Getting What You Want
Isn't Always What You Need:

Why California AB5 May Not Be the End-All-Be-All for Models After All

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> [W]e cannot promote healthy images without taking steps to protect the faces of this business . . . Correcting these abuses starts with seeing models through a different lens: not as dehumanized images, *but as human beings who deserve the same rights and protections as all workers*.[1] (emphasis added)

I. **Introduction**

Though the modeling industry's image is one premised on perfection, little actually is. Behind the industry's glamorous allure lies a workforce deprived of basic protections. Even though California's Talent Association Act regulates modeling agencies' licensure and procedural business operations, it is silent as to the rights and protections of models themselves. Indeed, the law deprives models of protection, leverage, delineated rights or consequential means of recourse, facilitating the "standard practice"[2] of their exploitation and mistreatment. The modest regulation of the most powerful of industry players – the modeling agencies–explains why their fierce opposition to the California Legislature's numerous attempts to enact model labor reform, in the end, achieved only minimal success. However, as it happens in politics, the best way through is sometimes around – which is why the success models long sought may lie in the enactment of AB 5, a bill compelling tech transportation/delivery companies to "employ" their independent contractors.[3]

However, "just because you can doesn't mean you should."[4] While in theory, AB 5's application in classifying models as employees achieves the labor reform models sought; in practice, it does so at the expense of undermining the entire industry for several reasons: (1) there is no clear "employer;" (2) the industry's commission based fee structure cannot support an "employee business model;" (3) increased costs associated with having "employees" raises anti-trust concerns in driving out smaller agencies and discouraging competition; and (4) inclusivity and diversity would dissipate as agencies/clients would have to restrict their "employee model" roster to only "it" models, guaranteed sizeable contracts, to stay profitable.

Until AB 5's application to models is legally challenged, the most immediate path to reform lies in the hands of models themselves. Instead of trying to reform the industry as it previously had from the outside-in—which takes money and time they lack—success lies in models capitalizing on their greatest asset—their numbers—to affect change from the inside-out. First, models need education and mentoring to empower and afford them industry leverage. Second, through increased organization and innovative alliances, models, like other artists before them, can compel change by partnering with – instead of against—the industry. Third, encouraging model entrepreneurship will afford models the opportunities for which they are otherwise agency beholden. Finally, heeding the success of Proposition 22, whereby California voters approved tech-based transportation and delivery companies' hybrid business model, which effectively modified AB 5's application to their industry, models should consider the political initiative process to affect similar change.

II. **The Very Nature Modeling Industry Leave Models Unprotected and the Industry Underregulated.**

A. The Modeling Industry's Infrastructure with Agencies' as the Industry Lynch Pins Contributes to It's Dark Side and Reluctance to Evolve

Insiders often describe the modeling world as the "wild west" in its inability to self-regulate.[5] The reason for that is simple: the industry's business infrastructure revolves around and filters through a single industry player: the agencies. This infrastructure, and the under-regulation of the agencies and the industry itself are to blame for the industry's "dark side"[6] for three reasons. First, agencies' industry positioning affords them immense, seemingly unfettered power and influence because every industry player is beholden to them: fashion, cosmetic, advertising and consumer product brand clients rely on them to source models for their advertising or marketing campaigns; while aspiring models clamor to be signed by them, as the employment gatekeepers. Relationships are the key to agencies' power and success –and why self-police when neither your clients nor models, who feel "totally replaceable,"[7] would ever dare whistle blow and jeopardize their precarious positions.

Second, minimal industry accountability further contributes to agency's power and industry positioning. Unlike other contractual agreements, the agency-model representation agreement confers agents with exclusive rights to steer models' careers and the use of her image,[8] without any legal obligation to find them work or pay them.[9] Aspiring models know that "[j]ust like you wouldn't go into a courtroom without a lawyer, you shouldn't represent yourself as a model."[10] As the employment gatekeepers, models are wholly dependent on an agent's discretion to submit their portfolio for clients' consideration, or as to which "go sees" or casting calls to attend.[11] The agent negotiates the model's pay,[12] dictates her schedule, advises the model as to the time and location of the shoot; who they will be working with, the duration of the shoot, as well as what the shoot calls for;[13] and often arranges their transportation or model's travel and accommodations if the shoot is out of town.[14] But, their gatekeeper role only goes so far: though agents can influence a client's hiring decisions, the decision ultimately rests with the client alone.[15] In sum, though the industry affords agencies great power and discretion, they bear little responsibility—or accountability—to those dependent on them.

Finally, the compensation structure further contributes to the industry's grim reality and agencies' adamance against an infrastructure overhaul. As the industry compensation structure affords agents agents dual revenue streams (20% commission each, from <u>both</u> the client[16] and the model on the same model booking), there is little incentive for change. With clients feeding them job opportunities, and a seemingly endless supply of young faces desperate to be signed, agencies have little incentive to seek or endorse reform when they are not subject to oversight.[17] As such, the industry's compensation structure, by its very nature, reinforces modeling agencies' stronghold.

B. <u>Under-regulation of The Industry and Its Power Players Is Also to Blame</u>

Though California promulgated legislation aimed at regulating modeling agencies, namely California Labor Code § 1700 et seq. (the California Talent Agencies Act) [18] its application and breadth are limited in scope, addressing only (a) modeling agency licensure;[19] (2) procedural business requirements and permissible business dealings;[20] and (3) conferring the Labor Commissioner with

oversight and dispute resolution power that is reactive, not proactive in application. [21] While the statute imparts general safeguards as to impermissible licensee or modeling agent conduct,[22] it is devoid of any safeguards or proscriptions against inappropriate workplace conduct and affords models few avenues for recourse.

C. Model's Independent Contractor Classification Deprives Them of Basic Legal Worker Protections and Fosters Industry Wide Abuse at the Hands of Unregulated Industry Players

Legally regarded as independent contractors, models are arguably afforded "inherent flexibility" in setting their work hours and schedule. However, the "attractiveness" [23] associated therewith is something agencies alone tout because "models are not given a choice… In order to book jobs, models must be part of the modeling or talent agency."[24] The harsh reality is that "only the modeling agency benefits by classifying models as independent contractors"[25] because in so doing, modeling agencies skirt otherwise mandatory Labor Code tax obligations (federal, state and social security taxes, workers compensation, minimum wage, unemployment insurance and taxes, access to collective bargaining,[26] guaranteed breaks, maximum work hours,[27] among others) they are otherwise obligated to pay their model "employees." Indeed, this worker classification structure deprives not only the government of significant tax revenue, but models of the safety net most workers enjoy if injured or unemployed.[28]

As independent contractors, models are tasked with ascertaining their state and federal tax liability – which is immensely difficult given how "modeling industry accounting can be quite opaque."[29] Moreover, models, in signing contracts with an agency, confer agents with power of attorney, or the "extraordinary power over a model's finances and career . . . the power to accept payments on behalf of the model, deposit checks and deduct expenses"[30] while essentially disclaiming any fiduciary obligations.[31] Without access to minimum wage,[32] and as "[s]ame-day pay for agency booked gigs are rare,"[33] models wait upwards of 120 – 250 days in some cases, to be paid[34] --for which the agencies fault the client.[35] Worse still, "the culture in the modeling industry is that unless you are asked to be paid, they [the agencies] won't take the initiative to pay you"[36]—and many models are afraid

to ask "because of the power the agency has over their career."[37] Between delays and being paid in trade,[38] because you "can't pay your rent with a tank top,"[39] models find themselves in a "debt hole"[40] that keeps "models in a perpetual state of dependence,"[41] "indentured to their agency." [42]

Models' independent contractor status also deprives models of federal and California Occupational Safety and Health Act protections, which assure safe and healthful working conditions.[43] Without healthy weight guidelines or regulations, the pressure "to fit into the tiny clothes of a famous designer, to lose weight so as to fulfill the demands of the modeling industry, to be chosen for castings, photo-shoots or runway shows . . . can lead to addictions or health problems."[44] Models are told to "go on a Diet Coke and cigarette diet;"[45] or to "eat one rice cake a day. And if that doesn't work, only half a rice cake."[46] Unlike other countries, such as France,[47] Spain[48], Denmark[49] and Israel[50], which established minimum Body Mass Index thresholds and require doctors to certify models as "healthy" before working, no similar policies exist in either in California or in the United States.[51]

Model's physical safety is further jeopardized by rampant workplace sexual harassment. Inappropriate touching and physical and sexual assaults occur routinely during photoshoots.[52] Models are dehumanized when deprived of basic privacy rights, such as being forced to change in front of photographers and others during castings and events.[53] Told where to be, how to dress, how to behave, where to go or not to go, even "model's private lives have been recast as a kind of labor [which] contributes to the devaluation of their work."[54] While many consider it just "part of the job,"[55] even after #MeToo, which spotlighted these issues and bolstered victims' credibility, the power disparity remains.[56] "When exploitation is standard practice, "when you are often the most subordinate worker in the room with no recourse to a human resources department and when compliance and agreeability are prized above all else, modeling, like other low wage work, fosters abuse."[57]

III. The California Legislature's Attempts to Reform the Modeling Industry Through Model Specific Legislation Do Little to Move the Needle.

Recognizing the industry's need for reform,[58] the California Legislature tried, but only modestly succeeded in passing model specific legislation – in large part due to agency opposition. Between 2016 and 2019, the California Legislature introduced three (3) separate bills aimed implementing worker protections for models. The first bill, AB 2539 (2016), mandated[59] that (1) models be classified as employees of the service recipient; and (2) occupational safety and health standards be established to address eating disorders and their prevention, workplace safety, and protection from sexual exploitation.[60] Unsurprisingly, the Association of Talent Agents ("ATA") opposed the AB 2539 on multiple grounds. First, the ATA believed the bill was overarching and contrary to law, as it disregarded "realities of the work environment and unfairly prejudices models . . . who exhibit control over their work and structure their business as independent contractors."[61] Second, it challenged the proposed OHSA standards on vagueness grounds as to what constituted "healthy;"[62] that it impeded First Amendment rights to freedom of expression,[63] and imposed burdensome duties on agencies to monitor models' health – duties that fell outside the scope of their work.[64] Though the bill ultimately passed the Assembly Committee on Labor and Employment, it died in the Appropriations Committee.[65]

Concerned that AB2539 was too far reaching in scope,[66] its successor, AB 1576, abandoned AB 2539's employee reclassification proposal. It instead focused squarely on models' health,[67] seeking still to implement OSHA health and safety standards[68] concerning the prevention of eating disorders. It further required modeling agencies to provide all agency employees, within 30 days of hiring, with sexual harassment prevention and health standards training.[69] Failing too to pass the Appropriations Committee,[70] next came AB 2338, "Talent Agencies: Education and Training Bill"[71] -- the most "watered down"[72] of the three bills. What appeared as an attempt to placate the agencies, AB 2338 abandoned all of the previous bills attempts to codify health standards, proposing only that modeling agencies "make available educational materials regarding nutrition and eating disorders to an adult model artist within 90 days of agreeing to representation by the licensee or agency." Unsurprisingly, AB 2338 passed.[73] Proponents felt it was an effective "compromise" with "important components,"

that could pave the way "to pass …. more complex legislation" in the future.[74] However, in reality, it did little to move the needle; and practically speaking, left models in virtually the same backseat position they found themselves prior to AB 2338's passage, with agencies still at the wheel.

IV. Sometimes the Best Way Through Is Around: Though AB 5 Classifies Models as Employees, Doing So May Upend the Industry.

A. AB 5's Codification of the California Supreme Court's *Dynamex* Holding Adopts the the ABC Test to Determine Whether a Worker is an Employee or Independent Contractor Under California Law

Though models' direct attempts to legislate impactful worker protections proved largely unsuccessful, the California legislature's codification of the California Supreme Court's 2018 holding in *Dynamex Ops. West. v. Sup. Ct.*[75] in AB 5,[76] may have indirectly achieved the reform they sought. In *Dynamex*, the Court applied the "ABC" test to determine whether a delivery driver was an employee or independent contractor per applicable wage order definition.[77] The Legislature adopted *Dynamex*'s ABC test as the applicable legal standard, but broadened its application to apply to all workers,[78] a "legislative fix"[79] so as to "create a clear and consistent definition for employment and raised the working standards for millions of workers"[80] in affording them "minimum wage, paid sick leave, workers compensation benefits, if there are injured on the job, or unemployment benefits if they are laid off, as well as the protection of other workplace healthy and safety rights." [81]

The ABC test presumes that a worker is an employee *unless the hiring entity can prove that all three conditions are met:* (A) the individual is free from the control and direction of the hiring entity, in connection with the performance of the service, both under contract for the performance of service and in fact; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[82] AB 5 excepts numerous categories[83] of workers, including licensed professionals, [84] and other service providers,[85] from the test's application, subjecting them instead to the predecessor *Borello* test[86] and other specified criteria.[87]

B. Under the ABC Test, Models Should Be Classified as Employees

Under the ABC test, models qualify as employees as none of the prongs can be satisfied so to rebut the "employee" presumption. Prong (A) cannot be met because agents and clients control virtually every aspect of a model's finances, career, and work itself. Agents—not models—dictate which "go sees" or casting calls the model attends; and alone determine the jobs for which a model may be considered.[88] Agencies bind models to multi-year, exclusive contracts, some with automatic renewals; and have power of attorney to control all financial aspects of the model's career, including the power to contractually bind them.[89] Indeed, the representation agreement confers agents with a virtual "monopoly"[90] to use of the model's image both during and after the contract period.[91] Similarly, fashion clients also exercise a great deal of control over models, once booked, in dictating what the model wears, every aspect of the model's look, behavior, posing, conduct and schedule; and can hire/fire the model at will.[92] Apart from deciding whether to accept a job or when to take vacation, every aspect of a models' work is subject to outside control[93]—rendering a model an employee under this prong.

The same is true as to Prong (B), as models' work falls squarely within the agency's and clients' usual course of work. Models <u>are</u> the cornerstone of the agency's business as agencies represent models in an attempt to procure them work. Just as agencies need models to earn their commissioned based income and do so only if and when clients book the agency's models for their marketing and advertising campaigns, models are equally integral to clients' business. Central to any company's success and profitability are advertising and marketing campaigns that drive consumer awareness and engagement. These campaigns are premised on the careful selection of models whose look, and aesthetic embody and convey the brand's messaging as the public face of the brand. This inextricability is what ultimately drives sales and plays a huge role in making or breaking the company's ultimate success and profitability. As models' work falls squarely within the marketing and promotional work of the fashion brand, Prong (B) too favors model's employee classification.

Finally, Prong (C) also weighs in favor of an employee designation because there is no way to distinguish or separate a model from her work. They are effectively one in the same: a model's work is how she utilizes her look, persona, presence, physique to convey the brand aesthetic. Though one could argue performing modeling services for various clients could constitute "business activity existing independently of . . . the service relationship with hiring firm,"[94] models' work is transitory by nature; and does not constitute the type of "stable lasting enterprise that survives termination with the hiring firm," which the test requires.[95] Except for the "it" supermodels of the moment, few models have ongoing, guaranteed work with a single client, let alone at all. Most work for a few hours, or for a day or two for a fashion brand; and then go weeks to months without work. Moreover, models' ability to obtain work is wholly dependent on – and not independent of—their agent and the agency clients that book them. Without a separate business or office location, a financial investment in the business' equity or profit scheme; a business license; and most significantly, the ability to contract more one agency at the same time due to their exclusive agency contracts,[96] models cannot be deemed an independent contractor under Prong (C).

In sum, the ABC test's application fails to rebut the presumption that models are employees. Moreover, the fact that neither the statutory language nor any delineated exception expressly or impliedly refers to models bolsters this conclusion.[97] Though various businesses and industries have sued the State of California challenging AB's application,[98] no suit to date involved a model or challenged AB 5's application to the modeling industry. As the ATA has too remained silent on the issue,[99] an argument can be made that AB 5 affords models the employee status they legislatively sought but failed to directly achieve.

C. While AB 5 Seemingly Affords Models the Protections They Seek, Its Application Could Upend the Modeling Industry Because the Current Industry Infrastructure Cannot Support A Model Employee Business Model

AB 5's application to the modeling industry may prove penny wise and pound foolish. Though AB 5 confers employee status, and the accompanying benefits and protections models seek under the

Labor Code, its application to the industry may undermine its very existence for several reasons. First, the current industry infrastructure presents no clear "employer." Models[100] and other U.S. jurisdictions and countries argue[101] that agencies are the natural employer candidate[102] because "the agency selects which models it will represent, chooses which models to send to clients, generally establishes the models' fee after consultation with the client, requires the models to submit completed job vouchers and then directly pays the models their wages"[103] pursuant to their exclusive contracts – as a traditional employer would.[104] Agents' power of attorney and their exclusive control over a model's financial affairs, use of her image, her career's direction and the like via their exclusive contracts provide a constant[105] --an emblematic characteristic of an employer-employee relationship.

On the other hand, one can argue the client is better suited to employ the model. While agents act only as "middlemen"[106] in contracting on behalf of the model with the client, for the model's services[107] it is the fashion client that "takes control over the assignment"[108] with regard to the model's work. "[D]esigners and photographers, as clients, exercise far-reaching control over the models"[109] as "the client decides the date of the work, provides the facilities, equipment tools, and supplies, stipulate the hours often requires exclusive services and can terminate the model's service."[110] Most importantly, the client—not the agent— pays, in compensating both the model and the agents for respective services rendered.[111] As the deep industry pocket, with ultimate financial responsibility and perhaps steadier revenue streams, fashion brand clients are better positioned financially to "employ" models.[112] However, without a clear "winner" (and no volunteers), any employee reclassification, though effective in theory, would be rendered moot in practice.

Second, even if an employer emerges, the current industry commission compensation structure could not support a "model employee" business model. Agencies and models both work on commission – and are not paid unless and until the model is booked and completes the work. To increase their placement odds with clients, agencies contract with established, rising and up-and-coming models –but neither bookings nor commission is guaranteed. This is one reason why agencies routinely contract and

then terminate model contracts because not all agency-signed models get booked. If models are agency employees, agencies would be required to pay every model it signs minimum wage and benefits; and the state social security, unemployment taxes and others– regardless of whether the model ever gets booked – which based on the current compensation structure, is not compatible with maintaining a profitable business. To financially support "model employees," the agency compensation structure would require an overhaul –something agencies would vehemently oppose, as evidenced by their AB 2539 and AB 1576 opposition. While some would argue that client's deeper pockets could afford model "employees," their business models too cannot currently accommodate it: the "transitory nature of modeling work . . . [that] makes it more difficult for each client to be seen as an employer"[113] in California and the US.[114]

Third, the adoption of an employee business model necessitates a complete restructuring of how agencies and clients do business—something the industry has historically been reluctant to even consider.[115] Agencies could no longer sign models simply because they had "potential" because they could not afford to keep them on payroll and remain profitable. Forced to slash the number of models they represent, agencies would be limited to signing only established, top models who could "guarantee" bookings. This would drastically limit opportunities in the modeling industry, making the industry more exclusive and competitive – and driving models to more extremes to remain competitive.[116] Similarly, if fashion brand clients became the employers, the brands would be pigeonholed into relying on a few select models – which effectively inhibits their business prospects and target audience, creativity in devising marketing strategies and campaigns; as well as their ability to pivot or rebrand with ease.

Fourth, increased financial responsibilities would drive smaller agencies out of business, leaving only larger corporate entities left to service the industry. Not only will this resurrect potential anti-trust concerns,[117] but it would further constrict opportunity in an already hyper-competitive industry. Furthermore, with increased financial demands, agencies would be deprived the freedom to think outside the box in selecting their model pool. Their decisions would be bottom line driven, forcing them not only to scale back their boards, but to limit them only to models "guaranteed" bookings. Gone

would be models of diverse sizes, ethnicities, hindering industry diversity and inclusion – something the modeling industry cannot afford certainly from a public relations standpoint. As such, while industry reform is needed, dictating change in the form of employee reclassification may ultimately do more harm than good.

IV. The Greatest Change Often Comes from Within: Ways Models Can Start to Implement Reform by Harnessing Their Own Power and Resources

In an industry slow to innovate, and in recognizing that law and policy only go so far, [118] immediate change lies in models' own hands. In harnessing their most valuable asset – their numbers[119]—models can slowly begin to move the needle from within, through (1) education and mentorship; (2) strategic organization; (3) disruptive entrepreneurship; and (4) the ballot initiatives.

A. Educating and Mentoring Models Can Improve Their Industry Experience and Empower Them to Self-Advocate

Simply stated, knowledge is power. Educating and mentoring young models can facilitate fundamental industry change by teaching them about their rights, and about how the industry *really* operates. The more models know and understand, the better armed they are to navigate the business, its challenges and pitfalls.[120] Models need to better understand their representation contracts and their complex provisions and deserve more than the suggestion they have an outside attorney "look over the contract" for them. Indeed, models need to know what questions to ask; what rights they retain vs. relinquish (like rights to use their image); and how the compensation structure[121] truly works as a means of leveling the playing field before they sign on the dotted line with an agency. While imparting industry knowledge and insight may not wholly equilibrate the industry's inherent power imbalance, it will cause models to fear less[122] and question more. Moreover, a shift industry wide in this regard, with a more educated and knowledgeable model population, can eradicate any risk of models being "labelled as difficult if you ask questions;"[123] thereby facilitating improved industry transparency and workplace equality.

Mentoring will prove instrumental in achieving this. The Model Alliance's Mentorship Program[124] is one such example. There, the Model Alliance, in partnership with some participating agencies, pairs experienced models with younger ones to afford young models support and career guidance.[125] In addition to opening channels of communication, promoting leadership skill development, and confidence in younger models, these programs facilitate community and comradery in arming models with the lessons only industry experience afford. The success of these mentorship programs will ideally spur the creation of similar independent or inter/intra-agency programs to not only support and guide to models as they traverse their careers, but to create a new generation of models who because of their enhanced understanding and knowledge, force agencies to finally come to the table.

B. Power in Numbers: Innovative Alliances That Organize Models and Harness Their Collective Power Is Critical to Implement Industry Reform

Secondly, innovative model organization will facilitate moving the needle. Models have long "grappled with the difficulties of organizing"[126] in large part because their efforts, historically, resembled shoving a square peg into a round hole.[127] Attempts to unionize as independent contractors – who cannot legally unionize – failed, as exemplified by the Model's Guild. The "proto-union,"[128] which achieved only some short-lived success,[129] could not withstand the "overwhelming might" of the agencies[130] nor eradicate models' "legitimate concerns about agency blacklisting"[131] should they affiliate. As "a union makes a strong oppositional statement that scares off people,"[132] the road to reform lies not in collective bargaining, but in "vigorously promoting a long-time labor strategy – strength in numbers—to press for better conditions."[133]

On the heels of "#MeToo," and in following in the footsteps of other emerging freelancer "unions'" work,[134] the Model Alliance's establishment may be the industry's fighting chance at reform. Serving as an industry "voice and a guardian,"[135] the Alliance recognizes that the path to effective change and longevity requires working with—and not against-- the industry.[136] In so doing, within the span of a few short years, the Model Alliance gained more traction than any other in growing its

membership;[137] in establishing a Modeling Bill of Rights[138] to educate and empower models to demand fair treatment; and in partnering with agencies to create mentorship programs through the Model Alliance Mentorship Program.[139] Externally, the Alliance also successfully tackled the following "winnable issues:"[140] persuading New York Fashion Week to bar photographers from model changing areas; and working with designers and agencies to fight model anorexia as well as fashion publications, such as Vogue, to cease hiring models under the age of 16.[141] The Alliance also achieved political success in its work with legislators and the New York Department of Labor to pass the New York child model law, which incorporated models into the "child performer" definition[142] to afford them better workplace protections. Most significantly, in 2018 with the support of over 100 models and a handful of industry players, the Alliance established the Respect Program,[143] a global initiative program regarded by the New York Times as a "most ambitious solution[]."[144] The Respect Program calls on brands and agencies to sign legally binding agreements with the Model Alliance[145] to follow "a set of comprehensive industry standards developed by models to govern behavior, rights, payment and recourse, as well as a detailed list of consequences and processes"[146] intended train and educate industry members "to prevent abuses from happening in the first place."[147]

The Alliance and its initiatives are designed not only to raise raise industry and global awareness, but in so doing *vis a vis* industry player partnerships, to affect incremental reform other attempts at "organizing" failed to achieve.[148] Though models have successfully unionized in countries such as Great Britain,[149] they succeeded because both industry and country embraced the need for reform.[150] Regrettably, the modeling industry in the United States lags far behind, as evidenced by decades of contemplation as to why the fashion and modeling industry has not –and effectively cannot—create a fashion/modeling counterpart to the Screen Actors Guild.[151] Some attribute it to the fact that "[m]odels are younger, less securely employed and more interchangeable than workers in other non-arts and entertainment-related professions."[152] Others contend that unlike Hollywood, where the film and television industry hubs reside, the modeling industry is international. With "models are working all

over the world without knowing [] schedules and without there being a place to congregate,"[153] organization is difficult.[154] Acknowledging these challenges and embracing them – instead of continually shoving the square peg into the round hole – is the key to reform, as alliances and partnerships have affected thus far. Therefore, forming alliances that harness models' power and influence, in partnerships that tackle universal industry issues in ways less undermining, will yield change –one tiny step forward at a time.

C. Model Business Enterprises, Namely Entrepreneurial Start Ups & Worker Cooperative Paradigms, May Afford Models with Opportunities to Circumvent the Agencies All Together

A third (and alternative) means of achieving industry reform is circumventing the agencies all together through the advent of model owned and run enterprise. Industry veterans have long recognized agencies' failure to evolve along with the industry.[155] As the industry's business has "moved online and the culture of celebrity has created massive changes [as m]ost jobs pay less, few jobs pay a lot, and only a handful of supermodels and 'it girls' book these high-paying jobs," a market gap emerged. In trying to "keep the good of the traditional agency system and leave out the bad," and leveraging technology to allow models to book their own jobs, models are founding their own start-ups, such as UBOOKER.[156] Offering a more "democratic" approach to booking model jobs,[157] UBOOKER enables models to book their own jobs, affording them the opportunity to "control over their careers, including full transparency, access to more jobs and a way to increase their earning potential, including supplemental income."[158] Unlike traditional agencies, UBOOKER charges models fixed low commission rates without requiring exclusive representation contracts, affording models true independent contractor status. With agencies slow to innovate, and the industry moving online, start-ups such as UBOOKER allow models to grow in the direction of the industry while affording them business ownership opportunities, flexibility and career self-determination.

Additionally, worker cooperatives, such as the Cooperative Labor Contractor (CLC) paradigm, are also emerging agency alternatives. Building on the 2016 California Worker Cooperative Act, [159]

which was legislation that promulgated the creation and infrastructure for worker owned cooperative businesses in California; and in the wake of AB 5, union and labor organizations are exploring the hybrid alternative business structures, where workers can receive employee worker protections while owning and governing their workplaces.[160] These efforts culminate in Cooperative Economy Act ("CEA"), which will be introduced to the California Legislature at the start of the 2021 term.[161] The CEA creates a new labor market intermediary called a Cooperative Labor Contractor ("CLC"). Operating like a staffing firm, workers, who prior to AB5 would be considered independent contractors, are instead classified as W2 employees who also own and govern the business. Companies that routinely work with independent contractors who, because of AB 5, would have to reclassify them as employees, can, under the CEA, contract with CLCs to be relieved of AB 5 otherwise mandated employment responsibilities. Indeed, companies who would rather exist without having to directly employ their workers[162] may be incentivized to create or work with CLCs. As such, CLCs seemingly resolve the fundamental issues raised by AB 5 for these companies in offering their workers employment security and protections, business ownership and profit sharing;[163] while absolving them of any "employment" responsibilities.

The CEA, as applied to the modeling industry, would not only resolve the employer question, but could strike the balance agencies/clients need to comply with AB 5– or an alternative to bypass them completely. Working within the current industry infrastructure, a model run/operated CLC could, for example, contract with the agencies, who would in turn contract with clients on models' behalf. This option affords models more protection and leverage as the CLC would negotiate with agencies on their behalf. Moreover, with a compensation structure mirroring that between agencies and mother agents, models would receive additional oversight in holding agencies accountable. Alternatively, models could create their own CLC and bypass the agencies completely. The Model CLC could directly contract with fashion brands to secure work for their employees. Given the industry shift to conducting business online, CLCs provide models with a viable industry infrastructural alternative.

D. California's Proposition 22 Could be a Model for Change for the Modeling industry

Perhaps most significantly, California voters' overwhelming support and passage of Proposition 22 in the November 2020 election may pave the way for a similar model directed initiative. Proposition 22 (the Protect App-Based Drivers and Services Act) was the technology-based gig driver and service worker companies' attempt at compromise. Concerned that AB 5's employee reclassification mandate would completely bankrupt their industry, Uber, Lyft and DoorDash, among others, promulgated the ballot initiative proposing a hybrid structure that maintained workers' independent contractor status while affording them some limited "employee" benefits such as maximum work hours; healthcare subsidies for drivers working an average of 25 hours per week; a calculated minimum wage; accident insurance and workers' compensation insurance; and compensation for lost income, among others.[164] It also required companies to develop anti-discrimination and sexual harassment policies.[165] While advocates urged its passage because it was about "starting to move into the best of two worlds"[166] in application, it enabled these companies to side step more comprehensive obligations imposed by the Labor Code, such as full benefits and minimum wage.[167] Viewed as both a bellwether[168] and a compromise (on the tech companies' terms) the proposition seemingly achieved the hybrid solution Uber, Lyft, Doordash and many independent contractors themselves sought knowing these companies would fight AB's full application to their industries to the bitter end.[169]

While modeling industry advocates acknowledge important differences exist between Uber drivers and models, "many of the kinds of abuses that models face, financial and otherwise, [are] strikingly similar to those faced by other low wage workers in the gig economy."[170] While models lack the resources to fund a similarly sized campaign,[171] with these issues at the forefront of the news and the legislature, and further spotlighted by the industry's famous faces, Proposition 22 affords a template for agencies and models to follow in exploring similar compromises in the face of AB 5's application to their industry. Indeed, Proposition 22's passage may have already prompted some initial tides to turn. Just days after the election – perhaps coincidentally—Elite Model Management USA introduced

"Insurance for Models"[172] whereby models will receive reduced rate insurance plans to afford them medical coverage, third party liability coverage, as well as limited travel insurance.[173] While optimists see this as a step in the direction of reform, with workers' rights issues at the forefront of California voters' minds, it is only a matter of time until models find themselves center stage for a long overdue battle worth fighting.

V. CONCLUSION

Though AB 5's passage may seemingly appear to be the "manna from heaven" modeling industry advocates wished for in securing models employee status, rights and benefits, its application to the modeling industry – as it currently exists—would yield model employees without a self-sustaining industry. Indeed, the current modeling industry infrastructure – with agencies as the lynch pins –afford few clear answers or volunteers as to which industry player would serve as "employer." The commission-based compensation structure is not only incapable of supporting an "employee" business model but being forced to embrace one would further stymie diversification and inclusion in a hyper competitive industry already slow to embrace anyone shorter than 5'10" and a size 0. Short of dismantling and rebuilding the industry from scratch – which an industry already slow and often reluctant to change would not readily allow –reform lies in the hands of models and in harnessing the power inherent in their numbers. Through strategic alliances and organization, that work with – instead of against—the industry, small wins, like ones the Model Alliance has achieved, can affect comprehensive change one success at a time. Moreover, California's cooperative legislation as well as models' entrepreneurial efforts, may further turn the tides by competing with the agencies in bypassing them all together, all the while affording models more control, business ownership and true flexibility. Additionally, Proposition 22's passage – perhaps prompting Elite's adoption of a more affordable insurance program for their models, paves the way for models' to advocate for a similar hybrid should a legal challenge concerning AB 5's application to models arise. In combination, the will to change will ultimately affect a way, even if it happens at a snail's pace.

[1]Sarah Ziff, The Ugly Truth of Fashion Models' Behaviour, The Guardian, https://www.theguardian.com/commentisfree/cifamerica/2012/feb/13/ugly-truth-fashion-model-behavior February 13, 2012 (emphasis added) (last visited Nov. 27, 2020).
[2] Isabel Cristo, *Fashion Weeks Labor Problem is Our Labor Problem,* The New Republic, https://newrepublic.com/article/155020/fashion-weeks-labor-problem-labor-problem (Sept. 11, 2019).
[3] Alexia Fernandez Campbell, *California is Cracking Down on the Gig Economy,* www.Vox.com, https://www.vox.com/policy-and-politics/2019/5/30/18642535/california-ab5-misclassify-employees-contractors, May 30, 2019.
[4] Quote by Sherrilyn Kenyon.
[5] Letter from Amy Lemons, In Support of AB 2539, March 31, 2016.
[6] Alexandra R. Simmerson, *Not So Glamorous: Unveiling the Misrepresentation of Fashion Models' Rights as Workers in New York City*, 22 Cardozo J. Int'l & Comp. L. 153, 154 (2013), *citing* Paula Viola, Paul, Weiss, Rifkind, Wharton & garrison LLP, Address at Violations En Vogue? Labor and Employment Laws Concerning Fashion Models and Interns (Feb. 12, 2013).
[7] Cristo, *supra,* ftnt. 2.
[8] *See* Cristo, supra, ftnt 2.
[9] Indeed, the California Labor Code, with respect to agent "obligations" to models regarding securing employment, merely states that licensed agents offer, procure, attempt to procure employment and engagements for their models without any legal or contractual obligation to do so. Agencies are not required to pay the models they exclusively represent minimum wage. *See* Cal. Lab. Code §1700.4; *compare* N.Y. Gen. Bus. Law §§ 172-177 (requiring agents to procure a license in connection with employment agency work; and N.Y. Gen. Bus. Law § 171(8) (requiring defining an agency as "any person . . . who procures or attempts to procure employment or engagements for . . . modeling;" but unlike California, non-licensed managers are permitted to procure employment engagements for models they represent where the procurement was incidental to their management duties. *See* N.Y. Gen. Bus. Law § 171(8).
[10] Vanessa Helmer, November 20, 2019, *Why Models Need an Agency*, The Balance Everyday, https://www.thebalanceeveryday.com/reasons-for-modeling-agency-2379478
[11] *Id.*
[12] *Frequently Asked Questions,* Ass'n of Talent Agents, *http://www.agentassociation.com/frontdoor/faq.cfm*.(last visited Oct. 28, 2020).
[13] *See Professional Agency Modeling: How It Works,* www.newmodels.com, *http://www.newmodels.com/works.html (*last visited Nov. 24, 2020).
[14] *See* Helmer, *supra,* ftnt. 10.
[15] Cristo, *supra*, ftnt, 2.
[16]Blake Ellis and Melanie Hicken, *The Outrageous Cost of Being a Model,* CNN Money, https://money.cnn.com/2016/05/04/news/runway-injustice-modeling/index.html, May 16, 2016
[17] Blake Ellis and Melanie Hicken, *How the Modeling Industry Exploits Young and Vulnerable Workers*, www.cnnmoney.com, https://money.cnn.com/2016/05/04/news/runway-injustice-modeling/index.html (May 12, 2016).
[18] *See* Cal. Lab. Code §§1700 (a) & (b) define models as "artists;" and modeling agencies as "talent agencies," and govern modeling agencies' licensure, business requirements and general conduct.
[19] Cal. Lab. Code §1700.5 requires that "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commission." Section 1700.6 further delineates the contents of the written application, and authorizes the Labor Commission, upon receipt of said application, which must contain the applicants' fingerprints and two affidavits from "reputable residents of the city or county in which business of the talent agency is to be conducted … [attesting] that the applicant is a person of good moral character, or in the case of a corporation, has a reputation for fair dealing.
[20] *See supra,* ft.18.
[21] *See* Cal. Lab. Code §1700.44 9 (authorizing the referral of all disputes arising under § 1700 to the Labor Commissioner, who shall hear and decide them. The Labor Commissioners decisions are appealable within 10 days to the superior court where the matter is heard *de novo*).
[22] The relevant California Labor Code sections that address modeling agencies character, conduct and behavior are general and broad in scope, at best. Relevant sections authorize the Labor Commission to: (1) refuse a license to a talent agency if the place of business itself would "endanger a model's health, safety or welfare;" (California Labor Code §1700.9); (2) revoke or suspend a license when it's show that the licensee or an agent thereof fails to comply with the applicable code provisions; ceases to be of good moral character; the conditions under which the license was initially issued have changed, or the licensee has made material misrepresentations of false statements in the license application (*see* California Labor Code § 1700.21 (a)-(d). Other code sections prohibit a talent/modeling agency from sending an artist "to any place where the health and safety or

welfare of the artist could be adversely affected, the character of which place the talent agency could have ascertained upon reasonably inquiry;" (Cal. Lab. Code. §1700.33); or from "knowingly permit any persons of bad character, prostitute, gamblers, intoxicated persons, or procurers to frequent, or be employed in the place of business of talent." (Cal. Lab. Code §1700.35).

[23] *See e.g.,*Cal. Lab. Code §1700.31 (prohibiting illegal contracts or provisions therein); Cal. Lab. Code § 1700.33 (prohibiting talent agencies from sending an artist to any place where their health, safety and welfare, could be adversely affected); Cal. Lab. Code §1700.35 (prohibiting agencies from knowingly employing people of bad character).

[24] Anais V. Paccione, *On Trend: Continuing the Effort to Inspire Fashion Industry Reform and Protect Underage Fashion Models,* 41 Seton Hall Legis. J. 413, 432 (2017) *citing* Gina Neff et. Al., *Entrepreneurial Labor Among Cultural Producers: "Cool" Jobs in "Hot" Industries,* 15 Soc. Semiotics 307, 307 (2005).

[25] Paccione, *supra,* ftnt. 24.

[26] Schiffbauer, *supra,*ftnt. 26, *citing*, Steven Cohen & William B. Eimicke, *Independent Contracting Policy and Management Analysis*, (Aug. 2013); *see also* Matthew Bidwell & Forrest Briscoe, *Who Contracts? Determinants of the Decision to Work as An Independent Contractor among Information Technology Workers*, 52 Acad. of Mgmt. J. 1148 (2009)

[27] *See* Steven Greenhouse, *A New Alliance Steps Up To Protect A New Generation of Models,* www.nyt.com, https://www.nytimes.com/2013/12/24/business/a-new-alliance-steps-up-to-protect-the-next-generation-of-models.html (Dec/ 23, 2013). Indeed, models work excessive hours, with "many runway models performing in back-to-back shows, staying up until the wee hours of the mornings for fittings and pulling sixteen-hour days during fashion week." Elizabeth Cline, *Fashion Models are Workers, Too*, The Nation, https://www.thenation.com/article/archive/fashion-models-are-workers-too/ (Sept. 13, 2013). Others work "all day and all night, to go directly to another [unpaid] 'editorial'job . . . [so the workday] ends up being 36 hours long." Milla Jovovich, Letter to Assemblyman Marc Levine, in support of AB 2539, April 5, 2016.

[28] *See* Cristo, *supra,* ftnt. 2.

[29] *See* Bryana Brown, *Models Sue Agency for $3.75 million*, Fashionnotes, (http://www.fashionotes.com/content/2010/11/models-sue-agency-for-3-75-million/ (Nov. 26, 2010).

[30] Lisa Lockwood, *The Model Conundrum,* www.wwd.com, https://wwd.com/business-news/media/models-wait-to-be-paid-1203209908/ (Sep.t 11, 2019).

[31] *Id.*

[32] Not only are models ineligible for minimum wage and are not compensated for the "look sees," and cattle call castings, but the median hourly wage for a model is well below the actual minimum wage. *See e.g.* Cristo, *supra,* ftnt. 2.

[33] A Model's Diary, *How Models Get Paid*, http://amodelsdiary.blogspot.com/2013/11/how-models-get-paid.html, Nov. 30, 2013.

[34] *See* Lockwood, supra, ftnt. 30.

[35] *Id.*

[36] *Id.*

[37] Vanessa Padula, *White Washed Runways: Employment Discrimination in the Modeling Industry,* Berk. J. Afr.-Am. L & Pol.'y, 117, 126 (2016); *see* Cristo, *supra,* ftnt. 2 (noting that models' innate fear of rocking the boat with their agencies so much that many opted out of collecting their share of a $22 million dollar class action lawsuit for fear they would never work again or be dropped by their agency, *citing* Ashley Mears, *Poor Models. Seriously.,* *https://www.nytimes.com/2011/09/15/opinion/its-fashion-week-poor-models.html* (Sept. 14, 2011) (last visited Nov. 25, 2020).

[38] Cristo, *supra,* ftnt. 2; Elizabeth Cline, *Fashion Models Are Workers, Too*, The Nation, https://www.thenation.com/article/archive/fashion-models-are-workers-too/, (Sept. 30, 2013).

[39] Sara Ziff, *Viewpoint: Do Models Need More Rights?*, BBC, https://www.bbc.com/news/magazine-20515337, (Nov. 29, 2012)

[40] Lockwood, *supra,* ftnt. 30; *see also* Shannon Quinn, *10 Facts About the Ugly Side of The Modeling Industry,* https://listverse.com/2018/03/28/10-facts-about-the-ugly-side-of-the-modeling-industry/, March 28, 2018 (discussing that when models are not timely paid, they are often forced to seek advances on their earnings from their agencies-- which their agencies are happy to offer subject to high interest rates. Often times, what they end up owing the agency exceeds their earnings, whereby even after the model leaves the agency, she remains indebted to them)..

[41] Blake Ellis and Melanie Hicken, *supra*, ftnt. 16.

[42] Cline, *supra,* ftnt. 38.

[43] *See generally,* https://www.dir.ca.gov/dosh/documents/health-and-safety-rights-for-workers.pdf, Health and Safety Rights: Facts for California Workers, June 2015, Department of Industrial Relations Cal/OSHA, Christine Baker, Director Juliann Sum, Cal/OSHA Chief

[44] Ligia Carvalho Abrehu, *The Work of Models through a Fundamental Rights' Perspective,* www.fashionmeetsrights.com.oage.viewp/the-work-of-models-through-a-fundamental-rights-perspective (last visited 9/7/20).

[45] Carolyn Kramer, Letter to Assemblyman Marc Levine in Support of AB 2539, April 3, 2016.

[46] Sara Ziff, *ViewPoints: Do Models Need More Rights?* BBC, https://www.bbc.com/news/magazine-20515337, (Nov. 29, 2012).

[47] In or around December 2015, in response to the death of Isabelle Caro, a model who died of anorexia, the French Assembly, the lower brand of the French Parliament, enacted legislation, which took effect in 2017, requiring a doctor's note certifying that a model has a healthy body mass index to work; and will be subject to weigh-ins. Fines are levied for non-compliance. Moreover, the country required that any photograph that has been retouched -whether to make a model appear heavier or thinner but be clearly labeled as having been altered so citizens are aware of the retouches. *See* Theresa Santoro, *The Pro's and Con's of France's New Eating Disorder Legislation*, 2015 https://www.nationaleatingdisorders.org/blog/pros-cons-frances-new-eating-disorder-legislation
banned excessively thin models by requiring all working models must have a minimum body mass index of 18. *See* Priya Elan, *My Agents Told Me to Stop Eating - the reality of body image in modeling,"* The Guardian, Apr. 7, 2016;
[48] Madrid's regional government and the Spanish Association of Fashion Designers, which sponsors fashion shows, banned models with a body mass index of less than 18, in 2006, and has continued since. *See* Selina Sykes, *Six countries taking steps to tackle super-skinny models*, https://www.euronews.com/2017/09/06/counties-fighting-underweight-modelling, June 9, 2017
[49] In Denmark, the Danish Code of Conduct does not impose a BMI limit but in modeling agencies committed to the Danish Fashion Ethical Charter, there is an annual compulsory health check for all models under 25. *See* Ligia Carvalho Abrehu, *The Work of Models through a Fundamental Rights' Perspective,* www.fashionmeetsrights.com.oage.viewp/the-work-of-models-through-a-fundamental-rights-perspective (last visited 9/7/20)
[50] Like France, Israel has adopted legislation to limit the access of work to models that have a body mass index below 18.5. *See id.* Moreover, in 2012, In 2012 the Israeli government passed a law banning the use of underweight models in advertising and on the catwalk. The legislation also requires models to provide medical proof of a healthy weight and for adverts to state if an image has been altered to make a model appear thinner. *See* Sykes, *supra,* ftnt. 48.
[51] Fashion trade organizations, such as the Council of Fashion Designers of America ("CFDA"), have formed a health initiative to address the health issues plaguing the modeling industry. Though the Guidelines set forth goals to educate the industry about eating disorders, encouraging models to seek professional counsel if they suffer from an eating disorder; discouraging the hiring of models under the age of 16; supplying healthy food for models at shoots, and encouraging healthy backstage environments by raising awareness about the impact of smoking and underage drinking, the CFDA Guidelines stop short of implementing minimum body mass indices to work or demanding the industry alter their sizing standards. *See* Council of Fashion Designers of America Health Initiative Guidelines, August 2011.
[52] Cristo, *supra,* ftnt. 2.
[53] Michael Love Michael, *Edie Campbell, Lack of Model Changing Rooms is 'Humiliating,"* Paper, https://www.papermag.com/edie-campbell-changing-rooms-2605702191.html?rebelltitem=3#rebelltitem3, Sept. 17, 2018.
[54] Cristo, *supra,* ftnt. 2. Indeed, one model reported that her agent went so far as to direct her public behavior: "be mysterious but not all the way mysterious. . . they would tell me to act cool and edgy in public even though that's not my personality. They would tell me I shouldn't go out to certain clubs, or that I shouldn't go out with certain people." *Id.*
[55] Cristo, *supra*, ftnt 2.
[56] Janelle Okwodu, *Ending Harrassment Backstage Is Becoming A NYFW Priority*, Vogue.com, https://www.vogue.com/article/nyfw-fall-2018-changing-rooms-model-alliance-sara-ziff-interview, Feb. 7, 2018.
[57] Cristo, *supra,* ftnt. 2.
[58] Telephone Interview with Assemblyman Marc Levine, California Assemblyman, 10th District of California, (Sept. 8, 2020); Interview with Nikki Dubose, Former Model, Model Advocate, Writer and Activist (Sept. 5, 2020).
[59] AB 2539 also proposed that anyone engaged in the occupation of a modeling industry was required to obtain a license pursuant to Section 1700 of the California Labor Code. The Association of Talent Agents, the trade association representing talent agencies, under which modeling agents are "regulated," opposed the bill in toto, and argued this provision was "redundant." *See* Modeling Agencies: Licensure: Models: Employees, Hearing on AB 5 Before the Ca. Assemb. Comm. on Lab. and Emp., 2015-2016 Reg. Sess., p. 8, April 6, 2016.
[60] A.B. 2539, 2015-2016 Reg. Sess. (Ca. 2016) (emphasis added). The legislation was supported by California Labor Federation, AFL-CIO, multiple eating disorder associations, as well as the Model Alliance. The Model Alliance is non-profit labor group that advocates for model's rights. It was started by model turned advocate, Sara Ziff, with the support of other models and the Fashion Law Institute at Fordham Law School in 2012. *See id.*
[61] A.B. 2539, 2015-2016 Reg. Sess. (Ca. 2016); A.B.2539; Modeling Agencies: Licensure: Models: Employees, Hearing on A.B. 5 Before the Ca. Assemb. Comm. on Lab. and Emp., 2015-2016 Reg. Sess., p. 8, April 6, 2016.
[62] *Compare* Aja Frost, *How These Six Countries Are Making The Fashion Industry Safer, https://groundswell.org/ethical-modeling/ (*April 17, 2015); (addressing legislation aimed at keeping models safe and healthy from countries such as Israel, Denmark, France, and Italy. Though some countries employ the specific word healthy in their statutory language, none take issue with the word specifically or allege it is vague); Selina Sykes, *Six Countries Taking Steps to Tackle Super Skinny Models, https://www.euronews.com/2017/09/06/counties-fighting-underweight-modelling* (June 9, 2017).
[63] AB 2539, *supra,* ftnt 59. Specifically, the agencies disclaimed any responsibility for the oversight and/or management of models' health. *See* A.B. 2539, Leg. History,

https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2539. Some industry insiders speculate that the industry lobbies pressured the legislature to ultimately let the bill die in Appropriations.
[64] *Id.*
[65] *See* A.B. 2539, Leg. History, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2539. Some industry insiders speculate that the industry lobbies pressured the legislature to ultimately let the bill die in Appropriations. *See also* Interview with Nikki Dubose, Sept. 5, 2020.
[66] Interview with Nikki DuBose, Sept. 5, 2020; *See* Modeling Agencies: Licensure: Models: Employees, A.B. 1576 (2017-2018).
[67] *See* Modeling Agencies: Licensure: Models: Employees, A.B. 1576 (2017-2018).
[68] *See id,* Proposed Section 1707.2(a) (2018).
[69] *See id,* Proposed Section §1707.2(a) (2018).
[70] *See* A.B. 2539, Leg. History, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2539.
[71] Talent Agencies, Training, A.B. 2338 , 2017-2018 Reg. Sess., August 14, 2018.
[72] Interview with Nikki Dubose, September 5, 2020.
[73] The bill required, that at a minimum, the educational materials included components specified in the National Institute of Health's Eating Disorder Internet website; and that materials be provided in the models' native language. It also required the agencies to keep a record for three years confirming said materials were provided. *See* AB 2338, *supra,* codified on January 1, 2019, as Ca. Lab. Code. §1700.51: Nutrition and eating disorder materials to be provided to adult model artists; time limit; language and content of materials.
[74] Nikki Dubose interview, *supra,* ftnt. 72.
[75] *See Dynamex Ops. West. v. Sup. Ct.,* 4 Cal. 5th 903 (2018).
[76] *See* A.B. 5, 2018-2019 Reg. Session (Ca. 2019).
[77] *See Dynamex, supra,* ftnt. 75, at 916. In *Dynamex,* two Dynamex drivers sued Dynamex alleging they were misclassified as independent contractors, rather than employees, under the applicable wage order definitions of "employ" and "employer," and Labor Code provisions governing the transportation agency. *See id* at 912-913; 919. The drivers were eventually certified as a class by the Court of Appeal, on the grounds that the complaining Dynamex workers, because they, during any given pay period, worked exclusively for Dynamex, fulfilled the commonality prong to be certified as a class for class action purposes. Following a somewhat complex procedural history, the Supreme Court granted review of the Court of Appeal's conclusion concerning the wage order definitions of "employ" and "employer" as to whether a worker is considered an employee or independent contractor for purposes of the obligations imposed by an applicable wage order. Though the decision addressed other issues, including the appropriate test to distinguish an employee from an independent contractor, and the commonality of factual and legal issues of the drivers themselves under the ABC test in determining whether the lower courts' class certification was appropriate, the discussion of the case will be limited to the ABC test and its application as codified by AB 5.
[78] Worker Status: Independent Contractors, Hearing on A.B. 5 Before the Ca. Assembly Comm. On Appropriations, 2019-2020 Reg. Session, May 1, 2019.
[79] Bruce Sarchet, Jim Peretti and Michael Lotito, *Independent Contractor Issues in California: Summer 2020 Update*, Littler WPI Report, https://www.littler.com/publication-press/publication/independent-contractor-issues-california-summer-2020-update, Sept. 1, 2020 (last visited Nov. 12, 2020).
[80] Worker Status: Independent Contractors, Hearing on A.B. 5 before Assembly Committee on Labor and Employment, Reg. Sess. (2019-2020), April 3, 2019.
[81] *See Gonzalez Bill Expands Employee Protections In Rigged Economy,* Published on Official Website – Assemblyman Lorena Gonzalez Representing the 80th California Assembly District (https://a80.asmdc.org), Dec. 5, 2018.
[82] Cal. Lab. Code. §2750.3(a)(1).
[83] Interestingly, AB5 articulates the ABC test in approximately 130 words, and the exceptions with 27 times that number, or almost 3500 words. *See* Bruce Sarchet, Jim Peretti and Michael Lotito, *Independent Contractor Issues in California: Summer 2020 Update*, Littler WPI Report, https://www.littler.com/publication-press/publication/independent-contractor-issues-california-summer-2020-update, Sept. 1, 2020 (last visited Nov. 12, 2020).
[84] Said licensed professionals subject to the *Borello* test include, but are not limited to: (a) insurance brokers; (b)physicians and surgeons, dentists, podiatrists, psychologists, lawyers, architects, engineers, private investigators, veterinarians, and accountants, provided that the medical fields listed above are not covered by a collective bargaining agreement; (c) registered securities broker-dealers, investment advisors, or their agents/advisors; (d) a direct sales person provided compensation is based on actual sales; (e) commercial fisherman; and (f) real estate licensees.
[85] AB 5 provided that professional service providers subject to *Borello* specifically include: marketing professionals; travel agents; human resource administrators (where contracted work is intellectual and varied in character); graphic designers; grant writers; fine artists; enrolled agents; payment processing agents through independent sales organizations; photographers and photojournalists who license content submissions to a hiring firm no more than 35 times a year; freelance writers, editors or newspaper cartoonists who provide content submissions to hiring firms no more than 35 times a year. These workers are considered independent contractors if they pass the Borello test, and satisfy 6 additional criteria including, but not limited to,

maintaining a separate business location, securing a business license, setting own hours and rates, not working exclusively, and able to exercise discretion and independent judgment in performing services. Workers in the beauty industry, such as licensed barbers, manicurists, electrologists, cosmetologists and estheticians also qualify as independent contractors under this exception if they meet *Borello* factors, the aforementioned criteria, as well as additional criteria. *See* Lab. Code § 2750.3 (c)(2)(B)(xi) *et seq.* Business to business contractors, construction subcontractors, real estate licensees, businesses that obtain work through referral agencies are also excepted from the ABC test and are subject to *Borello* and other specified criteria. *See* Lab. Code § 2750.3 (e) – (h).

After AB 5 became law, over 30 subsequent bills seeking modifications or the repeal of AB 5 were eventually distilled down to AB 2257, which was passed and enacted on September 4, 2020. The bill primarily modified exceptions to AB 5, such as the business to business exception, referral agencies, freelance writers, among others. It also adds a number of additional exceptions to AB 5, which too are subjected to *Borello*: recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineers, sound recording musicians, vocalists, photographers working on album covers, and other press and publicity photos relating to recordings; independent radio promoters; musicians or musical groups for the purpose of a single-engagement live performance event; an individual performance artist; licensed landscape architects; freelance translators; registered professional foresters; home inspectors; those performing underwriting inspections, premium audits, risk management or loss-control work for the insurance industry; manufactured housing salespersons; persons engaged in conducting international and cultural exchange visitor programs; competition judges with specialized skill sets; digital content aggregators who serve as licensing intermediaries for digital content.

[86] The *Borello* test served as the test previous to *Dynamex's* ABC test, employed to distinguish employees from independent contractors emanated from the California Supreme Court case of the same name. *See G. Borello & Sons v. Dept. Of Ind. Rel.* 48 Cal. 3d (1989). Less strict than the ABC test, the key factor in *Borello* is whether the hiring entity has control or the right to control the worker both as to the work done and the manner and means in which it is performed. The test also considers eleven other factors: (1) whether the worker is engaged in an occupation different than the hiring firm; (2) whether the work is part of the hiring firm's regular business; (3) who supplies the equipment/tools to perform the work; (4) the worker's financial investment in the equipment materials used; (5) occupational skill; (6) if the occupation or work done is under the hiring firm's direction or by a specialist without supervision; (7) the worker's opportunity for profit/loss; (8) duration of services; (9) degree of the working relationship's permanence; (10) payment method, aka by time or by job; (11) whether the parties believe there is an employee/employer relationship. Unlike the ABC test, no single factor in *Borello* is determinative; but the first factor, has the greatest weight. *See id.*

[87] *See* Cal. Lab. Code § 2750.3 (C) *et seq.; see also* Worker Status: Independent Contractors, Hearing on A.B. 5, *supra,* ftnt. 79.

[88] *Id.*

[89] www.cnnmoney.com, https://money.cnn.com/2016/05/04/news/runway-injustice-modeling/index.html (May 12, 2016) (stating that "[M]odels say agencies control much of their lives (down to their eating habits and the pay they receive").

[90] Brown, *supra,* ftnt. 29.

[91] *Id.*

[92] *See* Ariel Sodomsky, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee, and Independent Contractor In the New York Modeling Industry,* 25 Fordham Intell. Prop, Media & Ent. L.J. 269, 289 (2014); *see e.g., Zaremba v. Miller,* 113 Cal.App.3d Supp. 1, 5 (1980) (finding that a model is subject to the complete control of whomever she is working, and of the photographer, in this case, who controlled all of the details concerning her work and performance, i.e. every movement, the dress, hours, and place of work, etc.),

[93] *See infra.*, Section II.

[94] Stephen Fishman, *California Passes Historic AB 5 Gig-Worker Law*, https://www.nolo.com/legal-encyclopedia/california-gig-worker-law-AB-5.html (last visited Nov. 14, 2020).

[95] Indeed, Prong (C), usual steps to promote an independent business include incorporation and licensure. As models themselves do not incorporate, nor are they licensed, their working arrangement is transitory in nature. *See Dynamex, supra,* 5 Cal. 5th at 962; *see also Legal Tests for Independent Contractor Classification Under California Law,* Practical Law Labor and Employment, 2020.

[96] *See id.*

[97] Even though the California Talent Agencies Act define models as "artists," (*see* ftnt.18) the statute excepts only fine artists.

[98] Indeed, a number of companies and industries sought and were denied injunctions against AB 5's enforcement. *See Olson v. State of Ca.*, 2020 WL 905572 (2020) (brought by Postmates, a technology service-based delivery company); *American Society of Journalists and Authors, v. Becerra,* 2020 WL 1444909 (2020) (brought by a nonprofit association of independent non-fiction writers). Others sought declaratory relief (*see Crossley v. California,* 2020 WL 4747723 (2020) (brought by data processing entities who collect signatures from registered votes for ballot initiatives; and *California Trucking Ass'n. v. Becerra,* 438. F. Supp. 1139 (S.D. Ca. 2020) (brought by the California Trucking Association, among other relief sought);

whereas one suit, brought by the trucking industry, challenged discrete provisions of AB 5 on federal pre-emption grounds (*see Western States Trucking Ass'n v. Becerra,* 2020 WL 2542062 (2020)).

[99] In response to a written inquiry regarding AB 2539's attempted classification of models as employees, and AB 5's application to models, the ATA's response was as follows: "ATA supported and worked with Assembly Member Levine to pass the legislation. ATA has not taken a position on behalf of employers as to the employment status of models as either employees or independent contractors. That determination is made and entered into between the 'talent' and the employer – models are not employees of the talent agency." *See Interview/Email Correspondence with Karen Stuart,* Executive Director of Association of Talent Agents, Sept. 17, 2020.

[100] Model Nikki Dubose believes that "the agency should be their [i.e. models')] employers. . . The agencies should be the ones to provide adequate protections to the models (health care, timely pay, etc.) and should be safe, structured business environments that made models feel safe and proud to work at." Nikki DuBose Interview, *supra,* ftnt. 72.

[101] Indeed, Insurance Appeals Boards in New York have held that models should be regarded as employees of the agencies. *See e.g., In re Chopik,* 535 N.Y.S. 2d 268, 270 (N.Y.App. Div. 1988); *In re Barnes*, 627 N.Y.S.2dn 479 (N.Y. App. Div. 1995). Moreover, in France, models are agency employees protected under applicable Labor Laws. *See* Alexandra R. Simmerson, *Not So Glamorous: Unveiling The Misrepresentation of Fashion Models' Rights As Workers in New York City,* 22 Cardozo J. Int'l & Comp. Law, 153, 163-165 (2013) (citing and explaining French modeling law).

[102] Schiffbauer, *supra,* ftnt. 26.

[103] Sodomsky, *supra,* ftnt. 92, at 293-294, *citing, In re Chopik,* 535 N.Y.S. 2d 268, 270 (N.Y.App. Div. 1988); *In re Barnes*, 627 N.Y.S.2dn 479 (N.Y. App. Div. 1995).

[104] *See* Brown, *supra,* ftnt. 29; *see also id. Models of Confusion: Strutting the Line Between Agent and Manager, Employee and Independent Contractor in the New York Modeling Industry*, 22 Fordham. Intell. Prop. Media & Ent. L.J. 269, 293-294 (noting that all of the Unemployment Appeals Board cases found that models should be considered employees of the agencies).

[105] *See also,* Sodomsky, *supra,* ftnt. 92.

[106] Lockwood, *supra,* ftnt. 30.

[107] *See* Interview with Karen Stuart, Sept. 17, 2020. Stating that the "determination is made and entered into between the 'talent' and the 'employer' – models are not employees of the talent agency," the ATA Executive director believes that the clients are the model's employer; *see also* Padua, *supra,* ftnt. 37, at 128.

[108] Padua, *supra,* ftnt. 37, at 128.

[109] *Id.; see also Zaremba, supra.*

[110] Sodomsky, *Models of Confusion, supra,* ftnt. 92, at 290.

[111] Padua, *supra,* ftnt. 37.

[112] *See Zaremba, supra*, ftnt. 92.

[113] *Sodomsky, supra,* ftnt. 9, at 290.

[114] *Compare* Representation Mandate, sample Model-Agency contract under French law. Though their work too is transitory in nature, models working in France become employees of the agency for each booking and enter into a limited contract for said purposes; *see also* Simmerson, *supra,* ftnt.101, at 165.

[115] See A.B. 2539 Legislative History, *supra.*

[116] Interview with Roman Young, Founder/Owner of Nomad Management, Sept.16, 2020.

[117] In eliminating smaller agencies, and ultimately competition, the industry would be concentrated in the hands of but a few large companies – which could potentially raise anti-trust issues under the Clayton and Sherman Acts, as the *Fears v. Wilhemina* case did in 2005. See Order, issued by Judge Harold Baer, Jr, in *Fears v. Wilhemina Model Agency et al.,* (2005) which established ten-year consent decree creating defining clear contract language all modeling contracts must contain, in holding that various Model Management companies engaging in schematic price fixing that violated anti-trust law, to promote transparency and competition.

[118] Sara Ziff, Envisioning a New Model for the Modeling Industry, Model Alliance, https://modelalliance.org/2017/envisioning-a-new-model-for-the-modeling-industry/envisioning-a-new-model-for-the-modeling-industry (last visited Nov. 17, 2020) (interviewing Claudia Wagner, a model and co-founder of UBOOKER, a global bookings platform for models).

[119] *See* Mission Statement, The Model Alliance, https://modelalliance.org/mission (last visited Nov. 25, 2020); *Cristo, supra.*

[120] Interview with Brad Lemack, Lemack and Company Talent Management and PR, Sept. 21, 2020.

[121] *See* Vanessa Helmer, *5 Questions You Should Ask a Modeling Agency Before Signing,* The Balance Everyday, https://www.hg.org/legal-articles/modeling-contracts-answers-to-common-questions-of-how-models-can-protect-themselves-5597, (Oct. 31, 2019).

[122] *See generally*, R. Sebastian Gibson, Modeling Contracts - Answers to common Questions of How Models Can Protect Themselves, https://www.hg.org/legal-articles/modeling-contracts-answers-to-common-questions-of-how-models-can-protect-themselves-5597 (last visited 11/17/20).

[123] *'Slaves to Debt': Fashion Models Speak Out About Catwalk Misery*, FashionUnited UK, https://fashionunited.uk/news/fashion/slaves-to-debt-fashion-models-speak-out-about-catwalk-misery/2018092739173, Sept.

27, 2018; *see also,* Cristo, *supra,* (discussing how in spite of a $22 million dollar settlement, the court had to donate most of it because they could not find enough models willing to cross their agencies and identify themselves to collect their share.)
[124] The Model Alliance Mentorship Program, The Model Alliance website, https://modelalliance.org/model-alliance-mentorship-program (last visited 11/26/20).
[125] *See* e.g., Sara Ziff, Envisioning a New Model for the Modeling Industry, Model Alliance, https://modelalliance.org/2017/envisioning-a-new-model-for-the-modeling-industry/envisioning-a-new-model-for-the-modeling-industry (last visited Nov. 17, 2020); Blake Ellis and Melanie Hicken, *supra,* ftnt. 17; Blake Ellis and Melanie Hicken, *Two Undercover Models Expose Industry's Dark Side,* @CNNMoney https://money.cnn.com/2016/05/13/news/runway-injustice-models-instagram/index.html (May 13, 2016) (last visited November 14, 2020).
[126] Cristo, *supra,* ftnt. 2.
[127] The fight to allow independent contractors to unionize continues be an expensive uphill legal battle as evidenced by a recent 9th Circuit case whereby Uber drivers sought to uphold and enforce a Seattle City Council Ordinance that permitted them to unionize. The case was appealed to the Ninth Circuit, and the ordinance was struck down on grounds that the National Labor Relations Act pre-empted the statute in precluding unionization for independent contractors. *See Chamber of Commerce v. City of Seattle, et.al.,* 2018 WL 2169057 99th Cir. May 11, 2018).
[128] Cristo, *supra,* ftnt. 2.
[129] Former model, Donna Eller, founded the Model's Guild in 1995, and after securing labor backing, managed to secure insurance and credit union financial services for models. However, the Guild struggled to find a foothold in the industry because of the agencies' resistance and inclination to blacklist models who joined. *See Steven Greenhouse, Models Join Together to Make Unionism a Thing of Beauty,* http://nyti.ms/29di5iJ, Nov. 20, 1995; Cristo, *supra,* ftnt. 2.
[129] *See* Steven Greenhouse, *A New Alliance Steps Up To protect A New Generation of Models*, https://www.nytimes.com/2013/12/24/business/a-new-alliance-steps-up-to-protect-the-next-generation-of-models.html, Dec. 23, 2013.
[130] Cristo, *supra,* ftnt. 2.
[131] *See* Greenhouse, *supra,* ftnt. 129.
[132] *Id.*
[133] *Id.*
[134] *See e.g.* Freelancers Union, https://www.freelancersunion.org/about/ (last visited 11/27/20). The Freelancers Union is a non-profit, started in 1995, that uses the power of numbers to affect change, through policy advocacy work.
[135] Greenhouse, *Models Join Together to Make Unionism a Thing of Beauty*, *supra,* ftnt. 129.
[136] *See supra,* ftnt. 132.
[137] Indeed, within a year or so of its establishment, the Model Alliance had a membership of over 400 Models, as well as a Board of Directors featuring industry veterans. *See* The Model Alliance website, https://modelalliance.org/our-team (last visited Nov. 26, 2020); *see also* Greenhouse, *supra*, ftnt. 129.
[138] The Model Alliance, https://modelalliance.org/models-bill-of-rights (last visited Nov. 18, 2020). Among others, the Modeling Bill of Rights states that models are fundamentally entitled to professionalism, transparent accounting practices, control of their career, and the power to negotiate commissions.
[139] *See id.*
[140] *See* Greenhouse, *supra,* ftnt. 129. *A New Alliance Steps Up To Protect A New Generation of Models*, supra, ftnt.137.
[141] *Id.*
[142] *See* The Model Alliance, *supra,* ftnt. 138.
[143] *See* The Model Alliance, Respect Program, https://programforrespect.org/learn (last visited Nov. 16, 2020). Generally speaking, industry experts regard the Respect Program as a significant improvement from previous industry initiatives, such as the Responsible Trust for Models Initiative, which though advocated for an industry code of conduct, represented another failure to secure corporate responsibility. *See* The Worker Driven Social Responsibility Network Analysis of the Respect Program, https://wsr-network.org/model-alliance-respect-program/ (last visited Nov. 29, 2020).
[144] *Id.*
[145] *See* Business of Fashion, BoF 500 Profile on Sara Ziff, https://www.businessoffashion.com/community/people/sara-ziff (last visited Nov. 18, 2020). As recently as February 2020, over 100 models signed a letter calling out Victoria's Secret's detrimental work environment, calling on the company to sign on to the Respect Program's Pledge. *See* Shoshy Cement, *Over 100 models signed an open letter to Victoria's Secret's CEO decrying a 'culture of misogyny, bullying, and harassment' at the lingerie company,* Business Insider, https://www.businessinsider.com/models-criticize-victorias-secret-open-letter-to-ceo-2020-2 (Feb. 5, 2020) (last visited Nov. 29, 2020).
[146] The Model Alliance, Respect Program, *supra,* ftnt. 143.
[147] Lisa Lockwood, *Model Alliance Releases Video About Fashion Industry Abuses and the Respect Program,* https://wwd.com/fashion-news/fashion-scoops/model-alliance-releases-video-about-fashion-industry-abuses-and-the-respect-program-1234589589/ (Sept. 17, 2020).
[148] *See* Carvalho Abreu, *supra*.

[149] In 2009, models convinced the British Equity Union to accept models, and the Equity Models Network was born. Described by Marie Claire as a "pioneering campaign," the Equity Models Network is coordinated by models Eva Fahler, Dunja Knezevic and Victoria Keon-Cohen. The Network is appointed by and comprised of working models based in the U.K. and member of Equity. Together, they labor to improve working conditions and to inspire everyone in the industry to make the necessary changes to achieve a working environment based on respect, support, and understanding. Membership is available to all working models without fear or blacklisting or discrimination. It provides models health insurance (including facial disfigurement insurance), injury compensation, legal support, nutritionists, counseling accounting services and the opportunity to be a member of the models' network. *See* Ariel Sodomsky, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee and Independent Contractor in the New York Modeling Industry*, 25 Fordham. Intell. Prop, Media & Ent, L.J. 269, 302 (2014); Model Alliance, International Unions, https://modelalliance.org/international-unions (last visited Nov. 19, 2020).
[150] Denis Campbell, *Models Reveal Why They Need a* Union, The Guardian, https://www.theguardian.com/uk/2007/dec/16/fashion.lifeandhealth, Dec. 16, 2007.
[151] *See generally,* Paccione, Seton Hall Leg. J., *supra,* ftnt. 24.
[152] *Id. at* 438.
[153] Cristo, *supra.*
[154] *Id.*
[155] Sara Ziff, *quoting Claudia Wagner, Envisioning a New Model for the Modeling Industry,* The Model Alliance, https://modelalliance.org/2017/envisioning-a-new-model-for-the-modeling-industry/envisioning-a-new-model-for-the-modeling-industry (last visited Nov. 22, 2020)
[156] *Id.; see also* www.UBOOKER.com.
[157] *Id.* Another such business is Agent, Inc. It is a web-based app, whereby models can create a unique link to their body of work and profile, to market themselves to clients, set their own rates, "delivering a more transparent, safer environment for models." *See* https://joinagent.com/models. It launched in March 2018, after 2 years of beta testing, and is intended to "disrupt" the industry by empowering models to manage their own careers in connecting directly with clients, without an agent intermediary. *See* Lisa Lockwood, *Agent Inc., a New Modeling Platform, Seeks to Disrupt Status Quo,* www.wwd.com, https://wwd.com/fashion-news/fashion-features/agent-inc-new-modeling-platform-to-disrupt-status-quo-1202640074/ (March 28, 2018)
[158] *Id.*
[159] A.B. 816, The California Worker Cooperative Act was the result of a multi-year effort to remove barriers to the creation of worker cooperatives in California and to improve operations for existing ones. With a goal of empowering small businesses that are democratically owned and operated by their workers, it eases barriers to raising capital investment from within the community, and mandates that a worker cooperative have a class of worker-members who control the cooperative. *See Charlotte Tsui, Governor Brown Signs California Worker Cooperative Act,* Sustainable Economies Law Center, https://www.theselc.org/governor_brown_signs_california_worker_cooperative_act (Aug. 12, 2015).
[160] *See* Upside Down Consulting, *The Future of Work,* 2020.
[161] *See Email Interview with Ra Criscitiello*, Sept. 28, 2020.
[162] The Cooperative Economy Act Summary Sheet, www.cooperativeeconomyact.org.
[163] Ra Criscitiello, *Anchoring America's Solidarity Economy Helps To Heal Pandemic Inequality Challenges,* http://1worker1vote.org/anchoring-americas-solidarity-economy- helps-to-heal-oandeic-inequality-challenges/ (last visited Nov. 18, 2020).
[164] *See* Text of Proposition 22 (Ca. Nov. 2020 Election), https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf.
[165] *See id.*

[166] *Partnership for Working Families*, "Rigging the Gig," July 7, 2020.

[167] Kari Paul, *Prop 22 Explained: How California Voters Could Upend the Gig Economy*, The Guardian, https://www.theguardian.com/us-news/2020/oct/15/proposition-22-california-ballot-measure-explained, Oct. 15, 2020. Indeed, a University of California at Berkeley study revealed that under AB 5, gig workers would earn $25-27/hour. However, the same study revealed that under Proposition 22, earnings "could still be well below the minimum wage [$14/hour in 2021], at $5.64/hour.) *Id.* Nevertheless, given the immense amount of litigation Uber instituted following AB 5's passage, it is clear they were unafraid to fight against its application to the bitter end – in large part because the overall cost of complying with the California Labor Code with respect to employee benefits far exceeded the hundreds of millions the companies already expended between legal fees and the Prop 22 campaign. *Id.*
[168] *Id.*
[169] In truth, Uber, Lyft, Doordash and others, would have continued to challenge AB5's application. Pending litigation, which spanned the course of 2020, up until 2 weeks before the election, enabled these companies to avoid complying with AB5. Perhaps facing a losing battle, or simply being prepared to fight one on all fronts, Proposition 22 was their attempt to provide some benefits and worker protections short of what the Labor Code otherwise mandated. *See e.g. The People v. Uber*

Technologies, ___ Cal. Rptr.3d ___ (2020), 2020 WL 6193994; Paul, *Prop. 22 Explained, supra,* ftnt. 167. While it is true that some independent contractors working for Uber, Lyft, Doordash did support Proposition 22, many felt cheated by the meek benefits it afforded in comparison to what they were otherwise legally entitled to under AB 5 and the California Labor Law as employees. *See* Alissa Walker, *Uber and Lyft Just Bought a Law in California,* https://www.curbed.com/2020/11/california-uber-lyft-prop-22.html (Nov. 5, 2020).

[170] Cristo, *supra*, ftnt. 2.

[171] Companies in support of Proposition 22 spent almost $200 million in marketing and advertising, making it the most costly ballot measure marketing campaign in California's history. *See* Ryan Menses, Maloy Moore, Phi Do, *Billions Have Been Spent on California's Ballot Measure Battles. But This Year is Unlike Any Other*, Los Angeles Times, *https://www.latimes.com/projects/props-california-2020-election-money/* (Nov. 13, 2020); Interestingly, the campaign costs paled in comparison to the cost of employing its independent contractors, and speak to what's at stake for these companies. To comply with A.B. 5, employment costs would rise up to 30% or more. *See California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020),* Ballotpedia.com, www.ballotpedia.com, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)#cite_note-21 (last viewed on Nov. 18, 2020); Michelle Cheng, *A Ballot Measure Backed by Uber and Lyft Is Now the Most Expensive in California History,* Quartz.com, https://qz.com/1907040/uber-lyft-doordash-are-spending-millions-on-california-prop-22/ (Sept, 23, 2020).

[172] Lisa Lockwood, *Elite Model Management to Offer Insurance to Models*, https://wwd.com/business-news/media/elite-model-management-to-offer-insurance-for-models-1234655121/ (Nov. 12, 2020).

[173] *Id.*