No. 22-16562

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOE,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:19-cv-3310 | Hon. Jacqueline Scott Corley

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

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Dated: June 14, 2023

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million businesses 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, like this one, that raise issues of concern to the nation's business community. *E.g.*, *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 consented to the filing of this brief under Federal Rule of Appellate Procedure 29(a)(2). No counsel for a party authored this brief in whole or in part. No entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund 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' 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 strictly liable for individuals' personally motivated misconduct.

In California, courts have long held that an agent's intentional tort will not be considered attributable to the principal "unless its motivating emotions were fairly attributable to work-related events or conditions." *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal. 4th 291, 301 (1995). California courts have also held, in a case essentially

identical to this one, that even if a third party's harmful conduct was in some sense "to be anticipated," a business is not liable unless it specifically "encouraged" the harmful behavior. *Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410, 425-26 (2022). These precedents ensure that businesses do not face constant litigation attempting to hold them liable as quasi-insurers against third parties' intentional torts. The contrary views plaintiff advances in her opening brief would dramatically expand the scope of potential liability, with unintended consequences for businesses and consumers. The Chamber has a strong interest in ensuring that the Court hews to California law and rejects plaintiffs' efforts to expand it beyond recognition.

INTRODUCTION

The Court should apply California's long-established limits on businesses' liability for harms caused by third parties and reject plaintiff's invitation to treat everyday businesses as insurers against virtually all conceivable forms of harmful conduct. California law on this question is settled, grounded in common sense, and vital to the functioning of a vibrant economy.

Uber's platform, like many in today's economy, enables communication and transactions between independent parties. Such platforms benefit consumers, who can easily arrange for the services they need, and independent contractors, who can easily reach people interested in their services. The enormous majority of those interactions go precisely as both sides intend. But businesses like Uber are not immune from the challenges facing *all* businesses—including the possibility that bad actors will misuse their platforms.

There is no dispute that Brendan Sherman committed a horrific crime for which he should be held fully accountable. Indeed, he was sentenced to eleven years in state prison. 1-ER-4. The only question is whether *Uber*—which had already removed Sherman from its

platform and had no relationship with Sherman at the time—should be held liable for Sherman's crime. It should not.

First, plaintiff asserts that Uber is liable because Sherman was acting as Uber's agent when he assaulted her. That theory of agency liability fails. There is no dispute that Sherman had no actual relationship with Uber at the time. So plaintiff argues Sherman was Uber's "ostensible" agent because he had affixed an Uber decal to his car. But ostensible agency demands a manifestation *on the principal's part* to suggest that the independent party is its agent, and Sherman's act of displaying a decal does not suffice. *See, e.g.*, *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 959-61 (2002). Any other rule would impose an unworkable and unwarranted burden on businesses to police third parties' representations.

Even if there were some agency relationship here, Sherman's tort could not be imputed to Uber. California courts have recognized that such intentional torts will not be attributed to an agency relationship unless their motivation was "fairly attributable to work-related events or conditions." *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal. 4th 291, 301 (1995). Plaintiff's misapprehension that Sherman was a

driver referred to her by the Uber app may have "brought [her] and [Sherman] together," *id.* at 298, 300-01, but Sherman's conduct was not attributable to any misperceived work as a driver using Uber's platform. In advocating for a different result, plaintiff disregards decades of case law in favor of just two appellate decisions—one that expressly distinguishes cases like this, and another that is neither relevant nor an accurate exegesis of California law.

Second, plaintiff contends Uber is liable for "misfeasance"—i.e., for creating the risk that she would be assaulted. That theory, too, departs from settled California law. A defendant is liable for misfeasance only when it "urg[es] [others] to act in an inherently dangerous manner." *Olivia N. v. NBC*, 126 Cal. App. 3d 488, 496 (1981). And the California Court of Appeal recently held, in a case materially identical to this one, that Uber was *not* liable to plaintiffs assaulted by third parties pretending to be drivers using Uber's app because Uber did not "'take[] action to stimulate th[at] criminal conduct'" and indeed "made efforts to prevent" it. *Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410, 427-29 (cleaned up). *Uber* squarely forecloses plaintiff's argument. Yet plaintiff would have the Court

ignore that decision and remake California law to hold that a business is liable any time it makes harms to customers possible—a startling proposition that would invert California's no-duty rule, impose crushing and unjustified liability, and disrupt decades of settled expectations.

In entering judgment for Uber, the district court faithfully applied California-law principles that go effectively unrebutted in plaintiff's brief. This Court should affirm.

ARGUMENT

I. Plaintiff's ostensible-agency theory defies California law.

Plaintiff's lead theory for holding Uber liable is "ostensible" agency—i.e., that Sherman's assault of plaintiff occurred "within the scope of his ostensible agency relationship with Uber." AOB 20. The district court was right to reject that theory. 1-ER-13-15; 1-ER-26-30.

A. Plaintiff has not identified a manifestation by Uber of any agency relationship.

The only asserted basis for why anyone would have thought Sherman was Uber's agent was that he had an Uber decal on his car—i.e., that Sherman represented he was a driver using Uber's app. 1-

ER-24-25. But an ostensible-agency relationship can be created only "by the representations of the principal, not by those of the purported agent." *Rivett v. Nelson*, 158 Cal. App. 2d 268, 276 (1958). That "essential element" of ostensible agency "is usually lacking." *J.L. v. Children's Inst., Inc.*, 177 Cal. App. 4th 388, 404-05 (2009).

California's rule comports with broader doctrinal developments, which have demanded that "an agent's apparent authority originate[] with expressive conduct by the principal toward a third party through which the principal manifests assent to action by the agent." Restatement (Third) of Agency § 3.03 cmt. b. An ostensible-agency relationship, then, requires more than Sherman's placing an Uber decal on his car; Uber itself would have had to manifest to plaintiff that Sherman was its agent. Yet plaintiff alleges no such thing here.

Nor could she. As courts have observed, Uber undertakes significant "efforts to prevent the type of conduct that harmed" plaintiff. *Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410, 427-28 (2022). For instance, when a rider uses Uber's app to arrange a ride, the app shows the license plate number, the make and model of the vehicle, and a picture of the driver that has been paired with the rider.

5-ER-1094-95. Those "matching system features in the Uber app . . . , if utilized, can thwart efforts" by criminals who try to pose as riders on the app. *Uber*, 79 Cal. App. 5th at 427-28. Yet while plaintiff was aware of those features, she did not use any of them or otherwise verify Sherman's identity or status before getting into his car. 5-ER-1089-90. In fact, because plaintiff's cellphone was dead at the time, she wasn't using the Uber app or communicating with Uber at all. *Id.* Nor was she able to see the license-plate information of the driver that *had* been referred to her through the Uber app at her boyfriend's request. *See* 5-ER-1112.

There can be no ostensible-agency liability unless the injured party "justifiabl[y]" and "reasonabl[y]" relies on representations "'made by the principal.'" *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, 59 Cal. App. 4th 741, 747-48 (1997). Here, plaintiff was aware of the precautions Uber takes in communicating which drivers have been paired with which riders, 5-ER-1089-90, yet she got into Sherman's car without receiving any such communication from Uber. That is the antithesis of reasonable reliance on statements by the supposed principal.

Magallanes v. Doctors Medical Center of Modesto, 80 Cal. App. 5th 914 (2022), illustrates that plaintiff cannot clear the high bar California law imposes for parties to sue based on ostensible agency. The plaintiff brought medical-negligence claims against her doctor and the medical center where her surgery occurred. *Id.* at 916-19. The center sought summary judgment on the ground that it could not be held vicariously liable for the doctor's negligence, and the plaintiff responded that she was never "provided actual notice" that the doctor was an independent contractor rather than an employee of the center. *Id.* at 920. In essence, the plaintiff's theory was that the situation was sufficiently murky that she might have *guessed* the doctor was affiliated with the center. *Id.* at 921.

The California Court of Appeal rejected that theory. As it explained, the plaintiff had not actually "relied on the hospital's selection or assignment of a doctor"—i.e., on any manifestation by the principal. *Magallanes*, 80 Cal. App. 5th at 924. And it disavowed the plaintiff's view, which was that she could just "assume[]" her doctor worked at the center even though the center did not suggest as much. *Id.*

Here, too, plaintiff's theory reduces to an unsubstantiated assumption. Plaintiff "believed," AOB 2, that Sherman was Uber's agent because he had an Uber decal on his car. As discussed, however, plaintiff hasn't identified manifestations *by Uber* suggesting an agency relationship. That alone is enough to doom her theory.

And *Emery v. Visa International Service Ass'n*, 95 Cal. App. 4th 952 (2002), confirms as much in an analogous context. There, the plaintiff sued Visa, asserting it was vicariously liable for unfair practices of foreign lotteries that allowed payment through Visa and used Visa's logo as "a trusted seal of approval." *Id.* at 954-55, 959. The Court of Appeal rejected that theory. Even if Visa had granted the lotteries an interest in using its mark, neither that grant nor any "efforts to 'police' such use" could make the lotteries Visa's agent. *Id.* at 960-61. And without any indication that *Visa* actually manifested anything about the lotteries, arguments based on *the lotteries'* use of Visa's mark could not support an ostensible-agency theory. *Id.* at 961.

In so holding, the Court of Appeal noted that any broader view of ostensible agency would impose inappropriately "expansive responsibility" on defendants merely for their "failure to police"

independent actors' representations. *Emery*, 95 Cal. App. 4th at 962. This case illustrates exactly the concerns that the court in *Emery* identified. Plaintiff contends she believed Sherman was a driver referred to her by the Uber app because he had a decal on his car. So under plaintiff's view, the only way Uber could limit its liability for intentional torts like Sherman's would be to police every car on the road to ensure that no driver ever illegally copied and displayed its decal or otherwise used the decal in a misleading way. And (her argument continues) if Uber's policing were imperfect, then the company would become fully liable for intentional torts committed by individuals with whom Uber has no relationship whatsoever. No court has ever embraced that staggering theory of liability as a correct expression of California law.

Nor could plaintiff's theory be limited to platforms like Uber's. As *Emery* shows, plaintiffs can often find a way to repackage claims against the actual tortfeasors as claims against other parties that indirectly aided or enabled the tortfeasors' misconduct. If the "seal of approval" workaround were permissible, *Emery*, 95 Cal. App. 4th at 965, everyday businesses would have to spend untold time and

resources combing the marketplace for uses of their names or marks and overwhelming consumers with disclaimers. That is unworkable, and it's why California law (like that of jurisdictions nationwide) requires manifestations *by the principal* in the first place.

The district court reasoned that the decal on Sherman's car was "sufficient . . . to support a plausible inference" of apparent agency. 1-ER-25. That was error. But this Court can affirm the judgment on any ground, no matter whether the district court "relied on the same grounds." *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (per curiam). The lack of any evidence that Uber manifested to plaintiff that Sherman was its agent is a valid, independent basis for affirmance—one the district court had little need to examine closely given its correct analysis of the scope-of-agency issues.

B. Sherman's torts were not within the scope of any agency relationship.

Even if Sherman's decal were enough to create apparent agency, plaintiff's theory would still fail because Sherman's assault falls beyond the scope of any such agency relationship as a matter of law.

In California, a principal can be liable for harms caused by an agent only "in the transaction of the business of the agency" and for "wrongful acts committed . . . in and as a part of the transaction of such business." Cal. Civ. Code § 2338. That means a principal is not "vicariously liable for the torts of its [agents]" unless those torts were "committed within the scope of" the agency relationship. *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal. 4th 291, 296 (1995). By contrast, when an agent acts out of "personal malice," and in a way "not engendered by" the agency relationship, the principal is not liable. *Montague v. AMN Healthcare, Inc.*, 223 Cal. App. 4th 1515, 1522 (2014). Any other view would turn businesses into insurers against all conceivable misconduct, radically transforming California tort law beyond anything the state's legislature or courts have suggested. *See, e.g.*, *Farmers Ins. Grp. v. County of Santa Clara*, 11 Cal. 4th 992, 1004 (1995) ("an employer is not strictly liable for all actions of its employees").

1. Intentional torts like Sherman's cannot be attributed to a platform like Uber's.

An agent's intentional tort can be attributed to a principal only if the conduct is "engendered by," or a foreseeable consequence of, the agency relationship. *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal. 4th 291, 298-301 (1995). That necessary connection between the agent's harmful conduct and the agency relationship must "be distinguished from 'but for' causation." *Id.* at 298. That is, it's "not enough" that the agency relationship "brought tortfeasor and victim together in time and place"; acts of agents produce principal liability only "if they originated in a work-related dispute." *Id.* at 298-300.

Both sides of that rule have been developed at length. On one side are intentional torts where the tortfeasor's motivation is "fairly attributable to work-related events or conditions." *Lisa M.*, 12 Cal. 4th at 301. So in *Fields v. Sanders*, 29 Cal. 2d 834 (1947), a truck driver's assault of a motorist was attributable to his employer because the fight arose from a disagreement over his driving. *Id.* at 840. In *Carr v. Wm. C. Crowell Co.*, 28 Cal. 2d 652 (1946), a contractor's assault of a coworker was attributable to their employer because the dispute arose

"solely over the performance of [the employee's] duties." *Id.* at 656-57. And in *Hiroshima v. PG&E*, 18 Cal. App. 2d 24 (1936), a utility was liable after an employee hired to disconnect power lines at local businesses clashed with an owner who claimed he had paid his bills on time. *Id.* at 25-26, 31-32.

On the other side are intentional torts that are "the result of a personal compulsion" or that arise from "a personal dispute." *Lisa M.*, 12 Cal. 4th at 300-01. For instance, in *Thorn v. City of Glendale*, 28 Cal. App. 4th 1379 (1994), a fire department was not liable for a "fire marshal's entering a building and setting an incendiary device for the purpose of burning it down," which was the product of "a personal compulsion" unrelated to the work itself. *Id.* at 1383. And in *Monty v. Orlandi*, 169 Cal. App. 2d 620 (1959), a bar was not liable when its bartender got into a personal disagreement with his wife and struck a patron who tried to intervene in her defense. *Id.* at 624. Intentional torts undertaken solely for personal reasons in a way that does not "ar[ise] from the conduct of the . . . enterprise[]" are not attributable to the principal. *Farmers*, 11 Cal. 4th at 1006-07; *accord, e.g.*, *Carr*, 28 Cal. 2d at 656.

These cases underscore two core principles limiting the liability of principals for agents' intentional torts.

First, it is not enough for a business to "br[ing] tortfeasor and victim together in time and place." *Lisa M.*, 12 Cal. 4th at 298. Take *Thorn*: that a marshal is given access "to private areas of a building" that enable him to burn the building down is insufficient to make the fire department liable for his Bradbury-esque arson. 28 Cal. App. 4th at 1383-84.

Second, in analyzing whether an agent's intentional torts were "foreseeable," such that they could be attributed to the principal, courts must examine the "relationship between the nature of the work involved and the type of tort committed." *Lisa M.*, 12 Cal. 4th at 302. That foreseeability analysis demands more than "statistical frequency." *Id.* So even where news stories, reports, or legislative findings show certain torts are *likely* to occur, courts have declined to embrace liability unless those torts were fairly attributable to "the employer's particular enterprise." *Farmers*, 11 Cal. 4th at 1008-09.

As the district court correctly concluded, the California Supreme Court's decision in *Lisa M.* "disposes of any argument that the assault

here was engendered by or arose from [Sherman's] ostensible employment." 1-ER-27. There, the Court explained that a physical assault "will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions." *Lisa M.*, 12 Cal. 4th at 301. That is true, the Court continued, even where the employee's job "provided the opportunity for him to meet [the] plaintiff and to be alone with her in circumstances making the assault possible." *Id.* at 299. *Lisa M.* represents the culmination of decades of similar decisions of California courts, which have uniformly rejected attempts to hold principals liable for such intentional torts by employees or supposed agents.[2]

Under these settled principles, there is no basis to conclude that Sherman's criminal conduct is attributable to any supposed agency relationship with Uber. Plaintiff contends that Sherman's

[2] *See, e.g.*, *Alma W. v. Oakland Unified Sch. Dist.*, 123 Cal. App. 3d 133, 140-42 (1981); *Jeffrey E. v. Cent. Baptist Church*, 197 Cal. App. 3d 718, 722 (1988); *Rita M. v. Roman Cath. Archbishop*, 187 Cal. App. 3d 1453, 1461 (1986); *John R. v. Oakland Unified Sch. Dist.*, 48 Cal. 3d 438, 447-52 (1989); *Farmers*, 11 Cal. 4th at 997; *Z.V. v. County of Riverside*, 238 Cal. App. 4th 889, 894-902 (2015).

representation that he was a driver using Uber's app "provided the opportunity" for his misconduct, *Lisa M.*, 12 Cal. 4th at 299, and that Uber could have imagined that an assault by Sherman was possible as a matter of "probability," *Alma W. v. Oakland Unified Sch. Dist.*, 123 Cal. App. 3d 133, 141-42 (1981). But under California law, neither is enough to make Sherman's intentional tort arise from any agency relationship.

Plaintiff's argument shares the same "flaw" the court rejected in *Lisa M.*: instead of focusing on whether the *motivations* for Sherman's assault were "generated by or an outgrowth of" any agency relationship with Uber, plaintiff argues only that assaults by drivers are "generally foreseeable" or made *possible* by Uber's business model. 12 Cal. 4th at 301-02. Plaintiff's view—which asks only if third-party crimes are entirely unpredictable and thus "startling" as a matter of mere probability, AOB 28—would for the first time make principals liable for nearly *every* intentional tort of their agents. And as plaintiff sees it, merely "[b]y having . . . a policy" forbidding conduct, a business admits such conduct "is inherent in its business model." *Id.* That limitless view has no support in case law or logic, and it would

perversely *discourage* businesses like Uber from adopting such policies or taking other steps to protect users from third-party misconduct.

Plaintiff's last resort are "policy objectives," which she argues support creating an agency relationship where none exists here. AOB 29-31. As Uber explains (Ans. Br. 31-34), there is no basis in precedent for that argument. And plaintiff's policy-driven reasoning only underscores why courts—particularly federal courts sitting in diversity—are ill suited to make fine-tuned regulatory adjustments of the sort she envisions. Platforms like Uber's are valuable tools for consumers and independent contractors, and legislatures have taken care to "protect" those platforms while also ensuring public safety. *E.g.*, Cal. Bus. & Prof. Code § 7450. Plaintiff's one-sided view creates a risk of constant litigation and potentially dramatic liability that could dampen the growth of such platforms, ultimately to consumers' detriment.

2. *Mary M.* and *Xue Lu* do not support plaintiff's argument.

Plaintiff builds a contrary view of California law around just two appellate decisions: *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202

(1991), and *Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010). The first distinguishes itself, and the second's sharply criticized interpretation of California law should not be extended here.

Although plaintiff treats *Mary M.* as the rule, AOB 23-25, in fact it represents the narrowest of exceptions. In that case, the California Supreme Court repeatedly "stress[ed] that the case presented "unique" concerns. *Mary M.*, 54 Cal. 3d at 206, 218 n.11, 224. Four years later, it reiterated that *Mary M.*'s holding was "expressly limited." *Lisa M.*, 12 Cal. 4th at 304. Because this Court must determine "'how the state's highest court would decide the case,'" *Fast Trak Inv. Co. v. Sax*, 962 F.3d 455, 465 (9th Cir. 2020), it must honor the express limits that the California Supreme Court has placed and maintained on that decision.

Mary M. involved an assault committed by an on-duty police officer. 54 Cal. 3d at 207. In holding that the city could be liable for the officer's misconduct, the Court's first words were that "[p]olice officers occupy a unique position of trust." *Id.* at 206. Society, it explained, "has granted police officers extraordinary power and authority over its citizenry," allowing them to exercise "'the most

awesome and dangerous power that a democratic state possesses,'" a "formidable power" that produces an unparalleled "potential for abuse." *Id.* at 216-17. It was only "[i]n view of the considerable power and authority that police officers possess" that the Court held the city could bear responsibility for the officer's misconduct. *Id.* at 217-18.

The Court in *Mary M.* repeatedly emphasized that its decision "flows from the unique authority vested in police officers." 54 Cal. 3d at 218 n.11. And it distinguished and endorsed cases—including *Alma W.*, *Rita M.*, and *John R.*, *see supra* 18 n.2—outside of that *sui generis* context recognizing that principals are generally not liable when agents commit intentional torts for personally motivated reasons. *Mary M.*, 54 Cal. 3d at 218-19 & n.11.

Later decisions of California courts have consistently heeded *Mary M.*'s expressed limits. In *Lisa M.*, the Supreme Court again recognized the unique "coercive authority" given to police officers, which the Court found unlike that of a medical technician examining a patient. 12 Cal. 4th at 303-04. And in *Z.V. v. County of Riverside*, 238 Cal. App. 4th 889 (2015), the Court of Appeal noted "considerable doubt that *Mary M.* has *any* applicability beyond the narrow context of

an arrest performed by a uniformed, armed police officer in the normal course of that officer's duties," before declining to extend *Mary M.* to the context of a county social worker. *Id.* at 891; *accord M.P. v. City of Sacramento*, 177 Cal. App. 4th 121, 124 (2009) (noting it "is questionable whether the holding in *Mary M.* is still viable," but declining to apply *Mary M.* on the facts).

Although plaintiff acknowledges that drivers using Uber's app "do not enjoy the same legal or coercive authority [as] police … officers," she insists Uber's platform "empowers drivers like Sherman to exercise general control over their passengers' safety and liberty." AOB 27. But that is not enough to make Uber liable for Sherman's crimes because drivers using Uber's app, unlike police officers, do not "act as official representatives of the state" or with "'considerable public trust and authority.'" *Mary M.*, 54 Cal. 3d at 219-20.

The unique authority police officers possess is the only reason the California Supreme Court in *Mary M.* departed from the law of "other jurisdictions," under which the government is not liable for intentional torts committed by public officials. 54 Cal. 3d at 219. Plaintiff, though, asks this Court to extend *Mary M.* miles beyond that narrow context,

to a private driver with no state-endorsed authority. And she would have that extension occur in the context of an ostensible-agency theory that is *at best* highly attenuated, even though "[a]pparent authority rarely serves as a basis for liability when an employee or agent commits an intentional physical tort." Restatement (Third) of Agency § 7.08 reporter's note b. This Court should reject plaintiff's invitation.

Similarly, *Xue Lu* does not assist plaintiff because the defendant in that case (a federal asylum officer) was a public official vested with governmental authority, whose duties had immediate and dramatic consequences for individual liberty. 621 F.3d at 947-49. Even on its terms, then, *Xue Lu* is no model for this case.

What's more, *Xue Lu* "is not accurate either as a statement of California law or as an application of it." *Z.V.*, 238 Cal. App. 4th at 902. Judge Bybee dissented in *Xue Lu*, pointing to California's "substantial experience" with similar lawsuits and explaining that the majority's ruling could not be squared with *Farmers*, *Jeffrey E.*, *Rita M.*, or *Alma W.* *Xue Lu*, 621 F.3d at 954-55. That dissent proved prescient. In *Z.V.*, the California Court of Appeal endorsed Judge Bybee's analysis and agreed that *Xue Lu* could not "be squared with"

cases like *Lisa M.* or *John R.* *Z.V.*, 238 Cal. App. 4th at 898. *Z.V.* also rejected the policy analysis on which *Xue Lu* rested, explaining that "assuring victim compensation is nothing more than a statement of a desired *result*, not a means of analysis." *Id.* at 901.

The California Court of Appeal's unambiguous rejection of *Xue Lu* means that decision is not binding at all. *In re Watts*, 298 F.3d 1077, 1082-83 (9th Cir. 2002). But the Court could leave that broader question for another day. Whatever *Xue Lu*'s force may be in *analogous* cases, *Z.V.* and the extensive line of California decisions it cites make clear that *Xue Lu* should not be extended to a novel context where a third party with no public authority and no actual agency relationship with the defendant made an independent, personally motivated decision to assault the plaintiff.

II. Plaintiff's misfeasance theory also defies precedent.

Plaintiff's "misfeasance" theory—that Uber "'created or increased [her] risk of harm,'" AOB 35—is equally out of step with California law. In fact, the California Court of Appeal recently rejected identical claims against Uber in a case also involving riders assaulted by individuals claiming to be drivers using Uber's app, reasoning that

even if that misconduct was in some sense "to be anticipated," Uber had not "encouraged" it. *Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410, 424-29 (2022). *Uber* is binding, on-point authority from a California appellate court, and there are no indications—much less "'convincing evidence,'" *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 995 (9th Cir. 2007)—that the California Supreme Court would resolve these issues differently.

A. *Uber* forecloses plaintiff's misfeasance theory.

Generally, "'there is no duty to act to protect others from the conduct of third parties.'" *Uber*, 79 Cal. App. 5th at 419-20. That rule "has deep roots" and "has endured" over time. *Brown v. USA Taekwondo*, 11 Cal. 5th 204, 214-15 (2021) (cleaned up). And it yields "only when it is the defendant who has created a risk of harm to the plaintiff" and thus "is responsible for making the plaintiff's position worse." *Id.* at 214 (cleaned up).

Decades of cases have explained the limited circumstances in which defendants can be liable for creating the risk that plaintiffs would be harmed by others. In *Lugtu v. California Highway Patrol*, 26 Cal. 4th 703 (2001), for instance, a police officer pulled a car over and

directed it into the median of a highway, where it was struck by a passing truck. *Id.* at 707. The court reasoned that by intervening at the scene and exercising his "authority in a manner that . . . expose[d] [the plaintiffs] to an unreasonable risk," the officer could be held liable for misfeasance. *Id.* at 707, 716-17. And in *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40 (1975), a radio station that encouraged listeners to engage in a high-speed chase in search of "a peripatetic disc jockey" was liable to plaintiffs injured in a resulting crash. *Id.* at 47-49. The unifying feature of those decisions is that the defendant was liable for "urging [others] to act in an inherently dangerous manner." *Olivia N. v. NBC*, 126 Cal. App. 3d 488, 496 (1981).

California courts have declined to endorse misfeasance theories where the defendant did not specifically encourage the risky behavior—even where the defendant's conduct made that behavior possible or even likely. For instance:

- In *Sakiyama v. AMF Bowling Centers, Inc.*, 110 Cal. App. 4th 398 (2003), parents sued a roller rink that held an all-night rave after their children attended the party and got into an accident on the way home. *Id.* at 402-04. The parents argued

the rink should be liable because it created the risks that led to their children's injuries. *Id.* at 407. The Court of Appeal disagreed. It recognized that it in the case of an all-night rave for teenagers, it was in some sense "foreseeable" that attendees "would attempt to drive home, either while impaired from drug use and/or from fatigue." *Id.* But as it explained, "foreseeability is not coterminous with duty." *Id.* Because the rink did not actively "promote" drug use or "require[]" attendees to stay until they were too tired to drive, holding the rink liable for misfeasance would "unduly broaden the scope of the legal duty of care." *Id.* at 408.

- Likewise, in *Melton v. Boustred*, 183 Cal. App. 4th 521 (2010), the court declined to hold a defendant liable after he indiscriminately advertised a party on Myspace.com and attendees were attacked by unknown individuals. *Id.* at 532-41. The court acknowledged that the defendant's Myspace ads made it possible or even likely that individuals would target the party to prey on attendees. *Id.* at 532-33. But because the defendant "took no action to *stimulate* the criminal conduct"

> and merely created conditions making that conduct *possible*, imposing liability on him "would expand the concept of duty far beyond any current models." *Id.* at 534-35 (emphasis added) (quoting *Sakiyama*, 110 Cal. App. 4th at 406).

Such decisions share a basic insight: "many commonplace commercial activities" feature some risk of harms from third-party misconduct that is "an inescapable aspect of . . . life." *Melton*, 183 Cal. App. 4th at 534 (quoting *Sakiyama*, 110 Cal. App. 4th at 409). Holding businesses liable for those harms, absent "active conduct" by those businesses that increased the risks, *id.* at 533, would invert California's traditional rule, transforming the default no-duty rule into one in which businesses serve as quasi-insurers against third parties' misconduct.

In *Uber*, 79 Cal. App. 5th 410, the California Court of Appeal applied these principles in a case materially identical to this one. Women who were abducted and assaulted by third parties posing as drivers using Uber's app sued Uber, claiming Uber had "created a rideshare platform that encourages unsafe behavior," "offered a deficient matching system on the Uber app," and "made Uber decals

easy to obtain without keeping track of their use." *Id.* at 426. Summarizing cases including *Weirum*, *Sakiyama*, and *Melton*, the court explained that it was not enough for plaintiffs to claim that misconduct by individuals posing as drivers using Uber's platform was "a foreseeable result of the business model" or that the assailants "may not have been able to as easily commit their crimes . . . were it not for" that model. *Id.* at 427. Rather, because Uber was "not alleged to have taken action to stimulate the criminal conduct," and indeed "made efforts to prevent the type of conduct that harmed the plaintiffs," the court concluded the case was unlike *Weirum* and instead like *Sakiyama* and *Melton*. *Id.* at 427-28 (cleaned up).

Plaintiff's arguments here are the same ones rejected in *Uber*:

Uber	**This Case**
Uber "created a rideshare platform that encourages unsafe behavior." 79 Cal. App. 5th at 426.	Uber's model encourages people "to get into vehicles with strangers." AOB 39.
Uber "made Uber decals easy to obtain without keeping track of their use." 79 Cal. App. 5th at 426.	Uber "allows unauthorized drivers . . . to keep Uber decals even after their accounts have been deactivated." AOB 39.
Uber's model "created an opportunity" for misconduct. 79 Cal. App. 5th at 426.	Uber's model "creates the risk" of misconduct. AOB 39.

Here, as in *Uber*, plaintiff's argument that third-party violence was "a foreseeable result of the Uber business model" is insufficient to make that violence attributable to Uber, which did not "encourage[]" or otherwise take "action to stimulate the criminal conduct." 79 Cal. App. 5th at 427-29 (quoting *Melton*, 183 Cal. App. 4th at 535). And as in *Uber*, plaintiff "read[s] *Weirum* and its progeny too broadly," focusing "too much on whether the [assault] w[as] a foreseeable result" and too little on whether Uber itself *encouraged* that conduct. *Id.* at 428.

Plaintiff's reading also contravenes *Brown*, 11 Cal. 5th 204. Traditionally, courts considered foreseeability as one of many factors—the "*Rowland* factors," after the decisional namesake—in analyzing whether the defendant bore any duty to the plaintiff. *E.g.*, *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 14 Cal. 4th 814, 820 (1997). That analysis produced confusion, including because foreseeability was "not coterminous with duty." *E.g.*, *Sakiyama*, 110 Cal. App. 4th at 407. In *Brown*, the Court clarified that foreseeability, with the other *Rowland* factors, is relevant only if the court first finds the defendant owes the plaintiff a duty. 11 Cal. 5th at 216. And the Court rejected the plaintiff's argument that freestanding foreseeability

analysis can create a duty where none otherwise exists. *Id.* at 217. Here, plaintiff's argument—which reduces to a policy preference that Uber bear responsibility for her injuries because it was *conceivable* Sherman or someone like him could assault her—attempts to revive the position the California Supreme Court rejected in *Brown*.

That a business "creates an opportunity for criminal conduct against a plaintiff and thereby worsens the plaintiff's position" does not make the business liable for those crimes. *Uber*, 79 Cal. App. 5th at 428-29. The district court correctly held as much. 1-ER-6-11.

B. Neither plaintiff's arguments nor recent cases unsettle *Uber*.

Because *Uber* is an on-point decision of the California Court of Appeal, this Court is "'obligated to follow [it],' unless there is 'convincing evidence' that the California Supreme Court would decide differently." *Franklin v. Cmty. Reg'l Med. Ctr.*, 998 F.3d 867, 871 (9th Cir. 2021); *accord Estrella v. Brandt*, 682 F.2d 814, 817 (9th Cir. 1982) (intermediate appellate decision "'is not to be disregarded'" absent "'other persuasive data that the highest court of the state would decide otherwise'"). Plaintiff has not come close to satisfying that burden.

Plaintiff first contends *Uber* "is wholly irreconcilable with" *Lugtu*. AOB 42. But as *Uber* explained, "the conduct deemed to be misfeasance in that case is not analogous to the conduct at issue" in the suits against Uber. 79 Cal. App. 5th at 429 n.7. In *Lugtu*, the officer who pulled over the plaintiffs' car ordered them to stop in the median, thereby forcing them to engage in inherently dangerous conduct. 26 Cal. 4th at 716-17. Here, Uber did not encourage or require any such dangerous conduct. And plaintiff's misdirection that the officer in *Lugtu* "did not encourage the truck driver to hit the plaintiff's car," AOB 42, is facile—the point is that there the defendant took direct "action to stimulate the [harmful] conduct." *Melton*, 183 Cal. App. 4th at 535. This case, like *Uber*, involves a platform that allegedly makes harmful conduct *possible*, but not one that *requires* harmful conduct.

Plaintiff also takes issue (AOB 41-43) with *Uber*'s description that physical assaults are not a "necessary component" of Uber's business model or platform. 79 Cal. App. 5th at 427. But that phrase is unobjectionable shorthand for the broader analytical framework,

which *Uber* correctly recognized and applied.[3] As the Court of Appeal explained, the question is not whether the defendant's business merely "provided an opportunity" for risky conduct, but whether the defendant "affirmatively 'created a peril'" by "encourag[ing]" the inherently dangerous behavior. *Id.* at 424-26. That is the correct standard, and the Court of Appeal's well-reasoned application of that standard to facts substantively identical to those here makes this case easy.

Finally, no subsequent cases have undercut *Uber*. The California Supreme Court declined the plaintiffs' petition for review. *Doe No. 1 v. Uber Techs.*, No. S275425 (Cal. Aug. 24, 2022). And to date, the only opinion from California appellate courts to address *Uber* in any depth

[3] *Sakiyama* explained that hazardous driving in *Weimar* was a "necessary component" of the radio station's game, whereas staying awake to the point of exhaustion was not a necessary element of the rink's party. 110 Cal. App. 4th at 408. One decision, pointing out that *Sakiyama* was decided before *Brown*, asked whether "the rule announced in *Sakiyama* is relevant to the first step of the duty inquiry." *Hacala v. Bird Rides, Inc.*, 306 Cal. Rptr. 3d at 921 n.11 (2023). But as *Brown* makes clear, factors relevant to whether courts should recognize an *exception* to a duty "overlap to some degree with the considerations that determine" the existence of a duty in the first place. 11 Cal. 5th at 221; *see Uber*, 79 Cal. App. 5th at 420 (discussing *Brown*).

is *Hacala v. Bird Rides, Inc.*, 306 Cal. Rptr. 3d 900 (Ct. App. 2023). *Hacala* is entirely consistent with *Uber* and the decision below.

Hacala involved a company's obligation "to use ordinary care or skill in the management of its property." 306 Cal. Rptr. 3d at 907 (cleaned up) (quoting Cal. Gov't Code § 1714(a)). The court held that Bird, which "deployed its dock-less scooters onto public streets," had a duty to exercise "ordinary care to locate and move a Bird scooter when [it] pose[d] an unreasonable risk of danger to others"—e.g., when it was left on a crowded sidewalk "sticking out from behind a trash can." *Id.* at 906-07. That holding did not turn on the scope of liability for third parties' misconduct, but from harms stemming from "*Bird's* conduct" in managing its property. *Id.* at 916. The court repeatedly "emphasize[d]" the "limited" nature of that holding. *Id.* at 916, 918 n.8.

Hacala acknowledged and distinguished the reasoning in *Uber*. As the court explained, in *Uber* "the plaintiffs were not harmed by Uber's property, but rather by *third parties* exploiting the mere existence of ridesharing services to accomplish their criminal acts." *Hacala*, 306 Cal. Rptr. 3d at 921. So nothing in *Hacala*'s analysis of protection-of-property rationales makes *Uber* any less instructive, or

binding, here. The district court correctly ruled that case forecloses plaintiff's misfeasance theory. 1-ER-6-11.

CONCLUSION

Plaintiff's theory of ostensible agency liability cannot be reconciled with *Emery v. Visa International Service Association*, 95 Cal. App. 4th 952 (2002), or *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, 12 Cal. 4th 291 (1995), and her theory of misfeasance liability is equally foreclosed by *Doe No. 1 v. Uber Technologies, Inc.*, 79 Cal. App. 5th 410 (2022). This Court should affirm the judgment.

Dated: June 14, 2023

Respectfully submitted,

/s/ Theane Evangelis

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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