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18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 COUNTY OF SAN FRANCISCO

20 **PEOPLE OF THE STATE OF CALIFORNIA,**
21 **Plaintiff,**
22 **v.**
23 **UBER TECHNOLOGIES, INC., A DELAWARE**
24 **CORPORATION; LYFT, INC., A DELAWARE**
25 **CORPORATION; AND DOES 1-50, INCLUSIVE,**
26 **Defendants.**

Case No.: CGC-20-584402

Assigned to
Judge Ethan Schulman, Dept. 302

**AMICI CURIAE BRIEF OF NATIONAL
EMPLOYMENT LAW PROJECT, LEGAL
AID AT WORK, ET AL. (WORKERS'
RIGHTS ADVOCATES) IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

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SUMMARY OF ARGUMENT

Work should provide people with economic stability, safety, and the opportunity to contribute and connect with one another. It should be a place where workers are treated fairly and with respect. But Uber and Lyft hold different designs. By misclassifying their hundreds of thousands of drivers as independent contractors, Uber and Lyft dispossess their workers of basic labor protections, such as minimum wage, overtime pay, workers’ compensation, unemployment and state disability insurance, and other critical rights intended to cover most workers in our society.

Though they proudly wear the label of innovative “technology” companies, Uber and Lyft are no different than any other company that routinely violates labor and employment laws to boost its profits at the expense of its workers. By setting up business models that insist on misclassifying their drivers as independent contractors, Uber and Lyft avoid paying the costs, payroll taxes, and insurance that other employers incur, while reaping the benefits of their drivers’ labor. This work structure—where employers use all manner of fog and sleight-of-hand to obscure the employment relationship—produces irreparable harms to workers, honest businesses, and the public good. Uber and Lyft’s misclassification schemes are a clear violation of state law, as the companies dispossess their employee drivers of their legal rights and shift all economic and legal risks to workers and consumers.

Calling a driver an “independent contractor” does not make it so, and managing employees through an online application does not transform them into self-employed entrepreneurs. Drivers for Uber and Lyft are not running their own separate businesses; they are integral to the companies’ businesses. They are Uber and Lyft’s employees.

Independent contractor misclassification creates economically insecure, underpaid workers who are unable to access their legal rights as employees. This illegal practice relies on, and in turn exacerbates, a labor market in which stable employment is out of reach for too many workers, forcing them to accept take-it-or-leave-it jobs. People of color, who uniquely face racist exclusions from secure employment, comprise a substantial part of the on-demand workforce. As companies misclassify their workers, occupational segregation deepens.

Law-abiding businesses cannot compete against companies that skirt the requirements of payroll taxes and do not provide social insurance. Misclassification produces a “race to the bottom” in

1 which otherwise honest employers are forced to copy illegal practices to remain competitive.
2 Additionally, misclassification allows companies to skip the check on unemployment insurance,
3 workers' compensation, and payroll withholdings, draining public coffers that sustain robust social
4 protections.

5 Precisely for those reasons, the California Supreme Court in April 2018 clarified the test
6 employers must follow to ensure compliance with the state's wage orders in *Dynamex Operations W.*
7 *v. Superior Court*, 4 Cal.5th 903 (Cal. 2018). In September 2019, the California State Legislature
8 considered and passed Assembly Bill 5 ("A.B. 5"), codifying *Dynamex* and applying it broadly across
9 state law. Not long after, the Governor of California signed A.B. 5 into law, making it effective on
10 January 1, 2020.

11 Still, Uber and Lyft have stubbornly and blatantly refused to comply with the law. At this
12 point, it would be too simple to say the writing is on the wall. The message—unanimous from all three
13 branches of state government—has been bolded, underlined, and punctuated in all capital letters:
14 California will not abide independent contractor misclassification. *Dynamex* and A.B. 5 mean that
15 Uber and Lyft must classify their drivers as employees.

16 Enforcement of A.B. 5 is paramount in this case. When Uber and Lyft label drivers as
17 contractors and restrict them through take-it-or-leave-it contracts of adhesion, they deter those workers
18 from claiming their rights under workplace laws, as many workers tend to assume that their employers
19 have classified them accurately.¹ Where there is no clear line of accountability, work conditions are

22 ¹ Workers who believe they are not eligible for workplace protections likely will not go to an
23 enforcement body. The vast majority of the U.S. Department of Labor's Wage & Hour Division's
24 ("WHD") enforcement actions are triggered by worker complaints. *See, e.g.,* U.S. Gov't Accountability
25 Office, GAO-08-962T, *Better Use of Available Resources and Consistent Reporting Could Improve*
26 *Compliance* 7 (July 15, 2008) (noting that 72 percent of WHD's enforcement actions from 1997-2007
27 were initiated in response to complaints from workers); David Weil & Amanda Pyles, *Why Complain?*
28 *Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 *Compar. Lab. L. &*
Pol'y J. 59, 59-60 (2005) (finding that in 2004, complaint-derived inspections constituted about 78
percent of all inspections undertaken by WHD). Misclassification is often used by employers in
combination with non-compete and non-disclosure or confidentiality provisions to intimidate and
discourage low-wage workers, who often speak little or no English, from complaining or joining
together to improve wages and conditions.

1 likely to deteriorate: pay declines, wage theft increases, workplace injuries and discrimination rise, and
2 the social protections available to most workers vanish into thin air.

3 For these reasons, *amici* urge the Court to grant the People’s motion for a preliminary
4 injunction against Uber and Lyft.

5 **ARGUMENT**

6 **I. Uber and Lyft, among California’s worst offenders in independent contractor 7 misclassification, have continually refused to meet their employer obligations.**

8 Deception is the heart of Uber and Lyft’s business models. Rather than admit that they hire
9 employee drivers to build their transportation businesses, the companies insist that they are merely
10 “technology” platforms, matching independent contractors with short-term jobs. Although the drivers
11 carry out the companies’ core businesses, and although their work is controlled and managed through
12 the companies’ apps, the companies maintain that the drivers are their own bosses, running their own
13 businesses. Though this fiction may have enticed investors and satisfied shareholders, the reality is
14 that Uber and Lyft’s actions are exactly the all-too-common employer abuse that *Dynamex* and A.B. 5
15 aimed to eliminate. Drivers for Uber and Lyft are employees of the companies.

16 Uber and Lyft misclassify their drivers for one reason: to amass more money at their workers’
17 expense. Misclassification is a calculated business decision to unlawfully lower employers’ operating
18 costs by passing on economic risk to workers and consumers. By refusing to pay the taxes and other
19 payroll costs required of employers, law-breaking businesses are able to pocket as much as thirty
20 percent of payroll costs.²

21 Misclassification is not unique to app-based employers; it occurs in every industry where a
22 company might feel the itch to cut corners and boost profits.³ But in Silicon Valley, the practice has its
23 peculiarities. Companies like Uber and Lyft have flourished in a venture capital fever dream in which
24 regulations are disrupted and the dignity of human labor processed via algorithm and code. Through
25

26 ² Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs*
27 *on Workers and Federal and State Treasuries*, National Employment Law Project (Sept. 2017),
<https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf>.

28 ³ Independent contractor misclassification is prevalent in delivery services, construction, janitorial, home
care, and other labor-intensive low-wage sectors. *See generally id.*

1 their gospel of “flexible work,” Uber and Lyft have taken an illegal practice familiar to bad employers
2 everywhere and transmogrified it into the “future of work.”

3 To enshrine their ideology of technological novelty over workplace rights, the two companies
4 have asserted themselves in the legislative and regulatory arenas; there, they seek to escape laws
5 governing pay and other benefits.⁴ Since their beginnings, Uber and Lyft have kept busy in California
6 politics, for a time capturing the regulatory arms of local and state government to ensure the
7 companies enjoy special treatment.⁵ Uber and Lyft in 2013 pressured the California Public Utilities
8 Commission to regulate them not as taxicab services but as “transportation network companies,” an
9 altogether new category of business invented by the companies and approved by the California
10 regulators.⁶ Since that success, the companies have sought carveouts to labor and employment laws in
11 states across the country, arguing that they are not, *and cannot be*, the employers of their drivers.⁷
12 Their approach—flouting the law and rewriting the rules—is no secret. Before *Dynamex* and A.B. 5,
13 Bradley Tusk, Uber’s chief political strategist, asked, “What is ultimately a better business decision?
14 To try to change the law in a way that you think works for your platform, or to make sure your
15 platform fits into the existing law?”⁸ Clearly, the question was rhetorical.

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18 ⁴ See Joy Borkholder et al., *Uber State Interference: How Transportation Network Companies Buy, Bully, and Bamboozle Their Way to Deregulation*, National Employment Law Project (Jan. 2018),
19 <https://s27147.pcdn.co/wp-content/uploads/Uber-State-Interference-How-Transportation-Network-Companies-Buy-Bully-Bamboozle-Their-Way-to-Deregulation.pdf>.

20 ⁵ See Veena Dubal, *A Brief History of the Gig*, Logic (May 4, 2020), <https://logicmag.io/security/a-brief-history-of-the-gig/> (detailing the “regulatory pressure that Uber and Lyft exert . . . [including] pouring
21 money into California political campaigns . . . and hiring nearly every lobbyist in the state . . . [by
22 which] the companies weaseled their way out of century-old regulations on fares, vehicle caps, and
23 licenses in just a few months”).

24 ⁶ Anthony Ha, *California Regulator Passes First Ridesharing Rules, A Big Win for Lyft, SideCar, and Uber*, TechCrunch (Sept. 19, 2013), <https://techcrunch.com/2013/09/19/cpuc-ridesharing-regulations/>.
25 In a dramatic twist, the CPUC recently found that Uber and Lyft drivers are presumed to be employees
26 under A.B. 5. Carolyn Said, *California Regulators Say Uber, Lyft Drivers Are Employees*, San Francisco Chronicle (June 10, 2020), <https://www.sfchronicle.com/business/article/California-regulators-say-Uber-Lyft-drivers-are-15330779.php>.

27 ⁷ See Maya Pinto & Rebecca Smith, *Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It*, National Employment Law Project (Mar. 25, 2019), <https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2-19.pdf>.

28 ⁸ *Id.* at 3.

1 For too long, Uber and Lyft have sought to refashion the laws in their favor. By subverting
2 labor laws and disabling industry regulations, the two companies have been able to steal wages, duck
3 accountability, offload risk, sabotage worker power, and worsen income and wealth inequality.⁹ Only
4 amid this bottomed-out wasteland of their own creation can the companies possibly describe what they
5 offer—the detritus of dignified work—as “earning opportunities.”¹⁰

6 There is nothing exceptional about Uber or Lyft. They represent neither a new brand of
7 entrepreneurship nor a special sector of California’s economy, and they must comply with our laws
8 like any other business. Uber and Lyft stand only for the degradation of labor standards and work
9 quality, corroding full-time, stable, even unionized jobs.¹¹ Emblematic of that ethos, the companies’
10 misclassification schemes have inflicted colossal harms on workers, honest businesses, and the public
11 good.

12 Driving for Uber and Lyft must be seen for what it really is: employment for a company that
13 unilaterally dictates the material terms of work for people who are not running their own business.
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18 ⁹ See, e.g., Erin Mulvaney, *Uber, Lyft Talk Responsibility on Assaults but Deny in Court*, Bloomberg
19 Law (Mar. 2, 2020), [https://news.bloomberglaw.com/daily-labor-report/uber-lyft-talk-responsibility-on-](https://news.bloomberglaw.com/daily-labor-report/uber-lyft-talk-responsibility-on-assaults-but-deny-in-court)
20 [assaults-but-deny-in-court](https://news.bloomberglaw.com/daily-labor-report/uber-lyft-talk-responsibility-on-assaults-but-deny-in-court); Lauren Kaori Gurley, *Drivers Claim Uber and Lyft Owe Them Millions in*
21 *Wage Theft*, Vice (Feb. 5, 2020), [https://www.vice.com/en_us/article/m7q7x3/drivers-claim-uber-and-](https://www.vice.com/en_us/article/m7q7x3/drivers-claim-uber-and-lyft-owe-them-millions-in-wage-theft)
22 [lyft-owe-them-millions-in-wage-theft](https://www.vice.com/en_us/article/m7q7x3/drivers-claim-uber-and-lyft-owe-them-millions-in-wage-theft); Alana Semuels, *What the Strike Ahead of Uber’s IPO Exposes*
23 *About American Inequality*, Time (May 10, 2019), <https://time.com/5584829/uber-ipo-driver-strike/>.

24 ¹⁰ See, e.g., *Uber Driving Opportunities*, Uber, <https://www.uber.com/us/en/drive/driving-opportunities/>
25 (promoting a “flexible earning opportunity” for drivers) (last visited July 8, 2020); *How Much Do*
26 *Drivers Make?*, Uber, <https://www.uber.com/us/en/drive/how-much-drivers-make/> (promoting “earning
27 opportunities nearby” for potential drivers) (last visited July 8, 2020); *The Driver’s Guide to Pay – FAQ*
28 *What’s The Best Strategy to Earn More*, Lyft, <https://www.lyft.com/driver/pay#driving-smarter> (“Your
Lyft driver app shows you earning opportunities”) (last visited July 8, 2020); *Making Lyft Work for You*,
Lyft, <https://www.lyft.com/driver/improvements> (“Find high-earning opportunities”) (last visited July 8,
2020).

¹¹ See E. Tammy Kim, *The Gig Economy is Coming for Your Job*, N.Y. Times (Jan. 10, 2020),
<https://www.nytimes.com/2020/01/10/opinion/sunday/gig-economy-unemployment-automation.html>
(highlighting “a subtle, sneaky form of technological displacement, care of the gig economy. They’re
not robots stepping in for humans on a factory floor, but rather smartphone-based independent
contractors . . . chipping away at the careers of full-time and in some cases unionized employees”).

1 **II. Drivers for Uber and Lyft are misclassified as independent contractors, impeding**
2 **their access to labor protections without actually granting them workplace**
3 **“flexibility.”**

4 **A. Without critical protections at work, Uber and Lyft drivers endure challenging and**
5 **unsafe working conditions.**

6 Because they are mislabeled as contractors, Uber and Lyft’s drivers lack minimum wage and
7 overtime protections, access to unemployment insurance, state disability insurance, workers’
8 compensation, anti-harassment and discrimination protections, the right to organize and bargain
9 collectively, employer contributions to Social Security, and the chance to access retirement savings
10 plans. Meanwhile, many drivers experience chronic income instability, coupled with the constant
11 threat of deactivation from the platforms.¹²

12 Who accepts these demanding conditions of work? According to data from the Bureau of
13 Labor Statistics, Black and Latino workers make up almost 42 percent of workers for Uber, Lyft, and
14 other “electronically mediated work” companies, although they comprise less than 29 percent of the
15 overall U.S. workforce.¹³ Surveys of ride-hail drivers specifically (as opposed to the “electronically
16 mediated” workforce at large) reflect similar demographics. In San Francisco and Los Angeles, Lyft
17 data shows that most of its drivers are people of color. Although Uber has not published city-specific
18 demographics, the majority of its drivers nationwide are people of color.¹⁴ A recent survey of Bay
19 Area ride-hailing drivers and delivery workers—the majority of whom drive or deliver for Uber and
20 Lyft—similarly found that nearly 80 percent are people of color, and a majority are immigrants.¹⁵

21 ¹² See Marcus Lim, ‘Deactivated’—When Drivers Are Cut Off From Uber, Medium (Oct. 15, 2018),
22 <https://medium.com/labor-new-york/deactivated-when-drivers-are-cut-off-from-uber-fe7f9c04d136>.

23 ¹³ Bureau of Labor Statistics, U.S. Dep’t of Labor, *Electronically Mediated Work: New Questions in the*
24 *Contingent Worker Supplement*, Monthly Labor Rev. (Sept. 2018),
25 [https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-](https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm)
26 [contingent-worker-supplement.htm](https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm).

27 ¹⁴ See Martha Ockenfels-Martinez & Lili Farhang, *Driving Away Our Health: The Economic Insecurity*
28 *of Working for Lyft and Uber*, Human Impact Partners & Gig Workers Rising 3 (Aug. 2019),
29 [https://humanimpact.org/wp-content/uploads/2019/08/DrivingAwayHealthReport_2019.08final-](https://humanimpact.org/wp-content/uploads/2019/08/DrivingAwayHealthReport_2019.08final-compressed.pdf)
30 [compressed.pdf](https://humanimpact.org/wp-content/uploads/2019/08/DrivingAwayHealthReport_2019.08final-compressed.pdf).

31 ¹⁵ Chris Benner, *On-Demand and On-the-Edge: Ride-Hailing and Delivery Workers in San Francisco*,
32 Univ. of Cal. Santa Cruz Inst. for Soc. Transformation 70 (May 2020), [https://transform.ucsc.edu/wp-](https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf)
33 [content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf](https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf).

1 Workers of color, encountering racist barriers to stable employment, are left with precious little choice
2 but to accept the low-wage, unsafe, insecure conditions of app-based work.

3 Drivers often earn subminimum wages, while incurring expenses that cannot be passed onto
4 customers and which Uber and Lyft refuse to reimburse. One calculation estimates that Uber drivers
5 earn an average of \$11.77 an hour after deducting Uber’s fees and drivers’ expenses; that drops to
6 \$10.87 after deducting the Social Security and Medicare taxes that drivers are required to pay, and as
7 low as \$9.21 after taking into account additional deductions.¹⁶ The expenses that Uber and Lyft drivers
8 incur often have the effect of locking them into the work. Many take out loans or incur credit card debt
9 to pay for work-related expenses such as car maintenance costs.¹⁷ Given this combination of both
10 unpredictable expenses and unstable income, more than half of drivers surveyed in Los Angeles said
11 they would rather earn a set hourly wage after expenses, and the majority of these drivers said they
12 want to see a guaranteed rate of at least \$15 an hour.¹⁸ Belying Uber and Lyft’s proclamations that
13 their drivers enjoy the “independence” that comes with the job, more than half of the surveyed Los
14 Angeles drivers said they want to be employees, and nearly all said they at least would like employee-
15 like benefits, such as paid time off, health insurance, unemployment insurance, and workers’
16 compensation.¹⁹

17 Though Uber and Lyft frame driving for their platforms as a flexible, part-time supplement to
18 other work, driving is the primary source of income for the majority of drivers in San Francisco and
19 Los Angeles.²⁰ Over 70 percent of ride-hailing and delivery workers in San Francisco work for more
20 than 30 hours a week, with 50 percent of workers clocking more than 40 hours a week, and 30 percent
21

22 ¹⁶ Lawrence Mishel, *Uber and the Labor Market*, Econ. Pol’y Inst. (May 15, 2018),
23 [https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-
24 scale-of-uber-and-the-gig-economy/](https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy/). See also James A. Parrott & Michael Reich, *A Minimum
25 Compensation Standard for Seattle TNC Drivers*, The New Sch. Ctr. for N.Y.C. Aff. 38-40 (July 2020),
26 https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf (finding similar
27 earnings for ride-hail drivers in Seattle).

28 ¹⁷ See *More than a Gig: A Survey of Ride-Hailing Drivers in Los Angeles*, UCLA Inst. for Rsch. on
Labor and Emp. 3 (May 2018), [https://irle.ucla.edu/wp-content/uploads/2018/05/Final-Report.-UCLA-
More-than-a-Gig.pdf](https://irle.ucla.edu/wp-content/uploads/2018/05/Final-Report.-UCLA-More-than-a-Gig.pdf) [hereinafter *More than a Gig*].

¹⁸ *Id.* at 27-28.

¹⁹ *Id.* at 34.

²⁰ See Benner, *supra* note 15, at 16; *More than a Gig*, *supra* note 17, at 14-15.

1 logging more than 50 hours a week.²¹ In Los Angeles, nearly half of workers report driving more than
2 35 hours a week; half reported driving more than eight hours a day in the week before the survey; and
3 nearly three in five workers reported driving more than five days a week.²² The same studies show that
4 many drivers are struggling financially. In Los Angeles, nearly one in five drivers receives some form
5 of public assistance (such as food stamps or housing subsidies).²³ In San Francisco, nearly 40 percent
6 of ride-hailing drivers could not pay for a \$400 emergency without borrowing money, and nearly 20
7 percent have no health insurance.²⁴

8 Without access to affordable health insurance, paid leave, state disability insurance, or
9 workers' compensation, drivers face significant challenges obtaining medical care or recuperating
10 from health conditions that may arise on the job. Drivers in California report experiencing
11 musculoskeletal disorders and chronic pain in their backs and knees as a result of sitting for many
12 hours a day. As Uber and Lyft have decreased the amount that drivers earn for each trip, the days have
13 only gotten longer. Drivers also report suffering from headaches, fatigue, and dehydration as a result
14 of their work, not to mention the mental toll of the job, which many say has led them to experience
15 anxiety and depression.²⁵

16 The implications of not having basic health and safety protections have become even more
17 obvious during the COVID-19 pandemic. In the Bay Area, 62 percent of ride-hail drivers and delivery
18 workers surveyed said that they are working less out of fear of contracting COVID-19, leading to a
19 reduction in their earnings, while 28 percent said they are continuing to accept jobs out of financial
20 necessity, despite fears of getting sick. Nearly 80 percent of these workers say they have lost more
21 than half of their income as a result of COVID-19, and more than half feel that platforms such as Uber
22 and Lyft are not doing enough to respond to the virus.²⁶ And with no pathway to unionization, drivers
23 are limited in their ability to demand more protections.

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25
26 ²¹ Benner, *supra* note 15, at 21.

27 ²² *More than a Gig*, *supra* note 17, at 16.

28 ²³ *Id.* at 15.

²⁴ Benner, *supra* note 15, at 16-19.

²⁵ Ockenfels-Martinez & Farhang, *supra* note 14, at 12-15.

²⁶ Benner, *supra* note 15, at 61-66.

1 **B. Uber and Lyft drivers’ misclassification impedes their ability to access much-**
2 **needed state unemployment insurance benefits.**

3 Since the pandemic-induced recession, drivers also have struggled to access the unemployment
4 insurance (“UI”) benefits to which they are entitled as employees. In early March, many drivers for
5 Uber and Lyft quickly became unemployed as Bay Area counties, and eventually the entire state,
6 imposed shelter-in-place orders. Even drivers who continued to attempt to work were unable to earn
7 income, as the demand for services plummeted.²⁷ But because Uber and Lyft do not report their
8 earnings to the state’s Employment Development Department (“EDD”) as required by law, *see* Calif.
9 Unemploy. Ins. Code §§ 1085, 1088, drivers who applied for UI were told that they had no earnings
10 history—and thus were eligible for \$0 in benefits.²⁸ Drivers that had worked other jobs as properly
11 classified employees, either while or before working as a driver, were provided Notices of
12 Unemployment Insurance Award that calculated their Weekly Benefit Amounts—the amount paid
13 each week while fully unemployed—based exclusively on their W-2 work. These Weekly Benefit
14 Amounts typically were far less than what drivers would have received had Uber and Lyft reported
15 their wages to the state as required.

16 Some drivers, either by themselves or with the assistance of legal organizations and
17 community groups (including *amici*) have requested that EDD conduct an audit of their earnings as
18 drivers for Uber and Lyft. *Amici* know and have assisted Uber and Lyft drivers who, after EDD
19 performed wage audits, were found to be employees and thus eligible for state UI, usually at the
20 maximum weekly benefit amount of \$450. Although these drivers ultimately obtained unemployment
21 insurance, the wage audit process took months for each driver. While other workers received benefits
22 within weeks of becoming unemployed in March, many Uber and Lyft drivers did not receive any
23 insurance benefits until May or June. *Amici* have clients who are still waiting for their benefits as of
24 mid-July, many months after having applied. It is difficult to capture in words the financial desperation

25 ²⁷ *See, e.g.*, Andrew J. Hawkins, *Uber is doing 70 percent fewer trips in cities hit hard by coronavirus*,
26 The Verge (Mar. 19, 2020), [https://www.theverge.com/2020/3/19/21186865/uber-rides-decline-](https://www.theverge.com/2020/3/19/21186865/uber-rides-decline-coronavirus-seattle-sf-la-nyc)
[coronavirus-seattle-sf-la-nyc](https://www.theverge.com/2020/3/19/21186865/uber-rides-decline-coronavirus-seattle-sf-la-nyc).

27 ²⁸ *See, e.g.*, Shannon Bond, “*We Can’t Take Your Call*”: *Uber Drivers, Other Gig Workers Struggle For*
28 *Unemployment*,” All Things Considered (May 19, 2020),
[https://www.npr.org/2020/05/19/858410180/we-can-t-take-your-call-uber-drivers-other-gig-workers-](https://www.npr.org/2020/05/19/858410180/we-can-t-take-your-call-uber-drivers-other-gig-workers-struggle-for-unemployment)
[struggle-for-unemployment](https://www.npr.org/2020/05/19/858410180/we-can-t-take-your-call-uber-drivers-other-gig-workers-struggle-for-unemployment).

1 and emotional despair that overcome Uber and Lyft drivers who are forced to wait in benefits
2 purgatory. *Amici* have been at a loss for words when asked by drivers: *How am I supposed to pay my*
3 *rent? Feed my children? Buy diapers for my baby?*

4 Rather than assist drivers with accessing UI, Uber and Lyft have encouraged them to apply for
5 Pandemic Unemployment Assistance (“PUA”), the temporary federal program established for people
6 who are actually self-employed and ineligible for unemployment insurance.²⁹ Steering their drivers
7 toward PUA, the companies have hailed the new program as a *deus ex machina*—an ever-so-
8 convenient intervention from on high to allow drivers to access benefits they should already be
9 receiving as employees. This is, like so much of how Uber and Lyft operate, a deliberate lie. Even
10 members of Congress who crafted and passed the Coronavirus Aid, Relief, and Economic Security
11 (“CARES”) Act have condemned app-based companies’ efforts to launder their workers’
12 misclassification through PUA.³⁰

14
15 ²⁹ See, e.g., Irina Ivanova, *Uber And Lyft Drivers Accuse Companies of Holding Up Unemployment*
16 *Benefits*,” CBS News (Apr. 21, 2020), [https://www.cbsnews.com/news/uber-lyft-drivers-gig-economy-](https://www.cbsnews.com/news/uber-lyft-drivers-gig-economy-unemployment-benefits/)
17 [unemployment-benefits/](https://www.cbsnews.com/news/uber-lyft-drivers-gig-economy-unemployment-benefits/) (reporting that an Uber spokesperson stated, “We are actively reaching out to
18 all states to try and work with them to get [Pandemic Unemployment Assistance] to our drivers and
19 delivery people”); Greg Iacurci, *Some Uber, Lyft Drivers Fear Companies Will Use Unemployment*
20 *Benefits Against Them*, CNBC (May 23, 2020), [https://www.cnbc.com/2020/05/23/uber-lyft-drivers-](https://www.cnbc.com/2020/05/23/uber-lyft-drivers-fear-unemployment-benefits-will-be-used-against-them.html)
21 [fear-unemployment-benefits-will-be-used-against-them.html](https://www.cnbc.com/2020/05/23/uber-lyft-drivers-fear-unemployment-benefits-will-be-used-against-them.html) (noting that Lyft held conference calls to
22 tell drivers “the benefits in the CARES Act, including Pandemic Unemployment Assistance, which was
23 designed specifically to help independent workers like drivers”); Sam Hartman, *Uber and Lyft Aren’t*
24 *Paying for Drivers’ Unemployment: You Are, Confirms Newsom*, KQED (Apr. 15, 2020),
25 [https://www.kqed.org/news/11812496/uber-and-lyft-arent-paying-for-drivers-unemployment-you-are-](https://www.kqed.org/news/11812496/uber-and-lyft-arent-paying-for-drivers-unemployment-you-are-confirms-newsom)
26 [confirms-newsom](https://www.kqed.org/news/11812496/uber-and-lyft-arent-paying-for-drivers-unemployment-you-are-confirms-newsom) (noting that Uber wrote the Employment Development Department asking the
27 Department to modify guidance to discourage workers from listing the company as an employer).

28 ³⁰ See Letter from U.S. Senators Catherine Cortez-Masto, Sherrod Brown, Cory Booker, Ben Cardin, Ed
Markey, Patty Murray, Jacky Rosen, Bernie Sanders, and Elizabeth Warren to U.S. Dep’t of Labor
Secretary Eugene Scalia (June 8, 2020),
[https://www.cortezmasto.senate.gov/imo/media/doc/Letter%20to%20DOL%20re%20Gig%20Worker%20](https://www.cortezmasto.senate.gov/imo/media/doc/Letter%20to%20DOL%20re%20Gig%20Worker%20Misclassification%20(Final).pdf)
[20Misclassification%20\(Final\).pdf](https://www.cortezmasto.senate.gov/imo/media/doc/Letter%20to%20DOL%20re%20Gig%20Worker%20Misclassification%20(Final).pdf) (“[B]y creating a federal PUA program that supplements the existing
UI system, Congress did not intend to permit employers to inappropriately push their employees to
PUA, absolving employers of their obligation to pay into much-needed state trust funds during an
unprecedented crisis when states need to ensure they are fully and fairly resourced. . . . While PUA was
meant to be an emergency benefit to meet the unprecedented crisis of the moment, we are concerned that
dishonest businesses will use the program as a tool to enshrine their workers’ misclassification and skew
markets against fair competition.”).

1 Nevertheless, PUA is no salve for misclassified workers struggling to access UI. In most cases,
2 the temporary program offers far less generous benefits.³¹ Many drivers who initially applied for UI
3 and could not afford to wait on EDD’s wage audits reapplied for PUA out of sheer financial necessity.
4 Unlike regular UI, PUA requires no separate income verification before a grant of benefits. But while
5 UI is calculated using gross earnings during the last five seasonal quarters, Pandemic Unemployment
6 Assistance is calculated based on net earnings during the prior calendar year. *Compare* Calif.
7 Unemploy. Ins. Code §§ 926, 928.5 with CARES Act § 2102(d)(1); 20 C.F.R. § 625.6(a)(2). Drivers
8 are required to pay out-of-pocket for significant expenses, including wear-and-tear, gasoline,
9 cellphone plans, and so-called platform fees to Uber and Lyft. As a result, many drivers who earned
10 gross earnings that would allow them to access the maximum Weekly Benefit Award (\$450/week) on
11 UI stand to receive far less in weekly benefits on PUA.³²

12 PUA also has other features that are second-rate compared to California’s state UI. For
13 example, PUA at present only lasts up to 46 weeks; unemployment insurance lasts up to 59 weeks.³³
14 While EDD may waive an overpayment of UI benefits when it decides that collecting the overpayment
15 would be inequitable, *see* 22 CCR § 1375-1(a), it cannot waive overpayment of PUA benefits—an
16 unfortunate restriction that many advocates including *amici* suspect will become a common
17 occurrence given the rapid processing of benefits, *see* 20 C.F.R. § 625.14.

18 As a new benefit expansion for people who truly are self-employed and not entitled to state
19 unemployment insurance, PUA has proven to be a critical lifeline. But Uber and Lyft have sought to
20 hijack a well-intentioned program, dressing it up as a gift to their workers while using it to cement
21 their drivers’ misclassification.

24 ³¹ *See* E. Tammy Kim, *Why Is It So Hard for Gig Workers to Get Unemployment Benefits?*, The Markup
25 (May 12, 2020), [https://themarkup.org/ask-the-markup/2020/05/12/why-is-it-so-hard-for-gig-workers-](https://themarkup.org/ask-the-markup/2020/05/12/why-is-it-so-hard-for-gig-workers-to-get-unemployment-benefits)
26 [to-get-unemployment-benefits](https://themarkup.org/ask-the-markup/2020/05/12/why-is-it-so-hard-for-gig-workers-to-get-unemployment-benefits) (highlighting the discrepancy as “companies like Uber and Lyft . . .
27 [hold] up PUA as the best and fastest way to access relief” although many full-time app-based workers
“stand to lose a great deal” under PUA instead of UI).

27 ³² *See, e.g.*, Iacurci, *supra* note 29.

28 ³³ *See Additional Unemployment Insurance Benefits Now Available*, Emp. Dev. Dep’t (July 1, 2020),
https://www.edd.ca.gov/About_EDD/pdf/news-20-29.pdf.

1 **C. Any “flexibility” that the drivers may have on paper is illusory.**

2 In exchange for these bedrock labor rights—wage and hour protections, unemployment
3 insurance, workers’ compensation, and more—what do the drivers receive? Uber and Lyft claim that
4 the drivers’ “flexibility” and “independence” mean that they cannot be classified as employees.³⁴ In
5 reality, employee status and flexibility are fully compatible. Laws do not force workers into choosing
6 between having basic workplace protections and having flexibility. Companies do.

7 At any rate, the so-called “flexibility” lauded by the ride-hail companies vanishes upon further
8 inspection. Uber and Lyft may not explicitly tell their drivers what to do and how to do it, but the
9 companies use a host of behavioral tricks to shape and carefully manage their workers’ schedules,
10 availability, and activities.³⁵ Uber, for example, has hired teams of social and data scientists with one
11 objective: controlling driver behavior. The company has used “video game techniques, graphics and
12 noncash rewards of little value that can prod drivers into working longer and harder[.]”³⁶ It uses
13 earnings reminders to keep drivers on the road. It uses an algorithm to pre-load drivers’ next fare, not
14 dissimilar to Netflix’s auto-play feature that induces binge-watching. Whatever flexibility Uber and
15 Lyft drivers may have on paper, that flexibility is monitored, mediated, supervised, and carefully
16 managed by behavioral nudges that allow the companies to control their drivers.³⁷

18 ³⁴ See Shirin Ghaffary, *Some Uber and Lyft drivers say they were misled into petitioning against their*
19 *own worker rights*, Recode (June 27, 2019), [https://www.vox.com/recode/2019/6/27/18759387/uber-](https://www.vox.com/recode/2019/6/27/18759387/uber-lyft-drivers-misled-companies-political-campaign)
20 [lyft-drivers-misled-companies-political-campaign](https://www.vox.com/recode/2019/6/27/18759387/uber-lyft-drivers-misled-companies-political-campaign) (reporting that Uber and Lyft sought to rally workers
21 against A.B. 5 by directly messaging drivers about the bill’s threat to their flexibility).

22 ³⁵ See, e.g., Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers’ Buttons*, N.Y.
23 Times (Apr. 2, 2017), [https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-](https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html)
24 [psychological-tricks.html](https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html) (describing Uber’s use of “psychological inducements and other techniques
25 unearthed by social science to influence when, where and how long drivers work”); Sarah Mason, *High*
26 *Score, Low Pay: Why the Gig Economy Loves Gamification*, The Guardian (Nov. 20, 2018),
27 [https://www.theguardian.com/business/2018/nov/20/high-score-low-pay-gamification-lyft-uber-drivers-](https://www.theguardian.com/business/2018/nov/20/high-score-low-pay-gamification-lyft-uber-drivers-ride-hailing-gig-economy)
28 [ride-hailing-gig-economy](https://www.theguardian.com/business/2018/nov/20/high-score-low-pay-gamification-lyft-uber-drivers-ride-hailing-gig-economy) (detailing the “gamification” techniques and algorithms used by Uber and
Lyft to manage their drivers); Alex Rosenblat, *When Your Boss is an Algorithm*, N.Y. Times (Oct. 12,
2018), <https://www.nytimes.com/2018/10/12/opinion/sunday/uber-driver-life.html> (describing Uber’s
use of algorithms to manage its workforce).

³⁶ Scheiber, *supra* note 35.

³⁷ See Rebecca Smith, *Flexibility in the On-Demand Economy*, National Employment Law Project 4
(June 2016), [https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Flexibility-On-Demand-](https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Flexibility-On-Demand-Economy.pdf)
[Economy.pdf](https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Flexibility-On-Demand-Economy.pdf) (“In the end, a job with Uber or other on-demand companies comes with roughly the same

1 Without employee protections like paid leave or ready access to unemployment insurance,
2 some Uber and Lyft drivers have had no choice but to work through a public health crisis, endangering
3 themselves and their loved ones while navigating unreliable company safety policies or applying for
4 temporary federal unemployment benefits that provide less than regular UI.³⁸ The veneer of
5 “flexibility” has evaporated during the COVID-19 pandemic, leaving behind the simple and sober
6 truth: Uber and Lyft’s drivers, untethered to employee protections and carrying the companies’
7 transportation business, have been sitting atop ticking timebombs.

8 **III. The companies’ misclassification schemes inflict massive harms on honest businesses**
9 **and the public good.**

10 When companies like Uber and Lyft stubbornly refuse to be accountable to their employees,
11 law-abiding employers suffer. Independent contractor misclassification, as the United States Treasury
12 Inspector General found, “plac[es] honest employers and businesses at a competitive disadvantage.”³⁹
13 This is especially a problem in delivery services, construction, janitorial, home care, and other labor-
14 intensive low-wage sectors, where employers can gain competitive advantage by driving down payroll
15 costs.

16 App-based workers in ride-hail, delivery, home care, and domestic work, as well as other
17 misclassified workers in construction, agriculture, and custodial sectors, work in highly price-
18 competitive sectors. When companies escape their employer obligations to unlawfully boost profits,
19

20 degree of freedom as a job with a staffing agency or as a substitute teacher or day laborer: while a
21 worker is ostensibly free to decide not to work on a particular day, she may not get a call the next time
22 she wants to work, and she may be short on cash at the end of the month.”).

23 ³⁸ See, e.g., Danielle Echeverria, *Uber Drivers Protest Coronavirus Safety Program at CEO’s SF Home*,
San Francisco Chronicle (June 24, 2020), <https://www.sfchronicle.com/business/article/Uber-drivers-protest-coronavirus-safety-program-15364314.php>; Janet Burns, “*He Was Coughing up Blood: Uber*
24 *And Lyft Drivers Face Illness and Confusion Amid COVID-19 Outbreak*, Forbes (Mar. 17, 2020),
25 <https://www.forbes.com/sites/janetwburns/2020/03/17/he-was-coughing-up-blood-uber-and-lyft-drivers-face-illness-and-confusion-amid-covid-19-outbreak/#ebc7d4f7b31c>; Kevin Smith, *Uber, Lyft Drivers*
26 *Allege Lack of Protections Amid Coronavirus Outbreak*, Los Angeles Daily News (Apr. 15, 2020),
27 <https://www.dailynews.com/2020/04/15/uber-lyft-drivers-allege-lack-of-protections-amid-covid-19-outbreak/>

28 ³⁹ Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* 1 (Feb. 20, 2018), <https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf>.

1 they pressure businesses that employ workers in these fields to shed labor costs. Rampant
2 misclassification creates a “race to the bottom” where firms can remain competitive only by copying
3 these illegal business models.⁴⁰ Over time, working conditions like subminimum wages and no
4 benefits become the industry norm that workers are forced to accept.⁴¹ The market price for these
5 services is pushed lower and lower, until traditional employers cannot compete.⁴²

6 Law-abiding employers suffer from inflated unemployment insurance and workers’
7 compensation costs, as “free-riding” employers that misclassify employees as independent contractors
8 pass off costs to employers that play by the rules. A 2010 study estimated that misclassifying
9 employers shifts \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers’
10 compensation premiums to law-abiding businesses annually.⁴³

11 Misclassification also disrupts the viability and sustainability of public programs. By
12 misclassifying their workers, Uber and Lyft avoid payroll taxes that fund vital social insurance
13 programs and hurt state and federal coffers with far-reaching impact beyond those who work in the
14 app-based economy. When employers skip out on paying their fair share, the public must make up the
15 difference. Federal, state, and local governments suffer hefty losses of revenue due to independent
16 contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and
17 unemployment insurance and workers’ compensation premiums.⁴⁴ A 2009 report by the Government
18 Accountability Office estimates independent contractor misclassification cost federal revenues \$2.72
19 billion in 2006.⁴⁵ According to a 2009 report by the Treasury Inspector General for Tax
20 Administration, misclassification contributed to a \$54 billion underreporting of employment tax, and
21

22 ⁴⁰ See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be*
23 *Done to Improve It*, 139-41 (2017).

24 ⁴¹ See Ruckelshaus and Gao, *supra* note 2.

25 ⁴² See Weil, *supra* note 40, at 142.

26 ⁴³ Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers’ Compensation*
27 *Premiums*, Dep’t of Econ., Univ. of Mo., Kan. City 5-6 (Sept. 12, 2010).

28 ⁴⁴ Wage and Hour Division, U.S. Dep’t of Labor, *Misclassification of Employees as Independent*
Contractors, <https://www.dol.gov/whd/workers/Misclassification/>.

⁴⁵ U.S. Gov’t Accountability Office, *Employee Misclassification: Improved Coordination, Outreach,*
and Targeting Could Better Ensure Detection and Prevention (Aug. 2009),
<http://www.gao.gov/new.items/d09717.pdf>.

1 losses of \$15 billion in unpaid FICA taxes and UI taxes.⁴⁶ A 2017 review of the findings from the
2 twenty state studies of independent contractor misclassification demonstrates the staggering scope of
3 these abuses.⁴⁷

4 In California, Uber and Lyft have never paid either the Unemployment Insurance tax or the
5 Employment Training Tax for their drivers. For each driver, Uber and Lyft should have paid up to
6 \$441 a year in these taxes. A recent study estimated that the two companies together owed \$413
7 million to the state's UI fund between 2014 and 2019.⁴⁸ In the midst of an economic crisis with so
8 many out of work, the state's fund ran dry, and California in May became the first state in the country
9 to borrow from the federal government to provide UI benefits.⁴⁹ Uber and Lyft did not by themselves
10 create California's UI insolvency. But the companies' blatant and unlawful misclassification of
11 hundreds of thousands of drivers has directly contributed to the state's current fiscal crisis. Had Uber
12 and Lyft properly paid into the UI fund for their employee drivers, California would be better
13 positioned to assist unemployed workers during an unprecedented economic recession.

14 These are the public policy failures that Assembly Bill 5 aimed to correct. In the absence of
15 clear law and strong enforcement, employers have free rein to take advantage of desperate workers
16 who have no choice but to accept insecure and low-paying jobs. Independent contractor
17 misclassification skews fair competition, either pushing honest employers out of business or
18 encouraging them to cut corners to stay in the game. State coffers are depleted, while well-capitalized
19 firms such as Uber and Lyft escape their employer obligations.

23 ⁴⁶ Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address*
24 *Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed 2* (Feb.
25 4, 2009), <http://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.pdf>.

26 ⁴⁷ See Ruckelshaus & Gao, *supra* note 2.

27 ⁴⁸ Ken Jacobs & Michael Reich, *What Would Uber and Lyft Owe to The State Unemployment Insurance*
28 *Fund*, Univ. of Cal. Berkeley Labor Ctr. (May 7, 2020), <http://laborcenter.berkeley.edu/what-would-uber-and-lyft-owe-to-the-state-unemployment-insurance-fund/>.

⁴⁹ Sarah Chaney, *California Is First State to Borrow From Federal Government to Make Unemployment*
Payments, Wall Street Journal (May 4, 2020), <https://www.wsj.com/articles/california-is-first-state-to-borrow-from-federal-government-to-make-unemployment-payments-11588617257>.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by the People in its June 25, 2020 Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, *amici* respectfully urge this Court to grant the People’s motion for a preliminary injunction against Defendants.

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Respectfully submitted,

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