. As Plaintiffs' own screen-shots and allegations make clear, none of Uber's messages show that any driver—let alone the two named drivers here—was actually required to support Prop 22 in any way. No driver is required to support Prop 22 on the Uber app, complete any survey, or submit

[7] *See, e.g.*, *Lawson v. Grubhub Inc.*, 302 F. Supp. 3d 1071, 1093 (N.D. Cal. 2018); FLSA2019-6, Op. Letter from Keith E. Sonderling, Acting Administrator, Wage and Hour Division, U.S. Dep't of Labor (Apr. 29, 2019) at 7, https://tinyurl.com/y68cxz6v.

any statement or video to Uber, nor is any driver punished or rewarded for participating. *Cf. Thompson v. Borg-Warner Protective Servs. Corp.*, 1996 WL 162990, at *9 (N.D. Cal. Mar. 11, 1996). And drivers may ignore Uber's speech with a finger swipe. Rosenthal Decl. ¶¶ 25–31.

Plaintiffs may disagree with Uber's messaging, and they are free to express opposing views. But as the California Supreme Court has held, the Labor Code does *not* prohibit any employer from "publishing [its] political beliefs or views among [its] employees." *Lockheed*, 28 Cal. 2d at 486.

D. Uber's Prop 22 Messaging Is Supported by a Wealth of Evidence and Economic Analysis

Even if *speech* alone could somehow violate the Labor Code, the truth is that Uber's speech is completely accurate and lawful. Uber has provided drivers and the public with its accurate assessment of the likely impacts that Prop 22 passing or failing will have on Uber's business as a matter of economic reality. Even if the NLRA rules for union elections applied to this case—and they do not—predictions of likely business consequences would remain permissible. *See Gissel*, 395 U.S. at 618 (employer is free under the NLRA to "make a prediction as to the precise effects he believes unionization will have on his company ... on the basis of objective fact").

Uber's messaging to drivers is the same message Uber has presented through unrebutted evidence to state and federal courts in multiple cases. Plaintiffs allege Uber has stated it "will cease all California operations," "cut its driver workforce in California by 70 percent, or fire everyone and rehire some" (Compl. ¶ 6), and "temporarily suspend" operations to comply with Judge Schulman's Order (*id.* ¶ 45 & Ex. A); and Plaintiffs claim Uber has stated only "3 out of 10 drivers … would be hired" if Prop 22 does not pass (*id.* ¶ 46 & Ex. A at 16), "only 20-30% of current drivers" would be "allowed on the platform" (*id.* ¶ 47 & Ex. A at 6), "driving jobs would be limited," and drivers would have to "[a]pply now" to use the App (*id.* ¶ 73 & Ex. A at 16). But these statements mirror Uber's sworn expert and company testimony of the likely real-world business impact of forcing Uber to hire drivers as employees. Evangelis Decl. Ex. R ¶ 42 ("while there were 311,955 drivers actively using the Uber platform in California in 2019, Uber may need under 100,000 drivers" if they must be employees, and "Uber may need to shut down or drastically minimize service on the platform for a period of time to ensure compliance"), ¶¶ 52–53 (running other calculations reflecting 74.4% and 83.5% drops in the number of drivers permitted to use Uber); *id.* Ex. X ¶ 50 ("Uber estimates that the

number of quarterly active drivers would fall from 209,000 to 51,000. This represents a 76% decrease ...."), ¶ 53 ("Uber may need to shut down the Rides platform in California" while it reorganizes).

In pending litigation, Uber and expert witnesses have "warn[ed] drivers that ... they will lose scheduling flexibility" (Compl. ¶ 7), that "flexibility would be limited" (*id*. ¶ 74 & Ex. A at 17), and that "[s]hifts would be scheduled" (*id.* ¶ 75 & Ex. A at 18). *See* Evangelis Decl. Ex. R. ¶¶ 45, 60; *id.* Ex. X, ¶¶ 50–51 (in light of state and local employee benefit laws, "Uber likely would assign drivers work shifts in advance"). This is also true as to Uber's statements to drivers that "their earnings will be limited." *Compare* Compl. ¶ 7, *with* Evangelis Decl. Ex. R ¶ 48 (overtime pay requirements incentivize Uber "to limit employee drivers to no more than 40 hours per week").

Experts have also testified that a consequence of employment is that drivers "will be barred from using other ride-sharing apps." *See* Evangelis Decl. Ex. R ¶ 58 (if wait time is determined to be compensable, "Uber … could forbid synchronous multi-apping."); *id.* Ex. X ¶ 51 ("Consistent with the traditional duty of loyalty that employees owe to an employer, Uber would also likely prohibit multi-apping to ensure that drivers are compensated only for the time spent fulfilling requests using the Uber Apps, and not through the apps of Uber's competitors.").

Uber's statements that drivers "will be forced to accept rides with poorly rated riders" (Compl. ¶ 7) and "[e]very trip would be accepted" (*id.* ¶ 76 & Ex. A at 19), likewise accord with sworn expert and company testimony. *See* Evangelis Decl. Ex. R. ¶ 59 ("Uber may require employee drivers to accept certain ride requests" to "ensure that riders find matches sufficiently quickly"), ¶ 60 (to combat adverse driver incentives to log-on during periods of low demand, "Uber might require employee drivers to schedule their work shifts in advance and accept a minimum percentage (or all) requests"); *id.* Ex. X ¶ 51 ("Uber likely would … require [drivers] to accept essentially all ride requests.").

Multiple courts have acknowledged and accepted Uber's unrebutted evidence regarding the consequences of forcing Uber to employ drivers. *See People v. Uber Techs., Inc.*, 2020 WL 5440308, at *3 (Cal. Super. Ct. Aug. 10, 2020) (finding Uber and Lyft "undoubtedly will incur costs in order to restructure their businesses"), *id.* at *17 ("The Court is under no illusion that implementation of its injunction will be costless or easy."); *People v. Uber Techs., Inc.*, 2020 WL 6193994, at *20 (Cal. Ct. App. Oct. 22, 2020) ("Uber also submitted evidence it would incur substantial costs if it were required

to treat drivers as employees.... An injunction would give Uber an economic incentive to reduce the number of drivers, enforce a fixed work schedule, and limit the number of hours each employee could drive."). And government and officials have not disputed Uber's calculations of its "costs ... of restructuring [its] business to adopt and then optimize an employment model." Resp't's Br. at 81, *People v. Uber Techs., Inc.,* No. A160706 (Cal. Ct. App. Sept. 18, 2020).

Uber's statements and predictions are also confirmed by expert and company testimony from Lyft, Uber's co-defendant in the state enforcement action. *See People v. Uber Techs, Inc.,* No. CGC-20-584402 (Super. Ct. July 24, 2020), Hamilton Decl. ¶ 12 ("Drivers will likely need to work during pre-scheduled shifts, in specific locations, and will be able to work only for Lyft during those times."), ¶ 13 (opining it "would take months, if not years, to complete" a revamp of Lyft's HR systems); Sholley Decl. ¶ 33 ("Lyft would likely need to manage drivers' time by requiring drivers to work in scheduled shifts, at designated times and places, for multiple hours at a time."), ¶ 38 ("It would make more sense economically to retain and deploy only the minimum number of drivers...."). Although Plaintiffs accuse Uber of skewing driver survey results showing that over 71% of drivers wish to remain independent contractors (*see* Compl. ¶ 57 & Ex. A at 11.), they ignore the fact that this was an *independent* survey (by a source often hostile to Uber) in which Uber had no involvement (*see* Harry Campbell, *Everything You Should Know About AB5 & Its Impact on Uber*, The Rideshare Guy (Oct. 7, 2020), https://therideshareguy.com/ab5-end-of-rideshare/).

E. A TRO Would Not Maintain the Status Quo, But Would Dramatically Upset It, and Impose Irreparable Harm on Uber Based on a Manufactured Crisis Caused by Plaintiffs

Plaintiffs admit the speech they attack has been ongoing for three months (Compl. ¶ 37), yet they lay in wait until the week before an election, and now claim an "exigency." (Valdez Decl. ¶ 5; Castellanos Decl. ¶ 5). The law forbids such manipulation of the judicial process. *See O'Connell v. Superior Court*, 141 Cal. App. 4th 1452, 1481 (2006); *Nutro Prod., Inc. v. Cole Grain Co*., 3 Cal. App. 4th 860, 866 (1992) (same). Plaintiffs could—and would—have moved much sooner if they genuinely believed any immediate irreparable harms might befall them from Uber's ongoing speech, but instead they delayed filing an action or TRO until 6.5 million Californians (roughly half the likely electorate) had already cast their ballots. *See* https://tinyurl.com/y4jgjyyc.

Plaintiffs provide no showing of any credible harm to themselves warranting a TRO. They

do not assert that they personally have been compelled or coerced to take any imminent action at all in these intervening months—much less that they will be forced to do so if Uber's political speech continues until an ordinary motion can be heard. To the contrary, Plaintiffs have been for a year (and continue to be) active "organizers" for "No on Prop 22" campaign sponsors and organizations and do not claim any action has ever been taken against them as a result.

Instead, Plaintiffs rely on mere *false speculation* that some theoretical and unidentified drivers *might* feel coerced or pressured after choosing to listen to Uber's protected speech. But a TRO can never rest on speculation alone as to the feelings of absent and imagined parties. *See*, *e.g.*, *Korean Philadelphia Presbyterian Church v. California Presbytery*, 77 Cal. App. 4th 1069, 1084 (2000) ("An injunction cannot issue in a vacuum based on the proponents' fears"). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a [TRO and] preliminary injunction.'" *Caribeean Marin Srvcs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Plaintiffs attest to no immediate or irreparable injury to themselves, and a TRO cannot issue without such evidence. *Id.*

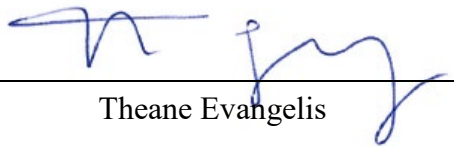
Moreover, Plaintiffs' TRO request seeks to *disrupt*—rather than preserve—the status quo. *Scripps Health v. Marin*, 72 Cal. App. 4th 324, 334 (1999) ("A TRO … is by design to preserve the status quo"). Uber has been engaging in this protected speech for months, and Plaintiffs now seek abruptly to *alter* the status quo and force Uber instead to speak in a different and contrary manner. Preventing Uber from exercising its First Amendment right to engage in political speech, in connection with a ballot proposition so central to Uber's business, would impose irreparable harm on Uber. The "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208–09 (9th Cir. 2009). Indeed, "[i]t is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence." *Citizens United*, 558 U.S. at 334. Plaintiffs cannot demand a prior restraint on Uber's speech mere *days* before the election—when speech matters most. Their frivolous TRO request must be denied.

V. CONCLUSION

The Court should deny Plaintiffs' motion for a temporary restraining order.

DATED: October 27, 2020

GIBSON, DUNN & CRUTCHER LLP

By: 

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