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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMIE DRAMMEH; et al., Plaintiffs-Appellants, v. UBER TECHNOLOGIES, INC., a Delaware corporation; et al., Defendants-Appellees.	No. 22-36038 D.C. No. 2:21-cv-00202-BJR MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted March 26, 2024
Submission Withdrawn June 24, 2024
Resubmitted August 30, 2024
San Francisco, California

Before: PAEZ, NGUYEN, and BUMATAY, Circuit Judges.

Dissent by Judge BUMATAY

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Cherno Ceesay ("Ceesay"), an Uber driver, was murdered by two Uber riders in a failed carjacking attempt in December 2020. His estate, Amie Drammeh et al. ("Drammeh"), sued Uber Technologies, Inc. ("Uber"), for negligence and wrongful death. Drammeh now appeals the district court's order granting summary judgment to Uber. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a district court's grant of a motion for summary judgment. *See A.T. Kearney, Inc. v. Int'l Bus. Machines Corp.*, 73 F.3d 238, 240 (9th Cir. 1995). We also review de novo a district court's determination of state law. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

In granting summary judgment to Uber, the district court concluded that Uber did not owe a duty of care to Ceesay. In Washington, "[t]he existence of duty is a threshold question of law decided by the court," *Lauritzen v. Lauritzen*, 74 Wash.App. 432, 438 (1994), and determining "whether a duty to protect against third party criminal conduct is owed at all" hinges on whether the harms were legally foreseeable, *McKown v. Simon Prop. Grp., Inc.*, 182 Wash.2d 752, 764 (2015). The district court concluded that no special relationship existed between Uber and Ceesay giving rise to a duty of care, and regardless, that the specific harms were not legally foreseeable to Uber. We disagree with both conclusions, and we reverse and remand for further proceedings.

1. *Special Relationship.* The district court erred in concluding that Uber did not have a special relationship with Ceesay and thus did not owe him a duty of care. In a prior order, we certified the question of whether Uber owed Ceesay a duty of care to the Washington Supreme Court. *See Drammeh v. Uber*

Tech., Inc., 105 F.4th 1138, 1140 (9th Cir. 2024). The court declined our request for certification. We therefore must "predict as best we can what the [Washington] Supreme Court would do in these circumstances." *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 830 (9th Cir. 2001) (citation omitted). We conclude that, under Washington law, a rideshare company owes a duty to its drivers to use reasonable care in matching them with riders.

In general, there exists "no duty [in tort law] to control the conduct of a third person as to prevent him from causing physical harm to another. . . ." Restatement (Second) of Torts § 315 (1965). One exception to the general rule is if "a special relation exists between the actor and the other which gives the other a right to protection." *Id.* at § 315(b). Washington law recognizes a number of protective special relationships, including between schools and their students, innkeepers and their guests, group homes for disabled individuals and their residents, businesses and their invitees, employers and their employees, and general contractors and subcontractors. *See H.B.H. v. State*, 192 Wash.2d 154, 169 (2018) (discussing the special relationships Washington recognizes).

When deciding whether to extend the special relationship exception, the Washington Supreme Court has looked to whether the relationship in question is analogous to any of the relationships currently recognized under Washington law. *See, e.g.*, *Niece v. Elmview Grp. Home*, 131 Wash.2d 39, 44–45 (1997). But mere analogy to an existing relationship is not always enough to recognize a new special relationship. *See, e.g.*, *Turner v. Wash. State Dep't of Soc. & Health Servs.*, 198 Wash.2d 273, 285–88 (2021) (declining to find a special relationship between recipients of the

state's long-term care services and the state's Department of Social & Health Services).

The court has clarified that the inquiry into whether a special relationship exists is less about simple analogy to an existing relationship and is instead more about "vulnerability and entrustment." *H.B.H.*, 192 Wash.2d at 172–73. The court has further explained that a special relationship does not necessarily require "physical custody." *Id.* at 170. Rather, a special relationship under Washington law requires the "traits of dependence and control." *Barlow v. State*, 2 Wash.3d 583, 593 (2024).

Predicting what the Washington Supreme Court would do, we conclude that the court would recognize a special relationship between rideshare companies and their drivers, such that rideshare companies owe a duty to use reasonable care in pairing their drivers with riders.[1] Significantly, while all parties agree that this case does not involve an employer-employee relationship, the relationship between a rideshare company and its drivers is closely analogous to the relationship between employer and employee and the relationship between contractor and subcontractor. *See, e.g.*, *Vargas v. Inland Wash., LLC*, 194 Wash.2d 720, 731 (2019) (holding that when a general contractor "retains control over some part of the work," they have

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[1] The dissent relies on a "recent Washington state law that 'preempts the field of regulating transportation network companies'" to conclude that we should have "left this in the hands of the Washington Legislature." Dissent at 1 (citing Wash. Rev. Code § 46.72B.190(1)). This law, however, has no effect on tort liability; rather, it prohibits counties, cities, and municipalities in the state of Washington from imposing "any tax, fee, or other charge, on a transportation network company or driver." Wash. Rev. Code § 46.72B.190(1). We thus fail to see its relevance here.

"a duty, within the scope of that control, to provide a safe place of work").

But we do not rely on mere analogy. Drammeh, in opposing Uber's summary judgment motion, presented sufficient undisputed evidence for us to conclude that Uber maintained a requisite level of control in matching drivers with riders, such that Ceesay entrusted and was dependent upon Uber for his safety. Drammeh pointed to Uber's "exclusive control over all aspects of the 'digital interface' between Drivers, Riders, and Uber." Uber alone controlled the verification methods of drivers and riders, what information to make available to each respective party, and consistently represented to drivers that it took their safety into consideration.

Ceesay relied entirely on Uber to match him with riders, and he was not given any meaningful information about the rider other than their location. The dissent points out that Ceesay could have simply rejected the ride, Dissent at 3, but this suggestion ignores the incentive structure created by ridesharing companies. Ceesay was driving as a means of making money, and in order to make money, he needed to accept riders. Uber did not disclose to Ceesay—nor give him any opportunity to discover—which riders had suspicious profiles or were using anonymous forms of payment. Under the dissent's logic, then, Ceesay would need to reject every ride—effectively quitting his job—in order to ensure his own safety. In this way, Ceesay rationally entrusted Uber to use reasonable care in accounting for his safety when Uber matched him with riders. The relationship thus possessed the "traits of dependence and control." *Barlow*, 2 Wash.3d at 593.

The district court erred in concluding that Uber owed no duty to Ceesay. Under Washington law, rideshare companies have a special relationship with their drivers, such that they owe the drivers a duty to use reasonable care when matching them with potential riders.

2. *Foreseeability.* The district court also erred in concluding that Ceesay's murder was not legally foreseeable. Under Washington law, foreseeability can be both a question of law and a question of fact.[2] *See McKown*, 182 Wash.2d at 762, 764. Legal foreseeability asks whether the defendant "had notice of criminal activity sufficient to give rise to a duty"—in other words, whether "*the specific acts* in question were foreseeable." *McKown*, 182 Wash.2d at 764, 767. Given the special relationship between rideshare companies and drivers, Uber owed Ceesay a duty of care when matching him with riders. With this duty in mind, we next ask whether the harms suffered by Ceesay were legally foreseeable, such that the duty would exist in this scenario. *See Niece*, 131 Wash.2d at 50. When an underlying duty of care exists, "[i]ntentional or criminal conduct may be [legally] foreseeable

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[2] Here, we are focused only on legal foreseeability, which is part of the duty inquiry and a question of law for the court. *McKown*, 182 Wash.2d at 764. Factual foreseeability, which is normally part of the causation inquiry, is a question for the jury and asks "if a reasonable person in the defendant's position would be aware of a general field of danger posing a risk to one such as the plaintiff." *H.B.H.*, 192 Wash.2d at 176–77 (cleaned up). We hold that an assault and attempted carjacking by rideshare riders on a rideshare driver is not a legally unforeseeable harm. The question of whether these specific riders' assault on Ceesay was within the general field of danger, however, remains a question of fact for the jury. *See Niece*, 131 Wash.2d at 51 n.10.

unless it is 'so highly extraordinary or improbable as to be wholly beyond the range of expectability.'" *Id.* (quoting *Johnson v. State*, 77 Wash.App. 934, 942 (1995), *review denied*, 127 Wash.2d 1020 (1995)).

In opposing summary judgment, Drammeh presented sufficient evidence to demonstrate that the specific acts which resulted in Ceesay's death were reasonably foreseeable to Uber. Drammeh provided evidence that Uber had knowledge that riders were committing violent assaults and carjackings against drivers. Here, the "specific acts in question," *McKown*, 182 Wash.2d at 767, were an attempted carjacking and a violent assault against Ceesay by riders with whom Uber paired him. The assault ultimately led to his death. Given Uber's knowledge of assaults at the time, this incident "was not so highly extraordinary or improbable as to be unforeseeable as a matter of law." *Asphy v. State*, 552 P.3d 325, 340 (Wash. Ct. App. 2024).

The district court thus erred in concluding that the assault on Ceesay was not legally foreseeable.

3. *Filing Under Seal.* The district court also abused its discretion in ordering certain documents to be filed under seal. We review a district court's decision to file records under seal for abuse of discretion. *Valley Broad. Co. v. U.S. Dist. Ct. for Dist. of Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986). A district court abuses its discretion when it does not "articulat[e] both a compelling reason and factual basis" for ordering records sealed. *United States v. Bus. of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1195–96. (9th Cir. 2011) (cleaned up).

The district court did not make any factual findings or articulate any reasons supporting its order that certain documents be filed under seal. This was an abuse of discretion. *See id.* We thus remand for the district court to "conscientiously balance the competing interests of the public and the party who seeks to keep certain judicial records secret," *id.* at 1195, and offer "compelling reasons and specific factual findings," *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102 (9th Cir. 1999), for any decision regarding the sealing of documents.

Plaintiffs-Appellants shall recover their costs on appeal.

REVERSED AND REMANDED for further proceedings consistent with this disposition.

BUMATAY, Circuit Judge, dissenting:

I think we failed to take the hint here. After the district court issued a thorough and well-reasoned decision granting summary judgment to Uber based on the lack of a "special relationship," we certified the question to the Washington Supreme Court. The Washington Supreme Court rejected our request for certification. The obvious reason—Washington law does not create a "special relationship" for a rideshare company to protect its drivers from the criminal conduct of passengers. That's clear from Washington courts' repeated "reject[ion of the] invitation to broaden the common law ["special relationship"] duty. *See Barlow v. State*, 540 P.3d 783, 788 (Wash. 2024). Yet we fashion a new expansive tort liability here with broad-ranging consequences for rideshare companies in particular and the "gig economy" in general. All this, despite recent Washington state law that "preempts the field of regulating transportation network companies and drivers." Rev. Code. Wash. § 46.72B.190(1). Even so, somehow the majority sees no value at looking at how the Washington Legislature has regulated (or not regulated) the precise industry in question here. But under Washington law, "a significant expansion of [tort] liability should be left to the consideration of the Legislature" if "[c]urrent Washington law does not support the [proposed] liability theory." *Niece* v. *Elmview Grp. Home*, 131 Wash. 2d 39, 52, 59 (Wash. 1997). So we should have taken the hint and left this in the hands of the Washington Legislature. At the very least, we should have deferred to the Washington courts' clear direction.

While the events that took place here are tragic, because Washington law doesn't extend so far as to establish a duty on rideshare companies to protect

drivers from the criminal acts of passengers, I respectfully dissent.

I.

To sustain the negligence claim here, Amie Drammeh, as the executor of Cherno Cessay's estate, must prove that Uber had a duty to protect its drivers from the foreseeable criminal acts of a third party. Absent the narrow exception for a "special relationship" or "misfeasance," under Washington law, "people and businesses have no duty to aid or protect others from harm." *Barlow*, 540 P.3d at 786. As the majority does not upset the district court's misfeasance analysis, I focus on whether (1) Uber has a "special relationship" with its drivers, and (2) whether the carjacking and murder of an Uber driver in Washington State was reasonably foreseeable to give rise to a duty of care.

A.

No Special Relationship

Under Washington law, no "special relationship" is formed unless the plaintiff is "helpless, totally dependent, or under the complete control of someone else for decisions relating to their safety." *Id.* at 788; *see also Turner v. Wash. State Dep't of Soc. & Health Servs.*, 493 P.3d 117, 125 (Wash. 2021) (concluding no special relationship when the department "did not have complete control over the living options nor did it make the ultimate decision" regarding the recipient's living situation); *Lauritzen v. Lauritzen*, 874 P.2d 861, 866 (Wash. 1994) (holding no special relationship between a driver and his passenger because the driver lacked the "control over access to the premises that [the person with a special duty] was obliged to protect").

No special relationship exists between Uber and its drivers. Uber retains little control over its drivers' day-to-day work. *See* Rev. Code Wash. § 49.46.300(1)(i)(i)–(iv) (describing independence of rideshare drivers); *see also Folsom v. Burger King*, 958 P.2d 301, 309 (Wash. 1998) (holding no duty between a franchisor and the murdered employees of the franchise because the franchisor did not retain control over their "daily operation[s]"). Though Uber may decide which customers drivers are matched with, drivers retain control over the daily operation of their jobs. Drivers often use their own personal vehicles and are required to maintain their cars' safety measures. Drivers choose the time when they work, they choose the location where they conduct their business, and, ultimately, they exercise a choice in picking up a passenger. So an Uber driver can reject a passenger—*any* time for *any* reason. *See* Rev. Code Wash. § 49.46.300(1)(i)(ii) ("The transportation network company may not terminate the contract of the driver for not accepting a specific transportation service request[.]"). Nothing in their relationship with Uber prevents drivers from taking charge of their own safety. Thus, this relationship "lacks the traits of dependence and control" of safety considerations necessary to establish a "special relationship." *Barlow*, 540 P.3d at 788.

And Uber has no physical custody or control over its drivers—a common hallmark of a "special relationship." *See HBH v. State*, 429 P.3d 484, 494 (Wash. 2018). In cases accepting a special relationship outside the physical-custody-and-control setting, Washington law requires the defendant to assume responsibility for the safety of a "vulnerable victim." *Id.* (including examples of foster children and children in the custody and care of a church). Without this

"entrustment for the protection of a vulnerable victim," no special relationship is created. *Id.* Uber drivers are nothing like the foster children considered "vulnerable victims." They are adults who enter an arm's-length contract with Uber to earn a living.

The majority's massive expansion of tort liability will have rippling effects across Washington's economy. Under the majority's theory, anytime a rideshare company (or any other "gig economy" company) fails to ensure the safety of its independent contractors, it may be on the hook if the company has any amount of control over the contractor's tasks. Indeed, if merely matching a driver to a passenger is enough to create a special relationship, then there's nothing "special" about it.

Based on clear Washington law, we should have found no special relationship here.

B.

No Foreseeable Harm

The murder and attempted carjacking of Ceesay was also unforeseeable and so doesn't create a duty for Uber. Washington law requires "notice of criminal activity sufficient to give rise to a duty" to protect. *McKown v. Simon Prop. Grp., Inc.*, 344 P.3d 661, 665 (Wash. 2015). "[I]f the criminal act that injures the plaintiff is not sufficiently similar in nature and location to the prior act(s) of violence, sufficiently close in time to the act in question, and sufficiently numerous, then the act is likely unforeseeable as a matter of law under the prior similar incidents test." *Id.* at 669.

Uber had no notice of criminal activity like what occurred here. No evidence shows a dangerous propensity of Uber passengers using a fake account with an anonymous payment method to carjack and then

murder Uber drivers in Issaquah, Washington—where Ceesay was murdered. See *Tortes v. King Cnty.*, 84 P.3d 252, 255 (Wash. 2003) (criminal acts were unforeseeable because there was "no evidence that Metro knew of the excessively dangerous propensities of [the attacker] and evidence does not support the fact that there were similar crimes on other Metro buses, only that simple assaults had occurred"). So no evidence supports the proposition that, any time a passenger created an Uber profile and used a gift card for payment, Uber was on notice of pending criminal mischief sufficient to form a duty to protect.

And under Washington law, even if statistical evidence showed a general increase in carjackings in other parts of the country or the world, this general crime rate data does not support that the carjacking in Washington State was foreseeable. *See Kim v. Budget Rent A Car Sys., Inc.*, 84 P.3d 252, 255 (Wash. 2001) (rejecting "utilization of high crime rates as a basis for imposing a tort duty").

Given the unforeseeability of Ceesay's tragic murder, Uber had no duty to protect against it.

II.

On the sealing of Uber's discovery, Uber has shown that the documents at issue involve sensitive or proprietary information. And the district court accepted Uber's reasons as "good cause" for a protective order. This isn't enough to find an abuse of discretion. So I would affirm across the board.

I respectfully dissent.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

AMIE DRAMMEH, et al Plaintiffs, v. UBER TECHNOLOGIES INC., et al., Defendants.	No. 103201-3 **ORDER** U.S. Court of Appeals for the Ninth Circuit No. 22-36038

This case came before the Court at its July 10, 2024, En Banc Conference to consider the Order Certifying Question to the Supreme Court of Washington entered on June 24, 2024, by the United States Court of Appeals for the Ninth Circuit. A majority of the Court voted to enter the following order.

Now, therefore, it is hereby

ORDERED:

The Court declines the federal court's request to answer the certified questions at this time.

DATED at Olympia, Washington this 11th day of July, 2024.

For the Court

/s/ González, C.J.
CHIEF JUSTICE

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMIE DRAMMEH; YUSUPHA CEESAY, Individually and as surviving parents of Cherno Ceesay; MARAM CEESAY, Personal Representative of the estate of Cherno Ceesay, *Plaintiffs-Appellants*, v. UBER TECHNOLOGIES, INC., a Delaware corporation; RASIER, LLC; DOES, 1-100, inclusive, *Defendants-Appellees.*	No. 22-36038 D.C. No. 2:21-cv-00202-BJR ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF WASHINGTON

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted March 26, 2024
San Francisco, California

Filed June 24, 2024

Before: Richard A. Paez, Jacqueline H. Nguyen, and Patrick J. Bumatay, Circuit Judges.

SUMMARY*

Certification Order / Washington Law

The panel certified the following questions to the Washington Supreme Court:

1. Under Washington law, does a rideshare company have a special relationship with its drivers giving rise to a duty to use reasonable care in matching drivers with riders to protect against riders' foreseeable criminal conduct?
2. Under Washington law, was an attempted carjacking and murder of a rideshare driver by a rider legally foreseeable?
3. If such a duty exists, what is the measure and scope of that duty?

ORDER

Pursuant to Revised Code of Washington § 2.60.020, we respectfully certify the questions set forth below to the Washington Supreme Court. The answers to our certified questions are "necessary . . . to dispose of [our] proceedings." Wash. Rev. Code § 2.60.020.

This case involves the 2020 murder of an Uber driver by two Uber riders. The riders used a fake Uber account and an anonymous form of payment with the intention of carjacking the driver's car. Tragically, the carjacking attempt failed, and the driver was killed. The central issue is whether Uber, the

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

company, owes a duty of care to protect its drivers from criminal acts of the riders it pairs them with.

For the reasons we discuss below, we certify the following questions:

1. Under Washington law, does a rideshare company have a special relationship with its drivers giving rise to a duty to use reasonable care in matching drivers with riders to protect against riders' foreseeable criminal conduct?
2. Under Washington law, was an attempted carjacking and murder of a rideshare driver by a rider legally foreseeable?
3. If such a duty exists, what is the measure and scope of that duty?

We recognize that our phrasing of these questions does not restrict the court's consideration of the issues involved and that the court may rephrase the question as it sees fit. We agree to accept the court's answers.

I.

We briefly summarize the relevant facts. In December 2020, Cherno Ceesay ("Ceesay") was working as an Uber driver in the Seattle area. He was matched, through the Uber app, with a rider account under the name "Stephanie Tylor," requesting a ride in Issaquah, a suburb of Seattle. "Stephanie Tylor" did not exist; rather, it was a fake name used to create an Uber account by two individuals planning to carjack an Uber driver's car. The email attached to the newly created Uber rider account was fake, and the payment method was a prepaid giftcard, which allowed the user to remain anonymous.

When Ceesay drove to the requested pickup spot, the individuals entered Ceesay's car and murdered

him in a botched attempt to steal his car. The individuals were eventually caught, arrested, and prosecuted for the murder.

Uber's business model relies on pairing drivers with riders who wish to be transported between locations. Uber requires drivers to undergo background checks and other identity verification procedures, in addition to tests verifying their driving abilities. Unlike traditional taxis, Uber drivers mainly use their personal vehicles—though Ceesay was using a vehicle he rented through Uber's "Vehicle Marketplace."[1] And further distinguishing its ridesharing business from taxis, Uber prohibits street hailing, which allows it to retain exclusive control over the process of matching drivers with riders.

When Uber matches a driver with a rider, Uber controls the information both parties receive. Uber provides drivers with only the location and the username of the rider requesting the ride. Uber also provides riders with information about the driver, including the driver's "name, photo, location, vehicle information, and certain other information."

At the time of Ceesay's murder, Uber employed a program in Latin America called "Social Connect," which required would-be riders who wanted to use anonymous forms of payment to undergo additional identity verification measures. Uber did not employ this program, or a similar one, in the U.S. at the time.

Uber had additionally undertaken research for a number of years into the use of recording devices

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[1] *See* Uber, *Vehicle Marketplace*, https://www.uber.com/us/en/drive/vehicle-solutions/ (offering "[c]ar rentals for gig workers" to "[d]rive with Uber") (last accessed Apr. 5, 2024).

("dashcams") in Uber cars. Uber allows its drivers to use dashcams but does not require or provide them. If a driver is using a dashcam in their car, a rider is notified in the app.

Ceesay's estate filed this lawsuit in federal court against Uber Technologies, Inc., and Rasier, LLC (collectively, "Uber"), alleging that Uber's negligence caused Ceesay's wrongful death. In September 2022, the district court granted Uber's motion for summary judgment, concluding that Uber did not owe Ceesay a duty of care under Washington law and that the fatal assault on Ceesay was not legally foreseeable.

II.

Washington law permits certification from a federal court when "it is necessary to ascertain the local law of [Washington] in order to dispose of such proceeding and the local law has not been clearly determined." Wash. Rev. Code § 2.60.020. In this appeal from the grant of summary judgment in favor of Uber, we must determine whether, under Washington law, a rideshare company owes its drivers a duty of reasonable care to protect them from foreseeable injury by the riders with whom the company pairs them. Washington law has not squarely addressed whether a special relationship exists between rideshare companies and their drivers that would give rise to such a duty of care. Resolution of the issue of duty is necessary to dispose of the present proceeding. And given the scope of the rideshare industry, the question of duty presents a critical issue of state law that is unsettled and has important policy ramifications.

A.

Washington law recognizes a "special relationship" exception to the general prohibition of imputing

liability to an actor for the criminal acts of a third party. *See H.B.H. v. State*, 192 Wash.2d 154, 168–69 (2018). This exception arises where "a special relation exists between the actor and the other which gives to the other a right to protection." Restatement (Second) of Torts § 315(b) (Am. Law Inst. 1965). When such a relationship exists, "the party owing a duty must use reasonable care to protect the victim from the tortious acts of third parties." *H.B.H.*, 192 Wash.2d at 169 (citing Restatement (Second) of Torts § 314A cmt. e).

Washington courts have applied this exception to liability to several relationships. Washington has adopted the "common examples" of protective special relationships, including "the relationships between schools and their students, innkeepers and their guests, common carriers and their passengers, and hospitals and their patients." *Id.* The Washington Supreme Court has extended the exception to cover relationships between a business and an invitee, *see Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192, 194 (1997), as well as between a group home for developmentally disabled individuals and its residents, *see Niece v. Elmview Group Home*, 131 Wash.2d 39, 41 (1997).

More recently, the Washington Supreme Court found a special relationship between the state's child custody agency and foster children. *H.B.H.*, 192 Wash.2d at 178. And Washington law recognizes a special relationship between employers and employees, *see Bartlett v. Hantover*, 9 Wash.App 614, 620–21 (1973), *rev'd on other grounds*, 84 Wash.2d. 426 (1974), and between a general contractor and subcontractor, *see Vargas v. Inland Washington, LLC*, 194 Wash.2d 720, 731 (2019). Washington courts, however, have not opined specifically on whether the

special relationship exception extends to the relationship between rideshare companies and their drivers.

Washington law is clear on what factors must be present to constitute a special relationship. In *H.B.H.*, the Washington Supreme Court clarified that the inquiry revolved not necessarily around "physical custody," but rather around "vulnerability and entrustment." 192 Wash.2d at 173. The court reiterated this principle in *Barlow v. State*, 2 Wash.3d 583 (2024). Responding to a certification order from this court, there, the Washington Supreme Court concluded that "[i]f the relationship lacks the traits of dependence and control," no duty exists. *Barlow*, 2 Wash.3d at 593. In *Barlow*, the Washington Supreme Court ruled that a special relationship exists between universities and university students when a student is on campus "for school related purposes or participating in a school activity." *Id.* at 597.

When deciding whether to extend the special relationship exception to novel relationships, the Washington Supreme Court has looked at whether the relationship in question is analogous to any of the relationships Washington law currently recognizes. *See, e.g.*, *Niece*, 131 Wash.2d at 44–45 (finding a special relationship between a group home for disabled individuals and its residents, noting that it was "most analogous" to the recognized special relationship between a hospital and its patients).

Analogy to an existing relationship is not always enough to recognize a new special relationship, however. In 2021, the Washington Supreme Court declined to recognize a special relationship between the state's Department of Social & Health Services and recipients of the state's long-term care services. *Turner v. Wash. State Dep't of Soc. & Health Servs.*,

198 Wash.2d 273, 276–77 (2021). The court noted that the department "did not have complete control over the living options nor did it make the ultimate decision" regarding the recipient's living situation. *Id.* at 286.

Similarly, a Washington Court of Appeals declined to find a special relationship between an automobile driver and his passenger. *Lauritzen v. Lauritzen*, 74 Wash.App. 432 (1994). The court there emphasized that a certain level of entrustment was necessary to form a special relationship, and distinguished the relationship between a driver and his passenger from other recognized special relationships on the basis that the driver lacked the "control over access to the premises that [the person with a special duty] was obliged to protect." *Id.* at 440–41.

The plaintiffs in this case argue that because Washington recognizes a special relationship in both the employer-employee and contractor-subcontractor contexts, the relationship between a rideshare company and its drivers is a sufficiently analogous context to warrant extending the exception. Uber, on the other hand, contends that because Washington law is clear on the legal status of rideshare drivers as independent contractors, *see* Wash. Rev. Code § 49.46.300(1)(i), and because the Washington Supreme Court has been reluctant to extend the exception in recent cases like *Barlow* and *Turner*, the court would not extend the relationship here.

We believe that the Washington Supreme Court should be the first to answer the question of whether Uber owes a duty of care to its drivers when matching them with riders.

B.

Under Washington law, a harm must also be legally foreseeable in order for a duty to arise. *See McKown v. Simon Prop. Grp., Inc.*, 182 Wash.2d 752, 762 (2015) ("foreseeability as a question of whether a duty is owed is ultimately for the court to decide"). In determining whether particular conduct was foreseeable, the Washington Supreme Court asks "'not whether the actual harm was of a particular kind which was expectable,'" but rather asks "'whether the actual harm fell within a general field of danger which should have been anticipated.'" *Meyers v. Ferndale Sch. Dist.*, 197 Wash.2d 281, 288 (2021) (quoting *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 42 Wash.2d 316, 321 (1953)).

The Washington Supreme Court has held that one—but not the only—way a plaintiff can demonstrate legal foreseeability is by "proving acts of similar violence" that are (1) "sufficiently similar in nature and location to the" crime against the plaintiff, (2) "sufficiently close in time to the act in question," and (3) "sufficiently numerous." *McKown*, 182 Wash.2d at 774. In 2022, for example, the Washington Court of Appeals held that the sexual assault of a tenant by a third party was legally foreseeable to a landlord. *Brady v. Whitewater Creek, Inc.*, 24 Wash.App.2d 728, 751 (2022). There, the plaintiff alleged that she was raped by an individual who entered her upper-floor apartment without authorization, and that the landlord knew of a previous attempted unauthorized entry to an upper-floor balcony. *Id.* at 749. The court concluded that such knowledge "made this conduct foreseeable," *id.* at 751, and reversed a grant of summary judgment to the landlord.

The plaintiffs in this case argue that Uber had sufficient knowledge that drivers were at risk of violence, including physical assaults, by riders, such that the attack on Ceesay would have been reasonably foreseeable to Uber. Uber, on the other hand, argues that the attack on Ceesay was not legally foreseeable because there were no "carjacking[s] in Issaquah . . . involving a premeditated plan to steal a car with a fake rider account using an anonymous payment method" on the Uber app. We believe that the Washington Supreme Court should be the first to answer the question of whether the alleged conduct is legally foreseeable, such that Uber would owe a duty of care to its drivers.

III.

An answer to the question of duty is necessary to "dispose of [our] proceedings," Wash. Rev. Code § 2.60.020. If the district court was correct that Uber owes no duty to its drivers to protect them from the criminal acts of riders, the district court's grant of summary judgment to Uber will be affirmed. If a duty does exist, the district court's ruling as to that issue must be reversed and further proceedings would be necessary to resolve plaintiffs' claim. Thus, the answer given by the Washington Supreme Court is necessary to dispose of the current appeal. We respectfully request that the court answer the questions presented in this order.

We recognize that certifying questions imposes a certain burden on a state court. Certification, however, is "particularly appropriate" in situations like the one here, where unsettled issues of law have "significant policy implications." *Barlow v. State*, 38 F.4th 62, 66–67 (9th Cir. 2022) (citing *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 793 F.3d 1087, 1089 (9th Cir. 2015)). Given the prevalence and scope of the

rideshare industry, determining whether rideshare companies owe a duty of care in matching their drivers with riders could have a significant impact on rideshare drivers and the gig economy more generally. We thus conclude that certification is appropriate here.

IV.

The names and addresses of counsel are:

For Plaintiffs-Appellants Amie Drammeh, Yusupha Ceesay, and Maram Ceesay: Brent Rosenthal, Law Offices of Brent Rosenthal, PC, 6617 Lakewood Blvd., Dallas, TX 75214; Corrie Yackulic, Corrie Yackulic Law Firm, PLLC, 110 Prefontaine Place S, Ste. 304, Seattle, WA 98104; Alexandra Caggiano, Brian Weinstein, Weinstein Caggiano, PLLC, 600 University St., Ste. 1620, Seattle, WA 98101.

For Defendants-Appellees Uber Technologies, Inc., and Rasier LLC: Julie L. Hussey, Perkins Coie, LLP, 11452 El Camino Real, Ste. 300, San Diego, CA 92130; Gregory F. Miller, Perkins Coie, LLP, 1201 Third Ave., Ste. 4900, Seattle, WA 98101.

V.

The Clerk of this court is hereby directed to file in the Washington Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, a copy of this order and all relevant briefs and excerpts of record pursuant to the Revised Code of Washington sections 2.60.010(4), 2.60.030(2) and Washington Rule of Appellate Procedure 16.16.

Further proceedings in this court on the certified question are stayed pending the Washington Supreme Court's decision on whether it will accept review, and if so, receipt of the answer to the certified question.

The case is withdrawn from submission, in pertinent part, until further order from this court. The Clerk is directed to administratively close the docket, pending further order. This panel will resume control and jurisdiction upon receipt of the Washington Supreme Court's decision to decline to answer the certified questions.

When the Washington Supreme Court decides whether to accept the certified questions (or orders briefing on the questions), the parties shall promptly file a joint report informing us of the decision. If the Washington Supreme Court accepts certification, the parties shall also promptly file a joint status report notifying us when briefing has been completed; when a date is set for oral argument before the Washington Supreme Court; and when that court has rendered an opinion.

It is so **ORDERED**.

APPENDIX D

The Honorable Barbara J. Rothstein

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON
AT SEATTLE

DRAMMEH, et al., Plaintiffs, v. UBER TECHNOLOGIES INC., et al., Defendants.	Civil Action No. 2:21-cv-202-BJR ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Sept. 27, 2022

I. INTRODUCTION

Plaintiffs Amie Drammeh and Yusuoha Ceesay, representing the estate of Cherno Ceesay ("Ceesay") (collectively, "Plaintiffs") filed this lawsuit against defendants Uber Technologies, Inc. ("Uber") and Rasier LLC[1] (together, "Defendants") alleging that Defendants' negligence caused the wrongful death of Ceesay, a driver for Uber who was killed by two passengers.[2]

[1] Plaintiffs' complaint describes Rasier as "a wholly owned subsidiary of Uber Technologies and . . . the party that directly contracts with drivers." Dkt. 1 ¶ 15. Neither party describes Rasier as separate from Uber in any legally relevant way.

[2] The two passengers have been charged but have not yet been tried. *See* Pl. Opp'n, Dkt. 123 at 7 (stating that they are "awaiting trial"). However, for purposes of this order, the Court will assume the allegations against them are true.

Before the Court is Defendants' motion for summary judgment. Having reviewed the motion, the record of the case, and the relevant legal authorities, the Court will grant Defendants' motion. The reasoning for the Court's decision follows.

II. BACKGROUND

A. Ceesay's Murder

On the evening of December 13, 2020, Ceesay responded, using Uber's smartphone app, to a call to pick up and ferry passengers in Issaquah, Washington. *See* Dkts. 129-1, 129-2. These passengers were Olivia Bebic and Devin Wade (hereinafter, the "Assailants)—nonparties dismissed from this action last year. Police Rpt., Dkt. 129-1 at PDF 4-7. The Assailants requested a ride through the app, and Ceesay accepted it. *Id.* The app notified Ceesay of the pick-up location the Assailants had entered. *Id.* Ceesay was found dead in his car minutes after he had at arrived at the pick-up location. *Id.* at PDF 6. Ceesay's car had crashed into a tree about 100 feet from the pick-up location, and Ceesay had multiple stab wounds. *Id.* The Assailants had fled the scene. *Id.*

An Issaquah Police investigation concluded that the Assailants created a fake Uber account, requested a ride, and murdered Ceesay in a botched carjacking. *Id.* at PDF 6-7. The allegedly fake account was registered under the name "Stephanie Tylor."[3] Def. MSJ, Dkt. 93 at 8 n.4. Defendants admit that this account was created and used to request a ride just before the attack on Ceesay. *Id.* When the account was created,

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[3] An account under Bebic's name was created about two hours before the Tylor account was created. Pl. Opp'n, Dkt. 123 at 5 n.16.

Uber verified that the phone number used to register was in the account-holder's possession ("SMS verification") and verified that the account was attached to a valid payment method. *Id.* The Assailants used a prepaid cell phone and a prepaid gift card, both of which are anonymous in that they are not attached to a named account-holder. *See* Dkt. 129-13.

On the day after Ceesay's murder, the Issaquah Police contacted Uber's Law Enforcement Response Team seeking information about Ceesay's passengers, and Uber identified the Tylor account as the last ride accepted by Ceesay. Pl. Opp'n, Dkt. 123 at 7 nn.29-30. The police traced the phone to the Assailants, who were arrested on December 15, 2020. Police Rpt., Dkt. 129-1 at PDF 6-10; *see also* Dkt. 129-13. Based on interrogations and other information gathered about the Assailants, the police concluded that the two "stabbed [Ceesay] to death in the course of trying to steal his car." Police Rpt., Dkt. 129-1 at PDF 4.

B. The Uber App

Uber's ride-sharing service uses a smartphone app to connect available drivers with people requesting rides. Def. MSJ, Dkt. 93 at 3-4. Riders must create an account in order to request a ride. *Id.* at 4. Creating an account entails entering a name, email address, and cell phone number and agreeing to various terms and conditions. *Id.* As noted above, Uber employs SMS verification to confirm that someone is not attempting to create an account using a phone number that is not their own. *Id.* When a rider uses a phone number to set up an account, a text message containing a code is sent to that phone number, and the rider must then enter the code in the Uber app. *Id.* A particular phone number may only be used for a single account, "which limits [a] person from

creating duplicate accounts." *Id.* A particular rider is also prohibited from created multiple accounts using different phone numbers. *Id.*

Uber uses an automated program called "Mastermind" to "assist in identifying potential risk and fraud." *Id.* at 5. Although the exact means of identifying fraud are proprietary and technical, Uber states that Mastermind generally considers: (1) whether the account is similar to other accounts that have been used for fraud; (2) whether the account is similar to other accounts that have not yet been used for fraud but "show suspicious behavior or may be bots;" (3) "whether new users have 'Uber,' 'Support,' or certain other words in their account names which are correlated with fraud." *Id.* The Mastermind analysis of the information entered by the new user may result in them being prevented from creating an account. *Id.*

Drivers also must create an account in the driver version of the app. *Id.* Creating a driver account entails more steps and more verification than a rider account. Drivers "(1) submit personal identifying information; (2) upload copies of a valid driver's, proof of insurance, and vehicle registration; (3) pass a criminal background check (performed by a third-party) and a driving history check; (4) pass an examination testing [their] knowledge of risk factors for crimes against drivers; and (5) confirm their vehicle has passed a uniform vehicle safety inspection." *Id.* at 5-6. Defendants note that some of the training and testing that Uber drivers undergo relates to potential risks to drivers' safety. *Id.* at 6.

C. Uber's Relationship with Drivers

The parties agree that, at least nominally, Uber drivers are independent contractors. *Id.* at 7; Dkt. 15

¶ 2. Defendants describe Uber drivers as having "sole control of the means and manner in which [they] provide[] transportation services and . . . complete discretion to determine the manner in which to operate [their] business." Def. MSJ, Dkt. 93 at 7. Drivers use their personal vehicles and are solely responsible for maintenance and any physical safety measures they choose to implement. *Id.* Defendants also state that drivers control the routes they take to a passenger's destination. *Id.*

Plaintiffs' characterization of Uber's business implies more control over drivers. Plaintiffs note that drivers may only find customers through the Uber app, as Uber "forbids 'street hails.'" Pl. Opp'n, Dkt. 123 at 10. In controlling the digital interface between drivers and riders, Uber controls and supplies "all information Drivers and Riders get about each other." *Id.* (emphasis removed). From a driver's perspective, it appears that this information is limited to the passenger's provided name and pick-up location. *Id.*

Uber itself possesses some additional information about riders and uses this information to "verify" their accounts. *Id.* at 13. This verification essentially amounts to ensuring the account is not duplicative or obviously fraudulent and checking that the payment method is valid. *Id.* Plaintiffs claim that, in December 2020, a person could nevertheless create an account and order a ride "completely anonymously" and note that Uber did not require any kind of identity verification as long as payment can be authorized. *Id.* (emphasis removed). Uber did not have any mechanism for verifying that a person opening an account was using their real name, email address, or phone

number, and riders could use a form of payment not attached to a bank account. *Id.* at 13-14.

III. LEGAL STANDARDS

A. Summary Judgment

"The standard for summary judgment is familiar: 'Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact.'" *Zetwick v. County of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017) (quoting *United States v. JP Morgan Chase Bank Account No. Ending 8215*, 835 F.3d 1159, 1162 (9th Cir. 2016)). A court's function on summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If there is not, summary judgment is warranted.

B. Negligence

A negligence claim requires (1) a duty of care, (2) a breach of that duty, (3) injury, and (4) actual and legal causation. *Lauritzen v. Lauritzen*, 74 Wash. App. 432, 438 (1994) (citing *Hansen v. Friend*, 118 Wash. 2d 476, 479 (1992)). The existence of a duty is a threshold question of law decided by the court. *Id.* Therefore, if the court finds the defendant did not have a duty of care, there is no issue of fact for a jury and summary judgment is appropriate. *Id.*

In this case, Plaintiffs must show that Defendants had a duty to protect them from the foreseeable criminal acts of a third party—namely, the Uber passengers who killed Ceesay. Under Washington law, "a private person does not have a duty to protect others from the criminal acts of third parties." *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash. 2d 217, 223

(1991). The parties generally agree that there are two relevant exceptions to this rule by which Plaintiffs might establish a duty of care.

1. Special Relationship

One exception applies when there is a "special relationship" between the parties that gives rise to a duty. *Lauritzen*, 74 Wash. App. at 438. This duty is triggered when "(1) the defendant has a special relationship with the third person that imposes a duty to control the person's conduct; or (2) the defendant has a special relationship with the victim that gives the victim a right to protection." *HBH v. State*, 192 Wash. 2d 154, 169 (2018). In some cases where the Washington Supreme Court has found a special relationship, it has emphasized the degree of control the defendant has over the aspect of the job that gave rise to the plaintiff's injuries. *E.g.*, *Vargas v. Inland Washington, LLC*, 194 Wash. 2d 720, 731-32 (2019) ("[W]hen a general contractor engages a subcontractor and 'retains control over some part of the work,' the general contractor 'has a duty, within the scope of that control, to provide a safe place to work.'"). The court has also recognized a special relationship in situations where the victim is uniquely vulnerable and reliant on a defendant's protection, such as children placed in foster homes by the state. *HBH*, 192 Wash. 2d at 173 ("[O]ur case law confirms that entrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship."). Other recognized special relationships include "a business and a business invitee, an innkeeper and a guest, state and a probationer, . . . a psychotherapist and a patient," as well as a common carrier and its passengers and an employer and its employees. *Id.*; *Robb v. Seattle*, 176 Wash. 2d 427, 433 (2013).

2. Misfeasance

The other relevant exception to the rule that there is no duty to protect against third-party criminal acts is a duty recognized "in the limited circumstances [where] the actor's own affirmative act creates a recognizable high degree of risk of harm." *Robb*, 176 Wash. 2d at 433. This narrow exception makes an important "distinction between an act and an omission." *Id.* at 435. A negligent omission—or "nonfeasance"—is not enough to trigger a duty. *Id.* A defendant must affirmatively engage in a "misfeasance" that creates a situation in which a plaintiff is exposed to a high risk of harm to which they would otherwise not be exposed. *Id.* at 437.

3. Foreseeability

Plaintiffs must also establish that Ceesay's murder was foreseeable as a matter of law. The Washington Supreme Court has "held that foreseeability can be a question of whether duty *exists* and also a question of whether the harm is within the *scope* of the duty owed. In the latter sense, it is a question of fact for the jury." *McKown v. Simon Property Grp., Inc.*, 182 Wash. 2d 752, 764 (2015) (emphasis added). In the former sense, however, it is the Court's responsibility to determine whether "the specific acts in question were foreseeable rather than whether the [defendant] should have anticipated any act from a broad array of possible criminal behavior." *Id.* at 767. In other words, if a particular criminal act is not reasonably foreseeable based on prior similar acts, then there exists no duty to protect against it, and there is no occasion for a jury to decide the scope of the duty.

IV. DISCUSSION

Plaintiffs argue that a special relationship exists between Uber and its drivers. Pl. Opp'n, Dkt. 123 at 25. Plaintiffs claim that Uber "has sole and absolute control of whom Drivers are matched with—and then Uber heavily censors the information available to Drivers." *Id.* at 29. Specifically, "Uber did not communicate to Mr. Ceesay . . . that (1) [Uber] had not verified the rider's identity, (2) the rider account had been opened just minutes before, and (3) the rider was using an anonymous payment method, which is associated with criminal intent." *Id.* Finally, Plaintiffs argue that, even if a special relationship does not exist, they qualify for the misfeasance exception noted above. According to Plaintiffs, Defendants' affirmative act of connecting Ceesay with the Assailants was a misfeasance that created a new risk of harm, and thus a duty of care. *Id.* at 34-37.

Defendants contend that Plaintiffs' special relationship cases are inapposite and do not warrant a further extension of the special relationship doctrine here. Def. Reply, Dkt. 139 at 6-7. Defendants also argue that Plaintiffs cannot succeed on a misfeasance theory, because they allege only omissions, not affirmative misconduct. *Id.* at 20-26. Finally, Defendants state that, whether or not the Court recognizes a special relationship or finds a misfeasance, the attack on Ceesay was "unforeseeable as a matter of law" and thus would not be included within any duty of care owed. *Id.* at 7, 15-19.

A. Special Relationship

Plaintiffs' briefs lack a clear and concise statement of the special relationship they believe Uber has

with its drivers.[4] This is a tacit acknowledgement that none of the existing special relationships recognized in Washington fit this context, and any relationship recognized in this case would involve cobbling together elements of selective precedent. Almost all of the cases in which Washington courts have recognized a special relationship involved the physical custody or control of the premises on which a plaintiff was injured—for example, hotels, stores, schools, and hospitals. In asking the Court to find a duty here, Plaintiffs ask the Court to announce a corollary to the typical boundaries of the special relationship doctrine, which is itself an exception to the general rule that private persons do not have a duty to protect others from third-party criminal conduct. Federal courts sitting in diversity jurisdiction and applying state law are "reticent to formulate any common-law 'special relationship' not previously recognized" without "clear Washington authority." *Buckley v. Santander Consumer USA, Inc.*, 2018 WL 1532671, at *6 (W.D. Wash. Mar. 29, 2018) (noting that it would be inappropriate for a federal court to venture into "uncharted waters" without clear guidance).

Plaintiffs cite only one case in which Washington courts found a special relationship outside of premises liability. In *HBH*, the Washington Supreme Court held that the state had a duty to protect foster children from abuse when it placed them in foster homes that were outside of the state's physical custody. *HBH*, 192 Wash. 2d at 173. Although Plaintiffs cite *HBH* for the principle that Washington courts may find special relationships even in the absence of physical custody, numerous other aspects of that case

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[4] Plaintiffs do not allege that Ceesay was an employee or that Uber is a common carrier.

nevertheless counsel against finding one in this case. The central holding in *HBH* was that "entrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship." *Id.* The state foster care agency's lack of physical custody was outweighed by the vulnerability of the victims and the responsibility with which the state had been entrusted, such that it was essentially the equivalent of physical control. *See id.* at 173-74 (agreeing with U.S. Supreme Court that foster care is analogous to incarceration or institutionalization). *HBH* thus illustrates that the Washington Supreme Court is willing to recognize special relationships outside of premises liability, but it also suggests it will only do so in exceptional cases. It is unlikely the court would consider this case exceptional. Uber drivers are clearly not as vulnerable as foster children, and providing drivers with the location of a passenger and processing a payment is not equivalent to a state foster care agency that "controls the placement of [a] child, determines the child welfare services to be provided, and decides when the child will be removed from a foster home." *Id.* at 174. It is also not equivalent to the second case Plaintiffs cite, in which the court found that an elderly group home had a responsibility to protect "[p]rofoundly disabled persons that are totally unable to protect themselves and are thus completely dependent on their caregivers for their personal safety." *Niece*, 131 Wash. 2d at 46.

The third and final case Plaintiffs cite to support their special relationship theory is *Vargas*, in which the Washington Supreme Court found a general contractor had a duty to a subcontractor, despite the fact that the latter was not an employee. *See Vargas, LLC*, 194 Wash. 2d at 731-33. *Vargas* did not involve a "highly vulnerable" victim as in Plaintiffs' other cases,

but it is inapplicable for other reasons. First, as Defendants observe, "[e]very case that has cited the relevant duty language in *Vargas* has done so in the narrow context of [a] general contractor's duty to maintain a safe worksite."[5] Def. Reply, Dkt. 139 at 3 n.2 (citing cases). The crux of *Vargas* was that the defendant general contractor "supervised the jobsite and had a right to exercise control over the work of the various entities on the jobsite," where the plaintiff was injured by a malfunctioning hose. *Id.* at 734. *See Vargas, LLC*, 194 Wash. 2d at 731-33. Plaintiffs do not allege Uber "supervised" any aspect of Ceesay's transportation of passengers. Additionally, the place in which Ceesay was attacked—his car—was not a "worksite" over which Uber "retained" control. Even if Uber had provided the car to Ceesay, it could not control Ceesay's safety in the same way a general contractor can control a tract of private property. Given the constantly changing nature of a car's environment and passengers, it is not analogous to a worksite.

In summary, this Court finds that Uber's role is not sufficiently supervisory to impose on it the degree of responsibility that a special relationship requires. The distinctions between this case and those cited by Plaintiffs are simply too many and too stark for the Court to venture into "uncharted waters" and recognize a special relationship between Uber and its drivers. Accordingly, the Court finds that Plaintiffs cannot establish duty on this basis.

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[5] Defendants also note that "[t]he *Vargas* decision dealt with the 'expansive statutory and common law duties' that general contractors have 'to provide a safe workplace'" and that no such parallel exists here. Def. Reply, Dkt. 139 at 5 (citing *Vargas*, 194 Wash. 2d at 722-23).

1. Misfeasance

Plaintiffs' alternative theory of duty is that it was Defendants' affirmative misfeasance that created the circumstances that enabled the Assailants to murder Ceesay. Pl. Opp'n, Dkt. 123 at 34. The misfeasance identified by Plaintiffs includes "Uber's allowing [the Assailants] on the Uber platform using a gift card without requiring ID verification, its failure to give Mr. Ceesay the means to identify such risky riders, and its failure to provide, require or even encourage Mr. Ceesay to use a dashcam integrated with the Uber app." *Id.* at 35. Plaintiffs suggest that, even if these are viewed individually as omissions, the appropriate question is "whether the actor's entire conduct created a risk of harm."[6] *Id.* at 34 (quoting Restatement (Third) of Torts: Physical and Emotional Harms § 37 cmt. (c)) (emphasis omitted).

Plaintiffs may be correct that certain omissions can amount to misfeasance if they create a risk of harm that would otherwise not exist. The Washington Supreme Court has stated in dicta that "[a] driver affirmatively create[s] a new risk to a pedestrian by failing to stop his or her car [at a crosswalk]." *Robb*, 176 Wash. 2d at 437. However, none of the omissions identified by Plaintiffs created the risk that resulted in Ceesay's death. Plaintiffs' own statistics show that carjacking is a broad societal problem. *See* Pl. Opp'n, Dkt. 123 at 20. There is no evidence or allegation that anything Defendants did actively encouraged carjackings or "create[d] a special or particular temptation or opportunity for crime." *Hutchins*, 116 Wash. 2d at

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[6] Defendants note that Washington has not adopted the Third Restatement or the concept cite d by Plaintiffs. Pl. Opp'n, Dkt. 123 at 23-24.

232-33; *see also Jane Doe 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410, 425 (finding Uber did not engage in misfeasance and contrasting a case in which a "plaintiff was injured by third parties doing exactly what defendant's conduct *encouraged* them to do" (emphasis added)). Even if it were conclusively shown at trial that the risk of carjackings would have been reduced if Defendants had implemented the measures demanded by Plaintiffs, it still would not follow that Defendants *created* the risk. Washington courts have rejected the idea that "the failure to take [preventative measures] against crime is not in and of itself a special temptation to crime." *Sourakli v. Kyriakos, Inc.* 144 Wash. App. 501 (2008).

The Court agrees with Defendants that Plaintiffs' claims are properly understood as alleging that Defendants "failed to eliminate a risk." Def. Reply, Dkt. 139 at 20. Washington courts have been clear that a failure to eliminate a preexisting risk does not itself create a duty of care. *Robb*, 176 Wash. 2d at 439 (noting the "firm line between misfeasance and nonfeasance"). Furthermore, the Washington Supreme Court has found misfeasance as a basis for duty only once. *See Washburn v. City of Federal Way*, 178 Wash. 2d 732 (2013) (police officer knew or should have known that third party would react violently to service of restraining order). It is obvious that Washington courts view this doctrine as applicable only in exceptionally compelling circumstances, and those are not present here. Accordingly, the Court finds that Plaintiffs cannot establish duty based on a misfeasance.

2. Foreseeability

The Court also finds that Plaintiffs have not established that the attempted carjacking and murder

of Ceesay was a foreseeable result of Uber's connecting the "Stephanie Tylor" rider account with Ceesay via the Uber app. Plaintiffs purported evidence of foreseeability is that Defendant knew that fraudulent, duplicate, and anonymous accounts were correlated with "criminal intent." *See* Pl. Opp'n, Dkt. 123 at 33. Plaintiffs also point to some evidence that carjacking, specifically, is connected to this type of suspicious activity. However, aside from generalized statistical data and expert testimony about the increased frequency of carjackings, the vast majority of Plaintiffs' evidence originated *after* Ceesay's murder in December 2020. Plaintiffs rely heavily on an "early 2021" internal report called "Responding to Carjacking" and an April 2021 blog post describing a new ID verification requirement that Plaintiffs say would have prevented the Assailants from requesting a ride.[7] *See id.*

Federal Rule of Evidence 407 bars evidence of subsequent remedial measures when offered to prove negligence. Fed. R. Evid. 407. Plaintiffs do not deny that the documents they rely on constitute subsequent remedial measures but claim that they are proffering them for a purpose outside the scope of the rule. Plaintiffs cite an advisory committee note stating that evidence of remedial measures is admissible to show "existence of duty." Pl. Opp'n, Dkt. 123 n.189 (citing Advisory Committee Notes to 1972 Proposed Rule, Fed. R. Evid. 407). It is not clear what the Advisory

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[7] Plaintiffs' surreply cites additional documents that allegedly show Uber had "[p]rior knowledge of the risks to drivers of anonymous payment methods of payment," but many if not all of these documents also appear to have originated after Ceesay's murder. Pl. Surreply, Dkt. 148; *see, e.g.*, Dkts. 149-1, 149-2; *see also* Def. Surreply, Dkt. 162 (Defendants' surreply noting that all documents were created in 2021).

Committee intended by that comment, but Defendants correctly observe that the Ninth Circuit has interpreted Rule 407 as prohibiting subsequent remedial measures as evidence of "what was knowable" prior to the plaintiff's injury or more broadly to establish a "duty to warn." Def. Reply, Dkt. 139 at 10-12 (citing *Rosa v. Taser Int'l, Inc.*, 684 F.3d 941, 948 (9th Cir. 2012). Plaintiffs are clearly offering the post-incident reports to prove that Uber knew or should have known of the carjacking risk and that Ceesay's murder was foreseeable based on this knowledge. Plaintiffs make no argument as to why *Rosa* should not apply. "In examining whether summary judgment is appropriate, [courts] 'consider only alleged facts that would be admissible in evidence [at trial].'" *Rosa*, 684 F.3d at 948 (quoting *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1260 (9th Cir. 1983)). Plaintiffs' post-incident evidence would be inadmissible as evidence, and thus the Court will not consider it here.

Plaintiffs' remaining, pre-December 2020 evidence is largely comprised of internal incident reports maintained by Uber (called "JIRA tickets") and collated by Plaintiffs. *See* Pl. Opp'n, Dkt. 123 at 15; Dkt. 129-61. Plaintiffs claim that the "JIRA data shows that beginning in the second quarter of 2020 after the start of the pandemic, there was a staggering increase in the rate of carjackings." Pl. Opp'n, Dkt. 123 at 39. However, based on the record, the JIRA data does not suggest a statistically significant connection between fake or anonymous accounts and carjacking, nor do Plaintiff's experts' opinions support that connection. One of Plaintiffs' experts, who has experience in the "payments industry" but not specifically with Uber, opined that "anti-money laundering professionals and law enforcement personnel have known for years that prepaid/gift cards and other

anonymous forms of payment are the payment method of choice of criminal elements, including (for example) those involved in human trafficking and drug trafficking." Corrigan Decl., Dkt. 124 ¶ 6. There is no further evidence to support an inference that the same applies to carjacking.

Without this evidence, there is no link between anonymous accounts like the "Stephanie Tylor" account and carjackings, let alone murder. Plaintiffs' statistical evidence may show Uber was aware of an increase in carjackings in 2020, but that does not mean a carjacking was foreseeable in this case. *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wash. 2d 190, 199 (2001) (Washington Supreme Court "has rejected utilization of high crime rates as a basis for imposing a tort duty"). To establish a legal duty, Plaintiffs were required to show that it was foreseeable the Assailants would use the Uber app to commit a carjacking and murder Ceesay. *See McKown*, 182 Wash. at 767. Legal foreseeability is based on whether the specific acts in question were foreseeable rather than whether Defendants should have anticipated any act from a broad array of possible criminal behavior. *Id.* The Court finds that Plaintiffs have failed to establish that the sequence of events leading to Ceesay's death was foreseeable. Further, the Court finds that Plaintiffs have failed to establish that Defendants had a duty of care. Because Plaintiffs have failed to establish these threshold elements, they cannot make out a claim for negligence, and summary judgment is appropriate.

IV. CONCLUSION

For these reasons, Defendants' motion for summary judgment (Dkt. 93) is GRANTED, and Plaintiffs' claims are dismissed. Plaintiffs' motions to seal several of their filings (Dkts. 112, 122, 146) are GRANTED. The Court strikes the remaining motions on the docket (Dkts. 92, 102, 107) as moot.

DATED this 27th day of September, 2022.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMIE DRAMMEH, et al., Plaintiffs-Appellants, v. UBER TECHNOLOGIES, INC., a Delaware corporation; et al., Defendants-Appellees.	No. 22-36038 D.C. No. 2:21-cv-00202-BJR Western District of Washington, Seattle ORDER Oct. 24, 2024

Before: PAEZ, NGUYEN, and BUMATAY, Circuit Judges.

Judge Paez and Judge Nguyen vote to deny Uber's petition for panel rehearing. Judge Nguyen votes to deny the petition for rehearing en banc, and Judge Paez so recommends. Judge Bumatay votes to grant the petition for panel rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JANE DOE, Plaintiff-Appellant, v. UBER TECHNOLOGIES, INC.; et al., Defendants-Appellees.	No. 22-16562 D.C. No. 3:19-cv-03310-JSC AMENDED MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, District Judge, Presiding

Argued and Submitted November 14, 2023
Submission Withdrawn January 9, 2024
Resubmitted August 8, 2024
San Jose, California

Before: GRABER, PAEZ, and FRIEDLAND, Circuit Judges.

Partial Concurrence and Partial Dissent by Judge GRABER.

This case involves the sexual assault of a rideshare passenger by an individual posing as an authorized Uber driver. Plaintiff Jane Doe appeals the district court's dismissal of three tort claims based on ostensible agency against Uber Technologies, Inc.,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Rasier, LLC, and Rasier CA, LLC (collectively, "Uber") as well as the district court's grant of summary judgment on her negligence claim. We affirm the dismissal of the claims based on ostensible agency and reverse the grant of summary judgment on the negligence claim.

1. The district court did not err by dismissing Plaintiff's tort claims based on ostensible agency. Even accepting Plaintiff's allegations as true, Plaintiff has not plausibly alleged that her assailant was acting within the scope of his ostensible employment when he assaulted her. *See Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal. 4th 291, 299–306 (1995); *Daza v. L.A. Cmty. Coll. Dist.*, 247 Cal. App. 4th 260, 268–69 (2016). Thus, Uber cannot be held vicariously liable for the actions of Plaintiff's assailant.

2. The district court erred, however, by granting Uber summary judgment on Plaintiff's negligence claim. In particular, the district court concluded that Uber did not owe Plaintiff a duty of care. *See Doe v. Uber Techs., Inc.*, No. 19-CV-03310-JSC, 2022 WL 4281363, at *4 (N.D. Cal. Sept. 15, 2022). We disagree.

Plaintiff asserts that Uber owes its app users a general duty of ordinary care under California Civil Code Section 1714(a), which establishes the default rule that "each person has a duty to exercise, in his or her activities, reasonable care for the safety of others." *Kuciemba v. Victory Woodworks, Inc.*, 14 Cal. 5th 993, 939 (2023) (quoting *Brown v. USA Taekwondo*, 11 Cal. 5th 204, 214 (2021)). The issue here is thus whether Uber owed Plaintiff a general duty of ordinary care because it "create[d] or contribute[d]" to her risk of

sexual assault at the hands of an imposter driver.[1] *Id.* at 940.

In a prior order, we certified the question to the California Supreme Court. *See Doe v. Uber Techs., Inc.*, 90 F.4th 946 (9th Cir. 2024). "The . . . court declined our request for certification. Accordingly, we must 'predict as best we can what the California Supreme Court would do in these circumstances.'" *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 829–30 (9th Cir. 2001) (quoting *Pacheco v. United States*, 220 F.3d 1126, 1131 (9th Cir. 2000)).[2] For the reasons below, we believe the California Supreme Court would hold, on the undisputed facts here, that Uber owes its app users a duty to exercise reasonable care regarding their safety, including a "duty not to expose others to an unreasonable risk of injury at the hands of third parties." *Lugtu v. Cal. Highway Patrol*, 26 Cal. 4th 703, 717 (2001).

3. As an initial matter, we must address a decision from the California Court of Appeal that Uber argues controls the outcome of this case. In *Jane Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410 (2022), the plaintiffs—women who had been abducted and sexually assaulted by assailants posing as authorized

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[1] Plaintiff also asserted that Uber owes its app users a duty of care under a "special relationship" theory of liability. Because we hold that Uber owed Plaintiff a duty of care under a misfeasance theory of liability, we need not reach the "special relationship" question.

[2] As we have previously acknowledged, "[t]he California Supreme Court's denial of our certification request is in no way an expression of its opinion on the correctness of the judgments" motivating that certification request. *In re K F Dairies, Inc. & Affiliates*, 224 F.3d 922, 925 n.3 (9th Cir. 2000) (citing, among others, *Trope v. Katz*, 11 Cal. 4th 274, 287 n.1 (1995)).

Uber drivers—brought negligence claims against Uber. The court concluded that Uber did not owe the plaintiffs a duty of care because they failed to "allege[] actions by the Uber entities that created a peril, that is, an unreasonable risk of harm to others." *Id.* at 426 (internal quotation marks and citation omitted). The court relied on a "necessary component" test, reasoning that "[t]he violence that harmed the Jane Does—abduction and rape—is not a necessary component of the Uber business model," so Uber did not owe them a duty of care. *Id.* at 427 (cleaned up). The California Supreme Court declined to review or depublish the decision.[3]

"When interpreting state law, we are bound to follow the decisions of the state's highest court, and when the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises." *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021) (quoting *Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015)). "Decisions of the California Supreme Court, including reasoned dicta, are binding on us as to California law."

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[3] The California Supreme Court's decision in *Trope v. Katz*, 11 Cal. 4th 274 (1995), affirmatively counsels against treating that court's denial of review as an acquiescence to the decision on the merits. Our court has nonetheless stated that we do give intermediate state court decisions extra weight when there has been a denial of review. *Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1069-70 (9th Cir. 2020); *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1267 (9th Cir. 2017). Our articulations of that heightened deference principle have anticipated that there could still be convincing evidence that the state supreme court would disagree with the state intermediate court even after a denial of review. *Herrera*, 953 F.3d at 1069-70; *Poublon*, 846 F.3d at 1266-67. We believe that is the situation here, for the reasons explained.

Muniz v. United Parcel Serv., Inc., 738 F.3d 214, 219 (9th Cir. 2013). By contrast, decisions of the California Court of Appeal "do not bind each other or us," *id.*, but are especially persuasive "where, as in this case, the highest court has refused to review the lower court's decision." *Herrera*, 953 F.3d at 1069. "[I]n the absence of convincing evidence that the highest court of the state would decide differently, a federal court is obligated to follow the decisions of the state's intermediate courts." *In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990) (internal quotation marks and citation omitted).

In this case, there is "convincing evidence" that the California Supreme Court would not follow *Jane Doe No. 1*.[4] Specifically, we conclude that *Jane Doe No. 1*'s "necessary component" test is irreconcilable with the California Supreme Court's own pronouncements, most recently its decision in *Kuciemba v. Victory Woodworks, Inc.*, 14 Cal. 5th 993 (2023). *Cf. In re K F Dairies*, 224 F.3d at 925 (disregarding two decisions from the California Court of Appeal that were "directly on point" because those cases were "in conflict with generally established principles . . . as articulated by the California Supreme Court").

In *Kuciemba*, the defendant had violated a county health order by transferring employees who had been exposed to COVID-19 to a different worksite. 14 Cal. 5th at 1017. As a result, an employee contracted

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[4] The dissent mischaracterizes our decision as based merely on "disagreement with the California Court of Appeal's reasoning." Dissent at 6. This is incorrect. As we explain, *Jane Doe No. 1* is irreconcilable with the California Supreme Court's own pronouncements, and we believe there is convincing evidence that the California Supreme Court would not follow that decision.

COVID-19, which he later transmitted to his wife. *Id.* The relevant question there was whether the defendant owed the employee's wife a duty of care under Section 1714(a) because it had created or contributed to her risk of harm. *Id.* at 1016-17. The *Kuciemba* court concluded that the defendant did owe the employee's wife a duty of care because it had "created a risk of harm by violating a county health order designed to limit the spread of COVID-19." *Id*. at 1018. Thus, the court determined that the plaintiffs' allegations "raise[d] a claim that [the defendant] violated its obligation 'to exercise due care in [its] own actions so as not to create an unreasonable risk of injury to others.'" *Id.* (quoting *Lugtu*, 26 Cal. 4th at 716).

This analysis plainly conflicts with the "necessary component" test applied in *Jane Doe No. 1*—indeed, applying the "necessary component" test would have precluded the outcome in *Kuciemba* and other state court decisions. Although the plaintiffs in *Kuciemba* alleged that the defendant had created the wife's risk of harm and that a third party "was the conduit" for that risk of harm, the California Supreme Court did not apply a "necessary component" test to the defendant's conduct. *Id* at 1017. Nor was there any reason to think in *Kuciemba* that the defendant's alleged negligent conduct—exposing its workers to COVID-19—was a "necessary component" of its business model. Instead, the court expressly stated that the "proper question . . . [was] whether the defendant's 'entire conduct created a risk of harm' to the plaintiff." *Id.* (quoting *Brown*, 11 Cal. 5th at 215 n.6).

That *Jane Doe No. 1* is plainly inconsistent with *Kuciemba* is further borne out by the California Supreme Court's earlier pronouncements. For example, in *Lugtu*, the court held that an officer owed a duty of

ordinary care "to exercise his or her authority in a manner that does not expose such persons to an unreasonable risk of harm" when pulling a vehicle over. 26 Cal. 4th at 707. The *Lugtu* plaintiffs alleged that the defendant's affirmative conduct "in directing [them] to stop [their car] in the center median of the freeway, placed plaintiffs [who were subsequently hit by a negligent third-party driver] in a dangerous position and created a serious risk of harm to which they otherwise would not have been exposed." *Id.* at 717. At no point, however, did the court require that the third party's negligent conduct (reckless driving) be a "necessary component" of the defendant's conduct to hold that the defendant owed the plaintiffs a duty of care—applying such a rule would have undermined the court's conclusion. *See also Weirum v. RKO Gen., Inc.*, 15 Cal. 3d 40, 46–49 (1975). Notably, the only California court to have considered the decision at all has declared the test's application unconvincing. *See Hacala v. Bird Rides, Inc.*, 90 Cal. App. 5th 292, 318 n.11 (2023).

Nor can the "necessary component" test be justified in the specific context of third-party criminal conduct. Indeed, California courts have long explained that "[i]f the realizable likelihood that a third person may act in a particular manner is . . . one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." *Richardson v. Ham*, 44 Cal. 2d 772, 777 (1955) (quoting Restatement (First) of Torts § 449 (1934)) (holding that defendants who left bulldozers unattended owed a duty of reasonable care even where injuries were caused by third-party trespassers who drunkenly raced the bulldozers).

To be sure, "[w]e do not lightly reject the view of an intermediate state appellate court on a question of state law, but our responsibility is to decide the case as would the California Supreme Court." *Hunter v. Ayers*, 336 F.3d 1007, 1012 (9th Cir. 2003). For the foregoing reasons, we conclude that the California Supreme Court would not follow *Jane Doe No. 1*.[5] We turn next to how we believe the California Supreme Court would decide this case in the first instance.

4. Based on the California Supreme Court's own pronouncements, we believe the court would, given the material facts in this case, determine that Uber owes Plaintiff a duty of care.

To briefly summarize, Section 1714(a) of the California Civil Code provides the general rule of duty in California. To determine whether a defendant owes a plaintiff a duty of care under Section 1714(a), courts undertake a two-step inquiry. First, courts determine "whether the defendant's 'entire conduct created a risk of harm' to the plaintiff." *Kuciemba*, 14 Cal. 5th at 1017 (quoting *Brown*, 11 Cal. 5th at 215 n.6). If Section 1714(a) applies, courts then ask whether the resulting duty ought be narrowed or excepted based

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[5] The dissent suggests that the California Supreme Court recharacterized *Brown* and *Regents* in *Kuciemba*. *See* Dissent at 7–8. This is incorrect for the simple reason that the plaintiffs in those cases never raised misfeasance claims. *See* Petitioners' Opening Brief on the Merits at 37–64, Brown v. USA Taekwondo, 11 Cal. 5th 204 (2020) (No. S259216); Petitioner's Opening Brief on the Merits, Regents of Univ. California v. Superior Court, 4 Cal. 5th 607 (2018) (No. S230568), 2016 WL 1168050, at *29–43. We decline to read *Kuciemba*'s passing mention of previous California Supreme Court decisions as foreclosing legal theories that the plaintiffs in those cases never raised and that, as the dissent acknowledges, the court never examined.

upon an analysis of the factors delineated in *Rowland v. Christian*, 69 Cal. 2d 108 (1968). *Id.* at 1021.

The first step of this inquiry is relatively straightforward: courts must determine whether the plaintiff's cause of action is "based upon [a] claim that [the defendant's] affirmative conduct itself . . . placed plaintiffs in a dangerous position and created a serious risk of harm to which they otherwise would not have been exposed." *Lugtu*, 26 Cal. 4th at 717; *see also Weirum*, 15 Cal. 3d at 49; *Kuciemba*, 14 Cal. 5th at 1017–18.[6] In other words, courts look to the *nature* of the plaintiff's "theory of liability" to determine whether they have properly raised such a claim. *Brown*, 11 Cal. 5th at 219 n.8; *see also Kuciemba*, 14 Cal. 5th at 1015 n.7. If so, the plaintiff's "action . . . is based upon a claim of misfeasance, not nonfeasance," *Lugtu*, 26 Cal. 4th at 717–18, and "the question of duty is governed by the standards of ordinary care," *Weirum*, 15 Cal. 3d at 49.

In light of the foregoing principles, Plaintiff has sufficiently presented a claim that Uber's "entire conduct created [her] risk of harm." *Kuciemba*, 14 Cal. 5th at 1017 (quoting *Brown*, 11 Cal. 5th at 215 n.6). Plaintiff's arguments are based entirely on Uber's own affirmative conduct in creating or contributing to the risk of sexual assault at the hands of a third party in how it conducts its business. The risk at issue here

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[6] Indeed, the California Supreme Court has repeatedly warned that courts should not examine case-specific facts during the duty inquiry, as that would intrude upon the province of the jury. *See, e.g.*, *Cabral v. Ralphs Grocery Co.*, 51 Cal. 4th 764, 771–74 (2011). Nor should courts consider foreseeability or the closeness of the connection between the defendant's conduct and the plaintiff's harm at the first step, as those are *Rowland* factors. *See Hacala*, 90 Cal. App. 5th at 318 n.11.

would simply not have existed without Uber's own conduct, as is evident from Plaintiff's articulation of the risk of harm in this case—that is, "the risk that an Uber rider may be kidnapped and sexually assaulted by a predator posing as an Uber driver." Finally, Plaintiff has presented evidence which, when viewed in the light most favorable to her, supports her theory. Thus, Uber owed Plaintiff a duty to use due care in its operations.

In response, Uber primarily relies on *Melton v. Boustred*, 183 Cal. App. 4th 521 (2010), and *Sakiyama v. AMF Bowling Centers, Inc.*, 110 Cal. App. 4th 398 (2003). Neither decision warrants a different conclusion.

In *Melton*, the court considered whether the plaintiffs, partygoers who were assaulted by a group of unknown individuals upon their arrival at a party, could maintain a negligence claim against the party's organizer, who had used social media to advertise the party with an open invitation. 183 Cal. App. at 527. The court ultimately rejected the plaintiffs' misfeasance theory of liability on the basis that the defendant "did not engage in any active conduct that increased the risk of harm to plaintiffs." *Id.* at 533.

Melton, however, is wholly distinguishable. In *Melton*, the defendant had "merely invited people—including unknown individuals—to attend a party at his house." *Id.* at 535. Here, by contrast, Plaintiff's theory of Uber's affirmative conduct contributing to her risk of harm is far more involved, including (1) a novel business model that placed strangers together in a situation where one individual had control over the other's freedom; (2) active encouragement of vulnerable users by Uber through marketing and the extension of novel services like Uber's remote ordering

capability; (3) reliance by app users on Uber's promotion of safety and its decals, which it did not require terminated drivers to return; and (4) previous incidents involving imposter drivers that had reached "crisis levels." *See also Reynolds v. Pope*, No. A155406, 2020 WL 4333532, at *5 (Cal. Ct. App. July 28, 2020).

Turning to *Sakiyama*, the California Court of Appeal there determined that the owner of a facility that hosted an all-night party "did not have a duty not to allow its facility to be used for such a party, even if it knew or could assume that drugs would be used by some of the attendees." 110 Cal. App. 4th at 402. The plaintiffs in *Sakiyama* were injured partygoers and the parents of deceased partygoers who had attended the party, consumed drugs, and then crashed their vehicle on the way home. *Id.* at 403. Uber argues *Sakiyama* demonstrates that California courts have consistently refused to treat "commonplace commercial activities that provide an opportunity for, and thus theoretically increase the risk of, criminal conduct by third parties" as misfeasance.

This argument, too, is unavailing. First, the passage cited from *Sakiyama* took place at the second step of the duty analysis—that is, as part of the weighing of the *Rowland* factors. *See id.* at 409. Thus, it does not shed any light on the first step of the duty inquiry. *Cf. Hacala*, 90 Cal. App. 5th at 318 n.11. Second, *Sakiyama* itself does not suggest that a broad limitation for "commonplace commercial activities" exists. The "commonplace commercial activities" mentioned in *Sakiyama* all involved the furnishing of alcoholic beverages, a context with a very specific history that reduces its utility in predicting how the

California Supreme Court would resolve the particular duty question here.[7] *See* 110 Cal. App. 4th at 409.

5. The determination that a duty of care exists, however, does not end our analysis. We must also determine whether that duty ought be narrowed or excepted due to "compelling policy considerations," as determined upon analysis of the *Rowland* factors. *Kuciemba*, 14 Cal. 5th at 1021. This analysis "involves the balancing of a number of considerations" identified by the California Supreme Court. *Rowland*, 69 Cal. 2d at 112–13. We conclude these considerations do not warrant narrowing or excepting the duty recognized here.

We begin with foreseeability, "[t]he most important factor to consider," and have little problem determining that Plaintiff's risk of harm was foreseeable. *Kesner v. Superior Ct.*, 1 Cal. 5th 1132, 1145 (2016). Indeed, Plaintiff has identified numerous examples of similar incidents that occurred prior to her assault as well as evidence that Uber was aware of these incidents. *Cf. Regents of Univ. of Cal. v. Superior Ct.*, 4 Cal. 5th 607, 629–30 (2018); *Brown*, 40 Cal. App. 5th at 1097. Even the *Jane Doe No. 1* court concluded that the plaintiffs' harm in that case was foreseeable. *See* 79 Cal. App. 5th at 415, 427. We thus conclude that foreseeability does not weigh in favor of narrowing Uber's duty to its app users.[8]

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[7] This history is described in *Ennabe v. Manosa*, 58 Cal. 4th 697, 705–10 (2014).

[8] We likewise conclude that the other foreseeability factors—that is, "the degree of certainty that the plaintiff suffered injury" and the "closeness of the connection between the defendant's conduct and the injury"—do not change the analysis. *Rowland*, 69 Cal. 2d at 113.

We next consider "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach." *Kuciemba*, 14 Cal. 5th at 1027 (quoting *Rowland*, 69 Cal. 2d at 113).[9] On this point, Plaintiff has produced evidence that "Uber already has systems in place to develop safety measures and protect its riders." The fact that a defendant has already managed to focus attention and resources on enhanced safety measures has been sufficient for the California Supreme Court to conclude that the burden policy factor does not warrant narrowing a duty of care. *See, e.g.*, *Regents*, 4 Cal. 5th at 633. We thus conclude that any burden caused to Uber by recognizing a tort duty also does not weigh in favor of narrowing that duty.

Finally, none of the remaining factors—that is, "moral blame" or the "overall policy of preventing future harm"—justifies carving out an exception to the duty Plaintiff here seeks to recognize.[10] *Id.* at 631–32. With respect to the former, the California Supreme Court has regularly assigned moral blame in "instances where the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over

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[9] Uber suggests that courts applying the *Rowland* factors must first "identify the specific action or actions the plaintiff claims the defendant had a duty to undertake." *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1214 (2007). However, the California Supreme Court has not required this showing outside the premises liability context. *Compare id.*, *with Kuciemba*, 14 Cal. 5th at 1027–30, *and Regents*, 4 Cal. 5th at 633. We likewise decline to apply this requirement.

[10] Neither party offers evidence that "the availability . . . of insurance for the risk involved" would change the analysis. *Kuciemba*, 14 Cal. 5th at 1021 (quoting *Rowland*, 69 Cal. 2d at 113).

the risks at issue." *Id.* at 631 (quoting *Kesner*, 1 Cal. 5th at 1151). As Plaintiff argues, and as Uber does not challenge, "[t]hat is the case here: compared to its riders, Uber has access to more information about potential dangers facing its riders and a superior ability to implement appropriate safeguards." With respect to the latter, "[t]he overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible." *Id.* at 632 (quoting *Cabral*, 51 Cal. 4th at 781). At minimum, the prevention of future harm factor counsels in favor of imposing a duty of reasonable care upon Uber, particularly if, as observed in *Regents*, "such steps can avert violent episodes like the one that occurred here." *Id.*

6. In sum, we conclude that Uber owed Plaintiff a duty to exercise reasonable care regarding her safety. As the California Supreme Court has made clear, this "general duty of due care includes a duty not to expose others to an unreasonable risk of injury at the hands of third parties." *Lugtu*, 26 Cal. 4th at 717. To be sure, our conclusion in no way suggests that Uber breached its duty of care, or that the alleged breach caused Plaintiff's injuries, as those questions lie squarely in the province of the jury. We decide only that Uber owed Plaintiff a duty to exercise reasonable care for her safety, and we correspondingly remand for further proceedings consistent with this disposition.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Plaintiff shall recover her costs on appeal.

Jane Doe v. Uber Technologies, Inc., No. 22-16562

GRABER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part 1 of the disposition but otherwise respectfully dissent. The principles of federalism required by our precedents mandate that we follow the holding of Jane Doe No. 1 v. Uber Techs. Inc., 294 Cal. Rptr. 3d 664 (Ct. App. 2022), review denied (Aug. 24, 2022), a decision that is consistent with state law as announced by the California Supreme Court.

1. We must apply "an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the State is otherwise." Six Cos. of Cal. v. Joint Highway Dist. No. 13, 311 U.S. 180, 188 (1940); see also Stoner v. N.Y Life Ins. Co., 311 U.S. 464, 467 (1940) (same); West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940) (same). In other words, the burden is to demonstrate that the state supreme court would not follow the intermediate court's decision. We are "obligated to follow the decisions of the state's intermediate appellate courts" unless there is "convincing evidence" that the state's supreme court would decide differently. Beeman v. Anthem Prescription Mgmt., LLC, 689 F.3d 1002, 1008 (9th Cir. 2012) (en banc) (citation and internal quotation marks omitted).

Our precedents emphasize the importance of following an intermediate appellate state court's decision where, as here, the state supreme court declines to review that decision. We held in State Farm Fire & Cas. Co. v. Abraio, 874 F.2d 619 (9th Cir. 1989), that the rule requiring us to follow an intermediate appellate state court's decision "is especially true when the supreme court has refused to review the lower court's

decision." Id. at 621. Abraio relied on an even earlier case, Tenneco West, Inc. v. Marathon Oil Co., 756 F.2d 769, 771 (9th Cir. 1985). We made the same point in Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1266–67 (9th Cir. 2017) (noting that the importance of relying on a California Court of Appeal case was heightened when the California Supreme Court had declined review), and in Miller v. County of Santa Cruz, 39 F.3d 1030, 1036 n.5 (9th Cir. 1994), as amended (Dec. 27, 1994) (relying on Hicks v. Feiock, 485 U.S. 624, 630 (1988) to demand "persuasive data" that the state supreme court would decide otherwise), and have made it again in Franklin v. Cmty. Reg'l Med. Ctr., 998 F.3d 867, 871 (9th Cir. 2021).

Furthermore, our precedents suggest that we must follow the holding or result of a state court case even if we disagree with its internal reasoning. In Abraio, for example, we stated that we must find convincing evidence that the California Supreme Court would "decide differently." Abraio, 874 F.2d at 621 (emphasis added). Similarly, in Poublon we quoted an earlier case that we must be convinced by persuasive data that the state supreme court would "decide otherwise." Poublon, 846 F.3d at 1266 (emphasis added) (quoting Miller, 39 F.3d at 1036 n.5).

Logic points in the same direction. Suppose that the California Court of Appeal definitively construed an ambiguous state statute but provided no reasoning, and that the California Supreme Court denied review without comment. Despite the lack of reasoning, we would be obligated to follow the holding of the California Court of Appeal in that hypothetical case, unless convinced by persuasive data that the California Supreme Court would reverse. That is true even if we thought there was a better reading of the ambiguous

statute. Similarly, imperfect reasoning is not, without more, a ground for refusing to apply a holding of the California Court of Appeal.

In light of our precedents, the majority disposition errs in three respects. First, it places unwarranted reliance on a footnote in K F Dairies, Inc. & Affiliates v. Fireman's Fund Ins. Co. (In re K F Dairies, Inc. & Affiliates), 224 F.3d 922 (9th Cir. 2000). See id. at 925 n.3 ("The California Supreme Court's denial of our certification request is in no way an expression of its opinion on the correctness of the judgments" in two intermediate appellate state court cases. (emphasis added)). Contrary to the majority disposition's contentions, that case does not detract from our caselaw that both pre- and post-dates K F Dairies and requires us to give weight to the California Supreme Court's earlier denial of review of Jane Doe No. 1. A three-judge panel, as we know, cannot overrule a previous three-judge panel. Miller v. Gammie, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc).

And even if K F Dairies permissibly ruled that the evidence showed convincingly that the California Supreme Court would not follow the particular California Court of Appeal opinion at issue there, its statement of the law on this point is wrong. K F Dairies relied entirely on California state cases holding that the California Supreme Court's denial of review does not necessarily suggest agreement with an opinion of the intermediate state court, plus one case from our court holding only that denial of review is not a decision on the merits for the purpose of analyzing claim preclusion. K F Dairies, 224 F.3d at 925 n.3. That is, K F Dairies ignored the solid wall of Supreme Court and Ninth Circuit precedent, detailed above, concerning our Erie role.

Moreover, I question the applicability of the footnote in the context here: the California Supreme Court already denied direct review and considered arguments on the merits of Jane Doe No. 1 before declining our request for certification. The California Supreme Court denied the petition to review Jane Doe No. 1 and then rebuffed our request for certification, despite our pointing out potential flaws in Jane Doe No. 1's reasoning and laying out a path for possible reversal. Where, as here, the state supreme court refuses review not once, but twice, the weight of its refusal—and the already heightened importance of adhering to existing state appellate court precedent—increases commensurately.

Second, the majority disposition ignores the distinct possibility that the California Supreme Court refused to certify our question because it assumed that we would follow Jane Do No. 1, as required by our precedents. A common reason for a state court of last resort to decline certification is the existence of on-point precedent in the state's intermediate court of appeals, which in general we must apply. Other reasons include that the question (such as an evidentiary issue) does not definitively resolve a claim, or a judgment by the state court that the issue is not important. In this instance such grounds do not seem to be germane so, even though the California Supreme Court did not state a reason for its denial, by process of elimination it would appear that the California Supreme Court is not troubled by our following Jane Doe No. 1. Our certification order laid out all the reasons why some of us had doubts about the California Supreme Court's willingness to follow Jane Doe No. 1. Nonetheless only one justice voted to grant our "cert petition." Additionally, the parties' filings on the certification question largely tracked the issues we

raised in our request, and therefore provide no separate reason for the court's denial.

Third, disagreement with Jane Doe No. 1's reasoning seems to be the gravamen of the majority disposition. The disposition interprets the "necessary component" test to be irreconcilable with the California Supreme Court's pronouncements of misfeasance liability. But as discussed above, the majority disposition's disagreement with the California Court of Appeal's reasoning is not, without more, a sufficient ground for rejecting its holding in favor of our own.

In sum, our precedents oblige us to follow the California Court of Appeal decision in Jane Doe No. 1. Jane Doe No. 1 held that Uber did not owe a duty of care to individuals who had been abducted and sexually assaulted by assailants posing as authorized Uber drivers. 294 Cal. Rptr. 3d at 678–79. Applying Jane Doe No. 1's holding here squarely forecloses Plaintiff's negligence claim. I would affirm.

2. Even setting aside the presumption to follow the intermediate appellate state court's holding, and contrary to the majority disposition's view, Jane Doe No. 1's reasoning aligns with California Supreme Court precedent. Jane Doe No. 1's "necessary component" test is consistent with how the California Supreme Court recently characterized its rejection of liability for organizations that merely provide opportunities for harm caused by third parties, rather than meaningfully create, or contribute to, the risk of harm.

In Kuciemba v. Victory Woodworks, Inc., 531 P.3d 924 (Cal. 2023), the California Supreme Court explained why California Civil Code section 1714 did not apply to the entities at issue in Brown v. USA Taekwondo, 483 P.3d 159 (Cal. 2021), and Regents of

University of California v. Superior Court, 413 P.3d 656 (Cal. 2018):

> These defendants, a sport's governing body and a university, did not create or contribute to the risk of sexual abuse or stabbing. For that reason, the default duty rule of Civil Code section 1714 did not apply, and the starting point for our analysis was instead the alternate rule that generally one owes no duty to control the conduct of another, nor to warn those endangered by such conduct.

Kuciemba, 531 P.3d at 940 (emphasis added) (citations and internal quotation marks omitted). The court in Brown and Regents did not reach the question whether the defendants contributed to the risk of third-party crime because it analyzed only the special relationship theory in those cases. See Brown, 483 P.3d at 165 ("We here focus, along with the parties, on another basis for finding an affirmative duty: [the special relationship theory]."); Regents, 413 P.3d at 660 ("[W]e hold that universities have a special relationship with their students. . . ."). Nevertheless, the California Supreme Court's later characterization of Brown and Regents as cases in which the defendants did not create or contribute to the risk supports Jane Doe No. 1's reasoning, particularly because the court in Brown clarified that "[a] defendant may have greater involvement in the plaintiff's activities than a chance spectator yet play no meaningful part in exposing the plaintiff to harm." Brown, 483 P.3d at 165 n.5 (emphasis added). If neither the entity responsible for coordinating the sporting events that a coach used as opportunities to sexually abuse young athletes nor the university where an enrolled student stabbed another student meaningfully created or

contributed to the risk of those crimes, it follows that Uber did not meaningfully create or contribute to the risk, either.

Finally, I remain unpersuaded that Jane Doe No. 1 conflicts with California law to an extent that would allow us to set it aside. As I see it, the California Supreme Court cases that purport to present such a conflict can be distinguished by unique factual circumstances not relevant here, such as a defendant that "engaged in affirmative misconduct by violating a county health order," Kuciemba, 531 P.3d at 941; a law enforcement officer's "affirmative conduct" in directing a plaintiff to stop his car in the center median of the freeway, Lugtu v. Cal. Highway Patrol, 28 P.3d 249, 257 (Cal. 2001); and heavy construction vehicles left unattended and without a proper locking device, Richardson v. Ham, 285 P.2d 269, 270–72 (Cal. 1955). After all, one case does not control another when "the kinds of foreseeable intervening conduct by third parties as well as the risks created by such conduct" are "materially different" between cases. Richardson, 285 P.2d at 271. At the very least, even if those cases can be read to support Plaintiff's position, they offer no convincing evidence that the California Supreme Court would decide Jane Doe No. 1 differently. Therefore, applying Jane Doe No. 1, as we are required to do, I would affirm the summary judgment for Uber.

APPENDIX G

Ninth Circuit – No. 22-16562

S283332

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JANE DOE, Plaintiff and Appellant,

v.

UBER TECHNOLOGIES, INC. et al., Defendants and Respondents.

The request, made pursuant to California Rules of Court, rule 8.548, for this court to decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit, is denied.

Groban, J., is of the opinion the request should be granted.

APPENDIX H

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOE, *Plaintiff-Appellant*, v. UBER TECHNOLOGIES, INC.; RASIER, LLC; RASIER CA, LLC, *Defendants-Appellees.*	No. 22-16562 D.C. No. 3:19-cv-03310-JSC ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF CALIFORNIA

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, District Judge, Presiding

Argued and Submitted November 14, 2023
San Jose, California

Filed January 9, 2024

Before: Susan P. Graber, Richard A. Paez, and Michelle T. Friedland, Circuit Judges.

Order

SUMMARY*

Certification Order / California Law

The panel certified the following questions to the California Supreme Court:

1. What duty of care, if any, does Uber Technologies, Inc. owe a rideshare passenger who suffers an assault or other crime at the hands of an unauthorized person posing as an Uber driver?

2. If there is a basis for holding that Uber owed such a duty of care, do the factors delineated in *Rowland v. Christian*, 69 Cal. 2d 108 (1968), counsel in favor of creating an exception to that duty in a category of cases involving rideshare companies and customers harmed by third-party conduct?

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

ORDER

We respectfully ask the California Supreme Court to answer the certified questions presented below because, pursuant to California Rule of Court 8.548, we have concluded that resolution of these questions of California law "could determine the outcome of a matter pending in [this] court," and there is no "controlling precedent."

This case involves the sexual assault of a rideshare passenger by an individual posing as an authorized Uber driver. The issue is whether Uber owed the passenger a duty of care because it created or contributed to her risk of sexual assault at the hands of an imposter driver.

For reasons we discuss below, we certify the following questions:

1. What duty of care, if any, does Uber owe a rideshare passenger who suffers an assault or other crime at the hands of an unauthorized person posing as an Uber driver?

2. If there is a basis for holding that Uber owed such a duty of care, do the *Rowland* factors counsel in favor of creating an exception to that duty in a category of cases involving rideshare companies and customers harmed by third-party conduct?

We recognize that our phrasing of these questions does not restrict the court's consideration of the issues involved and that the court may rephrase the questions as it sees fit. We agree to accept the court's answers.

I.

We briefly summarize the material facts. In August 2018, Plaintiff Jane Doe requested that her boyfriend call her an Uber remotely because her phone had low battery. Plaintiff's phone, however, lost its charge, and she did not receive from her boyfriend the information identifying the authorized vehicle. Plaintiff then entered a car displaying an Uber decal that stopped in front of her. In fact, the driver—Brandon Sherman—was no longer employed by Uber, having been previously terminated for sexually assaulting two female passengers. Nonetheless, he retained and displayed the Uber decals. Sherman proceeded to kidnap and sexually assault Plaintiff, for which he was eventually prosecuted and convicted.

Plaintiff later filed this lawsuit against Uber Technologies, Inc., Rasier, LLC, and Rasier CA, LLC (collectively, "Uber"), alleging that the company was both vicariously liable for the misconduct of its ostensible agent and negligent in failing to keep its riders safe. At the motion to dismiss stage, the district court dismissed the vicarious liability claims but allowed the negligence claims to proceed. The district court ultimately granted Uber's motion for summary judgment on the negligence claims, holding that the negligence theory relevant here had been "foreclosed" by a recent California Court of Appeals case, *Jane Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410 (2022). The district court concluded based on *Jane Doe No. 1* that Uber did not owe Plaintiff a duty of care under California law.

II.

"Certification is warranted if there is no controlling precedent and the California Supreme Court's

decision could determine the outcome of a matter pending in our court." *Kuciemba v. Victory Woodworks, Inc.*, 31 F.4th 1268, 1271 (9th Cir. 2022), *certified question answered*, 14 Cal. 5th 993 (2023). This appeal "not only meets both criteria, but also presents issues of significant public importance for the State of California." *Id.* In particular, the California Supreme Court's answers to the questions presented above will clarify the scope of a merchant's liability in tort with respect to customers who experience foreseeable injury due to third-party conduct. This decision will have especially profound implications for online platform companies, including but not limited to those that, like Uber, provide ridesharing services. In fact, as we note further below, the answers to our questions will directly impact a large number of cases currently pending before state and federal courts in California.

A.

"When interpreting state law, we are bound to follow the decisions of the state's highest court, and when the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises." *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021) (quoting *Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015)). "Decisions of the California Supreme Court, including reasoned dicta, are binding on us as to California law." *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 219 (9th Cir. 2013). By contrast, decisions of the California Courts of Appeal "are persuasive but do not bind each other or us." *Id.* Still, "in the absence of convincing evidence that the highest court of the state would decide differently, a federal court is obligated to follow the decisions of the state's intermediate courts." *In re*

Kirkland, 915 F.2d 1236, 1238 (9th Cir. 1990) (internal quotation marks and citation omitted).

To begin, Section 1714(a) of the California Civil Code provides the "general rule" of duty in California:

> Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

This duty, though broad, has important limits. In particular, it "imposes a general duty of care on a defendant *only* when it is the defendant who has created a risk of harm to the plaintiff, including when the defendant is responsible for making the plaintiff's position worse." *Kuciemba v. Victory Woodworks, Inc.*, 14 Cal. 5th 993, 1016 (2023) (cleaned up) (emphasis added) (quoting *Brown v. USA Taekwondo*, 11 Cal. 5th 204, 214 (2021)).

A corollary of this *misfeasance* principle is that the law "does not impose the same duty on a defendant who did not contribute to the risk that the plaintiff would suffer the harm alleged." *Id.* (quoting *Brown*, 11 Cal. 5th at 214).[1] Thus, when a defendant has

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[1] We note that the California Supreme Court has recently called into question the use of the term misfeasance. *See Brown*, 11 Cal. 5th at 215 n.6 ("Although our precedents have sometimes referred to the distinction between 'misfeasance' and 'nonfeasance,' we now understand this terminology to be imprecise and prone to misinterpretation."). We use the term cautiously here to capture those situations where one's affirmative conduct

"create[d] or contribute[d] to the [plaintiff's] risk of [harm]," the defendant owes the plaintiff a duty of care under Section 1714. *Id.* at 1017. This includes instances of "liability premised on the conduct of a third party," at least where the "defendant had a duty to prevent injuries due to its own conduct or possessory control." *Id.* at 1018 (emphasis omitted).[2]

One California court has recently considered whether Uber owes a duty of care under Section 1714 to the victims of sexual assaults committed by imposter drivers. In *Jane Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410 (2022), the plaintiffs—women who had been abducted and sexually assaulted by assailants posing as authorized Uber drivers—brought negligence claims against Uber, arguing that the company had created or contributed to their risk of harm and thus owed them a duty of care under Section 1714. The court rejected this argument, concluding that Uber did not owe the plaintiffs a duty of care because they failed to "allege[] actions by the Uber entities that created a peril, that is, an unreasonable risk of harm to others." *Id.* at 426 (internal quotation marks and citation omitted). As the court observed, "[a]lthough it is foreseeable that third parties could abuse the platform in this way, such crime *must be a 'necessary component'* of the Uber app or the Uber entities' actions in order for the Uber entities to be held liable, absent a special relationship between the parties." *Id.* at 415 (emphasis added). Because "[t]he

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creates or contributes to the risk of harm to another, such that a duty of care arises under California law.

[2] The resulting duty of care can be narrowed or excepted "when supported by compelling policy considerations," *Kuciemba*, 14 Cal. 5th at 1021, as determined upon analysis of the factors delineated in *Rowland v. Christian*, 69 Cal. 2d 108 (1968).

violence that harmed the Jane Does—abduction and rape—is not a necessary component of the Uber business model," the court held Uber owed no duty of care to the Jane Does. *Id.* at 427–28. The California Supreme Court later declined to review or depublish the decision.

Relying in significant part on *Jane Doe No. 1*, the district court determined that Uber did not owe Plaintiff a duty of care. *See Doe v. Uber Techs., Inc.*, No. 19-CV-03310-JSC, 2022 WL 4281363, at *2 (N.D. Cal. Sept. 15, 2022) (concluding that each of Plaintiff's legal theories was "foreclosed" by *Jane Doe No. 1*). Specifically, the court adopted and applied *Jane Doe No. 1*'s "necessary component" test, determining that none of Plaintiff's various legal theories survived. *Id.* at *4. As a result, "even drawing all reasonable inferences from the evidence in Plaintiff's favor, Uber did not have a duty under California law to Plaintiff." *Id.*

While this appeal was pending, however, the California Supreme Court decided *Kuciemba v. Victory Woodworks, Inc.*, 14 Cal. 5th 993 (2023), a case that calls into question whether the court would decide the issue presented in *Jane Doe No. 1* similarly. In *Kuciemba*, the defendant had violated a county health order by transferring employees who had been exposed to COVID-19 to a different worksite. As a result, an employee had contracted COVID-19, which he later transmitted to his wife. The question presented in *Kuciemba* was whether the defendant owed the employee's wife a duty of care under Section 1714 because it had created or contributed to her risk of harm.

The *Kuciemba* court concluded that the defendant did owe the employee's wife a duty of care because it had "created a risk of harm by violating a county health order designed to limit the spread of COVID-

19." *Id*. at 1018. More precisely, the plaintiffs had plausibly alleged that "[the employee's wife] was harmed by [the defendant's] *own* misconduct in transferring potentially infected workers to [the employee's] jobsite." *Id.* at 1017. Thus, the court concluded that the plaintiffs' allegations "raise[d] a claim that [the defendant] violated its obligation 'to exercise due care in [its] own actions so as not to create an unreasonable risk of injury to others.'" *Id.* at 1018 (citing *Lugtu v. Cal. Highway Patrol*, 26 Cal. 4th 703, 716 (2001)). "The fact that the alleged violation resulted in injury beyond the workplace, when the contagion was spread by an innocent third party, [did] not change the analysis." *Id.*

This analysis appears to conflict with the "necessary component" test applied in *Jane Doe No. 1.* Although the plaintiffs in *Kuciemba* alleged that the defendant had created the wife's risk of harm, the California Supreme Court did not apply a "necessary component" test to the defendant's conduct. *Id* at 1017. Instead, the court expressly stated that the "proper question . . . [was] whether the defendant's 'entire conduct created a risk of harm' to the plaintiff." *Id.* (quoting *Brown*, 11 Cal. 5th at 215 n.6). Moreover, it did not matter that the defendant was not the "immediate cause" of the plaintiff's harm, for an "exclusive focus on causation in this context [was] inconsistent with [the court's] case law." *Id.* The court accordingly rejected arguments that the defendant needed to have "created the virus itself to owe a duty of care" or "use[d] the . . . virus in its business or obtain[ed] any commercial benefit from it." *Id* at 1019. Such arguments did not "exempt [the defendant] from the default duty to use due care in its operations to avoid foreseeable injuries," including the virus's transmission from an employee to his household. *Id.*

In addition, and further increasing our doubt that the California Supreme Court would agree with the analysis in *Jane Doe No. 1*, we are aware of no other California court that has followed that decision's reasoning. In fact, the only court to have considered the decision at all has declared that the "necessary component" test's application is unconvincing. *See Hacala v. Bird Rides, Inc.*, 90 Cal. App. 5th 292, 318 n.11 (2023) (observing the court was "not convinced that [the "necessary component" test] is relevant to the first step of the duty inquiry" (citation omitted)).

In summary, no "controlling precedent" resolves whether Uber owed Plaintiff a duty of care, and we are in doubt as to the answer the California Supreme Court would give to this important question of California law. Moreover, and by extension, no California court has yet considered whether public policy favors creating an exception to such a duty under a *Rowland* analysis. The ultimate answers to these questions, however, will have significant economic and policy impacts on the State of California. They therefore readily meet the "high standard for certification" this court has previously required. *Gantner v. PG&E Corp.*, 26 F.4th 1085, 1090 (9th Cir. 2022); *see also Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003) (observing that certification is invoked "only after careful consideration" and is "reserved for state law questions that present significant issues"). Indeed, as noted above, this case will 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. In fact, a remarkable number of pending cases—coordinated in federal multi-district litigation (MDL) and California Judicial Council Coordination Proceedings (JCCPs)—will be directly affected by the answers to our questions. *See In re Uber Techs., Inc., Passenger*

Sexual Assault Litig., No. MDL 3084, 2023 WL 6456588, at *1 (J.P.M.L. Oct. 4, 2023) ("Uber MDL") (MDL before the Northern District of California involving plaintiffs who allege that "Uber failed to implement appropriate safety precautions to protect passengers, and that plaintiffs suffered sexual assault or harassment as a result");[3] Order Granting Petition for Coordination and Request for a Stay at 2, In re: Uber Sexual Assault Cases, No. CJC21005188 (Cal. Super. Ct. Dec. 9, 2021) ("Uber JCCP") (coordinating "actions aris[ing] out of Plaintiffs' use of the Uber app resulting in alleged sexual assault . . . by their Uber driver");[4] Court's Ruling and Order re: Petition for Coordination at 2, In re: Lyft Assault Cases, No. CJC20005061 (Cal. Super. Ct. Jan. 8, 2020) ("Lyft JCCP") (coordinating actions where "Plaintiffs were Lyft passengers who were sexually assaulted by sexual predators driving for Lyft").[5] We thus conclude that "the spirit of comity and federalism dictates that California's courts be offered the opportunity to answer [the certified questions] . . . in the first instance." *Kuciemba*, 31 F.4th at 1273 (internal quotation marks and citation omitted).

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[3] The Uber MDL originally consisted of 22 actions. As of December 1, 2023, the MDL consisted of at least 182 actions. Further, and as recognized by the Judicial Panel in its original order, a significant number of these actions arise out of California and will thus be determined according to California state law. *See In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, No. MDL 3084, at *2 (observing that 62 of the 79 actions initially noticed by the Judicial Panel when rendering its order were pending in the Northern District of California).

[4] The Uber JCCP originally consisted of 86 cases. As of September 27, 2023, the JCCP consisted of at least 234 cases.

[5] The Lyft JCCP originally consisted of 15 actions. Like the Uber MDL and Uber JCCP, it has continued to accumulate add-on cases.

B.

In addition, "[r]esolving [these questions] will dispose of this appeal." *Id.* As discussed above, the district court concluded that, "under [*Jane Doe No. 1*], even drawing all reasonable inferences from the evidence in Plaintiff's favor, Uber did not have a duty under California law to Plaintiff." *Doe*, No. 19-CV-03310-JSC, 2022 WL 4281363, at *4. If this holding was correct, the district court's ruling on Uber's motion for summary judgment would likely be affirmed. If this holding was not correct, the district court's ruling must be reversed, and the suit allowed to proceed. Thus, the answers given by the California Supreme Court will dispose of this appeal currently pending before the Ninth Circuit. We respectfully request that the court answer the questions presented in this order.

III.

The names and addresses of counsel are:

For Plaintiff-Appellant Jane Doe: Matthew D. Davis, Sara M. Peters, Andrew P. McDevitt, Walkup, Melodia, Kelly & Schoenberger, 650 California Street, 26th Floor, San Francisco, CA 94108; Tiffany J. Gates, Law Offices of Tiffany J. Gates, PMB 406, 3940 Broad Street, Suite 7, San Luis Obispo, CA 93401.

For Defendants-Appellees Uber Technologies, Inc., Rasier, LLC, and Rasier CA, LLC: Julie L. Hussey, Perkins Coie LLP, 11452 El Camino Real, Suite 300, San Diego, CA 92130; Gregory F. Miller, Perkins Coie LLP, 1201 Third Avenue, Suite 4900, Seattle, WA 98101.

Plaintiff-Appellant Jane Doe should be deemed the petitioner if the California Supreme Court agrees to consider these questions. *See* Cal. R. Ct. 8.548(b)(1).

IV.

The Clerk of this court is hereby directed to file in the California Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, copies of all relevant briefs and excerpts of record, and an original and ten copies of the request with a certification of service on the parties, pursuant to California Rules of Court 8.548(c) and (d).

This case is withdrawn from submission. Further proceedings in this case before our court are stayed pending final action by the California Supreme Court. The Clerk is directed to administratively close this docket, pending further order. The parties shall notify this court within fourteen days of the California Supreme Court's acceptance or rejection of certification and, if certification is accepted, within fourteen days of the California Supreme Court's issuance of a decision.

IT IS SO ORDERED.

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JANE DOE, Plaintiff, v. UBER TECHNOLOGIES, INC.; et al., Defendants.	Case No. 19-cv-03310-JSC **ORDER RE: UBER'S MOTION FOR SUMMARY JUDGMENT** Re: Dkt. No. 220

Jane Doe brings a negligence claim against Uber and its wholly owned subsidiaries Rasier, LLC and Rasier CA, LLC (collectively "Uber") arising from an assault by a former Uber driver posing as a current Uber driver. The Court previously dismissed Plaintiff's tort claims based on ostensible agency and her common carrier negligence claim, but allowed her negligence claim to proceed under a misfeasance theory. (Dkt. No. 41.) Since that time, the California courts have issued a series of rulings regarding the scope of negligence claims under California law. *See, e.g.*, *Brown v. USA Taekwondo*, 11 Cal. 5th 204, 209 (2021), reh'g denied (May 12, 2021); *Jane Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410 (2022), reh'g denied (Aug. 24, 2022). Following the latest of these decisions, which likewise involved a claim of negligence against Uber based on injuries caused by third-party criminal acts, Uber filed the now pending motion for summary judgment arguing that Plaintiff's negligence claim is foreclosed as a matter of law. (Dkt. No. 220.) Having considered the parties' briefs and

the relevant legal authority, and having had the benefit of oral argument on August 30, 2022, the Court GRANTS the motion. Plaintiff's negligence claim fails as a matter of law because Uber did not own her a duty of care.

BACKGROUND[1]

On August 18, 2018, Plaintiff, who had been out shopping by herself all day in the San Francisco bay area, asked her boyfriend to call an Uber for her because her phone battery was dying. He did so and sent Plaintiff a message through WhatsApp with the license plate information for the Uber ride he ordered on her behalf. Plaintiff's phone ran out of battery before she received the license plate information. Shortly thereafter, a vehicle with an Uber decal pulled up to where Plaintiff was waiting and she got into the vehicle believing it was the ride her boyfriend requested. It was not. The vehicle was driven by Brandon Sherman, a former Uber driver, who had been deactivated from the Uber platform two months earlier after two separate complaints that he had sexually assaulted passengers. Sherman drove Plaintiff to a remote location, raped and strangled her. He was subsequently arrested and convicted of kidnapping, strangulation, and witness intimidation and sentenced to 11 years in prison.

DISCUSSION

Uber insists that Plaintiff's negligence claim fails because Uber did not owe her a duty of care to protect her from injuries caused by third-party criminal acts.

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[1] The underlying facts are largely undisputed, but as this is Uber's motion for summary judgment, the Court draws all reasonable inferences in Plaintiff's favor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

Because this threshold legal argument is dispositive, the Court's analysis begins and ends there.

"To establish a cause of action for negligence, the plaintiff must show that the defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury." *Brown*, 11 Cal. 5th at 213 (internal citation omitted). "Recovery in a negligence action depends as a threshold matter on whether the defendant had a duty to use due care." *S. California Gas Leak Cases*, 7 Cal. 5th 391, 397 (2019). However, the duty of care "is not universal [and] not every defendant owes every plaintiff a duty of care." *Brown*, 11 Cal. 5th 204 at 213. Rather, "[a] duty exists only if the plaintiff's interests are entitled to legal protection against the defendant's conduct." *Id*. (cleaned up).

Under California law, "as a general matter, there is no duty to act to protect others from conduct of third parties." *Delgado v. Trax Bar &* Grill, 36 Cal. 4th 224, 235 (2005). Nonetheless, "[u]nder some circumstances, a defendant may have an affirmative duty to protect the plaintiff from harm at the hands of a third party, even though the risk of harm is not of the defendant's own making." *Brown*, 11 Cal. 5th at 215. The California Supreme Court has identified two such circumstances. First, where the parties are in a "special relationship." *Id*. "Relationships between parents and children, colleges and students, employers and employees, common carriers and passengers, and innkeepers and guests, are all examples of special relationships that give rise to an affirmative duty to protect." *Id*. at 216. Second, "where [it] is the defendant who has created a risk of harm to the plaintiff, including when the defendant is responsible for making the plaintiff's position worse." *Id*. at 214 (cleaned up).

This second theory is known as misfeasance. However, "[w]here the defendant has neither performed an act that increases the risk of injury to the plaintiff nor sits in a relation to the parties that creates an affirmative duty to protect the plaintiff from harm . . . the defendant owes no legal duty to the plaintiff." *Id*. at 216. "This rule reflects a long-standing balance between several competing interests. It avoids difficult questions about how to measure the legal liability of the stranger who fails to take affirmative steps to prevent foreseeable harm, instead leaving the stranger to make his or her own choices about what assistance to offer." *Id*. at 220.

Courts thus engage in a two-step inquiry to determine if a duty exists examining: (1) whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect; and if so, (2) whether the policy considerations set forth in *Rowland v. Christian*, 69 Cal. 2d 108 (1968)—the so-called *Rowland* factors—counsel for limiting that duty. *Brown*, 11 Cal. 5th at 209.

A. Special Relationship

Plaintiff contends in her opposition that she had a "special relationship" with Uber sufficient to give rise to a duty of care. Any such theory under the facts here is unsupported by any California law. *See Brown*, 11 Cal. 5th at 214. To the extent Plaintiff describes the "special relationship" as based on her status as "an Uber rider who was a guest or invitee on its platform" (Dkt. No. 236-5 at 30), the Court previously rejected Plaintiff's contention that she had a common carrier/passenger relationship with Uber. (Dkt. No. 29 at 12; Dkt. No. 41 at 4); *see also Jane Doe No. 1 v. Uber Techs., Inc*., 79 Cal. App. 5th 410, 420-21 (2022), reh'g denied (Aug. 24, 2022) (holding that Uber was not in

a special relationship with the Jane Does that would "give rise to a duty to protect the Jane Does against third party assaults").

B. Misfeasance

Plaintiff advances four theories of misfeasance: (1) Uber failed to take any steps to retrieve its decal from Sherman after he was terminated; (2) Uber "shield[ed]" Sherman from criminal investigation and prosecution" which "embolden[ed] him"; (3) Uber "ignor[ed] the data show[ing that] its riders were being assaulted due to their trust in drivers apparently affiliated with Uber" and thus failed to give them "direction and tools to reliably deliver them into safe Ubers"; and (4) Uber allowed rides to be requested on behalf of individuals who did not have a working cell phone. (Dkt. No. 237 at 27.)

Each of these theories is foreclosed by *Jane Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410. In *Doe 1*, the California Court of Appeals considered whether the plaintiffs had adequately alleged that Uber had a duty to protect riders from the criminal conduct of third-parties; in particular, men who, like Sherman here, were posing as Uber drivers and kidnapping and sexually assaulting passengers. The court considered whether the plaintiffs' allegations that "the Uber entities did not just fail to protect or warn the Jane Does, but rather: actively concealed the fake Uber scheme and instances of sexual assault reported to Uber; created a rideshare platform that encourages unsafe behavior, but marketed it as safe; offered a deficient matching system on the Uber app; and made Uber decals easy to obtain without keeping track of their use" demonstrated that Uber created an unreasonable risk of harm to others. *Id.* at 426.

In concluding that these allegations were not sufficient to state a misfeasance claim, the court held that the "crux of the difference between misfeasance and [nonactionable] nonfeasance for purposes of assessing a duty to protect is whether the third-party conduct was a necessary component of the [defendant's] conduct at issue." *Id.* at 427. The court concluded:

> The fake Uber scheme may be a foreseeable result of the Uber business model, and the Jane Does' assailants may not have been able to as easily commit their crimes against the Jane Does, were it not for the Uber app and the Uber business model. But these connections cannot establish that the harm the Jane Does suffered is a 'necessary component' of the Uber entities' actions.

Id. at 427 (quoting *Sakiyama v. AMF Bowling Centers, Inc*., 110 Cal. App. 4th 398, 408 (2003)); *see also Doe 1*, 79 Cal. App. 5th at 427 (explaining that the Uber entities are not alleged to have taken action that stimulated the criminal conduct). Further, "that a defendant's organization or business creates an opportunity for criminal conduct against a plaintiff and thereby worsens the plaintiff's position does not render such criminal conduct a necessary component of the organization's actions—even when that conduct is foreseeable. Providing such an opportunity does not constitute misfeasance triggering a duty to protect." *Id.* at 428-29.

The *Doe No. 1* court likened the plaintiffs' allegations to those in *Sakiyama v. AMF Bowling Centers, Inc*., 110 Cal. App. 4th 398 (2003). In *Sakiyama*, the court found that while it was foreseeable that

"promoting and producing the all night drug infested rave to teenagers" was "sufficiently likely to result in auto accidents which would injure both rave attendees and members of the general public," AMF did not owe the plaintiffs—minors who were injured in a car accident after the rave and the estate of two minors killed in the car accident—a duty of care. *Id*. at 407. The court reasoned that "[v]irtually any consequence of an all-night party attended largely by teenagers was foreseeable," but the question was whether the resulting accident was "a necessary component" of the rave. *Id*. at 407-08. In concluding that it was not, the court compared hosting a rave to "many commonplace commercial activities" such as "bars and restaurants [which] are open late and provide patrons with the opportunity to drink alcohol, become intoxicated, and then drive" and collected cases refusing "to hold business owners and hosts in these situations liable for negligence." *Id*. at 409.

Sakiyama distinguished the conduct there from that alleged in *Weirum v. RKO Gen., Inc*., 15 Cal. 3d 40, 48 (1975), wherein the California Supreme Court held that a radio station could be liable for negligence after it broadcast a radio contest which encouraged listeners to search for and find a popular radio disc jockey who was traveling to various locations around Los Angeles in a conspicuous red automobile, and the first person to find the disc jockey and fulfill a particular condition would win a cash prize. *Id.* at 44. Two teenage drivers, racing to find the disc jockey, forced another car off the road, killing the driver whose estate brought wrongful death claims. *Id*. at 45. *Sakiyama* rejected any parallels between the two cases, focusing on the fact that liability in *Weirum* arose out of the radio station's active involvement in the dangerous activity. While there were dangers inherent in

having the rave, these dangers were not encouraged by the defendant in *Sakiyama*. *Sakiyama*, 110 Cal. App. 4th at 408. To the contrary, the defendants "took numerous steps to discourage and prevent drug use. And, although the party lasted all night, the attendees were not required to stay until they were too tired to drive home," *Sakiyama*, 110 Cal. App. 4th at 408, whereas the giveaway contest in *Weirum* was "a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit." *Weirum*, 15 Cal. 3d at 48.

Doe No. 1 drew from both *Weirum* and *Sakiyama* when it concluded that the question was not whether the fake Uber scheme was a foreseeable consequence of its business model, but whether the resulting harm was "a necessary component" of the business model. *Doe No. 1*, 79 Cal. App. 5th at 427 (citing *Melton v. Boustred*, 183 Cal. App. 4th 521, 535 (2010). *Doe No. 1* adopted *Melton's* reasoning that "the crux of the difference between *Weirum* and *Sakiyama* is this: In *Weirum*, 'hazardous driving by teenagers was a necessary component' of the conduct at issue, whereas in *Sakiyama*, 'the rave party was simply a party attended by teenagers.'" *Melton*, 183 Cal. App. 4th at 534. (internal citations omitted). *Melton* rejected a negligence claim brought by individuals who were beaten and stabbed by unknown individuals at a party at the defendant's house which had been advertised on a social networking site. *Id*. at 527. Because the defendant there "took no action to stimulate the criminal conduct" and "[t]he violence that harmed plaintiffs [] was not 'a necessary component' of defendant's MySpace party," there was "no basis for imposing a legal duty on him to prevent the harm inflicted by unknown third persons." *Id*. at 535.

This reasoning dispenses of Plaintiff's misfeasance theories. Plaintiff's first and third theories of liability—that Uber failed to retrieve the Uber decal from Sherman and that Uber has been aware of instances of riders being assaulted by Uber drivers for years, but has not given riders tools to protect themselves—were expressly considered and rejected by *Doe 1*. *See Doe No. 1*, 79 Cal. App. 5th at 426 (rejecting argument that "made Uber decals easy to obtain without keeping track of their use."); *id*. at 427 (finding that the harm alleged did not "become a necessary component of the Uber business model because the Uber entities marketed the Uber app as safe to use, refused to cooperate with sexual assault investigations, or concealed sexual assaults related to the use of the app [because e]ven accepting such allegations as true, the Uber entities still are not alleged to have "[taken] . . . action to stimulate the criminal conduct") (*quoting Weirum*, 15 Cal. 3d at 48).

While Plaintiff's other two theories are slightly more nuanced than those pled in *Doe No. 1*, neither her theory that Uber emboldened Sherman's actions nor her theory that Uber owed her a duty of care because it allowed rides to be requested for individuals without a working cell phone, support a finding that Sherman's conduct was "a necessary component" of Uber's business, or that Uber stimulated Sherman's criminal conduct such that Uber owed Plaintiff a duty of care. Further, Plaintiff's theory that Uber somehow emboldened Sherman by shielding him from criminal prosecution for the first two reports of sexual assault ignores that Uber terminated Sherman from the Uber app after the second report. Just as the defendant in *Sakiyama*, Uber took steps to reduce the risk of harm. *Sakiyama*, 110 Cal. App. 4th at 408 ("AMF did not promote drug use; in fact, it took

numerous steps to discourage and prevent drug use."). Likewise, that Uber allowed individuals to order rides for individuals without a working cell phone is untethered to the criminal conduct here; that is, that individuals can order rides for others through the Uber app does not encourage, promote, or relate to Sherman's criminal conduct.

Thus, under *Doe No. 1*, 79 Cal. App. 5th at 427, even drawing all reasonable inferences from the evidence in Plaintiff's favor, Uber did not have a duty under California law to Plaintiff.

C. This Court is Bound by *Doe 1*

"When interpreting state law, we are bound to follow the decisions of the state's highest court, and when the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises." *Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015) (cleaned up). Federal courts sitting in diversity, "will ordinarily accept the decision of an intermediate appellate court as the controlling interpretation of state law, unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." *Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1124 (9th Cir. 2021) (internal citations and quotation marks omitted). "This is especially true when the supreme court has refused to review the lower court's decision." *Franklin v. Cmty. Reg'l Med. Ctr.*, 998 F.3d 867, 871 (9th Cir. 2021).

The Court does not find "convincing evidence" that the California Supreme Court likely would not agree with *Doe 1's* reasoning. Plaintiff's insistence that *Brown*, 11 Cal.5th 204, 214 n.5 (2021), "reiterated the general, well-established rule that the duty of care

includes a duty to protect or warn when one's actions create or increase a risk that others will be injured, whether directly or by third parties" (Dkt. No. 236-5 at 23), fails to persuade. *Brown* instead emphasized the general "no duty to protect rule" and its limited exceptions, and held that the defendant Olympic Committee did not have a duty to protect the plaintiff children from their coach's criminal conduct. *Brown*, 11 Cal.5th at 212-13.

Lugtu v. California Highway Patrol, 26 Cal. 4th 703, 717 (2001), best supports Plaintiff's argument. There the court held that "under California law, a law enforcement officer has a duty to exercise reasonable care for the safety of those persons whom the officer stops, and that this duty includes the obligation not to expose such persons to an unreasonable risk of injury by third parties." *Id*. at 718. That is, the duty arises where the law enforcement officer intercedes and his "affirmative conduct" puts the plaintiff in a position that makes he or she more vulnerable to a risk of injury by third parties. *Id*. at 717. Plaintiff argues that *Doe 1* got it wrong by holding that Uber had to have caused the criminals conduct in order to have a duty of care. As Plaintiff correctly notes, in *Lugtu* the officer did not encourage the third party to strike the plaintiffs' vehicle; nor was the third party's conduct a necessary component of the officer's conduct. Uber responds that *Lugtu* must be limited to the law enforcement context where the defendant—a police officer—has special authority to direct the plaintiff's conduct. While *Lugtu* could be read to support Plaintiff's position, given its context, it is not convincing evidence that the California Supreme Court would likely disagree with *Doe 1*.

Plaintiff's reliance on *Richardson v. Ham*, 44 Cal. 2d 772, 777 (1955), and *McEvoy v. American Pool Corp.*, 32 Cal.2d 295 (1948), is equally unavailing. Neither involved the duty to protect from third-party criminal conduct and both arose under unique factual circumstances not present here. *See Richardson*, 44 Cal. 2d at 777 (holding that absent special circumstances, the owner of a motor vehicle owes no duty to remove the keys from a vehicle to protect third parties from the negligent acts of a thief); *McEvoy*, 32 Cal.2d at 295 (discussing an employer's duty to warn employees regarding the inherently dangerous nature of the chemicals that the employees carried in their vehicles).

In sum, this Court does not analyze the duty question on a blank slate. As a federal court sitting in diversity, the Court is required to follow the "on all fours" opinion of the California Court of Appeals absent convincing evidence that the California Supreme Court would not follow it. The Court does not find such convincing evidence. Accordingly, as a matter of law, Uber did not owe Plaintiff a duty of care and thus Uber is entitled to judgment in its favor on her negligence claim.

CONCLUSION

For the reasons discussed above, the Court GRANTS Uber's motion for summary judgment. There is no dispute that Plaintiff was the victim of a heinous crime. But California law does not provide a basis to hold Uber liable for her injuries.

Plaintiff's second motion to file under seal portions of her opposition brief and the exhibits thereto is granted as to the redactions set forth in Uber's supporting declaration. (Dkt. No. 245.)

This Order disposes of Docket Nos. 220, 231, 236.

The Court will enter judgment by separate order.

IT IS SO ORDERED.

Dated: September 15, 2022

/s/ Jacqueline Scott Corley
JACQUELINE SCOTT CORLEY
United States District Judge

APPENDIX J

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOE, *Plaintiff-Appellant,* v. UBER TECHNOLOGIES, INC.; RASIER, LLC; RASIER CA, LLC, *Defendants-Appellees.*	No. 22-16562 D.C. No. 3:19-cv-03310-JSC ORDER

Filed January 13, 2025

Before: Susan P. Graber, Richard A. Paez, and Michelle T. Friedland, Circuit Judges.

Order

ORDER

The majority memorandum disposition filed on August 8, 2024, is hereby amended. The dissent has not been amended. The amended memorandum will be filed and the dissent re-filed concurrently with this order.

With the filing of the amended memorandum, the petition for panel rehearing (Dkt. 87) is DENIED. Judge Graber voted to grant the petition.

A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc rehearing. Fed. R. App. P. 40(c). Judges Gould, Miller, and VanDyke did not participate in the deliberations or vote in this case. Appellees' petition for rehearing en banc (Dkt. 87) is thus DENIED. No further petitions for rehearing shall be filed.