No. 22-16562
Decided Aug. 8, 2024
(Graber, Paez & Friedland, JJ.)

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 DEFENDANTS-APPELLEES' PETITION FOR REHEARING

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Dated: September 16, 2024

Respectfully submitted,

/s/ Theane Evangelis
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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.† It represents about 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.

One 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* briefs in cases, like this one, raising issues of broader concern to the Nation's business community. *E.g.*, *DZ Res. v. Meta Platforms, Inc.*, No. 22-15916, Dkt. 97 (9th Cir. May 13, 2024); *NetChoice, LLC v. Bonta*, No. 23-2969, Dkt. 64 (9th Cir. Feb. 14, 2024); *Davis v. Lab'y Corp. of Am. Holdings*, No. 22-55873, Dkt. 24 (9th Cir. Apr. 7, 2023); *Bielski v. Coinbase, Inc.*, No. 22-15566, Dkt. 21 (9th Cir. Aug. 2, 2022).

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† All parties consented to the filing of this brief under Federal Rule of Appellate Procedure 29(a)(2) and 9th Circuit Rule 29-2(a). No counsel for a party authored this brief in whole or in part. No entity or person, aside from *amicus*, 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 transactions between independent parties. Those businesses depend upon longstanding limits on their liability for intentional torts that third parties may commit. Predictable limits allow businesses to understand the risks they face, and to secure insurance against harms that can be reasonably attributed to them.

For decades, California law has hewed to those limits, recognizing that businesses are not liable for third-party misconduct unless they contribute to or encourage it. And in a case identical to this one, the California Court of Appeal held that Uber did not owe a duty to protect users of its rideshare platform against the risk of criminal assaults by third parties. *Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410, 425-29 (2022).

The panel majority here has remade California law. It embraced a staggeringly broad duty on Uber's part to protect riders against assaults by third parties—even people only pretending to be drivers affiliated with the platform. That rule creates a risk of unprecedented liability even where businesses neither contribute to nor encourage such assaults. Worse, the majority reached that

conclusion by breezing past on-point decisions from California appellate courts and extensive state-law precedent. The Chamber has an interest in ensuring that the majority's missteps are corrected and that this Court hews to state law on which businesses have long relied. It urges this Court to grant rehearing en banc for all the reasons stated in Uber's petition, and provides this brief to further explain the conflicts the majority's decision creates and the "exceptional importance" of the issues presented. Fed. R. App. P. 35(a)-(b).

INTRODUCTION

As Judge Graber's dissent details, the panel majority's decision is fundamentally flawed. It jettisons a wealth of California precedent, including an on-point appellate decision that the California Supreme Court *twice* declined to disturb. And it raises the specter of newfound liability for businesses "that merely provide opportunities for harm caused by third parties" but that do not "meaningfully create, or contribute to, the risk." Dissent 6. The majority's opinion will work significant mischief across the Nation's largest market, exposing businesses to substantial uncertainty and potential liability for third-party harms that they did not encourage and that they may be

unable to prevent or insure against. This Court should grant rehearing en banc.

When federal courts sit in diversity, predicting how state courts would apply settled standards to particular facts can sometimes be challenging. But here, that exercise should have been straightforward. The California Court of Appeal rejected identical negligence claims challenging the exact same business model. *Uber*, 79 Cal. App. 5th at 425-29. And the California Supreme Court left that decision intact, both on initial review and after the panel here sought certification. That decision comports with decades of California law, and there is no reason to think—much less "convincing evidence" demonstrating, *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir. 2007)—that the California Supreme Court would reach a different conclusion. As a matter of federalism, reliance interests, and this Court's *Erie* precedent, *Uber* should have governed here.

The panel majority instead departed from *Uber*. It held that defendants can potentially be liable for third-party harms not just when they contribute to or encourage them, but whenever consumers

face a risk of third-party harms when using the defendants' services. California law has never embraced such expansive tort liability.

The majority offers no legitimate justification for restructuring California law. It chooses to rely not on *Uber*, which applies longstanding case law to the same rideshare platform, but on a decision addressing whether employees owe a duty to prevent the spread of COVID-19 to employees' families. That decision does not undercut *Uber*; if anything, it *reaffirms* that businesses cannot be liable unless they contribute to or encourage the risk of third-party harms.

Businesses in California must be able to predict when they will be liable for third-party misconduct. Liability ought not depend on whether litigation is proceeding in state or federal court. Nor should it turn on vague notions about what makes a rideshare platform "novel" (Maj. Op. 11) or the overbroad rule that a business is liable whenever the way "it conducts its business" is a but-for cause of third-party harms (*id.* at 10). Businesses should not be forced to operate under such uncertainty—especially under the majority's approach, in which courts need not specifically define the nature of the claimed duty before imposing it on defendants.

This Court should grant rehearing en banc to bring its case law back in line with California's and to ensure consistency and predictability in the rules governing potential tort liability for third-party misconduct.

ARGUMENT

I. The majority's decision improperly departs from decades of California law.

By a 2-1 vote, the panel majority has remade California law. Traditionally, defendants have had no duty to protect plaintiffs against third-party harms unless they specifically encourage the risky behavior. And as the California Court of Appeal held in an identical case, because Uber does not affirmatively contribute to or create the risk of criminal assaults by third parties, it bears no duty to shield users from that risk. The majority provides no coherent reason for departing from that on-point decision. And it offers no response at all to another recent California decision requiring courts, before recognizing such a duty, to specify what realistic steps a defendant should have taken to prevent third-party harms. The majority's approach creates multiple conflicts worthy of en banc review,

both in its approach to the *Erie* exercise and in its treatment of California law. Fed. R. App. P. 35(a)-(b).

1. California law has "deep roots" when it comes to whether defendants must protect plaintiffs from harm caused by third parties. *Brown v. USA Taekwondo*, 11 Cal. 5th 204, 214 (2021). "As a general matter, there is no duty to act to protect others from the conduct of third parties." *Id.* (cleaned up). That "general rule" yields "only when it is the defendant who has created a risk of harm to the plaintiff" by "making the plaintiff's position worse." *Id.* (cleaned up).

Over the years, California courts have erected guardrails to protect businesses against overly broad duties to shield plaintiffs from third-party harms. Consider *Sakiyama v. AMF Bowling Centers, Inc.*, 110 Cal. App. 4th 398 (2003), in which a roller rink held an all-night party for teenagers and attendees got into an accident driving home. *Id.* at 402-04. The court described as "foreseeable" that teenagers who partied all night "would attempt to drive home, either while impaired from drug use and/or from fatigue." *Id.* at 407. Nonetheless, the court rejected any duty on the rink's part, emphasizing

that it did not specifically "promote" drug use or "require[]" attendees to stay until they were too tired to drive. *Id.* at 408.

Similarly, 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 social media and attendees were attacked by third parties. *Id.* at 532-41. Again, the court acknowledged that the 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," imposing liability "'would expand the concept of duty far beyond any current models.'" *Id.* at 535 (emphasis added).

Only in limited circumstances have California courts approved duties to shield others from third-party misconduct. 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, where it was struck by a passing truck. *Id.* at 707. The court held that the officer could be liable only because he created the risk by exercising his "authority in a manner that . . . expose[d]" the plaintiffs to harm. *Id.* at 707, 716-17. Likewise, in *Weirum v. RKO General, Inc.*, 15 Cal. 3d

40 (1975), a radio station was held liable for encouraging listeners to engage in a dangerous high-speed chase of a "peripatetic disc jockey." *Id.* at 43, 47-49. As one decision put it, defendants face liability only when they "urg[e] [others] to act in an inherently dangerous manner" and thus actively contribute to the risk of third-party harm. *Olivia N. v. NBC*, 126 Cal. App. 3d 488, 496 (1981).

These limits on the duty to protect plaintiffs against third-party harms rest on an important principle. "[M]any 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. Holding businesses liable for those harms, absent "active conduct" that created or increased the risks, *id.* at 535, would transform the default no-duty rule into a drastically different scheme in which businesses serve as quasi-insurers against third-party misconduct.

2. The California Court of Appeal applied those principles to a materially identical case in *Uber*, 79 Cal. App. 5th 410. There, as here, plaintiffs who were assaulted by third parties posing as drivers using Uber's app sued Uber, claiming its platform "encourages

unsafe behavior." *Id.* at 426. And the Court of Appeal rejected any duty on Uber's part to protect the plaintiffs against third-party assaults. *Id.* at 426-29.

Uber drew that conclusion from a comprehensive review of cases including *Weirum*, *Sakiyama*, and *Melton*. As the court explained, it was not enough for plaintiffs to claim that misconduct by third parties posing as drivers was a "foreseeable result" of Uber's model or that the third parties could not have committed the crimes "were it not for" that model. 79 Cal. App. 5th at 427. Because Uber did not take "action to stimulate the criminal conduct," and in fact "made efforts to prevent the type of conduct that harmed the plaintiffs," it owed the plaintiffs no duty. *Id.* at 427-29 (cleaned up).

California appellate courts have since approvingly cited *Uber*, emphasizing that there is no duty to protect against harm caused "by *third parties* exploiting the mere existence of ridesharing services to accomplish their criminal acts." *Hacala v. Bird Rides, Inc.*, 90 Cal. App. 5th 292, 318 (2023); *see also, e.g.*, *A.L. v. Harbor Developmental Disabilities Found.*, 102 Cal. App. 5th 477, 488 n.8 (2024) (emphasizing need for "an affirmative act that places a consumer in 'peril'").

And as Judge Graber noted (Dissent 4), the California Supreme Court twice declined to disturb the *Uber* rule—initially by denying a petition for review and depublication requests, *see* Dkt. 27 (SER-8), and later by denying this Court's certification request, *see* Dkt. 76.

3. As the case comes to the Court, the question is not how to resolve the state-law issue on a blank slate, but whether there is "convincing evidence" that the California Supreme Court would reject *Uber*'s analysis. *Ryman*, 505 F.3d at 994; *see* Dissent 1-2. But the majority, in departing from *Uber*, does not supply anything close to the requisite convincing evidence.

As Uber's petition explains (at 10-14), the majority's departure from *Uber* rests on its conclusion that nothing can be gleaned from the California Supreme Court's double-declination to review that decision. That conclusion is dubious. True, a denial of discretionary review is not identical to an express endorsement. But neither must the Court blind itself to the fact that a state supreme court not only denied review and requests for depublication, but also later concluded that there was no need to accept certification to answer a question that this Court wrote would have "significant economic and

policy impacts." Dkt. 74 at 10. Nor must this Court ignore that the California Supreme Court evidently considered review unnecessary "to secure uniformity of decision," Cal. R. Ct. 8.548(f)(1), despite this Court's doubts about whether *Uber* represents "'controlling precedent,'" Dkt. 74 at 7-10.

The panel majority's disregard of those valuable indicators contravenes Supreme Court precedent. Pet. 11 (discussing *West v. AT&T Co.*, 311 U.S. 223, 237 (1940)). And it is not the first time in recent memory that a panel, after a state supreme court declined certification, responded by crafting "new expansive tort liability." *Drammeh v. Uber Techs., Inc.*, 2024 WL 4003548, at *4 (9th Cir. Aug. 30, 2024) (Bumatay, J, dissenting). To the extent this Circuit's decisions support that approach, *see* Maj. Op. 3 n.2 (citing *In re K F Dairies, Inc. & Affiliates*, 223 F.3d 922, 925 n.3 (9th Cir. 2000)), the Court should grant rehearing en banc to correct course. Fed. R. App. P. 35(b)(1)(A).

The majority offers no other good reason to depart from *Uber*. Much of its analysis rests on *Kuciemba v. Victory Woodworks, Inc.*, 14 Cal. 5th 993 (2023), which addressed "whether California law

imposes a duty of care on employers to prevent the spread of COVID-19 to their employees' household members." *Id.* at 1015. According to the majority, *Kuciemba* is inconsistent with what it calls *Uber*'s "'necessary component' test." Maj. Op. 5-6. That is incorrect for three reasons.

First, *Uber* used "necessary component" not as a distinct, standalone rule, but as unobjectionable shorthand for the broader analytical framework in cases like *Melton*, *Sakiyama*, and *Weirum*. *See Uber*, 79 Cal. App. 5th at 424-28. Under that framework, defendants that do not take affirmative steps "'to stimulate the criminal conduct'" are not liable for it. *Id.* at 427. Those decisions remain good law, and neither plaintiff nor the panel majority has argued to the contrary. Much of the majority's disagreement with what it characterizes as *Uber*'s rule, therefore, is a red herring.

Second, the majority dismissed *Uber's* straightforward application of *Sakiyama* because the reasoning there involved "the second step of the duty analysis" (whether a duty should be narrowed or eliminated based on a multifactor inquiry). Maj. Op. 12. But as the California Supreme Court has explained, the factors relevant to

whether a duty should be narrowed "overlap" with the factors "that determine the existence" of the duty in the first place. *Brown*, 11 Cal. 5th at 221.

Third, if anything, *Kuciemba* confirms that *Uber* is correctly decided. *Kuciemba* explained that the narrow exception to the "default rule" that defendants are not liable for third-party harms is limited to situations in which defendants "create or contribute to the risk." 14 Cal. 5th at 1017. The two cases *Kuciemba* cited to support that point are especially instructive: *Brown*, where the plaintiff sued the U.S. Olympic Committee and the sponsor of national competitions for failing to protect her against sexual abuse by her coach, 11 Cal. 5th at 209-10, and *Regents v. Superior Court*, 4 Cal. 5th 607 (2018), where a college student attacked by a hallucinating classmate sued the university for failing to protect her, *id.* at 613-14. As Judge Graber observed, if the Olympic Committee did not "create or contribute to" the risk of abuse of a minor athlete by her coach and a university did not "create or contribute to" the risk of violence from a disturbed student, then the same must be true for Uber. Dissent 7-8. Those decisions may not themselves have involved misfeasance claims,

Maj. Op. 8 n.5, but that does not change the way the California Supreme Court used them to characterize the default no-duty rule.

The majority's analysis is also irreconcilable with other California appellate decisions. The majority reasoned, for instance, that Uber owes plaintiff a duty because the risk of assault by third parties pretending to be affiliated drivers "would simply not have existed" without the way Uber "conducts its business." Maj. Op. 10. But the risk of teenagers' fatigued or impaired driving likewise "would simply not have existed" without the all-night party the rink held in *Sakiyama*. And the risk of predatory crime "would simply not have existed" without the indiscriminately broad advertising of the party in *Melton*. Yet those cases rejected the very duty the majority embraced here. *Supra* at 7-8.

The majority dismisses those cases on flimsy factual grounds. Nothing in *Sakiyama*'s analysis, for instance, turns on some unique rule involving "the furnishing of alcoholic beverages" (Maj. Op. 13)—the roller rink did not even serve alcohol. And the majority's assertion that the theory of risk creation here is "more involved" than in *Melton* (*id.* at 11-12), is little more than disagreement with the way

the California Court of Appeal addressed the same arguments relating to Uber's business (including both the general model of "plac[ing] strangers together in a situation where one individual ha[s] control over the other's freedom" and specifics such as "Uber's promotion of safety and its decals"). *Compare id.* at 11-12, *with Uber*, 79 Cal. App. 5th at 416, 426-27. Such disagreement is not a valid reason to depart from on-point state appellate authority. Dissent 2-3.

4. The panel majority created yet another conflict by altogether ignoring *Al Shikha v. Lyft, Inc.*, 102 Cal. App. 5th 14 (2024), even though that decision was brought to the Court's attention in a supplemental-authority notice, *see* Dkt. 79.

Al Shikha involved an affiliated driver's assault of a rider using Lyft's rideshare app. 102 Cal. App. 5th at 18-19. Unlike in this case, in *Al Shikha* there was a conceded "special relationship" between Lyft and the plaintiff that could potentially support "'an affirmative duty to protect the victim of [the driver's] harm.'" *Id.* at 22. Even so, the Court of Appeal emphasized that in determining whether a defendant can be liable based on third-party harm, courts must *first*

"identify the specific duty [the plaintiff] asserts [the defendant] should undertake." *Id.* at 24.

That rule has a long lineage. "'Only after the scope of the duty under consideration is defined may a court meaningfully undertake the balancing analysis of the risks of burdens present in a given case'" to determine whether imposing a duty is appropriate. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1214 (2007). Put plainly, the rule ensures plaintiffs do not ask for the impossible.

But the majority relegated that rule to a footnote, suggesting it is limited to "the premises liability context." Maj. Op. 14 n.9. Of course, *Al Shikha* applied that rule not in a case about premises liability, but in a case (like this one) about rideshare apps—which is why the panel's choice not to mention the decision is so striking. And by sidestepping that longstanding requirement, the majority framed a general duty in the broadest terms—i.e., to prevent all users of Uber's rideshare platform from any harms by third parties. That overbroad definition prevented meaningful analysis of whether any duty could reasonably be imposed on Uber, and left Uber and

companies like it without any clear understanding of what steps they can take to prevent future liability.

II. The majority's decision sows confusion and threatens unobjectionable business models throughout the Nation's biggest market.

This case also presents "a question of exceptional importance," Fed. R. App. P. 35(a)(2), because if left undisturbed, the majority's opinion will have serious consequences for businesses across California. A business's ability to predict its exposure to liability for third-party harms is paramount, and that liability should not depend on the happenstance of whether litigation proceeds in state or federal court. Moreover, the majority's reasoning could too easily be applied to all sorts of longstanding business practices that put consumers in contact with third parties and that accordingly create some risk of third-party harms. The litigation and potential liability that will follow the majority's decision will suppress innovation and harm businesses and consumers.

1. In addition to the "principles of federalism," Dissent 1, there are good reasons why this Court must abide by state appellate decisions absent convincing evidence that the state supreme court would

reach a different conclusion. Consistency is also a virtue—especially from the perspective of businesses operating under the cloud of potential litigation.

There should not be one rule for cases in state court and another for cases in federal court. Such a scheme incentivizes forum shopping. It also introduces an unpredictable variable into the already-difficult calculus businesses must perform in structuring their affairs. As a result, businesses are left unable to predict with confidence the potential liability they may face, with dramatic consequences for their ability to grow and pursue profitable enterprises. Accordingly, both the "proper administration of justice," *Fidelity Union Tr. Co. v. Field*, 311 U.S. 169, 179-80 (1940), and the practical demands of running a business require greater consistency between the state-law rules in state court and those in federal court.

2. The panel majority's opinion suggests its reasoning turns on what it calls Uber's "novel business model." Maj. Op. 11. There is nothing particularly "novel" about rideshare and other multisided platforms, which have existed for more than a decade—and which California voters have sanctioned as beneficial for "consumers and

businesses, and [California's] economy as a whole." Cal. Bus. & Prof. Code § 7449(c). In any event, the majority's analysis is not confined to the rideshare industry, or even to similar multisided platforms; it finds an affirmative duty to protect others from third-party harms simply because the way Uber "conducts its business" creates a risk of harm. Maj. Op. 10.

The panel itself has already indicated as much. In asking the California Supreme Court to accept a certified question, the panel declared that the Supreme Court's decision would "broadly clarify the scope of a merchant's liability in tort with respect to customers who experience foreseeable injury as a result of third-party conduct." Dkt. 74 at 10. That is the issue the panel majority has now purported to address.

The majority's holding is deeply troubling. It suggests businesses across California could be sued whenever their models create a risk that third parties may engage in misconduct. Gone, in other words, are California law's wise observations that "'*many* commonplace commercial activities'" create risks of third-party misconduct and that businesses have no duty to prevent that misconduct unless

they themselves encourage it. *E.g.*, *Melton*, 183 Cal. App. 4th at 534 (emphasis added). In its place is a rule, essentially, that defendants must bear the costs of third-party misconduct whenever it is foreseeable, or at least when the defendants' business model is a but-for cause of the harm. That rule contravenes case law from the California Supreme Court establishing that foreseeability alone cannot create a duty to protect, *Brown*, 11 Cal. 5th at 216-17, and decisions rejecting exactly that sort of but-for analysis, *supra* at 7-8, 15. And the result will be a drastic expansion in the liability businesses face for third-party misconduct that they did not encourage—and that they may have no practical ability to prevent.

Such expansion of liability is particularly problematic in cases, like this, involving assaults and other intentional torts. That sort of third-party harm "is about the *least* amenable to risk-spreading via insurance because of its 'inseparably intentional' nature." *Z.V. v. County of Riverside*, 238 Cal. App. 4th 889, 901-02 (2015). In the wake of the majority's decision, therefore, businesses face not only a sharp spike in litigation based on third-party harms, but also the prospect that those costs will be largely uninsurable—and thus will

result either in increased costs for consumers or in the shuttering of businesses altogether. And because, under the panel majority's rule, there is no need for courts to specifically identify the nature of the duty being urged, those businesses also will not be able to easily identify or implement changes that prevent future liability or a surge of litigation. California law does not call for that outcome, and the majority was wrong to walk that path alone.

CONCLUSION

The Court should grant rehearing en banc or, alternatively, panel rehearing.

Dated: September 16, 2024

Respectfully submitted,

/s/ Theane Evangelis
Theane Evangelis

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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