Brooke Peery: Whenever you're ready, Brian.

Brian: Okay. Welcome to the California Advisory Committee to the US Commission on Civil Rights. We are going to get started with a roll call of the members. I'm just going to go down the list. Please acknowledge if you are here. Clare Pastore.

Clare Pastore: Here.

Brian: Daniel Ortner.

Daniel Ortner: Here.

Brian: Ramone Schwarzschild. Rachel Sigman.

Rachel Sigman: Here.

Brian: Velma Montoya. Rogelio Ruiz. Christopher Yost. Jennifer Friedmann. Jennifer? Thought I saw her on.

Jennifer Friedm...: Present.

Brian: Okay. Alison Dundes Renteln.

Alison Renteln: Here.

Brian: Star Parker. Daryl Hunter. Chanee Franklin Minor. Javier Gonzalez. And Gunner Gundersen. Okay. We do have a quorum. Did I miss anybody? All right, let's go ahead and go on with the agenda. Next on the agenda is the testimony from Veena Dubal. Brooke, do you want to do any introduction?

Brooke Peery: No, I'll let Veena introduce herself.

Brian: Okay.

Brooke Peery: Yeah, go ahead, Veena.

Veena Dubal: Great. Can you hear me? Am I on mute?

Brian: Yes.

Veena Dubal: Okay, great. Well, I want to start by saying thank you so much for this invitation. I'm deeply honored to be here and I thank you all for your service on this important committee. So I'm a professor of law at the University of California, Hastings College of the Law, where I hold the Harry & Lillian Hastings Research Chair and teach the laws of work. In addition to a law degree, I have a PhD from the Jurisprudence and Social Policy Department at the UC Berkeley School of Law. And for over a decade, in my capacity is both a legal scholar and cultural

anthropologist, I've studied the phenomenon of independent contracting, particularly as it relates to precarious work and low income immigrant communities. My scholarship is cited in the California Supreme Court's Dynamex decision, and my research has informed regulatory decisions in both the US and in Europe. Up until quite recently, due to the limitations of existing data sets, academics have had trouble identifying the trends involving contract work.

Veena Dubal: Earlier this month however, because of a unique collaboration between the California Tax Franchise Board and the University of California Berkeley, we now have a more accurate analysis of the prevalence and characteristics of independent contracting for the state, based on all anonymized tax filings from 2014 to '16. And these findings cut through the anecdotal information, to reveal that employment W-2 work is by far the most common way that workers earn a living in the state. In 2016, for example, only 8.6% of workers in California relied on independent contracting as their sole source of income, and only 9.7% relied on a combination of independent contracting and traditional W-2 employment. This includes people like me, who have a secure job as an employee of the state and who received 1099's from freelance writing. During this two year period, there was very little increase in the number of people laboring as independent contractors.

Veena Dubal: The largest increase in independent contracting was in the transportation sector, due in large part to the advent of companies like Uber and Lyft. Transportation, the share of independent contracting worked nearly doubled in this two year period. The report also revealed that, although traditional w-2 work is by far the most common way that workers earn a living in California, independent contractors are overrepresented in low wage professions, including construction, janitorial services, transportation and warehousing. Indeed, transportation and warehousing were sectors in which the highest proportion of firm compensation went to independent contractors. And unsurprisingly, these are industries that are also rife with misclassification. That's the main problem with these statistics. The statistics from this research is not under inclusion in its counting of independent contractors, but over inclusion. The tax data cannot distinguish between employees who have been erroneously and unlawfully treated as independent contractors and those who are true, independent business people.

Veena Dubal: That's the percentage of true, independent contractors is actually much smaller. Data from the following year 2017 to 2018, prior passage of AB5 found that California agencies found nine out of 10 employers that they inspected, were out of compliance with the state's laws against misclassifications, this is again before AB5. So who are the workers laboring in these low income industries in California, which has one of the highest income inequality rates in the nation? These workers laboring without access to the minimum wage, overtime, unemployment insurance, workers compensation and anti-discrimination protections. Well, according to one study, seven of eight high misclassification occupations are held disproportionately by women and/or workers of color. The

trucking industry, especially port trucking, has disproportionately large numbers of citations for misclassification related wage theft. In the janitorial industry, the franchise model has been identified as a source of misclassification in several high profile lawsuits.

Veena Dubal: And as you've heard in other testimonies, widespread misclassification also exists in the construction industry. According to the US Department of Labor, as many as 30% of employers misclassify their workers, perhaps more. The California Supreme Court unanimously adapted the ABC Test in Dynamex and the California legislator codified it in AB5, because the text makes it much harder to evade the law. Almost all the companies and entities discussed at previous hearings, including Uber, newspaper companies and translation companies, lost cases under the Borello Test. But the ABC Test makes the enforcement and application of employment laws more straightforward, and it makes it more difficult for intransigent companies to use court decisions to find new ways to misclassify their workers. This is a phenomenon I've written about in some depth, that I direct you to my article in the Wisconsin Law Review, Winning the Battle, Losing the War, if you wish to know more.

Veena Dubal: Importantly, the ABC Test does not limit the ability of any individual to work as a contractor or to act as their own business. This is still perfectly legal in every industry, but if a company is in the business of providing a service, it cannot rely on a workforce of contractors. Someone who wants to market their own services as a translator, or as a caregiver is free to contract directly with the recipient of those services. But companies acting as middle men, for example, those that dispatch translators as contractors, while setting rates and taking a cut, are the companies that are out of compliance with the state's employment laws. As this commission likely knows, hiring entities choose to unlawfully hire their workers as independent contractors and not as employees take on great legal risk, but they also lower their labor overhead by as much as 30%.

Veena Dubal: The downstream effects of misclassification are not limited to the workers and their families who do not benefit from the basic protections of the minimum wage and overtime. They also extend to hurt both law abiding businesses, many of them small and medium sized firms that can't afford to face lawsuits, who are put at a competitive disadvantage, and taxpayers who end up footing the bill for the necessities of life, like healthcare that are traditionally provided through employment. Indeed, these are the legal and policy reasons that drove the California Supreme Court decision and Dynamex. The test, which is used by more than 20 other states to determine who is an employee for purposes of the minimum wage, unemployment insurance and/or workers' compensation has been in place since the 1930s to deter misclassification. Republican Governor Mitt Romney signed it into Massachusetts law almost two decades ago. Notably, ride hailing companies, Uber and Lyft, are also now challenging the law in that state, threatening to sponsor a proposition similar to Proposition 22 in California.

Veena Dubal: As I mentioned at the top of my testimony, my legal and ethnographic research since roughly 2014 has been on the work experiences of these app deployed service workers in California. And the first many months of the global coronavirus pandemic and lockdowns that followed, the misclassification of these ride hail drivers as independent contractors highlighted the devastating impacts of misclassification on these workers, their families, and on taxpayers. Under California law, ride hail drivers was statutorily considered essential workers, but because of the dramatic drop in demand and their treatment as contractors, if they attempted to work, they would lose, not make money. Like many workers across the country, they turned to unemployment insurance, which they were eligible for under state law. However, as I have documented in an article forthcoming in the South Atlantic Quarterly, their employers, Uber and Lyft, aggressively pointed these workers in the direction of pandemic unemployment assistance, insisting, despite the very clear test, that they were independent con contractors and not employees. The companies never provided wage data to the state, nor did they pay the sum $413 million that they owed in unemployment insurance taxes.

Veena Dubal: And as a result, the low level bureaucrats who handled the unemployment insurance claims of Uber and Lyft drivers systematically rejected them. Weekly remittances for pandemic unemployment assistance under the CARES Act were far lower than under state unemployment insurance, and notably, they came from federal taxes collected from law abiding employers. Giving Uber and Lyft drivers pandemic unemployment assistance amounted to a large financial bailout for these companies. And it did not meet the basic needs of workers. A driver whose gross income working for Lyft was $45,000 in the previous year, for example, was entitled to the full amount of $450 per week, under state unemployment insurance. Under the emergency pandemic unemployment assistance, which was calculated according to net earnings, he received $250. Thus, worker misclassification exacerbated poverty and insecurity for hardworking ride hail drivers and their depends. Many in my research were forced to turn to food banks and charity for survival.

Veena Dubal: So how do these workers spare under non pandemic times? How much exactly an Uber driver makes remains somewhat of an enigma, not only to policymakers, but also to the drivers themselves. Conflicting studies using the same dataset have come up with different answers. The industry sponsored ones, perhaps unsurprisingly, arrive at a much higher average per hour wage, based largely on how drivers overhead is calculated. But even these industry sponsored studies find that some ride hail drivers in high earning markets, earn lower than the minimum wage. Some even lose money. No one in the USA should labor for a large, multinational hiring entity and go home with less money in their pocket than they started their shift with. And this is precisely why we have minimum wage protections. You might have heard or read that the extent data suggests that most ride hail workers want to be independent contractors.

Veena Dubal: To better understand this, I invite you to read my article, An Uber Ambivalence, published in a recent Cambridge University Press edited volume called Beyond the Algorithm. What I found in my extensive ethnographic research is not only that, informal survey questions that arrive at this conclusion are methodologically flawed, but also that this question, do workers want to be employees, is the wrong question to guide policy. Most people do not understand the legal differences between employee status and independent contracting. If you ask workers instead, if they want access to minimum wage protections, overtime protections, unemployment insurance, workers compensation, and protection against discrimination at work, they will almost universally say, yes, I want these protections, but they may say no to the question of whether they want to be considered employees. So how do we explain this? I found that workers are most concerned about scheduling flexibility. This fear arises, not from the letter of the law, but from the misinformation that their employers feed them.

Veena Dubal: There is nothing about employment law that mandates a shift schedule. And in fact, with the great advances in digital technology, it is quite possible to provide even low income service workers, scheduling flexibility and basic work protections. My colleague sociologist, professor Julie Shore, has documented companies in California that have done exactly this since AB5. But instead of using their technologies to advance the future of work and workers, companies like Uber and Lyft invested $223 million in a proposition that carved them and their workers out of the law, excluding a workforce that is made up of almost 70% immigrants and racial minorities, from the basic protection of work laws. California's approach to the work status of ride hail workers, courtesy of Prop 22 is not the norm, but the exception among Western jurisdictions. There is broad, international consensus that platform workers around the world are employees and platforms are ordinary employers.

Veena Dubal: The notable exceptions are Russia, China and California. The Court of Justice of the European Union, for example, has found that a worker is not self-employed if he is unable to independently determine his own conduct in the market. Because ride hail and food delivery workers are entirely depend on the principle hiring entity, they have to accept the pricing policies of the companies for which they labor. They do not have direct access to markets. Forming a client base is in fact unlawful, under their contract terms. The judges at the London Employment Tribunal called the notion that Uber drivers are a mosaic of small businessmen, quote unquote, fairly ridiculous. The UK High Court has found that these drivers are workers, deserving pay for all the time that they spend laboring. Both the Spanish and French Supreme courts have rejected the idea that working for more than one platform at a time, or being able to switch off the app, makes workers self-employed.

Veena Dubal: These courts have decided that the nature of algorithmic control creates a system of stressful subservients. While companies like Uber and Lyft like to tout their workers as being free, these app deployed workers are in many ways,

more controlled than traditional employees. Once recruited, workers are encouraged algorithmic and under threat of deactivation, to accept all requests. If they do not, they can be downgraded in the internal ranking, which then punishes them by allocating them poor rides. The exact location of drivers and consumers is closely monitored and recorded, used we believe, to predict mobility and consumption patterns.

Veena Dubal: Yet the address of the consumer or the destination of a trip are rarely revealed before a worker accepts the trip. The grim results are unstable working hours, low earnings, well below the average of comparable industries, no sick pay, no overtime, no health insurance and no worker's compensation. All of this in an industry that OSHA has found to be one of the most dangerous in the nation. Laws like AB5 and the enforcement of laws like AB5 are key to countering these disturbing trends, especially as they impact minority communities. Before I end, I encourage this committee to consider that African American civil rights leaders and groups have long championed the growth of good jobs in their inclusion in the nation's worker protections. AB5 is a great achievement in the fight for greater economic equality and inclusion, and should be heralded as such. I'm happy to take questions.

Brian: Thank you very much. We appreciate that. Do any committee members have any questions for Veena? Let's start with Clare.

Clare Pastore: Thank you, Veena. The study that you mentioned at the beginning sounds brand new, is that right?

Veena Dubal: It is.

Clare Pastore: Maybe you already have linked to that in your written testimony or something, but I'd sure like to see that, can you-

Veena Dubal: Yes, I will send it to you. It literally, just came out last week and I will send it to you along with a bunch of other research that I've cited too.

Clare Pastore: That'd be great. And if you can also, I've seen several of them, but not all of them. If you could also link to your own work that you're putting us to.

Veena Dubal: Sure.

Clare Pastore: I think that would be really helpful. So Brian, is it okay if I ask a question? I feel like that was housekeeping, but if you think that's double dipping, we can go on to second.

Brian: No, it's okay. Go ahead.

Clare Pastore: Okay, thanks. I wonder whether there is any jurisdiction that has found that these platform drivers or other platform workers are not employees. I'm aware,

and you mentioned places that have found that they are, you mentioned Russia and China. Are there any other jurisdictions that have accepted the idea that they're not employees?

Veena Dubal: In the US, no. So except for, in a number of states in the South, where very early on, the companies went to the legislature and got the legislature to pass statute saying that they're independent contractors from the very beginning, there are about nine states in the South that are like that. But what is remarkable is that, through arbitration agreements and settlements, that companies have been really good about keeping any sorts of decisions from being made at a judicial level. And so in the US, there are no conclusive, judicial decisions, finding them to be independent contractors. There are, for example, in the Philadelphia, I'm sorry, the Pennsylvania Supreme Court has found them to be employees for purposes of unemployment insurance. And the same is true for the New York Supreme Court, but otherwise, there haven't been public decisions.

Veena Dubal: It's notable though, in California, even prior to the passage of AB5, the EDD was treating these workers as employees under the Borello Test. That was their analysis that these were employees, but it just wasn't enforced in a way that actually changed how the companies did business. And part of the reason that it hadn't been enforced is because, the state was really wary of going up against well financed, well lawyered companies. And some of my interviews with state regulators, I was told, we don't have resources to be papered by their lawyers, essentially. And so, part of what Massachusetts has found, and certainly California has found, and all these other 20 states that have the ABC Test has found is that, it's much easier to enforce the ABC Test, because the problem as I've written about with the control test, is that it's really quite subjective, like with the multi-state litigation that FedEx endured for many years, you have the Ninth Circuit saying these FedEx home delivery drivers are very clearly, employees.

Veena Dubal: And then, you have the DC Circuit saying, under the NLRA, they are very clearly independent contractors, and these are the same sets of workers and the same sets of facts. And so the idea again, was to standardize the test so that employers businesses can be on notice, this is a very clear test for employment status. And so that the state could also step in and say, look, we have the power to enforce these regulations, it's very clear. And that's precisely what they did after the coronavirus pandemic and after actually, thousands of drivers filed wage claims with the State of California, alleging this classification, the California AG, as you know, moved forward with the city attorneys of large cities in California to sue the companies for misclassification, and a California judge, an appellate judge affirmed that they were in fact employees, but just days later, the voters pass Proposition 22.

Brian: Thank you very much. Daniel, did you have a question?

Daniel Ortner: Yes, I did. Thank you for your testimony. I wanted to ask about the B Prong of the ABC Test, or of the law. It seems like the B Prong is what is creating a lot of the problems. The business, the work has to be different from the person that's hiring you. It's creating a lot of the problems for journalists, for a lot of the creative types that we heard from in the previous session. And so I wonder, you said people can be independent contractors, as long as they're working directly with the clients. It seems like that's disconnected from the reality of how a lot of these businesses actually operate. And I wonder, couldn't you get all the benefits of the tighter restrictions on businesses that control their employees, without hurting creative types that rely on contracting with different employers of the type like journalists do? I just wonder your thoughts on the necessity of the B Prong and whether there are alternatives that could better protect the independent contractors that are being affected by the B Prong, in particular?

Veena Dubal: Yeah. Thank you, commissioner Ortner. I think that's a really good question. I think that it is the B Prong that precisely captures the misclassification. And as a result of some industries, like the creative industries, being made up primarily of independent contractors or a large percentage of them being made up by independent contractors, the study that I referenced, actually, I would pull it up right now, speaks to whether or not this is actually the reality, but in those contexts, AB5 actually facilitates a business to business exception. So if you actually are a true business person and not a middle man, it shouldn't impact how you do work. I think, and this is my conjecture based on what I've observed, I think that there has been a lot of misinformation that has spewed about what AB5 actually does.

Veena Dubal: For example, there are artists in Massachusetts and there are writers in Massachusetts. There are lots of creative types in Massachusetts that, since 2004, have certainly not gone out of business. I think, from what I saw, even I saw a company that essentially is the middle man for psychiatrists who have long been carved out of wage laws, psychiatrists that do moonlighting. I noticed that they sent a letter asking everyone to register as LLCs or whatever, so they didn't have to be liable for AB5. And I thought that was so interesting, because it actually wasn't what was required under the law in order to maintain compliance. I think that there are ways to think about statutory construction, that provide for very strict protections in industries, where workers have very little power, like janitor, construction, transportation, caregiving industries. And then, also create carve outs or exceptions for industries where there is more independent contracting. And actually, I believe that's what the cleanup bill to AB5 actually did.

Veena Dubal: So that said, if you're interested and I can direct your staff to this. My colleague at Tel Aviv University, Guy Davidov, who's a world expert in international labor law recently wrote a piece, suggesting a slight shift to the ABC Test that might be worth looking at, in order to ensure that it isn't over inclusive, but still includes all of the low wage workers that are precisely the people for whom these laws are written.

Daniel Ortner: Just to say, could you include that as well, in what you're sending over? I'd like to see that.

Veena Dubal: Sure. I might have to be reminded there's a lot I'm going to send, but yes.

Daniel Ortner: Yes.

Brian: Veena, just to clarify-

Veena Dubal: I don't know that it's actually been published. Sorry, go ahead.

Brian: Just for clarification, the studies that we've requested that you send over, you mentioned, I think it was Julie Shore. Is that one of them that you were going to send? [crosstalk 00:26:05]

Veena Dubal: Yes, I can send that. Yeah.

Brian: That I was talking about, okay.

Veena Dubal: And her research is published, and I haven't published this, but I've also done, and I can just tell you anecdotally, although it's not in publish, but I've also interviewed home care companies in California since AB5, that now use employee labor and actually like it much better, because it's created a stability of a labor force for them. And instead of people coming and going, coming and going, because the workers have security, they say this has actually been quite good for business.

Brian: Thank you. Any other questions from committee members? Alison, go ahead.

Alison Renteln: Thank you very much for your incisive analysis and fascinating research. I'm also a graduate of the JSP program from back in the day.

Veena Dubal: Oh, my goodness.

Daniel Ortner: 1987. So I'm quite thrilled to see you in action. Very impressed. I wonder if international law could shed any light on this, if there are any ILO conventions or policies from the European Union. And I also meant to ask if Lauren Edelman was your advisor, but I just wondered if there's some comparative law context, since we are discussing which other countries have dealt with this phenomenon?

Veena Dubal: Yes. It's a great question and I'm so pleased to meet you. So the European Commission has just issued new regulations around platform work in particular, making it very clear that these workers are employees, and I'm happy to send those, analysis of those along as well. There's a book that's about to be published by my colleagues, Valerio De Stefano, and Antonio Aloisi, originally published in Italian, but they're just doing a translation to be released by

Rutledge this summer, that offers all the comparative analysis. It's interesting. It's a similar situation all over the world, where you have these companies engaging in regulatory arbitrage, and then it being allowed in most places, with the exception of a few states where they were very good about enforcing regulations like Germany, for example.

Veena Dubal: And then, regulators saying, "Oh my gosh, this is terrible. We have all these essentially, migrant workers who are earning less than the minimum wage, getting injured, having to rely on state subsistence and taxpayer money to survive, when they're actually working very long hours." And so, after a whole flurry of regulatory meetings in the European context, there is now some consensus that these are employees both on a judicial consensus, as well as legislative consensus. The response, however, has been really fascinating. For the most part, instead of just directly hiring these workers as employees, they've hired them through staffing agencies. And so, on the one hand, the workers have the protections of the minimum wage and workers comp, et cetera. But the degree of... There's still a liability shield between Uber, for example, and the UK, or Just Eat and Amsterdam, and the workers who are laboring for the company. And yes, Lauren Edelman was my advisor and she's still there.

Brian: Okay. Are there any other questions from committee members? Clare, go ahead.

Clare Pastore: I'm curious whether you could speak to the relationship between, I guess the real pronunciation is Dynamex, but everybody says dynamics now. So I don't know which is a better way to say it, but if AB5 and the subsequent bill 2257 or whatever, if that was repealed tomorrow, the Dynamex decision would still be in effect, right? So-

Veena Dubal: That's correct, but the Dynamex decision or Dynamex decision just applied to wage orders. So it would still be in effect for minimum wage and overtime and all the laws in the wage orders. What would go away is the protection against discrimination at work, workers compensation and unemployment insurance, primarily. Among other things, but those are the primary things. But the difficulties for employers, especially law abiding employers in these scenarios is that, it's very difficult to say, "Okay, well, I'm going to make sure that my workers are paid, are treated as W-2 for purposes of wages, but not for these other purposes." And essentially, employers who can afford it are going to risk the lawsuits, having a worker injured on the job. And then suing to say that they're an employee. And workers that can't afford it, aren't going to do it. And they're going to classify them as employees across the board, which again, creates a real disadvantage for small businesses. And small businesses are the ones that are more likely to actually treat their workers as employees, because they interact with and really a care for the people that they hire.

Clare Pastore: Just to follow up on that. Why is that? Why would there be different standards for wage orders, relating to minimum wage and overtime, and to these other... We have separate tests for workers comp and unemployment comp, that's the problem is that they-

Veena Dubal: This is the huge, more asset employment law, that this is essential to the problem of employment law, that there are so many different tests to determine who is an employee for different rights. And so, there's different tests under the Fair Labor Standards Act. There's a different test under the National Labor Relations Act. Every state has different tests. There is some version of the control test. There is some version of the ABC Test, and there's some version of what's known as the Economic Realities Test that's supposed to look at how economically reliant a worker is, on this particular firm, in order to determine employee status. And having looked at all of these tests and the results and the real inconsistency of the results. What I can say is that, the ABC Test is the most clear, both for employers and for employees. And I think that for California employers, it's really important, I say this as the daughter of small business people, that it's really important to have very clear law about who people are, who the workers are and how they should be classified.

Brian: Thank you very much. Hold on, Daniel. Angelica, I saw your hand go up. Did you have a comment?

Rachel Sigman: No. I'm sorry, Brian. No, I don't. Thank you.

Brian: Okay, no problem, Daniel. Go ahead.

Daniel Ortner: So I did have another question, following off on your last comment and mentioned states like Massachusetts, that have had some version of the ABC standard for wage. I saw that, recently the Massachusetts Supreme Judicial Court said the ABC Test does not apply to at least some aspects of employment law, like the Joint Employment Relationship Standard. I'm wondering, you mentioned Massachusetts, we didn't see massive levels of people losing their jobs or not getting contracts with out-of-state people. What was different in your understanding and under California's application or the strictness of the ABC Test and under AB5, where you have all these horror stories that we've heard, what's causing that, and why is that not being seen then, in these other states? What do you understand is causing the difference?

Veena Dubal: Daniel, I can only conjecture. It's a really good question. And it's one that I thought about for a long time, and this is again conjecture, this is not fact in any way shape or form, but the conclusion that I've come to for myself is that, because AB5 was directly related to how the media understood these platform companies, Uber, Lyft, Instacart, DoorDash, there was a lot of hubub about it. It was very closely watched. And I think a lot of fear arose in a way that it maybe wouldn't have, had there not been such close attention paid to the law as a result of these platform companies. I think in 2004, in Massachusetts, people

weren't watching misclassification because it really only happens in a very small number of industries, because most work is employment work.

Veena Dubal: In the United States, the vast majority of work is W-2 work. And so, again for myself, the only way I can understand it is that, there was hysteria that probably resulted in real job loss, that needed to have occurred, not only because of the cleanup bill, but because you can actually continue to contract as a provider, with clients under the ABC Test, even without the business to business exception. The real problem of course is, if you are a middle man, not just if you are an individual person who's working as a freelancer, as an independent contractor. It's been something that has puzzled me, but I also think that the horror stories that have been articulated are easier to access than the success stories of people who have really benefited from, in construction, janitorial industry, nail salon industries, care taking industries, who have really benefited from the laws protections.

Brian: And just for the record, Rogelio Ruiz is a member of the committee and he has been on with us. I just wanted to note, because I didn't have him here during the roll call. So I just want to acknowledge he's with us. I have a question about, it seems that the benefit to being an independent contractor is largely, that flexibility to set your own hours. It's largely it. And yet, a lot of them would like to have the protections of the workers comp employment laws, wage laws, and all that stuff. Is there a way to marry the two together? Is there a solution that would work?

Veena Dubal: Yes. So I'll just say one thing, when employment laws were first passed during the New Deal era, they were passed to apply to all workers. In fact, there were references to workers who you would traditionally now consider independent contractors, like trucking, taxi insurance salesmen. And then, it was in the late 1940s that independent contractor carve-out was put into these laws, actually over president Truman's veto. So just to say that, people like insurance salesmen, real estate agencies, these are people that until the late 1940s, 1948, '49 really had under the law, were supposedly benefiting from these protections. So there are scenarios in the recent past, when flexibility and protections existed. So limiting flexibility is a business decision, not a legal decision. And I have argued in my writing that, what is amazing about the technological advances of these companies is that in fact, they can provide flexibility and basic protections, because they have such minute data around behavior and around location.

Veena Dubal: And so, it might be something that the California legislature should consider, to think about scheduling flexibility as part of a statutory protection with regard to platform workers, that they can benefit from the protections, and also have scheduling flexibility that they need. I, and Benjamin Sachs at Harvard Law have argued that in fact, even if these companies were forced to hire their workers as employees, that they would probably not move to a shift schedule. We've already seen this in New York, where they have a wage floor by statute. And the

reason is that, they depend on a workforce, a labor market that needs a flexible schedule. So if they start putting people into shift schedule, they're not going to have a workforce. But the other thing to consider is that, it's actually not as flexible as you might believe.

Veena Dubal: So at the beginning of each week, a Lyft or Uber driver actually gets an email telling them if they work during certain hours, and this is based on data from the previous week, if they work during certain hours and in certain places, then they are more likely to have earnings. And so, if they don't work during those time periods, say four to six on a Thursday afternoon, in the financial district, then they're not actually going to be earning any money. And so, there is scheduling flexibility in so much as, if someone is sick, they're not going to be terminated for not coming to work, but less scheduling flexibility in terms of day to day realities. And so, a statutory protection for platform workers that includes scheduling flexibility would be an amazing way to marry the protections of the basic protections with the needs of the actual workforce.

Brian: Go ahead, Clare.

Clare Pastore: I could listen to Professor Dubal talk about this all day, because it's so interesting and you're so knowledgeable. I have a question about, we heard in the last two panels, a lot from journalists and translators and people in industries, some of whom are now statutorily exempt from AB5 anyway, but claiming these job losses and things. And it really strikes me, listening to some of this testimony, that many of those protesting and citing to job loss, even though there isn't lot of data about it, seem to be higher income, more highly educated, and I would venture to guess, less of a minority workforce.

Clare Pastore: And I wonder if you have any insight about that, into the demographic makeup, because of course, our baileywick is enforcing civil rights laws and looking at civil rights implications. So are concerned about whether there is a detrimental effect or discrimination on the familiar basis of race, color, gender, disability, et cetera. And I wonder whether some of the things that are being pointed to, about whether it's journalists or translators or whatever, are really rather far afield from the misclassification, largely affecting workers of color and the job. So I wonder if you could just speak to that a little bit.

Veena Dubal: Yeah. I think that's very true, that the higher income workforce, in terms of creative professionals that Mr. Ortner referenced and that probably you heard from before, have a very different demographic. Just what I've seen anecdotally, it seems like a lot of white women, in particular. And what's interesting, so I have this other piece that you might just be interested in reading called The Time Politics of Digital Piecework, and during the passage of the Fair Labor Standards Act in the New Deal, you saw something very similar. You saw a ton of testimony from women who, the manufacturing companies brought on, who are doing piece work at home saying, "Look, this is so important to me. This is

essentially the only way I can earn, because I have to take care of my kids while I'm doing it."

Veena Dubal: And in that scenario, those women were making just a fraction of what men in the warehouse, or, sorry, not in the warehouse, but in the factories we're making, and they were working much harder, longer days in this scenario, which we're also talking essentially about piece work. It's fascinating to see so much of the testimony again, be women and often the elderly, talking about how they need independent contractor work to get by. And what's sad of course, is that those people are often, again, earning less than journalists who have full-time jobs for media companies. And what's also interesting, of course, is that this is in light of the decimation of journalism as a result of monopolization, the fact that it's much harder now to find a full-time job in journalism.

Veena Dubal: And it's sort of a pathology that has created precarious work. And so, the only people who can survive doing that are often people who have other financial resources, people who maybe have a partner who has a full-time job. And this actually comes out of the data and the study that I'm referencing, a partner who has a full-time job, they're married, but people who are not sole providers for families. And I think there have long been carve outs for true creative professionals under California law. And so, that was another real question I had about the hysteria that I saw that came out of some of the freelance journalism. It wasn't that different from the existing law. Many of them would have failed the Borello Test and in fact, did fail the Borello Test in various lawsuits. And so, again, it's unclear to me why that became the focus, except for that those are the people that have the resources and the time to make their voices heard.

Brian: Great. Thank you very much. We are limited on time. So we're going to go ahead and end this segment Professor Dubal. Thank you very much for your testimony today.

Veena Dubal: It's been a pleasure. Thank you so much for having me. Take good care.

Brian: Thank you so much. And then, if we have any more questions for Professor Dubal, we will do it in writing and send it over to Brooke, and she'll forward it out. So let's go ahead and move on, on the agenda. The next section is to debrief on panels one and two, and then we'll discuss additional suggestions of panelists and go over the Google sheet. Now, Daniel, you have something?

Daniel Ortner: I just had a question. Shouldn't there be time for public comment, similar to the previous panels? It seems analogous, there's speakers, and then there should be time for public comment afterwards. Shouldn't there be? I just don't know why we're doing it differently.

Brian: We do have time for public comment at the end of our meeting. So it will be open for public comment.

Brooke Peery: Yes. So I only have one member of the public in the queue, if anybody is on the call and would like to be added to the queue, just send me a message. But for now, we'll hear from Madeline Rios. Madeline, go ahead.

Madeline Rios: Thank you. I am an independent certified interpreter and translator. I have a large client base within my own industry, and I also have a hearing disability that I overcome through, quite expensive, technical devices. We certified interpreters who are independent. We are well compensated professionals. Most of us are actually minority women. And I want to point out with all due respect that, I believe that Veena Dubal misquoted the actual State of California law regarding certified interpreters and translators, because under AB 2257, particularly at Section 2277, we are allowed to work through referral agencies that market our services. And Ms Dubal, she also mentioned that independent contractor interpreters and translators could directly market our end clients, but that does not correspond to reality in many cases. For example, all of the California government agencies, such as the Air Quality Management District, or even the parole board, they tender their services for all of the interpreting and translating services as a block.

Madeline Rios: So there is no way that I, as a independent contractor, could directly market my services to them. I must work through a middle man to do any of that work. When AB5 passed originally, many of us had significant revenue losses, particularly because of the B Prong. And it was only through the exemption of 2257 that we could regain our ability to work specifically, for such agencies as I just mentioned. Our jobs were often exported to other states and we are very concerned, because if this goes national through something like the PRO Act and if the ABC Test rigidly enforces the B Prong, then we'll be in a situation where our income tax will be on our gross income. We will not be allowed to deduct our business expenses. We could also see that all of certain credits, such as our health insurance credit, which we have to pay ourselves because we work for so many different companies on short term jobs, would be eliminated, and many other business type credits would be eliminated.

Brooke Peery: One minute warning.

Madeline Rios: Okay. And also, when we talk about that, we can have a flexible schedule. As independent contractors, we can do it, we can enforce flexibility. It doesn't depend on whether the employer wants to or not. And the one other thing I want to mention is that, undocumented people without a work permit, cannot work as employees. And so, if they're not allowed to work as contractors either, that affects them and that affects minorities. Thank you.

Brooke Peery: Thank you. Next, we'll be hearing from Karen Anderson. Karen, you have three minutes. Go ahead.

Karen Anderson: Thank you very much. I'd like to address some of the misstatements that I just heard from Veena Dubal. First of all, the ABC Test does limit the ability of an independent contractor to work as a contractor. When she talks about creative industries, in the context of the business to business exemption, the creative professionals have exemptions under the professional services exemption, in the AB5 AB 2257 cleanup bill, but it comes with caveats and fine print. And there's so many different ways that these exemptions do not work for the average independent contractor. Some of them, you can only gain an exemption by jumping through 11 requirements of a referral agency exemption, for example. The B2B has 13 requirements in it. She talked about LLCs. LLCs are not exempt from AB5, solely. There are 12 more requirements that you would have to meet as an LLC in order to bypass the ABC Test, and of AB5.

Karen Anderson: Also, this notion about hysteria, about people losing work and clients. And this has nothing to do with media attention paid to so-called hysteria. Actually, the big picture, collateral damage that has taken place across 600 categories of professions because of AB5, is rarely even covered in the media. The media tends to focus on trucking and writers and Uber and Lyft. And I appreciate the opportunity that this committee has allowed, for at least our voices to be somewhat heard. And as I presented in the panel back on March 8th, so many stories of devastation, like I said, freelance transcriptionists have been wiped off the face of the map in California. There is no exemption for them. That's not hysteria for them.

Brooke Peery: One minute warning.

Karen Anderson: That's absolute job loss. Thank you very much.

Brooke Peery: Great. Next we'll hear from Mike Bradley. Mike, you have three minutes. Go ahead. Mike, we can't hear you. Are you on mute? We still can't hear you. If you're joined on the phone, try pressing *6 and make sure you're unmuted on your own keyboard. All right. And that concludes all the public comment we have for today.

Brian: I noticed there's a hand up for JB McDaniel.

Brooke Peery: Yeah. I messaged JB McDaniel and I haven't heard back from them.

Brian: Okay.

JB McDaniel: Hi, that's me. I didn't get your message. Am I able to comment? Because I'd like to.

Brooke Peery: Sure. Go ahead. You have three minutes.

JB McDaniel: Thank you. Yeah, I was on panel two. You heard my story about journalists. You heard about our federal lawsuit, which is against AB 2257, that Veena Dubal

claims, in a misstatement, that it fixed the business-to-business, that it allows any independent contractor to work in any industry. That is false. There's an entire section in AB 2257, and that's why we're going to the Supreme Court. They're hearing our case in a private meeting, April 1st. And a few of the things it does, it outlaws video journalism for TV stations, documentary films, and theater. So what that means is, if I have a ten second video of a wildfire, I am not allowed to, by law, by the state, to sell that to a TV station or a documentary film maker. Now tell me how that is an independent contractor being able to work in any industry.

JB McDaniel: There are other restrictions that were added. There's a whole section in AB 2257. For her to call this hysteria, for her to put this on older women. And yeah, we are angry about this, because a lot of us have been freelancing for decades and we've been affected by this law and by this research that doesn't take into account what self-employment does, especially as a journalist, that you're able to hold your own copyright to your own work. That's one of the biggest parts of it, that you're able to choose your own retirement plan, that you're able to be a caregiver. All this is in my sworn testimony, in our federal lawsuit and the testimony of all these other journalists as well. So, she seems not to understand the harm this law has done in the state, and not just in journalism, but you've heard it from translators, from transcriptionists. It's across the board. I just heard about this panel, what, a couple of hours ago.

Brooke Peery: One minute warning.

JB McDaniel: And I knew right away, who was going to be on it, let's put it that way. Because, having this full panel, just for one person. This is a neutral commission and I'm a journalist and I'm sorry, but I don't see neutrality. And I want you all to think about that. We had four pro-union people on our panel and two freelancers who are, you've been hearing several times today, are hysterical. This is hysteria. This is not hysteria. This is reality. And all of you-

Brooke Peery: That's your time.

JB McDaniel: Have... Thank you. In closing, all of you have this responsibility. I hope you take it seriously.

Brooke Peery: Thank you. All right, that concludes our public comment portion. I hand it over to Brian.

Brian: Thank you. Okay. Does anybody have any other comments? Our next committee meeting is Friday, April 15th, and we will go ahead and adjourn for today. Thank you guys so much. I appreciate it.

Brooke Peery: Thank you.

Clare Pastore: Thanks everyone.