

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

APPEAL NOS. 20-15689, 20-15700

JOHN ROGERS, AMIR EBADAT, and HANY FARAG,
individually and on behalf of others similarly situated,
Plaintiffs - Appellants/Cross-Appellees

v.

LYFT INC.,
Defendant - Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:20-cv-01938-VC
The Honorable Vince Chhabria

**BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT LAW PROJECT,
PARTNERSHIP FOR WORKING FAMILIES, LEGAL AID AT WORK,
BET TZEDEK, CENTER FOR WORKERS' RIGHTS, CENTRO LEGAL
DE LA RAZA, AND PUBLIC RIGHTS PROJECT
IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1, Amici Curiae National Employment Law Project, Partnership for Working Families, Legal Aid at Work, Bet Tzedek, the Center for Workers' Rights, and Centro Legal de la Raza state that they are non-profit corporations, that they have no parent corporations, and that no publicly-held corporations own 10% or more of their stock. Amicus Curiae Public Rights Project, a project of the Tides Center, states that it does not have a parent company or issue stock.

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STATEMENT OF INTEREST OF AMICI

The National Employment Law Project (“NELP”) is a non-profit legal organization with fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP’s areas of expertise include the workplace rights of contingent workers, workplace health and safety, and forced arbitration requirements. NELP has collaborated closely with state and federal agencies, including in California, community-based worker centers, unions, and state policy groups, litigated, and participated as *amicus* in numerous cases addressing the rights of contingent workers under federal and state laws. NELP has submitted testimony to the U.S. Congress and state legislatures on numerous occasions on the problems of independent contractor misclassification.

Partnership for Working Families (“PWF”) is a national network of twenty-one regional affiliate organizations that support innovative solutions to the nation’s economic and environmental problems. PWF provides original research, advocacy, legal support, and strategic communications to its affiliates and allies, who advance policies at the city, state, and federal level that improve lives and create quality jobs and healthy, sustainable, and democratic communities. PWF’s recent report *Rigging the Gig* notes Lyft’s ability to profit by misclassifying its workforce as independent contractors while blocking them from accessing basic workplace protections. PWF has also provided legal and technical assistance to Gig Workers Rising, a campaign

that supports Lyft drivers and other gig workers organizing for better jobs, by creating legal resource guides, leading worker know-your-rights trainings, and representing drivers who have applied for unemployment insurance.

Legal Aid at Work (formerly the Legal Aid Society – Employment Law Center) (“LAAW”) is a public interest legal organization founded in 1916 that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. Since 1970, LAAW has represented low-wage clients in individual and class action cases involving a range of employment-related issues, including wage theft, labor trafficking, retaliation, and discrimination. LAAW frequently appears in federal and state courts to promote the interests of clients both as plaintiffs’ counsel and as *amicus curiae*. LAAW also advises thousands of workers, including misclassified workers, on their employment rights through Workers’ Rights Clinics and helplines, and represents misclassified workers in appeals for unemployment insurance benefits before the California Unemployment Insurance Appeals Board and in claims for wages at the California Labor Commissioner’s Office. Protecting low-income workers, including ride-hail drivers, from the ills of misclassification is a core part of LAAW’s work.

Bet Tzedek—Hebrew for the “House of Justice”—was established in 1974 as a nonprofit organization that provides free legal services to Los Angeles County residents. Bet Tzedek’s Employment Rights Project focuses on the needs of low-

wage workers, providing assistance through individual representation before the Labor Commissioner, civil litigation, legislative advocacy, and community education. Bet Tzedek has taken a leading role in advocating for the rights of California's low-wage and immigrant workers, including by submitting amicus briefs and letters on issues of broad importance to California employees. Bet Tzedek's interest in this case comes from nearly 20 years of experience advocating for the rights of California's low-wage workers. As a leading voice for Los Angeles's most vulnerable workers, Bet Tzedek has an interest in the correct development and interpretation of California's worker-protection laws.

The Center for Workers' Rights ("CWR") is a Sacramento-based, non-profit legal services and advocacy organization whose mission is to create a community where workers are treated with dignity and fairness. CWR provides legal representation to low-wage workers, advocates for initiatives to advance workers' rights, and promotes worker education, activism, and leadership in the greater Sacramento area. CWR represents misclassified workers in appeals for unemployment benefits before the California Unemployment Insurance Appeals Board and in claims for wages at the California Labor Commissioner's Office.

Since 1969, Centro Legal de la Raza ("Centro Legal") has provided free legal services to low-income and immigrant clients throughout the San Francisco Bay Area and Northern and Central California. Centro Legal assists thousands of

workers, tenants, and immigrants each year through legal clinics and consults, as well as full representation in state and federal court. Many of the clients in Centro Legal's workers' rights practice are misclassified as independent contractors and are systematically denied basic workplace protections.

Public Rights Project ("PRP") works at the intersection of community organizing and government enforcement, with a focus on catalyzing equitable and community-based enforcement. Spurred by a mission to bridge the gap between the promise of laws and the lived experience of communities of color as well as other historically marginalized groups, PRP has advocated for enforcement of the ABC test against businesses exploiting workers in the fissured economy, as well as connecting government enforcement agencies with organizations that support affected workers.

A ruling in favor of Lyft in this case would undermine amici's longstanding policy goals, and those of close partners in community-based worker advocacy organizations across the Ninth Circuit.

SUMMARY OF ARGUMENT

This past March, in the midst of a public health crisis, Plaintiffs John Rogers, Amir Ebadat, and Hany Farag, on behalf of themselves and other Lyft drivers, sought emergency reclassification as employees under California’s A.B. 5 in order to access state-mandated paid sick leave and protect both their and the public’s health during this pandemic. But the district court denied them this emergency relief, ruling it would make little difference to the drivers, and holding that Plaintiffs were required to arbitrate their claims in private, alone.

Amici submit this brief not to repeat arguments made by the parties, but to illustrate for this Court four interlocking points: (1) Lyft has failed to protect its drivers, who are at high risk of infection during this pandemic, harming the drivers, their customers, and the public; (2) Lyft has done this by misclassifying its drivers as “independent contractors,” disclaiming responsibility for them; (3) this misclassification costs the state and public millions of dollars; and (4) these drivers are transportation workers engaged in interstate commerce who should not be forced into private arbitration under the facts and the proper legal standard.

The district court’s decision was wrong, misjudging Plaintiffs’ likelihood of success on the merits, and improperly deciding that the drivers were not transportation workers engaged in interstate commerce. Lyft drivers labor in vehicles in which social distancing is impossible, putting them at high risk of

COVID-19 infection, and Lyft has utterly failed to protect its drivers. Without access to critical days of paid sick leave under California and local laws, Lyft drivers will continue driving during this pandemic, jeopardizing their and the public's health. Lyft's lawbreaking also imposes a range of other harms on law-abiding employers and the public. Plaintiffs are entitled to both a preliminary injunction and public injunctive relief under California law.

For years, Lyft has openly defied California law by misclassifying employees, wielding its forced arbitration requirements (which include class-action waivers) as a shield and using the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), to evade accountability. But last year the U.S. Supreme Court unanimously held that under 9 U.S.C. § 1, the "contracts of employment" of transportation workers engaged in interstate commerce are not subject to the FAA, regardless of whether the workers are misclassified as independent contractors. *New Prime v. Oliveira*, 139 S. Ct. 532, 543–44 (2019).

As the First Circuit Court of Appeals recently held, drivers who transport goods or passengers within the flow of interstate commerce are a class of workers engaged in interstate commerce under 9 U.S.C. §1, and thereby not subject to the FAA. *Waithaka v. Amazon.com, Inc.*, No. 19-1848, 2020 WL 4034997, at *11 (1st Cir. Jul. 17, 2020). This Court should adopt this sound holding here because Lyft has arranged for its drivers to regularly transport passengers to and from airports

throughout the state. Finally, because Lyft drivers' forced arbitration requirements are not subject to the FAA, they must be examined under California law, which prohibits imposition of forced arbitration requirements as a condition of employment.

ARGUMENT

I. Lyft Drivers' Working Conditions Put Them at High Risk of COVID-19 Infection and Death.

Lyft drivers work in an environment in which it is generally physically impossible to socially distance from passengers—a car that puts them at a high risk of contracting COVID-19. Moreover, Lyft drivers disproportionately come from Black, Latinx, and other communities of color that are already more vulnerable to severe illness and death from COVID-19. Lyft and other rideshare drivers remain at serious risk of contracting coronavirus on the job, spreading it to their families and communities, and getting sick and dying from COVID-19.

On March 4, 2020, the Centers for Disease Control and Prevention (“CDC”) informed the public that the main route of transmission of COVID-19 is through droplets in the air spread by an infected person’s coughs or sneezes.¹ Soon thereafter, significant evidence began to emerge about the enormous risk of transmission from infected individuals who are pre-symptomatic and asymptomatic. *See* Caroline Chen, *What We Need to Understand About Asymptomatic Carriers if We’re Going to Beat Coronavirus*, PROPUBLICA (April 2, 2020), <https://www.propublica.org/article/what-we-need-to-understand-about-asymptomatic-carriers-if-were-going-to->

¹ *See* CDC, *Coronavirus Disease 2019 (COVID-19): How It Spreads* (updated Jun. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>; *March 4, 2020 version archived at* <https://web.archive.org/web/20200328191833/https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

beat-coronavirus. Researchers further clarified that normal speaking and breathing can also spread respiratory droplets. *Id.*

Based on the early evidence, the CDC issued guidelines that all employers should ensure workers stay six feet apart from others and from customers, wear masks when unable to socially distance, regularly wash their hands with soap and warm water (or where unavailable provide hand sanitizers), and regularly disinfect shared surfaces.²

The most fundamental of the CDC's recommendations, physical distancing, is impossible to implement in most passenger automobiles, as the distance between the driver's seat and the back seat is less than six feet.³ The typical Lyft, in other words, is not a socially distant workplace. When an infected passenger coughs,

² See CDC, *Interim Guidance for Businesses & Employers Responding to Coronavirus Disease 2019 (COVID-19)*, (updated May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; *Mar. 6, 2020 version archived at* <https://web.archive.org/web/20200306210106/https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

³ See CDC, *Protect Yourself When Using Transportation* (May 26, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/using-transportation.html> (urging rideshare passengers to “sit in the back seat in larger vehicles such as vans or buses so you can remain at least 6 feet away from the driver.”); Ridester, *Driving for Uber/Lyft in the age of coronavirus – and how to get through it*, AUTOBLOG (Apr. 6, 2020), <https://www.autoblog.com/2020/04/06/coronavirus-uber-lyft-rideshare-driver-survey-results-safety/> (“[I]t’s not feasible to stay the recommended six feet away from your passengers in a normal-size vehicle.”).

sneezes, breathes, or speaks, they emit respiratory droplets containing the virus that can infect their driver—and vice versa. Within a car’s enclosed space, virus particles may be able to linger in the air and infect the driver. See Apoorva Mandavilli, *The Coronavirus Can Be Airborne Indoors, W.H.O. Says*, N.Y. TIMES (Jul. 9, 2020), <https://www.nytimes.com/2020/07/09/health/virus-aerosols-who.html>.

Lyft drivers also face a higher risk of COVID-19 infection because they are disproportionately from Black and Latinx communities, the populations hardest-hit by the coronavirus.⁴ According to the Bureau of Labor Statistics, Black and Latinx workers account for nearly 42% of Lyft, Uber, and other “electronically mediated work” companies’ workforces, though they represent less than 29% of the overall U.S. workforce.⁵ Surveys of ride-hail drivers specifically reflect similar demographics. In San Francisco, Los Angeles, and San Diego, Lyft’s data shows

⁴ See generally COVID Tracking Project & Bos. Univ. Ctr. for Antiracist Research, *The COVID Racial Data Tracker* (accessed Jul. 30, 2020), <https://covidtracking.com/race>; Richard A. Opiel et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (Jul. 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

⁵ Bureau of Labor Statistics, U.S. Dep’t of Labor, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, MONTHLY LAB. REV. (Sept. 2018), <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-thecontingent-worker-supplement.htm>.

that most of its drivers are people of color.⁶ A recent survey of Bay Area ride-hailing drivers and delivery workers—the majority of whom drive or deliver for Uber and Lyft—found that nearly 80% are people of color, and a majority are immigrants.⁷

Due to systemic racism and policy choices that extend far beyond the workplace, Black, Latinx, and other workers of color have a higher likelihood of underlying health conditions which put them at increased risk of death or serious complications from COVID-19. See ELISE GOULD & VALERIE WILSON, ECON. POLICY INST., BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS—RACISM AND ECONOMIC INEQUALITY 8–9, 26 (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/>; Virginia Isaad, *How COVID-19 Disproportionately Affects Latinos in These California Counties*, REMEZCLA (Jul. 30, 2020), <https://remezcla.com/culture/coronavirus-effect-latino-communities-counties-in-california-details/>.

⁶ See *2020 Economic Impact Report: San Francisco*, LYFT (accessed Jul. 30, 2020), <https://www.lyftimpact.com/stats/cities/san-francisco> (77% of Lyft’s San Francisco drivers identify with a minority group); *2020 Economic Impact Report: Los Angeles*, LYFT (accessed Jul. 30, 2020), <https://www.lyftimpact.com/stats/cities/los-angeles> (79% of Lyft’s L.A. drivers); *2020 Economic Impact Report: San Diego*, LYFT (accessed Jul. 30, 2020), <https://www.lyftimpact.com/stats/cities/san-diego> (67% of Lyft’s San Diego drivers),.

⁷ CHRIS BENNER, U.C. SANTA CRUZ INST. FOR SOC. TRANSFORMATION, ON-DEMAND AND ON-THE-EDGE: RIDE-HAILING AND DELIVERY WORKERS IN SAN FRANCISCO 70 (May 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf.

II. Lyft Has Failed to Adequately Protect Its Drivers From COVID-19.

Because a large portion of their work involves transporting passengers to and from airports, Lyft and other rideshare drivers were at heightened risk of COVID-19 infection during the early weeks of the pandemic, when international travelers were still regularly riding, unmasked, to and from airports using rideshare services. *See* Peter Jakubowicz, *Coronavirus Diaries: What Your Lyft Driver is Thinking Right Now*, SLATE (Mar. 9, 2020), <https://slate.com/human-interest/2020/03/coronavirus-ride-sharing-uber-lyft-advice.html>.

As COVID-19 became known to Lyft and other employers, Lyft urged drivers to regularly clean their vehicles, but did not pay drivers for this time, provide masks or protective equipment, or otherwise offer detailed guidance for how they could protect themselves. *See id.* (Lyft’s guidelines were to “Take care of yourself,” “Keep your car clean,” and “Stay informed”). Overall, Lyft maintained there was “no indication of a unique risk to members of the Lyft community.” Ryan Broderick, *Ride-Hail And Delivery Apps Like Uber And Postmates Are Tight-Lipped About What They’ll Do When The Coronavirus Hits The United States*, BUZZFEED NEWS (Feb. 28, 2020), <https://www.buzzfeednews.com/article/ryanhatesthis/ride-hail-and-delivery-apps-like-lyft-and-doordash-arent>.

As U.S. states began implementing stay-at-home orders and shuttering vast portions of their economy, rideshare drivers were labeled “essential workers,”

including in California. Cal. Dep't of Public Health, *Essential Workforce*, at 10 (April 28, 2020), <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf> (including “Transportation Network Companies” and “rideshare” among California’s “Transportation and Logistics” essential workforce). This designation was attributed to the drivers’ critical role, especially in urban centers, transporting individuals to stores for essential goods (e.g. groceries) and frontline healthcare workers to hospitals. *See id.* at 2, 11. Still, as the pandemic escalated into a full-blown public health emergency, Lyft did not require its drivers or riders to wear face coverings, much less provide drivers with PPE. *See Lyft’s latest info on Coronavirus*, LYFT (updated Mar. 9, 2020), *archived at* <https://web.archive.org/web/20200310060807/https://www.lyft.com/safety/coronavirus> (advising drivers that masks were not recommended by the CDC, but should be worn by those showing symptoms).

Drivers were, in other words, largely left on their own. Some drivers fashioned makeshift partitions with plastic sheeting and tape. *See, e.g.*, Yaron Steinbuch, *Lyft driver crafts crude coronavirus containment compartment in car*, N.Y. POST (Mar. 10, 2020), <https://nypost.com/2020/03/10/lyft-driver-crafts-crude-coronavirus-containment-compartment-in-car/>. But most drivers, with families to feed and no guidance, requirements, or resources from Lyft to help them, continued driving—despite the health risks surrounding them. *See, e.g.*, Sarah Holder, *The Human Cost*

of *Calling an Uber Right Now*, BLOOMBERG CITYLAB (Mar. 24, 2020), <https://www.bloomberg.com/news/articles/2020-03-24/the-human-cost-of-calling-an-uber-right-now> (quoting Alameda-based Lyft driver Edan Alva saying getting sick was the least of his priorities, because he “live[s] pretty much from road to mouth.”). A survey of 397 full-time Uber and Lyft drivers found that 57% of respondents planned to keep driving, despite the obvious health risks in doing so. Zachary Crockett, *Amid a pandemic, Uber drivers choose between health and livelihood*, THE HUSTLE (Mar. 22, 2020), <https://thehustle.co/coronavirus-uber-lyft-drivers/>.

Lyft took some steps to limit its workers’ exposure, such as ending pooled rides involving multiple passengers. See Shannon Bond, *Uber, Lyft Halt Shared Carpool Service in U.S. and Canada*, NPR (Mar. 20, 2020), <https://www.npr.org/2020/03/17/817240060/uber-lyft-halt-shared-carpool-service-in-u-s-and-canada>. But Lyft also took other steps that increased the likelihood of its drivers being exposed, including encouraging drivers to undertake risky trips bringing healthcare workers and patients to and from hospitals. See Holder, *supra*; *Doing more for patients and healthcare organizations amid the COVID-19 crisis*, LYFT BLOG (Apr. 6, 2020), <https://www.lyft.com/blog/posts/doing-more-for-patients-and-healthcare-organizations>.

In addition, because Lyft and other rideshare companies misclassify their employees as independent contractors, rideshare drivers in California and around the country faced weeks and even months in which they were unable to access unemployment benefits. *See* Rebecca Rainey, *Millions of Gig Workers Are Still Waiting for Unemployment Benefits*, POLITICO (Apr. 30, 2020), <https://www.politico.com/news/2020/04/30/millions-of-gig-workers-are-still-waiting-for-unemployment-benefits-225844> (reporting Lyft's withholding of payroll data prevented workers from timely receiving benefits). Thus, despite a significant drop-off in rideshare demand in the pandemic's first months, many rideshare drivers had no choice but to continue working and exposing themselves to COVID-19. *See, e.g.*, Joshua Emerson Smith, *A COVID-19 death renews questions of Uber and Lyft's responsibility to drivers*, SAN DIEGO UNION-TRIBUNE (Jul. 24, 2020), <https://www.sandiegouniontribune.com/news/transportation/story/2020-07-24/uber-driver-dies-covid-19>.

In early April, the CDC recommended all Americans wear face coverings when they were in public settings and could not otherwise socially distance. Chris Megerian et al., *CDC recommends wearing face masks during coronavirus pandemic*, L.A. TIMES (Apr. 3, 2020), <https://www.latimes.com/science/story/2020-04-03/cdc-recommends-wearing-face-masks-during-coronavirus-pandemic>. In response, some California cities, including Los Angeles and San Francisco,

mandated that face coverings be worn by all non-medical essential workers. *See Public Order Under City of Los Angeles Emergency Authority: Worker Protection Order* (issued Apr. 7, 2020; rev. May 7, 2020), <https://www.lamayor.org/sites/g/files/wph446/f/page/file/20200507MayorPublicOrderWorkerProtectionRev050720.pdf>; City & Cty. Of S.F., Order of the Health Officer No. C19-12 (Apr. 17, 2020), https://sfbos.org/sites/default/files/20200417_FINAL_Order_No_C19-12.pdf.

In mid-April, the CDC issued specific guidance that acknowledged the physical impossibility of social distancing in all but large vehicles.⁸ The CDC offered clear recommendations to rideshare drivers and their employers, such as requiring that drivers and passengers wear face coverings and installing partitions between drivers and passengers.⁹

Lyft did not, however, provide its drivers with adequate personal protective equipment (“PPE”). Instead, Lyft told its drivers that PPE supplies were only available “on a first-come, first-served basis” and that drivers could only receive “one face mask and one sanitizing product per week.” *See* Dara Kerr, *Uber and Lyft*

⁸ *See* CDC, *What Rideshare, Taxi, Limo and other Passenger Drivers-for-Hire Need to Know about COVID-19* (Apr. 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/rideshare-drivers-for-hire.html> (hereafter “CDC Rideshare Guidance”).

⁹ *Id.*

drivers: Give us safety gear to protect us from COVID-19, CNET (Apr. 16, 2020), <https://www.cnet.com/news/uber-and-lyft-drivers-give-us-safety-gear-to-protect-us-from-covid-19/>. In a late April survey of 1,087 rideshare drivers, 68% reported that their rideshare employer did not provide gloves, sanitizing products, or other protective equipment. Mobile Workers Alliance & We Drive Progress, *Rideshare Driver Covid-19 Survey Data Brief* (May 6, 2020), https://static1.squarespace.com/static/5e8512b7cebf196b1ec5c42d/t/5eb22368fa094f2b1b433c58/1588732778079/FINAL+Rideshare_Driver_Survey_Memo.pdf.

On May 7, 2020, Lyft announced a health safety program that would require its drivers and riders to complete a “health safety certification” before using Lyft, ostensibly requiring both passengers and drivers to wear face coverings. Moira Warburton & Tina Bellon, *Lyft to require passengers and drivers to wear masks*, REUTERS (May 7, 2020), <https://www.reuters.com/article/us-health-coronavirus-lyft/lyft-to-require-passengers-and-drivers-to-wear-masks-idUSKBN22K07Q>.

Enforcement of these requirements, however, has been spotty. Rideshare drivers have reported that they can do little about customers who refuse to wear masks. *See, e.g.,* Eric Graves, *Rideshare driver struggles with requiring masks*, WAFF48 NEWS (Jun. 30, 2020), <https://www.waff.com/2020/06/30/rideshare-driver-struggles-with-requiring-masks/>. Some Lyft drivers who attempt to enforce the mask requirements have been attacked by customers and had police called on

them. *See, e.g., Caught On Camera: Passenger Punches, Spits At Lyft Driver After Being Asked To Wear Face Covering*, CBS LOS ANGELES (Jul. 10, 2020), <https://losangeles.cbslocal.com/2020/07/10/passenger-punches-spits-at-lyft-driver-after-being-asked-to-wear-face-covering/>; Marc Santia, *Lyft Driver Says He Was Attacked, Then Arrested After Refusing Rider Without Mask*, NBC NEW YORK (Jul. 23, 2020), <https://www.nbcnewyork.com/news/local/lyft-driver-says-he-was-attacked-after-refusing-rider-without-mask-then-he-was-arrested/2529101/>.

Lyft failed to ensure its drivers could outfit their vehicles with partitions for months after the CDC recommended using partitions to protect against COVID-19 transmission. On July 17, 2020, Lyft announced it would provide only 60,000 of its drivers with partitions, “with the goal of providing 50% ride coverage” in Washington, D.C., Los Angeles, Seattle, Boston, Phoenix, Dallas, and New York City.¹⁰ Sara Ashley O’Brien, *Lyft is providing some drivers with vehicle partitions for free, while others will have to pay*, CNN BUSINESS (Jul. 17, 2020), <https://www.cnn.com/2020/07/17/tech/lyft-vehicle-partitions/index.html>. Lyft

¹⁰ It is not clear whether the Lyft-produced partitions will effectively reduce virus transmission. An installation demonstration video shows that, when installed, there will be a gap of “2 inches or bigger” on either side of the partition. *See* Lyft, *How to install your vehicle partition*, YOUTUBE, at 1:26 (Jun. 24, 2020), <https://youtu.be/uwJNZXrnWIk>. This is certainly not the “impermeable barrier between the front and rear seats” that Cal/OSHA recommends. Cal/OSHA, *Covid-19 Industry Guidance: Public and Private Passenger Carriers, Transit, and Intercity Passenger Rail*, 12 (Jul. 2, 2020), <https://files.covid19.ca.gov/pdf/guidance-transit-rail.pdf>.

claims it will sell the partitions to hundreds of thousands of other drivers, including all California drivers based outside Los Angeles, in the coming months. *See Lyft Expands its Health Safety Program, Strengthening Commitment to Driver Safety*, LYFT BLOG (Jul. 17, 2020), <https://www.lyft.com/blog/posts/lyft-expands-health-safety-program>.

In the meantime, drivers are still forced to rely on own makeshift solutions, much as they were back in March. *See Smith, supra* (describing how one driver crafted a partition that “doesn’t cover 100 percent” but “helps a lot”). Lyft’s failure to install in-vehicle partitions is particularly notable given that many grocery stores—which feature better air circulation than cars—installed such barriers within the first month of the pandemic to protect their workers. *See Lisa Baertlein, U.S. grocers add plexiglass sneeze guards to protect cashiers from coronavirus*, REUTERS (Mar. 30, 2020), <https://www.reuters.com/article/us-health-coronavirus-kroger/u-s-grocers-add-plexiglass-sneeze-guards-to-protect-cashiers-from-coronavirus-idUSKBN21H3G1>.

Lyft still does not provide adequate PPE or cleaning supplies to its drivers. *See Chauncey Alcorn, Lyft drivers accuse company of not providing enough protective gear*, CNN BUSINESS (Jul. 23, 2020), <https://www.cnn.com/2020/07/23/business/lyft-drivers-ppe-gig-app/index.html>. Instead, Lyft sells its drivers such supplies. *See id.*; LYFT STORE (accessed Jul. 29, 2020), <https://www.lyft-store.com>.

The CDC has also recommended that rideshare drivers avoid using recirculated air and lower vehicle windows. *See* CDC Rideshare Guidance, *supra* note 8. But Lyft has only encouraged drivers and passengers to open their windows to ensure greater airflow “when possible,” and to avoid recirculated air “when possible.” *See Lyft launching personal health certification, will require face masks as part of new Health Safety Program*, LYFT BLOG (May 7, 2020), <https://www.lyft.com/blog/posts/lyft-launching-health-safety-program>.

Opening windows, to be sure, is cost-free and can mitigate—though not eliminate—the risk of transmission. *See* Joseph Allen et al., *Is there coronavirus in your car? Here’s how you can protect yourself.*, USA TODAY (Apr. 22, 2020), <https://www.usatoday.com/story/opinion/2020/04/22/coronavirus-car-protect-yourself-column/5166146002/>. But making it optional means passengers can ignore this recommendation. Opening windows will also generally not be an option for drivers during rain or other inclement weather, when rideshare drivers typically see significant spikes in usage. *See* Abel Brodeur & Kerry Nield, *An empirical analysis of taxi, Lyft and Uber rides: Evidence from weather shocks in New York City*, 152 J. ECON. BEHAVIOR & ORG. 1–16 (Aug. 2018) (number of Lyft rides per hour is 19% higher when raining). Similarly, if passengers ask for windows to be closed, or for the driver to use air conditioning, drivers have little option but to comply—or risk

getting a low rating.¹¹ *See generally* Carolyn Said, *Uber, Lyft drivers fear getting booted from work*, S.F. CHRONICLE (Oct. 14, 2018), <https://www.sfchronicle.com/business/article/Uber-Lyft-drivers-fear-getting-booted-from-work-13304052.php>.

III. Lyft’s Misclassification of Drivers Denies Them Access to Paid Sick Days, Endangering Workers’ Health and the Public’s Health.

Since the start of the pandemic, the CDC has emphasized that employers should “actively encourage sick employees to stay home” to reduce the spread of the virus, including by offering paid sick leave.¹² The CDC specifically urged rideshare companies to do the same in its mid-April rideshare guidance.¹³ But because Lyft insists on calling its drivers non-employees, it does not provide paid sick leave.

The CDC’s advice is supported by numerous studies that have shown that workers without paid sick days are more likely to go to work with a contagious

¹¹ While Lyft’s Health Safety Program claims to allow drivers to cancel rides without penalty “if the health safety commitment isn’t being followed,” it is not clear how disputes about whether a rider complied with these types of optional recommendations would be resolved. *See Helping Lyft’s driver community*, LYFT (accessed Jul. 29, 2020), <https://www.lyft.com/safety/coronavirus/driver>.

¹² *See* CDC, *Interim Guidance for Businesses & Employers*, *supra* note 2 (first updated Mar. 6, 2020).

¹³ *See* CDC Rideshare Guidance, *supra* note 8.

disease than workers with access to paid sick days.¹⁴ Research has also identified a clear correlation between lack of paid sick leave and the spread of the flu; one study estimates that providing all U.S. workers with paid sick leave can reduce the spread of flu by 6 percent.¹⁵

But Lyft never implemented a paid sick leave policy that enabled its drivers to stop working if they were sick with COVID-19. Lyft did offer some sick pay to its drivers, but only if they tested positive for the disease or if their doctor ordered them to self-quarantine. *See A Note for the Lyft Driver Community*, LYFT HUB (Mar. 19, 2020), <https://www.lyft.com/hub/posts/a-note-for-the-lyft-driver-community>. Because Lyft drivers faced the same testing obstacles as other Americans, and lack

¹⁴ *See, e.g.*, TOM W. SMITH & JIBUM KIM, PUBLIC WELFARE FOUNDATION, *PAID SICK DAYS ATTITUDES AND EXPERIENCES* (Jun. 2010), <http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-attitudes-and-experiences.pdf>; LeaAnne DeRigne et al., *Workers Without Paid Sick Leave Less Likely to Take Time Off For Illness or Injury Compared to Those with Paid Sick Leave*, 35:3 HEALTH AFFAIRS 520–25 (Mar. 2016), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2015.0965>.

¹⁵ Supriya Kumar et al., *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent Based Model*, 103:8 AM. J. PUBLIC HEALTH 1406–11 (2013); *see also* Stefan Pichler and Nicolas R. Ziebarth, DIW Berlin, *The Pros and Cons of Sick Pay Schemes* (2015), https://www.diw.de/documents/publikationen/73/diw_01.c.514633.de/dp1509.pdf; ROBERT DRAGO AND KENNETH MILLER, INSTITUTE FOR WOMEN’S POLICY RESEARCH, *SICK AT WORK: INFECTED EMPLOYEES IN THE WORKPLACE DURING THE H1N1 PANDEMIC* (Jan. 2010), <http://www.iwpr.org/publications/pubs/sick-at-work-infected-employees-in-the-workplace-during-the-h1n1-pandemic>.

employer-based health insurance that would enable them to easily see a doctor and obtain an order of quarantine, few were able to access this sick pay benefit.

The terms of Lyft’s sick pay policy were also unclear. Lyft initially said it would “provide funds to affected drivers based on the rides they provided on the Lyft platform over the last four weeks,” but later said it would only pay “qualifying” drivers “an amount determined by the driver’s previous activity on the Lyft platform.” See Dara Kerr, *Lyft pulls bait-and-switch on promised coronavirus sick pay, drivers say*, CNET (Apr. 8, 2020), <https://www.cnet.com/news/lyft-quietly-adjusts-its-coronavirus-sick-pay-policy-for-drivers/>.

If Lyft properly classified its workers as employees, it would be required to provide its drivers with up to 24 hours of state-mandated sick leave. CAL. LAB. CODE § 246. Because employees may use paid sick leave in increments (i.e., need not take 8 hours in a single day), *id.* § 246(k), this state-mandated leave could effectively extend for up to five days, if taken in four- to five-hour increments. This modest amount of leave would enable tens of thousands of Lyft drivers across California to stay home when they are sick with COVID-19—or when they fear they were exposed and infected, and seek preventive care/diagnosis¹⁶—thus helping limit the spread of the virus and save lives.

¹⁶ See Cal. Lab. Comm’r, *California Paid Sick Leave: Frequently Asked Questions*, “For what purposes can an employee take paid sick leave” (accessed Jul. 30, 2020), https://www.dir.ca.gov/dlse/paid_sick_leave.htm.

In addition, drivers in several of Lyft’s largest markets, including Los Angeles and San Francisco, would be able to access up to 48 hours of city-mandated sick leave. *See* L.A., CAL. MUNI. CODE § 187.04; S.F., CAL. ADMIN. CODE § 12W.3. And several cities, including Los Angeles, San Jose, and San Francisco, have mandated employers provide up to 80 hours of supplemental paid sick leave. L.A., CAL. MUNI. CODE § 200.53; SAN JOSE, CAL. ORDINANCE 30390; S.F., CAL. EMERGENCY ORDINANCE 59-20.

But Lyft has been flouting the law, denying its drivers these basic rights to paid sick days. Lyft drivers are thus unable to afford to stay home when they are sick, and instead continue to drive—putting themselves at risk of a longer, more severe bout of COVID-19, and putting riders and the public as a whole at risk of infection.¹⁷ *See* CDC, *Duration of Isolation and Precautions for Adults with COVID-19* (updated Jul. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html>; *see also* Ariana Eunjung Cha, *How long should you isolate if you test positive for the coronavirus? At least 10 days after symptom onset*, WASH. POST (Jul. 21, 2020), [---

¹⁷ Lyft has also expanded its business model into “essential deliveries” of goods to high-risk populations—meaning infected drivers also risk exposing such individuals. *See Essential Deliveries: A New Way for Drivers to Earn and Support Our Community*, LYFT BLOG \(Apr. 15, 2020\), <https://www.lyft.com/blog/posts/essential-deliveries>.](https://www.washingtonpost.com/health/2020/07/21/how-</p></div><div data-bbox=)

long-should-you-isolate-if-you-test-positive-coronavirus-new-cdc-guidance-says-10-days-not-14/.

IV. Lyft’s Misclassification of Drivers Harms Law-Abiding Employers and the Public, Depriving Public Coffers of Millions of Dollars in Payroll Taxes, Unemployment Insurance Payments, and Workers’ Compensation Premiums

Lyft’s misclassification of drivers creates a range of other harms, including to law-abiding employers and public coffers.

When companies like Lyft evade their obligations as employers by misclassifying their workers as independent contractors, law-abiding employers suffer. Independent contractor misclassification, as the United States Treasury Inspector General found, “plac[es] honest employers and businesses at a competitive disadvantage.”¹⁸ This is especially a problem in labor-intensive low-wage sectors, where employers can gain competitive advantage by driving down payroll costs.

App-based workers in ride-hail work in a highly price-competitive sector. When companies escape their employer obligations to unlawfully boost profits, they pressure other businesses in the ride-hail sector to shed labor costs. Rampant misclassification creates a “race to the bottom” where firms can remain competitive

¹⁸ 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>.

only by copying these illegal business models.¹⁹ Over time, working conditions like subminimum wages and the lack of paid sick days and other benefits become the industry norm that workers are forced to accept.²⁰ The market price for these services is pushed lower and lower, until traditional employers cannot compete.²¹

Law-abiding employers also suffer from inflated unemployment insurance and workers' compensation costs, as free-riding employers that misclassify employees as independent contractors pass off costs to employers that play by the rules. A 2010 study estimated that misclassifying employers shift \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers' compensation premiums to law-abiding businesses annually.²²

Misclassification also disrupts the viability and sustainability of public programs. By misclassifying their drivers, Lyft avoids paying payroll taxes that fund

¹⁹ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 139–41 (2017).

²⁰ See CATHERINE RUCKELSHAUS & CEILIDH GAO, NAT'L EMP. L. PROJECT, *INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES* 7 (2017), <https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf> (misclassified workers earn thousands less in pay than properly classified employees doing the same work).

²¹ See WEIL, *supra* note 19, at 142.

²² MICHAEL P. KELSAY, DEP'T OF ECON., UNIV. OF MO., KAN. CITY, *COST SHIFTING OF UNEMPLOYMENT INSURANCE PREMIUMS AND WORKERS' COMPENSATION PREMIUMS* 5–6 (Sept. 12, 2010).

vital social insurance programs and hurt state and federal coffers with far-reaching impact beyond those who work in the app-based economy. When employers refuse to pay their fair share, the public must make up the difference.

Federal, state, and local governments suffer hefty losses of revenue due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.²³ According to a 2009 report by the Treasury Inspector General for Tax Administration, misclassification contributed to a \$54 billion underreporting of employment tax, and losses of \$15 billion in unpaid FICA taxes and UI taxes.²⁴ A 2017 review of findings from twenty state studies of independent contractor misclassification demonstrates the staggering scope of these abuses.²⁵

Lyft has never paid California's Unemployment Insurance tax or Employment Training Tax for its drivers. A recent study estimated that Lyft and its chief competitor Uber together owed \$413 million to the state's UI fund between 2014 and 2019.²⁶

²³ Wage and Hour Division, U.S. Dep't of Labor, *Misclassification of Employees as Independent Contractors*, <https://www.dol.gov/whd/workers/Misclassification/>.

²⁴ TREASURY INSPECTOR GENERAL, *supra* note 18, at 2.

²⁵ RUCKELSHAUS & GAO, *supra* note 20.

²⁶ KEN JACOBS & MICHAEL REICH, U.C. BERKELEY LABOR CTR., WHAT WOULD UBER AND LYFT OWE TO THE STATE UNEMPLOYMENT INSURANCE FUND (May 7,

In May, amidst an unprecedented economic crisis, the state's UI fund ran dry, and California became the first state in the country to borrow from the federal government to provide UI benefits.²⁷ Lyft alone did not create California's UI insolvency. But the company's blatant and unlawful misclassification of hundreds of thousands of drivers has directly contributed to the state's current fiscal crisis. Had Lyft properly paid into the UI fund for its employee drivers, California would be better positioned to assist unemployed workers—including Lyft drivers—during this recession.

Had Lyft properly paid workers' compensation premiums, its drivers would be able to access workers' compensation, which lets sick workers access critically needed medical benefits and lost wages. In California, employees who tested positive within 14 days of working during the duration of the stay-at-home order are entitled to a rebuttable presumption that they contracted COVID-19 at work, and thus face an easier path than workers in many states to accessing workers' compensation benefits. Exec. Order N-62-20 (May 6, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>;

2020), <http://laborcenter.berkeley.edu/what-woulduber-and-lyft-owe-to-the-state-unemployment-insurance-fund/>.

²⁷ Sarah Chaney, *California Is First State to Borrow From Federal Government to Make Unemployment Payments*, WALL STREET J. (May 4, 2020), <https://www.wsj.com/articles/california-is-first-state-to-borrow-from-federal-government-to-make-unemployment-payments-11588617257>.

see Debbie Berkowitz, Nat'l Emp. L. Project, Testimony Before the Connecticut General Assembly, *Workers' Compensation Presumption for COVID-19* (Jun. 17, 2020), <https://s27147.pcdn.co/wp-content/uploads/Testimony-Workers-Compensation-Presumption-Covid19.pdf>.

V. The Court Should Adopt the First Circuit's *Waithaka* Standard For Determining Whether Workers are Engaged in Interstate Commerce

The Lyft drivers in this case sought emergency relief that would give them access to the paid sick leave they need in this pandemic. But the district court erroneously denied this relief, finding that the drivers were not transportation workers engaged in interstate commerce and were therefore required, under Lyft's arbitration requirements, to individually arbitrate their claims.

The district court's decision exemplifies a larger confusion among district courts over how to interpret Section 1 of the FAA. Some district courts have held that workers must physically cross state lines to be engaged in interstate commerce. *See, e.g., Bryant v. Tristate Logistics of Ariz. LLC*, No. CV-19-01552-PHX-SMB, 2020 WL 1455770, at *4–5 (D. Ariz. Mar. 25, 2020). Other courts have held that workers must transport goods, not passengers, to be engaged in interstate commerce. *See, e.g., Mendoza v. Uber Techs. Inc.*, No. CV 19-9741-FMO (JPR), 2020 WL 2563273, at *4 (C.D. Cal. Mar. 25, 2020), *report and recommendation adopted*, 2020 WL 2563047 (C.D. Cal. May 4, 2020).

Fortunately, there is a solution to this confusion: the rule recently adopted by the First Circuit, which held that workers who transport goods or people within the flow of interstate commerce are engaged in interstate commerce and exempt from the FAA. *Waithaka v. Amazon.com, Inc.*, No. 19-1848, 2020 WL 4034997, at *11 (1st Cir. July 17, 2020) (Amazon last-mile drivers, “by virtue of their work transporting goods or people ‘within the flow of interstate commerce,’ are ‘a class of workers engaged in interstate commerce.’”) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001)).

In arriving at this standard, the First Circuit emphasized the Supreme Court’s holdings in Federal Employers’ Liability Act (“FELA”) cases that addressed the question of when a worker is engaged in interstate commerce. *See Waithaka*, 2020 WL 4034997, at *6 (quoting FELA, 45 U.S.C. § 51). Those Supreme Court cases found that workers “who transported goods or passengers that were moving interstate” were engaged in interstate commerce for purposes of the FELA. *Id.* (citing *Phila. & Reading Ry. Co. v. Hancock*, 253 U.S. 284, 285–86 (1920)). The First Circuit found that such cases, decided shortly before the enactment of the FAA, were particularly relevant in shedding light on Congress’s meaning when it used the words “engaged in . . . interstate commerce” in 9 U.S.C. § 1.

The Ninth Circuit should adopt the sound reasoning of *Waithaka*. The goals of the FAA are best served by a reliable, clear rule for determining whether workers

are transportation workers engaged in commerce. *See generally* Imre Stephen Szali, *Exploring the Federal Arbitration Act through the Lens of History*, 2016 J. DISP. RESOL. 115, 119 (2016) (a key purpose of the FAA was “to simplify court procedures, relieve overcrowded judicial dockets, and provide for improved, efficient methods of solving disputes.”).

VI. A Significant Amount of Lyft Drivers’ Work Involves Transporting Passengers Within the Flow of Interstate Commerce

The district court concluded that Lyft drivers’ “relationship to interstate transit is only casual and incidental,” “lack[ing] the requisite ‘practical, economic continuity’ with interstate air or rail transportation,” *Rogers v. Lyft*, No. 20-cv-1938-VC, 2020 WL 1684151, at *7 (E.D. Cal. Apr. 7, 2020) (citations omitted). These conclusions—which were made seemingly without any evidence—ignore the integral role that airport transportation plays in Lyft’s business.

Almost nothing about Lyft drivers’ relationship with airports is “casual or incidental.” Lyft has business arrangements with airports that require it to pay fees, which in turn are added to the riders’ fare. *See, e.g.*, Hugo Martin, *Airports Feared Losing Revenue to Uber and Lyft*, L.A. TIMES (Mar. 1, 2019), <https://www.latimes.com/business/la-fi-airport-uber-parking-revenue-20190301-story.html> (reporting that in 2018 Lyft and Uber paid \$44.3 million to Los Angeles International Airport). Moreover, Lyft drivers are limited to only those airports with

which Lyft has a fee arrangement. In California, Lyft drivers are explicitly authorized to pick up and drop off passengers at 45 of the state’s airports. *See California Airport Information for Drivers*, LYFT HELP CENTER (accessed Jul. 30, 2020), <https://help.lyft.com/hc/en-us/articles/115013081008-California-airport-information-for-drivers>.

Lyft’s relationships with airports are so important to the company’s business and growth that it employs a team of ten people dedicated exclusively to airport operations. *Lyft’s Aviation Journey & Future of Ridesharing at Airports*, RUNWAY.VC, at 6:20–6:30 (Nov. 20, 2016), <https://www.runway.vc/podcasts/category/Runway.VC+Podcast> (interview with Lyft Senior Director of Business Operations & Airport Policy Manager Baraki Brock). Among other issues, Lyft negotiates the location of passenger pick-up areas with airports, and shares data with airports about traffic congestion. *See id.* at 31:59–33:04; *see also* Harriet Baskas, *As LAX Ends Curbside Pickup, Here’s How Other Airports Are Handling Uber, Lyft Congestion*, USA TODAY (Oct. 9, 2019), <https://www.usatoday.com/story/travel/news/2019/10/09/lyft-uber-airport-rides-how-lax-other-airports-address-pickups/3912890002/>.

Lyft’s relationship to airline passengers also extends to the airlines they fly. A Delta passenger, for example, can use either their Delta Skymiles account or their Lyft account to “earn miles on every Lyft ride,” and can earn two miles per dollar

spent on all airport rides. *See Delta and Lyft Partnership*, LYFT HELP CENTER (accessed Jul. 23, 2020), <https://help.lyft.com/hc/en-us/articles/115012927287-Delta-and-Lyft-partnership>; *see also Delta Lyft Partnership* (accessed Jul. 23, 2020), <https://www.deltalyft.com/>. Southwest Airlines passengers can use Southwest’s app to book their Lyft ride up to four hours before their flight. *Need A Lyft Ride?*, SOUTHWEST (accessed Jul. 23, 2020), <https://www.southwest.com/html/air/products/mobile.html>.

Lyft’s own data reflects how significant airport rides are for the company’s business. In California, Lyft reports that 71% of its riders statewide use Lyft to get to the airport.²⁸ In San Francisco, 88% of riders use Lyft to get to the airport; in Los Angeles, 76%.²⁹ While Lyft may not be exclusively in the airport ride business, a staggering portion of its customer base relies on Lyft for transportation to airports. Far from the “casual and incidental relationship to interstate transit” of local cab companies, *see United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947), Lyft maintains a formal and regular relationship with airports, airlines, and their passengers.

²⁸ *See 2020 Economic Impact Report: California*, LYFT (accessed Jul. 30, 2020), <https://www.lyftimpact.com/stats/states/california>.

²⁹ *2020 Economic Impact Report: San Francisco*, *supra* note 6; *2020 Economic Impact Report: Los Angeles*, *supra* note 6.

VII. Under California Law, Lyft's Forced Arbitration Requirements are Unenforceable

Because Lyft's arbitration requirements are not subject to the FAA, their enforceability is a question of state law. In California, employers are prohibited from imposing forced arbitration requirements as a condition of employment. *See* CAL. LAB. CODE § 432.6(a), (c); CAL. GOV'T CODE § 12953. While enforcement of these statutes is currently enjoined with respect to arbitration requirements covered by the FAA, the statutes remain in force when the FAA does not apply. *See Chamber of Commerce of U.S. v. Becerra*, 438 F. Supp. 3d 1078, 1108 (E.D. Cal. 2020).

Lyft's forced arbitration requirements are directly contrary to California's public policy under the statute. Enforcement of its class waiver is also contrary to the California Supreme Court's holdings that class waivers are unenforceable where they undermine statutory rights to privately enforce important state-law employee protections. *See Gentry v. Superior Court*, 42 Cal. 4th 443, 462–66 (2007), *recognized as preempted in cases governed by the FAA in Iskanian v. CLS Trans. L.A., LLC*, 59 Cal. 4th 348, 366 (2014). As the First Circuit recently recognized, "Notwithstanding the Supreme Court's view that such state policies must give way when the FAA governs a dispute, the policies remain intact where, as here, the FAA does not preempt state law." *Waithaka*, 2020 WL 4034997, at *17 (citation omitted).

CONCLUSION

When COVID-19 infections were surging across California this spring, the district court allowed Lyft to use its arbitration requirement to escape its legal obligation to provide its employees with paid sick days. That decision ignored the high risk of coronavirus infection that Lyft drivers face every day. Since then, Lyft has failed to protect its workers from the spread of the virus, further endangering workers' and the public's health. This Court should reverse the district court's decision, direct the district court to enter a preliminary injunction reclassifying Lyft drivers and granting them access to paid sick days, and hold that Lyft drivers are not required to arbitrate their claims under the FAA or California law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because it contains 6,991 words, excluding the items exempted under Federal Rule of Appellate Procedure 32(f).

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