

Case Nos. A160701 & A160706

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION FOUR

**PEOPLE OF THE STATE OF CALIFORNIA,**

*Plaintiff and Respondent,*

**v.**

**UBER TECHNOLOGIES, INC. AND LYFT, INC.,**

*Defendants and Appellants.*

Appeal from the Superior Court, County of San Francisco  
Case No. CGC-20-584402  
The Honorable Ethan P. Schulman

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**Application for Leave to File *Amici Curiae* Brief, and Proposed Brief of *Amici Curiae* National Employment Law Project, American Civil Liberties Union of Northern California, et al. (Economic and Racial Justice Advocates)  
In Support of Plaintiff and Respondent**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....3

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF.....11

*AMICI CURIAE* BRIEF OF ECONOMIC AND RACIAL JUSTICE ADVOCATES  
IN SUPPORT OF PLAINTIFF AND RESPONDENT .....21

INTRODUCTION .....21

ARGUMENT .....23

    I. Uber and Lyft do not offer “opportunities” to marginalized workers and  
    communities of color. Their misclassification model deepens the desperation  
    of workers who have been excluded from stable employment, with Black and  
    Latino workers made to bear the brunt. ....23

    II. Workers of color, already facing longstanding economic exclusion and  
    segregation, are uniquely harmed by the companies’ misclassification.....32

        A. Income, Wealth, and Financial Stability.....34

        B. Sickness, Injuries, and Health.....39

        C. Job Security and Unemployment.....43

        D. Discrimination.....48

CONCLUSION .....51

WORD COUNT CERTIFICATION .....53

[PROPOSED] ORDER GRANTING LEAVE TO FILE *AMICI CURIAE* BRIEF  
.....54

## TABLE OF AUTHORITIES

### Cases

*Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010).....51

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42 U.S.C.A. § 2000e et seq.....49

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**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF**

Prospective *amici curiae* National Employment Law Project, ACLU of Northern California, Asian Americans Advancing Justice – Asian Law Caucus, Bet Tzedek Legal Services, California Employment Lawyers’ Association, the Center for Workers’ Rights, Centro Legal de la Raza, Council on American-Islamic Relations – California Chapter, La Raza Centro Legal’s Workers’ Rights Program, Legal Aid at Work, the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, the Women’s Employment Rights Clinic of Golden Gate University School of Law, and Worksafe, Inc. respectfully submit this Application for Leave to File *Amici Curiae* Brief in Support of Plaintiff and Respondent, as well as the following proposed *amici curiae* brief.

**STATEMENT OF INTEREST**

*Amici curiae* are national and California-based nonprofit organizations that work to advance economic and racial justice through legal and policy advocacy. *Amici* are familiar with illegal business practices that exploit workers in low-wage industries, such as independent contractor misclassification, and have extensive experience advocating on behalf of underpaid workers, including immigrants and workers of color, who are misclassified. *Amici* have a strong interest in this case because the ongoing operation of Uber and Lyft will irreparably harm hundreds of

thousands of misclassified workers, the majority of whom are low-wage workers of color.

The **National Employment Law Project** (“NELP”) is a nonprofit legal organization with more than fifty years of experience advocating for the employment and labor rights of underpaid and unemployed workers. For decades, NELP has focused on the ways in which various work structures, such as mislabeling workers “independent contractors,” exacerbate income and wealth inequality, the segregation of workers by race and gender into poor quality jobs, and the ability of workers to come together to negotiate with business over wages and working conditions. NELP has litigated directly and participated as *amicus curiae* in numerous cases and has provided Congressional and state testimony addressing the issue of employment relationships and independent contractors, including misclassification by companies in the app-based economy.

The **American Civil Liberties Union** (“ACLU”) is a national, nonprofit, non-partisan civil liberties organization with approximately two million members dedicated to the principles of liberty and equality embodied in the Constitution. **The ACLU of Northern California** is an affiliate of the national ACLU. Both organizations share a longstanding commitment to fighting for racial and economic justice.

**Asian Americans Advancing Justice - Asian Law Caucus** (“Advancing Justice - ALC”) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. Advancing Justice - ALC is part of a national affiliation of Asian American civil rights groups, with offices in Los Angeles, Chicago, Atlanta, and Washington, DC. Advancing Justice - ALC has a long history of advocating for low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. Advancing Justice - ALC’s clients regularly include misclassified workers, including ride-hail and other gig drivers.

**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. Each year its attorneys, advocates, and staff work with more than one thousand pro bono attorneys and other volunteers to assist more than 20,000 people regardless of race, religion, ethnicity, immigrant status, or gender identity. Bet Tzedek’s Employment Rights Project focuses specifically on the needs of low-wage workers, providing assistance through a combination of 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 low-wage and immigrant workers in California,

including by submitting amicus briefs and letters on such issues of broad importance to California employees. 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, including those presented in the case.

**California Employment Lawyers' Association** ("CELA") is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting *amicus curiae* briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, and *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, as well as in cases before the Ninth Circuit.

The **Center for Workers' Rights** is a Sacramento-based, nonprofit legal services and advocacy organization whose mission is to create a community where workers are respected and treated with dignity and fairness. To bring that vision into reality, it 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. The Center for Workers' Rights represents misclassified workers in their 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 clients in our workers' rights practice are misclassified as independent contractors and are systematically denied basic workplace protections. Accordingly, the outcome of this matter is of great interest to our organization and the clients we serve.

**Council on American-Islamic Relations, California ("CAIR-CA")** is a chapter of CAIR, the nation's largest American Muslim civil rights and advocacy organization. CAIR-CA's mission is to enhance the understanding of Islam, protect

civil rights, promote justice, and empower American Muslims. Through its four offices, CAIR-CA serves California's estimated 1 million American Muslims by providing direct civil rights and immigration legal services, working with the media, facilitating community education, and engaging in policy advocacy to advance civil liberties and civic engagement.

For more than 25 years, CAIR-CA has assisted individuals facing employment discrimination because of their actual or perceived Muslim identity. CAIR-CA attorneys help workers receive legal redress with federal and state civil rights enforcement agencies. Our attorneys also occasionally file lawsuits for violations of civil rights statutes governing employment discrimination and harassment such as the Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, and the Religious Freedom Restoration Act of 1993.

As an advocate for a faith community that is overrepresented in the low-wage worker demographic, CAIR-CA has significant interest in ensuring our clients and constituents, including low-wage workers and misclassified ride-hail drivers, are subject to equal labor standards that help realize economic and civil rights protection.

**La Raza Centro Legal's Workers' Rights Program** is part of a public interest organization that has, for the last thirty years, focused on protecting the rights of low-wage and immigrant workers. We represent workers before the



California Labor Commissioner's Office through complaints regarding employment misclassification, wage and hour theft, overtime, meal and rest breaks, discrimination, and retaliation; the Department of Labor through complaints regarding wage theft; the Department of Fair Employment and Housing through complaints as to unlawful discrimination in employment cases, i.e. national origin discrimination; and the Equal Employment Opportunity Commission through complaints regarding sexual harassment and discrimination in the workplace.

**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 both individual and class action cases involving a broad 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 from wage theft both as counsel for plaintiffs and as *amicus curiae*. In addition to litigating cases, LAAW advises thousands of low-wage workers, including misclassified workers, on their employment rights through its Workers' Rights Clinics and helplines, and represents misclassified workers in their 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.

The **Lawyers' Committee for Civil Rights of the San Francisco Bay Area** ("LCCRSF") works to advance, protect, and promote the legal rights of communities of color, low-income persons, immigrants, and refugees. Assisted by pro bono attorneys, LCCRSF provides free legal assistance and representation to individuals on civil legal matters through direct services, impact litigation, and policy advocacy. LCCRSF is committed to advocating for fair employment practices especially as they impact low-income clients.

The **Women's Employment Rights Clinic of Golden Gate University School of Law** ("WERC") is an on-campus nonprofit that serves the dual purpose of training law students and providing critical legal services to the community. WERC represents low-wage workers, predominately women and immigrants, through impact litigation, individual representation, policy advocacy, and community education. For more than twenty-five years, WERC has advised and represented employees misclassified as independent contractors across various industries, including ride-hail drivers, in actions for unemployment insurance benefits and unpaid wages.

**Worksafe, Inc.** is a California-based nonprofit organization dedicated to advocating for worker health and safety through education, training, and advocacy. Millions of low-wage and immigrant workers often toil long hours in harsh and hazardous work environments in California. The fissured workplace has eroded the basic workplace protections workers are owed. Worksafe is committed to protecting the rights of workers against misclassification and other unlawful employment practices that prevent workers from full access to workplace protections under the law.

*Amici* write not to repeat arguments made by the parties but to offer the Court considerations on the social ramifications of Lyft and Uber’s illegal independent contractor misclassification, particularly on low-wage workers of color. *Amici* have significant legal and policy experience on issues concerning the app-based economy and are intimately familiar with the ways that employers dispossess workers of their legal rights. The proposed brief highlights how Uber and Lyft’s misclassification deepens the desperation of workers who are excluded from stable employment, with Black and Latino workers made to bear the brunt. Far from offering “gig” opportunities to communities of color, the companies’ misclassification strengthens the economic segregation that has excluded people of color from decent jobs for so long. *Amici* urge the Court to consider their proposed

brief in determining that the trial court's preliminary injunction was both appropriate and necessary.

Accordingly, *amici* respectfully request that the Court grant their Application for Leave and consider the following proposed *amici curiae* brief.

DATED: September 22, 2020

Respectfully submitted,

/s/ George Warner  
GEORGE WARNER  
Legal Aid at Work

**AMICI CURIAE BRIEF OF ECONOMIC AND RACIAL JUSTICE  
ADVOCATES IN SUPPORT OF PLAINTIFF AND RESPONDENT**

**INTRODUCTION**

Work should provide people with economic stability, safety, and the opportunity to contribute to our communities and connect with one another. It should be a place where workers are treated fairly and with respect. But these goals—universal for all people—have been moved out of reach for too many. Many poor Black and Latino workers, as well as immigrants and other people of color trapped in low-wage industries, face racist barriers to jobs that meet the dignity inherent in all work. The conjoined forces of class and race have pushed them to the very bottom of the economy. Only in this system can exploitative companies like Uber and Lyft pretend to offer workers “opportunities” while deepening inequality and work insecurity.

Calling a driver an “independent contractor” does not make it so, and pretending that precarious work provides “flexibility” does not create the actual conditions that permit workers to have a say in their lives.

By misclassifying their hundreds of thousands of California drivers as independent contractors, Uber and Lyft dispossess their workers of basic labor protections, such as a minimum wage, overtime pay, workers’ compensation, unemployment and state disability insurance, and other critical rights intended to

cover most workers in our society. Misclassified workers also lack critical anti-discrimination rights to combat racial prejudice. These foundational protections provide people a ground upon which to secure for themselves financial stability and economic dignity.

Uber and Lyft's business model depends upon, 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. Many poor workers of color and immigrants are stuck in a separate and unequal economy where they are underpaid, put in harm's way on the job, and left to fend for themselves without access to paid sick leave, unemployment insurance, workers' compensation, and other protections. By insisting that their drivers are not employees, Lyft and Uber further distance workers of colors from the bedrock workplace rights that provide real flexibility and economic security. Instead, their business models trap poor workers into intractable cycles of poverty and economic exclusion.

It is a sinister contradiction when low-wage, predominantly Black, Latino, Asian, and immigrant workers build the wealth of rich corporations, while being denied core working protections in the name of individual venture.

Lyft and Uber's rampant misclassification is illegal because the companies cannot pass California's "ABC test." It is *wrong* because it tramples the dignity

of work, reducing human beings to piecemeal labor under a fiction of entrepreneurial “opportunity.”

Because Respondent People of the State of California has made a strong showing of a likelihood of prevailing on the merits, and given the facts, the law, and the public policy goals underlying the present dispute—as detailed in Respondent’s brief and below—*amici* urge the Court to affirm the Superior Court’s preliminary injunction against Appellants.

## ARGUMENT

- I. **Uber and Lyft do not offer “opportunities” to marginalized workers and communities of color. Their misclassification model deepens the desperation of workers who have been excluded from stable employment, with Black and Latino workers made to bear the brunt.**

Let’s lift the hood over the engines that power Uber and Lyft’s staggering success. Past the technological innovations, the finely engineered algorithms, the celebrated initial public offerings, lies the heart of Uber and Lyft’s businesses: fleets of drivers detached from the basic safety nets and protections available to most workers. None is excluded from this workforce, all are welcome; yet overwhelmingly it is poor workers of color and immigrants who fill its inauspicious ranks.

Companies like Uber and Lyft misclassify their workers for one simple reason: to amass more money at their workers’ expense. Independent contractor misclassification is a calculated business decision. By refusing to pay the taxes

and other payroll costs required of employers, law-breaking businesses are able to pocket as much as thirty percent of payroll costs.<sup>1</sup>

Misclassification relies on the desperation of workers unable to access secure employment due to a variety of reasons, including structural barriers and stigma on account of color. It is no coincidence that independent contractor misclassification is prevalent in low-wage, labor-intensive industries, such as delivery services, janitorial services, and home care.<sup>2</sup> Because work in these industries is sometimes described as “unskilled,”<sup>3</sup> individual workers have little power to demand fair conditions. Excluded from decent jobs with livable wages and benefits, they have no choice but to accept work with challenging and unfavorable terms, including the unilateral removal of employee benefits.<sup>4</sup> The desperate condition of those on the bottom makes the tradeoff unfortunately simple—they take the job because there is no alternative.

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<sup>1</sup> Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs 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>.

<sup>2</sup> *See id.*

<sup>3</sup> *See, e.g., Misclassification of Employees as Independent Contractors*, Office of the Legislative Auditor of the Minnesota Legislature (Nov. 2007), <https://www.auditor.leg.state.mn.us/ped/2007/missclasssum.htm> (“[I]ndustries prone to misclassification are those that use unskilled labor.”). *Amici* reject the notion that any labor may be described as “unskilled.”

<sup>4</sup> *See* Ruckelshaus & Gao, *supra* note 1.



Misclassification capitalizes on the economic despair of all poor workers, but the practice is strikingly racialized, occurring in occupations in which people of color, including Black, Latino, and Asian workers, are overrepresented.<sup>5</sup> In California’s janitorial industry, where misclassification is widespread, Latinos make up 82 percent of contracted janitors even though they comprise only 37 percent of the state’s total workforce; further, 70 percent of contracted janitors are immigrants who were born outside the United States.<sup>6</sup> In home care work, the majority of workers are people of color, with 28 percent Black and 23 percent Latina.<sup>7</sup> 76 percent of workers in the nail salon industry are Asian.<sup>8</sup> All workers who are misclassified suffer alike from a lack of workplace protections, but poor people of color and immigrants already on the fringes of the economy uniquely must accept low-wage, unsafe, and insecure working conditions.

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<sup>5</sup> Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 Minn. L. Rev. 907, 924 (2017) (finding that “seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color”).

<sup>6</sup> Sara Hinkley, Annette Bernhardt, and Sarah Thomason, *Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California’s Property Services Industry*, University of California Berkeley Labor Center (Mar. 8, 2016), <https://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf>.

<sup>7</sup> *U.S. Home Care Workers: Key Facts*, PHI (Sept. 3, 2019), <https://phinational.org/resource/u-s-home-care-workers-key-facts-2019/>.

<sup>8</sup> *Nail Files: A Study of Nail Salon Workers and Industry in the United States*, UCLA Labor Center (Nov. 2018), [https://www.labor.ucla.edu/wp-content/uploads/2018/11/NAILFILES\\_FINAL.pdf](https://www.labor.ucla.edu/wp-content/uploads/2018/11/NAILFILES_FINAL.pdf) (noting also that “[m]isclassification is a key concern in the sector”).

Data on Uber and Lyft drivers match the broader patterns in other misclassified industries: work for the two companies may be open to all, but workers of color make up a majority of the drivers, with Black workers particularly overrepresented. While findings on ride-hail demographics differ based on survey methodology and area of study, white people tend to comprise a minority of the drivers, with Black, Latino, Asian, and multiracial drivers together making up the majority. Uber’s internal data indicate that the company’s drivers nationwide are 37 percent white, 18 percent Black or African American, 16 percent Latino, 15 percent Asian or Pacific Islander, and 6 percent some other ethnic background.<sup>9</sup> When compared to the overall U.S. workforce,<sup>10</sup> Uber’s drivers are overrepresented by workers of color, particularly Black workers. According to a Bureau of Labor Statistics survey on the on-demand economy, Black and Latino workers make up almost 42 percent of workers for Uber, Lyft, and other “electronically mediated work” companies, although they comprise less than 29 percent of the overall U.S. workforce.<sup>11</sup> The Pew Research Center has

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<sup>9</sup> *Uber: The Driver Roadmap, Where Uber Driver-Partners Have Been, And Where They’re Going*, Benenson Strategy Group (Jan. 2015), [https://ubernewsroomapi.10upcdn.com/wp-content/uploads/2015/01/BSG\\_Uber\\_Report.pdf](https://ubernewsroomapi.10upcdn.com/wp-content/uploads/2015/01/BSG_Uber_Report.pdf).

<sup>10</sup> Bureau of Labor Statistics, U.S. Dep’t of Labor, *Labor force characteristics by race and ethnicity, 2018*, <https://www.bls.gov/opub/reports/race-and-ethnicity/2018/pdf/home.pdf>.

<sup>11</sup> Bureau of Labor Statistics, U.S. Dep’t of Labor, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, Monthly Labor Rev. (Sept.

also found that “Black and Latino workers are more likely to have worked for an online platform.”<sup>12</sup>

In California cities with diverse populations, workers of color comprise even greater shares of Uber and Lyft’s drivers. In San Francisco and Los Angeles, internal Lyft data show that most of its drivers are people of color.<sup>13</sup> A recent survey of San Francisco ride-hailing drivers and delivery workers—the majority of whom drive or deliver for Uber and Lyft—found that nearly 80 percent are people of color, and a majority are immigrants.<sup>14</sup> 29 percent identify as Asian, 23 percent Latino, 22 percent white, 12 percent Black, and 13 percent as multiracial. Compared to the general workforce in San Francisco, Black and Latino drivers, as well as drivers who identify as multiracial, are overrepresented

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2018), <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>.

<sup>12</sup> Annette Bernhardt and Sarah Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting*, University of California Berkeley Labor Center (June 2017) at 7, <https://laborcenter.berkeley.edu/pdf/2017/What-Do-We-Know-About-Gig-Work-in-California.pdf>.

<sup>13</sup> Martha Ockenfels-Martinez & Lili Farhang, *Driving Away Our Health: The Economic Insecurity of Working for Lyft and Uber*, Human Impact Partners & Gig Workers Rising (Aug. 2019) at 3, [https://humanimpact.org/wp-content/uploads/2019/08/DrivingAwayHealthReport\\_2019.08final-compressed.pdf](https://humanimpact.org/wp-content/uploads/2019/08/DrivingAwayHealthReport_2019.08final-compressed.pdf).

<sup>14</sup> Chris Benner, *On-Demand and On-the-Edge: Ride-Hailing and Delivery Workers in San Francisco*, University of California Santa Cruz Institute for Social Transformation (May 2020) at 70, [https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge\\_MAY2020.pdf](https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf).

by a combined 22 percentage points.<sup>15</sup> In Los Angeles county, 23 percent of drivers for Uber and Lyft are Black, compared to only 8 percent of the general population.<sup>16</sup>

These disparities are stark, but numbers alone cannot tell the story of inequality. Any ride-hail driver who is misclassified, white or otherwise, experiences an unjust deprivation of their employee rights. What *race* does, in its pernicious way, is underwrite the practice of misclassification. Race steps in to ensure that the whole unseemly business might be more easily ignored when its injustices are borne by poor people of color already on the margins of society.

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<sup>15</sup> California Employment Development Department, *Demographic Profiles for Local Workforce Investment Areas in California, San Francisco County, 2018* <https://www.labormarketinfo.edd.ca.gov/file/Census2018/sanfrdp2018.pdf> (finding that Black drivers are overrepresented by 7 percentage points, Latino or Hispanic drivers by 7 percentage points, and drivers who identify as multiracial by 8 percentage points).

<sup>16</sup> *More than a Gig: A Survey of Ride-Hailing Drivers in Los Angeles*, UCLA Institute for Research on Labor and Employment (May 2018), <https://irle.ucla.edu/wp-content/uploads/2018/05/Final-Report.-UCLA-More-than-a-Gig.pdf> [hereinafter *More than a Gig*].

For their part, Lyft and Uber present driving for the companies not as base exploitation, but instead as “earning opportunities.”<sup>17</sup> They claim to offer an entrepreneurial platform by which workers can “be their own boss.”<sup>18</sup>

If the poor workers of color and immigrants who make up the bulk of Uber and Lyft’s driver workforce are enjoying “opportunities,” *amici* must wonder: the opportunity to do *what*, exactly? To earn subsistence wages while working a virtually full-time schedule?<sup>19</sup> To be one household emergency away from

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<sup>17</sup> See, e.g., *Uber Driving Opportunities*, Uber, <https://www.uber.com/us/en/drive/driving-opportunities/> (promoting a “flexible earning opportunity” for drivers) (last visited Sept. 17, 2020); *How Much Do Drivers Make?*, Uber, <https://www.uber.com/us/en/drive/how-much-drivers-make/> (promoting “earning opportunities nearby” for potential drivers) (last visited Sept. 17, 2020); *The Driver’s Guide to Pay – FAQ 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 Sept. 17, 2020); *Making Lyft Work for You*, Lyft, <https://www.lyft.com/driver/improvements> (“Find high-earning opportunities”) (last visited Sept. 17, 2020).

<sup>18</sup> *Drive with Uber – Be Your Own Boss*, Uber, <https://www.uber.com/us/en/drive/> (last visited Sept. 17, 2020); *Become a Driver – Drive with Lyft*, Lyft, <https://www.lyft.com/driver> (“Want to be your own boss?”) (last visited September 17, 2020).

<sup>19</sup> Though Uber and Lyft frame driving for their platforms as a flexible, part-time supplement to other work, driving is the primary source of income for most drivers in San Francisco and Los Angeles. Over 70 percent of ride-hailing and delivery workers in San Francisco work for more than 30 hours a week, with 50 percent of workers clocking more than 40 hours a week, and 30 percent logging more than 50 hours a week. In Los Angeles, nearly half of workers report driving more than 35 hours a week; half reported driving more than eight hours a day in the week before the survey; and nearly three in five workers reported driving more than five days a week. Benner, *supra* note 14, at 14-16, 21.

financial catastrophe? To remain uniquely vulnerable to public health and economic crises without even minimal protections?

In appealing to notions of “opportunity,” the companies suggest a level playing field by which their drivers might, through enough hard work, achieve individual prosperity. But the companies’ tale of economic opportunity may well have the opposite effect, tightening the straitjacket around their workers. By pretending their drivers enjoy equal opportunities, Lyft and Uber concoct a narrative that legitimizes the poor conditions of their Black, Latino, Asian, and immigrant drivers. So, it may be true that some ride-hail drivers, working full-time schedules, are homeless and live in their cars.<sup>20</sup> But if, by the companies’ incantation and abracadabra, the drivers magically have “opportunities” to get ahead, then the game has changed. The fault lies no longer with the employer and the illegal business practice, but instead with the worker who has failed to show initiative.<sup>21</sup>

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<sup>20</sup> See, e.g., Carolyn Said, *He drives 60 hours a week for Uber. He’s still homeless*, San Francisco Chronicle (Sept. 22, 2019), <https://www.sfchronicle.com/business/article/He-drives-60-hours-a-week-for-Uber-He-s-still-14457115.php>; Eric Newcomer and Olivia Zaleski, *When Their Shifts End, Uber Drivers Set Up Camp in Parking Lots Across the U.S.*, Bloomberg (Jan. 23, 2017), <https://www.bloomberg.com/news/articles/2017-01-23/when-their-shifts-end-uber-drivers-set-up-camp-in-parking-lots-across-the-u-s>.

<sup>21</sup> See Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1380 (1988) (“After all, [if] equal opportunity is the rule, and [if] the market is an impartial judge; if Blacks are on the bottom, it must reflect their relative inferiority. Racist

When the theoretical promise of “opportunity” meets the material realities of hundreds of thousands of workers dispossessed of employment and labor rights, the truth is there for all to see: Uber and Lyft weaponize “opportunity” to obscure their drivers’ unjust working conditions. The companies’ misclassification reifies occupational segregation under a pretense of entrepreneurship.

Certainly, Lyft and Uber both do some symbolic work to support Black lives.<sup>22</sup> But in the real world, where working families contend with overdue bills and making rent, the two companies’ employment structure—unilateral removal of protections and benefits, locked through forced arbitration contracts that forbid collective action—depends upon, and in turn reinforces, the structural disadvantages of workers who face stigma and prejudice on account of race. While Lyft and Uber parade diverse faces in their public relations, their work structures subordinate poor people of color.

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ideology thus operates in conjunction with the class components of legal ideology to reinforce the status quo, both in terms of class and race.”).

<sup>22</sup> See, e.g., “*If you tolerate racism, delete Uber*”, MediaCom (Sept. 2, 2020), <https://www.mediacom.com/us/news/news/2020/if-you-tolerate-racism-delete-uber> (describing a “racial injustice campaign” launched by Uber and an advertising agency); Logan Green and John Zimmer, *A note from our co-founders: A call to action for each of us*, Lyft (June 1, 2020), <https://www.lyft.com/blog/posts/a-note-from-our-co-founders-a-call-to-action-for-each-of-us> (discussing systemic racism on a company blog in the aftermath of the George Floyd uprisings).

## **II. Workers of color, already facing longstanding economic exclusion and segregation, are uniquely harmed by the companies' misclassification.**

If successfully mislabeled as contractors, Uber and Lyft's drivers lack minimum wage and overtime protections, access to unemployment insurance, state disability insurance, workers' compensation, paid sick leave, employer contributions to Social Security, and the chance to access retirement savings plans. These foundational workplace protections provide workers a ground upon which to secure for themselves stability and economic dignity. These are the rights that help ensure meaningful flexibility when workers face life's unexpected challenges. Critically, drivers know this. In a Los Angeles survey, nearly all drivers said they at least would like employee-like benefits, such as paid time off, health insurance, unemployment insurance, and workers' compensation.<sup>23</sup>

No person should have to accept jobs that unilaterally remove these benefits, but it is singularly intolerable that these conditions fall disproportionately on poor people of color who have been shunted to the bottom of the economy. Workers of color both make up the majority of Uber and Lyft's drivers and are overrepresented in the companies' workforce, as described above. In both absolute and relative terms, workers of color are most harmed by Uber and Lyft's unlawful misclassification. If employment and labor protections are to

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<sup>23</sup> Benner, *supra* note 14, at 34.



provide all workers with a foundation of stability, then they must be in reach of those who need them most.

To assess the exclusion of baseline work protections on Uber and Lyft's drivers of color, we need to consider the economic backdrop for so many of those workers.<sup>24</sup> However, *amici* first must say a word: the statistics on poverty, health, job security, and other outcomes described below do not begin to capture the individual despair that results when poor workers of color are, as a practical matter, forced to accept insecure jobs that leave them on the precipice of devastation. *Amici* have worked with countless ride-hail drivers and other misclassified workers who have had their wages stolen by their employers. We have assisted low-wage workers who struggle to access the unemployment benefits to which they are entitled as employees. We have advocated for and alongside misclassified immigrants and workers of color who cannot take a day off and must work while sick to provide for their families. Over the course of these interactions, *amici* have come to recognize the special emotional toll when low-wage workers, disproportionately people of color, are systematically excluded from decent jobs. We have seen the persistent anguish when people are

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<sup>24</sup> In presenting the disparities below, *amici* intend neither to essentialize the experiences of people of color, nor to explain dynamic social phenomena strictly on account of race. *Amici* only hope to contextualize the drivers' working conditions amid the material realities for so many people of color.

made to labor under the pretense that they are independent businesses yet lack the *actual economic flexibility* to have a say in their lives when it counts. For these underpaid workers, too many come to see life not as a bounty of opportunities, but as “a long and desolate corridor with no exit signs.”<sup>25</sup>

#### A. *Income, Wealth, and Financial Stability*

When the Emancipation Proclamation was signed in 1863, the Black community owned 0.5 percent of the total wealth in the United States; roughly one and a half centuries later, that number has nudged up to a whopping 1 percent of the country’s wealth.<sup>26</sup> While the median net worth of white households is \$171,000, the median net worth of Black households is \$17,600.<sup>27</sup> For Latino households, it is \$20,700.<sup>28</sup> In 2019, 19 percent of Black Americans and 16

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<sup>25</sup> Martin Luther King, Jr., *The American Dream*, Sermon at Ebenezer Baptist Church, Atlanta, Georgia (July 4, 1965), available at <https://kinginstitute.stanford.edu/king-papers/documents/american-dream-sermon-delivered-ebenezer-baptist-church> (describing the “utter hopelessness” that results when Black people are continually excluded from decent jobs).

<sup>26</sup> Dalton Conley, *Being Black, Living in the Red: Race, Wealth, and Social Policy in America*, 25 (2010).

<sup>27</sup> Lisa J. Dettling, et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, Board of Governors of the Federal Reserve System (Sept. 27, 2017), <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm>.

<sup>28</sup> *Id.*

percent of Latinos were poor, while 7 percent of whites were poor.<sup>29</sup> Together, Black and Latino Americans comprise 25 percent of all households but account for 44 percent of the nation's poor.<sup>30</sup> About a third of Black and Latino families have either negative wealth or no assets at all.<sup>31</sup> And amid the current recession, things are only getting worse. From June 2019 to June 2020, the number of working-age Black and Latino individuals with below-poverty family earnings skyrocketed by 3.6 million (40 percent) and 4.0 million (34 percent), respectively.<sup>32</sup>

In 2018, the median Black household nationwide earned 59 cents for every dollar of income the median white household earned, while the median Latino

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<sup>29</sup> Jessica Semega, et al., *Income and Poverty in the United States: 2019*, United States Census Bureau (Sept. 15, 2020) at 15, <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf>.

<sup>30</sup> Linda M. Burton, et al., *State of the Union 2017: Poverty*, Stanford Center on Poverty and Inequality (2017), [https://inequality.stanford.edu/sites/default/files/Pathways\\_SOTU\\_2017\\_poverty.pdf](https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_poverty.pdf).

<sup>31</sup> Rakesh Kochhar, Richard Fry, and Paul Taylor, *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, Pew Research Center 2 (Sept. 26, 2011), <https://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

<sup>32</sup> Matt Saenz and Arloc Sherman, *Research Note: Number of People in Families With Below-Poverty Earnings Has Soared, Especially Among Black and Latino Individuals*, Center of Budget and Policy Priorities (July 15, 2020), <https://www.cbpp.org/research/poverty-and-inequality/research-note-number-of-people-in-families-with-below-poverty>.

household earned 73 cents.<sup>33</sup> Black and Latino Americans are more likely to suffer minimum wage violations, partly because they are so overrepresented in low-wage work.<sup>34</sup> In California specifically, Black and especially Latino workers make up disproportionate shares of the low-wage workforce.<sup>35</sup> And while Asian Americans, on average, enjoy financial stability and high earning power, nearly one in four Asian Americans in California is working and struggling with poverty. Some Asian ethnic groups, such as Hmong and Native Hawaiian and Pacific Islanders, particularly struggle with poverty, though no group is free from economic challenges.<sup>36</sup>

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<sup>33</sup> Valerie Wilson and Jhacova Williams, *Racial and ethnic income gaps persist amid uneven growth in household incomes*, Economic Policy Institute (Sept. 11, 2019), <https://www.epi.org/blog/racial-and-ethnic-income-gaps-persist-amid-uneven-growth-in-household-incomes/>.

<sup>34</sup> See David Cooper and Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, Economic Policy Institute (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>.

<sup>35</sup> *Low-Wage Work in California*, University of California Berkeley Labor Center, <https://laborcenter.berkeley.edu/low-wage-work-in-california/#worker-profile> (noting +17 percentage points for Latinos in low-wage work compared to the general workforce, and +2 percentage points for Black workers).

<sup>36</sup> *The Working Lives and Struggles of Asian Americans and Pacific Islanders in California*, PRRI (Nov. 18, 2019), [https://www.prrri.org/wp-content/uploads/2019/11/PRRI\\_Nov\\_2019\\_CA\\_AAIP.pdf](https://www.prrri.org/wp-content/uploads/2019/11/PRRI_Nov_2019_CA_AAIP.pdf)

(describing a state of “two Californias’ among [Asian American Pacific Islanders]—one where some AAPI workers report a great deal of financial stability and one in which other AAPI workers report significant financial insecurity and struggle”).

California’s wage and hour laws are designed to guard against this kind of low pay and income instability that have, over time, sustained staggering wealth gaps. A guaranteed minimum wage and overtime pay protect all underpaid workers, but they particularly stand to improve the material conditions for Black and Latino workers historically segregated into low-wage industries. In areas with relatively strong minimum hourly wages, such as the state of California (\$12) and large cities like Los Angeles and San Francisco (\$15), a guaranteed minimum wage dramatically raises the floor to help narrow the pay and wealth gap for poor people of color.<sup>37</sup>

Yet because they are misclassified as independent contractors, Uber and Lyft’s drivers—the majority of whom are people of color—cannot step upon even that modest floor, aggravating a long and abysmal history of income and wealth disparities. Without the coverage of California’s wage and hour laws, drivers frequently earn subminimum wages while incurring expenses that cannot be passed onto customers and which Uber and Lyft refuse to reimburse. One calculation estimates that Uber drivers earn an average of \$11.77 an hour after

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<sup>37</sup> See Laura Huizar and Tsedeye Gebreselassie, *What a \$15 Minimum Wage Means for Women and Workers of Color*, National Employment Law Project (Dec. 2016), <https://www.nelp.org/wp-content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf> (“A \$15 minimum wage could make significant inroads in helping women and people of color make ends meet, closing persistent gender and race-based pay and wealth gaps, and improving educational and health prospects for children.”).

deducting Uber's fees and drivers' expenses; that drops to \$10.87 after deducting the Social Security and Medicare taxes that drivers are required to pay, and as low as \$9.21 after taking into account additional deductions.<sup>38</sup> The expenses that Uber and Lyft drivers incur often have the effect of locking them into the work. Many take out loans or incur credit card debt to pay for work-related expenses such as car maintenance costs.<sup>39</sup> As a result, many drivers are struggling financially. In Los Angeles, nearly one in five drivers receives some form of public assistance (such as food stamps or housing subsidies).<sup>40</sup> Given this combination of both unpredictable expenses and unstable income, more than half of drivers surveyed in Los Angeles said they would rather earn a set hourly wage after expenses, and the majority of these drivers said they want to see a guaranteed rate of at least \$15 an hour.<sup>41</sup>

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<sup>38</sup> Lawrence Mishel, *Uber and the Labor Market*, Economic Policy Institute (May 15, 2018), <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 Compensation Standard for Seattle TNC Drivers*, The New School Center for New York City Affairs (July 2020) at 38-40, [https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report\\_July-2020.pdf](https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf) (finding similar earnings for ride-hail drivers in Seattle).

<sup>39</sup> *More than a Gig*, *supra* note 16, at 3.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> *Id.* at 27-28.

## *B. Sickness, Injuries, and Health*

Health and safety benefits like paid sick leave, workers' compensation, state disability insurance, and employer-subsidized healthcare help ensure that workers can enjoy physical and mental health, recover from illness at home, and maintain financial stability if they suffer a debilitating injury. These universal protections are critical for people already at risk of poorer health outcomes. Black and Latino Americans, given their low incomes, on average, and the resultant deprivation of material wealth, are more likely to have worse health outcomes.<sup>42</sup> 14 percent of Black Americans and 10 percent of Latinos report suffering from chronic health conditions, compared to eight percent of whites.<sup>43</sup> Black, Latino, and Asian Americans are less likely than whites to have health insurance.<sup>44</sup> Further, Black and Latino Americans are more likely to work in jobs with the

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<sup>42</sup> See Frederick Zimmerman and Nathaniel W. Anderson, *Trends in Health Equity in the United States by Race/Ethnicity, Sex, and Income, 1993-2017*, JAMA Network Open (June 28, 2019),

<https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2736934>.

<sup>43</sup> Sofia Carratala and Connor Maxwell, *Health Disparities by Race and Ethnicity*, Center for American Progress (May 7, 2020),

<https://www.americanprogress.org/issues/race/reports/2020/05/07/484742/health-disparities-race-ethnicity/>.

<sup>44</sup> Heeju Sohn, *Racial and Ethnic Disparities in Health Insurance Coverage: Dynamics of Gaining and Losing Coverage over the Life-Course*, Population Research and Policy Review (Oct. 2016),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5370590/> (noting persistently lower insurance coverage rates at all ages for Black, Latino, and Asian Americans).

highest injury rates, on average.<sup>45</sup> Black and especially Latino workers have less access to paid family and medical leave.<sup>46</sup>

By insisting that their drivers are not employees, Uber and Lyft remove basic health protections from workers of color who already are more likely to experience worse health outcomes, in an occupation known to result in physical and mental health challenges. Drivers in California report experiencing musculoskeletal disorders and chronic pain in their backs and knees as a result of sitting for many hours a day. As Uber and Lyft have decreased the pay that drivers earn for each trip, the days have only gotten longer. Drivers also report stress, fatigue, muscle and skeletal pain as the top health issues they have experienced as a result of driving for Lyft and Uber.<sup>47</sup> More than half of the drivers suffer from headaches, dehydration, kidney issues, hypertension, heart problems, anxiety, and depression as a result of their work.<sup>48</sup>

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<sup>45</sup> Seth A. Seabury, et al., *Racial and Ethnic Differences in the Frequency of Workplace Injuries and the Prevalence of Work-Related Disability*, Health Affairs (Feb. 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6198680/> (concluding that “disparities in economic opportunities expose minorities to greater risk of workplace injury and disability”).

<sup>46</sup> Bureau of Labor Statistics, U.S. Dep’t of Labor, *Racial and ethnic disparities in access to and use of paid family and medical leave: evidence from four nationally representative datasets*, Monthly Labor Review (Jan. 2019), <https://www.bls.gov/opub/mlr/2019/article/racial-and-ethnic-disparities-in-access-to-and-use-of-paid-family-and-medical-leave.htm>.

<sup>47</sup> Ockenfels-Martinez & Farhang, *supra* note 13, at 12.

<sup>48</sup> *Id.* at 12-15.



Without access to paid sick leave, affordable health insurance, state disability insurance, or workers' compensation, misclassified drivers face significant challenges obtaining medical care or recuperating from health conditions that may arise on the job. The lack of health protections exacerbates the chronic low pay and income insecurity as the drivers—some of whom are living at or near the poverty line—are left to foot the medical bill when workplace injuries arise. Nearly 40 percent of ride-hailing drivers in San Francisco ride-hail drivers could not pay for a \$400 emergency without borrowing money, and nearly 20 percent have no health insurance.<sup>49</sup>

Uber and Lyft's illegal misclassification perpetuates the economic segregation that has historically denied so many Black and Latino workers the ability to stay home and take care of themselves or loved ones, without risking financial devastation.

These health inequities have become all the more urgent during the COVID-19 pandemic, which has uniquely wreaked havoc on people of color in the United States.<sup>50</sup> Although Uber and Lyft created new policies establishing

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<sup>49</sup> Benner, *supra* note 14, at 16-19.

<sup>50</sup> See Mary Van Beusekom, *Studies: People of color bear larger share of COVID-19 burden*, University of Minnesota Center for Infectious Disease Research and Policy (July 28, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/07/studies-people-color-bear-larger-share-covid-19-burden> (“Predominantly non-white communities bore nearly three times the burden of COVID-19 infections and deaths as white neighborhoods. In poorer counties, those

limited paid leave for drivers with positive COVID-19 tests, onerous eligibility requirements made it difficult—sometimes prohibitively so—for workers to actually access paid leave.<sup>51</sup> This difficulty resulted in many ride-hail drivers forced to work through a pandemic out of sheer financial desperation.

Public health crises such as COVID-19 require universal policies that pay people to stay at home; otherwise, low-wage workers are incentivized to work while sick, while wealthy individuals can afford to stay home and recover.<sup>52</sup> The hundreds of thousands of Lyft and Uber drivers—atomized and left to fend for themselves in the name of “opportunity”—cannot access the paid sick leave laws of California and local municipalities, magnifying the historical health disparities for low-income communities of color.

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with predominantly non-white residents had an infection rate nearly eight times that of counties with mostly white residents . . . and a death rate more than nine times greater[.]”).

<sup>51</sup> See, e.g., Lia Russell, *Uber’s Bait and Switch on Paid Sick Leave*, The American Prospect (May 5, 2020), <https://prospect.org/coronavirus/uber-bait-and-switch-on-paid-sick-leave/> (“[T]he foot-dragging on paid sick leave appears to transfer the relief for workers from Uber to the federal government.”); Jacey Fortin, *A Quarantined Uber Driver’s Quest for Paid Sick Leave*, The New York Times (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/business/coronavirus-uber.html>.

<sup>52</sup> See Aiha Nguyen, *Paid Sick Leave Flattens the Curve*, Data & Society (Apr. 16, 2020), <https://points.datasociety.net/paid-sick-leave-flattens-the-curve-3298b618810e> (“Employers, including platform companies that treat workers as independent contractors, will *continue to lay the responsibility on workers* who are ill-equipped to protect their own and public health. In times of crisis, this creates a situation wherein coverage is sporadic and inconsistent, hindering the public’s ability to contain a pandemic.”).

### *C. Job Security and Unemployment*

Even in “good” times, Black and Latino Americans are substantially more likely to be unemployed compared to whites.<sup>53</sup> In October 2019, well before the current recession, 5.4 percent of Black workers were unemployed and 4.1 percent of Latino workers were unemployed, compared to 3.2 percent of whites.<sup>54</sup> Those disparities have only increased since the outbreak of COVID-19, with employers laying off Black and Latino workers at a disproportionate rate.<sup>55</sup> Latinos have been hit the hardest by the coronavirus and recession, with 17.6 percent of all Latinos unemployed, more than any other group, in May 2020.<sup>56</sup>

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<sup>53</sup> See, e.g., Elise Gould and Valerie Wilson, *Black workers face two of the most lethal preexisting conditions for coronavirus—racism and economic inequality*, Economic Policy Institute (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/> (“[T]he black unemployment rate has, even in the tightest of labor markets, been persistently and significantly higher than the white unemployment rate.”); Cherrie Bucknor, *Hispanic Workers in the United States*, Center for Economic and Policy Research (Nov. 2016), <https://cepr.net/images/stories/reports/hispanic-workers-2016-11.pdf> (noting persistently higher unemployment rates at every level of educational attainment for Latino and Black Americans compared to whites).

<sup>54</sup> Bureau of Labor Statistics, U.S. Dep’t of Labor, *Unemployment rate was 3.6 percent in October 2019* (Nov. 6, 2019), <https://www.bls.gov/opub/ted/2019/unemployment-rate-was-3-point-6-percent-in-october-2019.htm>.

<sup>55</sup> See Jacqueline Alemany, *Power Up: Black and Hispanic Americans are getting laid off at higher rates than white workers*, The Washington Post (May 7, 2020), <https://www.washingtonpost.com/news/powerpost/paloma/powerup/2020/05/07/powerup-black-and-hispanic-americans-are-getting-laid-off-at-higher-rates-than-white-workers/5eb38eb688e0fa17cddf4497/>.

<sup>56</sup> Suzanne Gamboa, *Latinos still have the highest unemployment rate, as joblessness drops slightly*, NBC News (June 5, 2020),

Unemployment insurance (“UI”) helps ensure that people out of work have at least some temporary wage replacement as they look for new employment. This standard portable benefit is even more critical for households with less generational wealth and fewer assets to cushion any job loss. When excluded from UI, poor people of color who start out with less wealth are doubly harmed by the inability to access wage replacement.<sup>57</sup> They simply do not have the cash reserves for the basic necessities of life.

However, Uber and Lyft drivers, called “independent contractors” and supposedly running their own business, can be unilaterally “deactivated” from the platforms, unable to perform ride-hail work, and—unless classified as employees—excluded from California’s unemployment insurance. These repercussions particularly harm drivers of color, who are more likely to be fired because they generally receive lower ratings from riders in the first place.<sup>58</sup>

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<https://www.nbcnews.com/news/latino/unemployment-still-highest-among-latinos-joblessness-drops-slightly-n1225861>.

<sup>57</sup> See Ava Kaufman and Hannah Fresques, *Black Workers Are More Likely to Be Unemployed but Less Likely to Get Unemployment Benefits*, ProPublica (Aug. 24, 2020), <https://www.propublica.org/article/black-workers-are-more-likely-to-be-unemployed-but-less-likely-to-get-unemployment-benefits> (“Because Black households have one-tenth of the wealth of white households, it’s that much more important that unemployment insurance kicks in to reduce the different experiences across these racial groups[.] . . . If you start out with less wealth and you have less access to unemployment insurance, you’re doubling down on this negative impact.”) (quotation marks omitted).

<sup>58</sup> See generally Alex Rosenblat, et al., *Discriminating Tastes: Customer Ratings as Vehicles for Bias*, Data & Society (Oct. 19, 2016)

Fortunately, some Uber and Lyft drivers in California have been able to contest their misclassification to access UI, but only after going through extended audits and, in the end, sometimes receiving far less than what they should have received if the companies properly classified them. Because Uber and Lyft insist that their drivers are independent contractors, they do not report drivers' earnings to California's Employment Development Department ("EDD") as required by law, *see* Calif. Unemploy. Ins. Code §§ 1085, 1088. This means that drivers who apply for UI are first told by EDD that they have no earnings history—and thus are eligible for \$0 in benefits.<sup>59</sup> Drivers who work other jobs as properly classified employees, either while or before working as a driver, are provided Notices of Unemployment Insurance Award that calculate their Weekly Benefit Amounts—the amount paid each week while fully unemployed—based exclusively on their W-2 work. These Weekly Benefit Amounts typically are far less than what drivers would have received had Uber and Lyft reported their wages to the state as required.

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[https://datasociety.net/pubs/ia/Discriminating\\_Tastes\\_Customer\\_Ratings\\_as\\_Vehicles\\_for\\_Bias.pdf](https://datasociety.net/pubs/ia/Discriminating_Tastes_Customer_Ratings_as_Vehicles_for_Bias.pdf).

<sup>59</sup> *See, e.g.*, Shannon Bond, “*We Can’t Take Your Call*”: Uber Drivers, Other Gig Workers Struggle For 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-struggle-for-unemployment>.

Some drivers have requested that EDD conduct an audit of their earnings as drivers for Uber and Lyft. *Amici* know and have assisted drivers who, after EDD performed wage audits, were found to be employees and thus eligible for state UI, usually at the maximum weekly benefit amount of \$450. Although these drivers ultimately obtained unemployment insurance, the wage audit process took months for each driver. Since the start of the pandemic, while other workers received benefits within weeks of becoming unemployed in March, many Uber and Lyft drivers did not receive any insurance benefits until May or June. Many still are waiting. And this inability to access UI benefits is not borne equally. A nationwide survey found that Black workers are more likely to be unemployed during the current recession but less likely to actually receive unemployment benefits, in part because they are overrepresented in “non-traditional jobs” (such as driving for ride-hail companies) that preclude access to unemployment compensation.<sup>60</sup>

Meanwhile, rather than assist drivers with accessing UI, Uber and Lyft have encouraged them to apply for Pandemic Unemployment Assistance (“PUA”), the temporary federal program established for people who are *actually*

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<sup>60</sup> See Kaufman and Fresques, *supra* note 57 (reporting that, even with the expansion of PUA eligibility, “a smaller percentage of unemployed Black workers are receiving unemployment benefits than white workers during the pandemic . . . 13% of jobless Black workers received such payments between April and June, compared with 22% for Hispanic workers and 24% for white workers”).

self-employed and ineligible for unemployment insurance.<sup>61</sup> But in most cases, the temporary program offers far less generous benefits. While UI is calculated using gross earnings during the last five seasonal quarters, PUA is calculated based on net earnings during the prior calendar year. *Compare* Cal. Unemploy. Ins. Code §§ 926, 928.5 *with* CARES Act § 2102(d)(1); 20 C.F.R. § 625.6(a)(2). Thus, under PUA but not UI, drivers must reduce their earnings amount by their out-of-pocket expenses, including wear-and-tear, gasoline, cellphone plans, and so-called platform fees to Uber and Lyft. As a result, many drivers who earned gross earnings that would allow them to access the maximum Weekly Benefit Award (\$450/week) on UI stand to receive far less in weekly benefits on PUA.<sup>62</sup>

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<sup>61</sup> See, e.g., Irina Ivanova, *Uber And Lyft Drivers Accuse Companies of Holding Up Unemployment Benefits*,” CBS News (Apr. 21, 2020), <https://www.cbsnews.com/news/uber-lyft-drivers-gig-economy-unemployment-benefits/> (reporting that an Uber spokesperson stated, “We are actively reaching out to all states to try and work with them to get [Pandemic Unemployment Assistance] to our drivers and delivery people”); Greg Iacurci, *Some Uber, Lyft Drivers Fear Companies Will Use Unemployment Benefits Against Them*, CNBC (May 23, 2020), <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 tell drivers “the benefits in the CARES Act, including Pandemic Unemployment Assistance, which was designed specifically to help independent workers like drivers”); Sam Hartman, *Uber and Lyft Aren’t Paying for Drivers’ Unemployment: You Are, Confirms Newsom*, KQED (Apr. 15, 2020), <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 Department to modify guidance to discourage workers from listing the company as an employer).

<sup>62</sup> See Iacurci, *supra* note 61.

PUA, for all its deficiencies, has been a lifeline to individuals who are *legitimately* self-employed and cannot access state unemployment. But the temporary program is no substitute for California’s unemployment compensation to which the drivers already are entitled as employees. Uber and Lyft’s unlawful misclassification has impeded drivers from accessing state UI—an obstacle that especially harms low-wage workers of color with scant generational wealth to help them weather the pandemic and recession.

#### *D. Discrimination*

Finally, Uber and Lyft’s drivers contend not only with structural barriers that shunt them to the bottom of the economy, forcing them to accept low pay with no benefits. Like all people of color, the many ride-hail drivers who identify as Black, Latino, Asian, and/or multiracial must confront prejudice and racial discrimination at the workplace. But if misclassified as independent contractors, drivers cannot access critical anti-discrimination protections.

Study after study has shown that people of color face discriminatory employment practices based on racial prejudice.<sup>63</sup> At every level of a worker’s

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<sup>63</sup> See, e.g., Lincoln Quillian, et al., *Meta-analysis of field experiments show no change in racial discrimination in hiring over time*, Proceedings of the National Academy of Sciences (Sept. 12, 2017), <https://www.pnas.org/content/early/2017/09/11/1706255114> (finding “a striking persistence of racial discrimination in US labor markets”); Devah Pager, et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 American Sociological Review 777 (Oct. 2009),



education, there is evidence that racial discrimination plays a role in hiring and firing decisions.<sup>64</sup> Complaints of racial discrimination are the most common non-retaliation claim under Title VII of the Civil Rights Act.<sup>65</sup>

Under California’s Fair Employment and Housing Act, an employer may not make hiring and firing decisions on the basis of race, sex, religion, or national origin.<sup>66</sup> Critically, its protections, like those of Title VII,<sup>67</sup> extend only to workers who are classified as employees, not to independent contractors. When Uber and Lyft misclassify their California drivers as independent contractors, they weaken

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<https://scholar.harvard.edu/files/bonikowski/files/pager-western-bonikowski-discrimination-in-a-low-wage-labor-market.pdf> (“[B]lack applicants were half as likely as equally qualified whites to receive a callback or job offer. In fact, black and Latino applicants with clean backgrounds fared no better than white applicants just released from prison. . . . These results point to the subtle yet systematic forms of discrimination that continue to shape employment opportunities for low-wage workers.”).

<sup>64</sup> See Jhacova Williams and Valerie Wilson, *Black workers endure persistent racial disparities in employment outcomes*, Economic Policy Institute (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment/> (“[T]he fact that the country’s most highly educated black workers are still less likely to be employed than their white counterparts, and when they are employed, are less likely to be employed in a job that is consistent with their level of education, strongly suggests that racial discrimination remains a major failure of an otherwise tight labor market.”).

<sup>65</sup> Maryam Jameel, et al., *More than 1 million employment discrimination complaints have been filed with the government since 2010. Here’s what happened to them.*, The Washington Post (Feb. 28, 2019), <https://www.washingtonpost.com/graphics/2019/business/discrimination-complaint-outcomes/>.

<sup>66</sup> Cal. Gov’t Code § 12940.

<sup>67</sup> 42 U.S.C.A. § 2000e et seq.

the state’s anti-discrimination regime by removing from its reach the workers who most deserve its protections.

Employer discrimination against ride-hail drivers based on race is not simply a problem in the abstract; empirical research suggests that ride-hail drivers of color are more likely than white drivers to be terminated by the companies.<sup>68</sup> Lyft and Uber’s performance evaluation system—offloading reviews of their drivers to the companies’ customers—can result in drivers being fired in a racially discriminatory manner. When a ride is completed, customers are asked to rate their experience on a scale of one to five stars. Both companies decide which drivers to retain or “deactivate” based on performance, including the star ratings.<sup>69</sup> Yet social science research on the prevalence of racial bias in ratings systems points to a problem: customer feedback systems may “hard-wire discrimination into the supervisory techniques of gig economy platforms.”<sup>70</sup> While a management design like customer star ratings may appear neutral, “[c]onsumer-sourced ratings

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<sup>68</sup> See Noah Zatz, *Beyond Misclassification: Gig Economy Discrimination Outside Employment Law*, On Labor (Jan. 19, 2016), <https://www.onlabor.org/beyond-misclassification-gig-economy-discrimination-outside-employment-law/>.

<sup>69</sup> See Samantha Allen, *The Mysterious Way Uber Bans Drivers*, The Daily Beast (Jan. 27, 2015), <http://www.thedailybeast.com/articles/2015/01/27/the-mysterious-way-uber-bans-drivers>.

<sup>70</sup> Zatz, *supra* note 68.

like those used by Uber are highly likely to be influenced by bias on the basis of factors like race or ethnicity.”<sup>71</sup>

Companies that outsource worker assessments—and ultimately the fates of their workers—to their customers make their workers vulnerable to the enduring prevalence of bias and discrimination in society. As Uber and Lyft decide whether to retain or fire drivers based on their customer ratings, such bias by customers may result in ride-hail drivers being fired on account on race. At the federal level, Title VII does not permit racially motivated decisions by an employer based upon customer preference.<sup>72</sup>

By misclassifying their hundreds of thousands of California drivers, the majority of whom are people of color, Uber and Lyft foreclose their drivers’ ability to fight discrimination. All this in a job where the frequency of racial discrimination may be measured by the minutes, with the chance of prejudice presenting itself each and every time a driver completes a ride.

## CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the trial court’s preliminary injunction against Appellants.

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<sup>71</sup> Rosenblat, et al., *supra* note 58, at 7.

<sup>72</sup> *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010).

Dated: September 22, 2020

Respectfully Submitted,

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**WORD COUNT CERTIFICATION**

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the Proposed Brief of *Amici Curiae* National Employment Law Project, ACLU of Northern California, et al., (Economic and Racial Justice Advocates) in Support of Plaintiff and Respondent is proportionately spaced, has a typeface of 13 points or more and contains 7193 words, including footnotes.

Dated: September 22, 2020

*/s/ George Warner* \_\_\_\_\_  
GEORGE WARNER

**[PROPOSED] ORDER GRANTING LEAVE  
TO FILE *AMICI CURIAE* BRIEF**

The application of the National Employment Law Project, ACLU of Northern California, et al. (Economic and Racial Justice Advocates), for permission to file a brief as *Amici Curiae* having been read and filed, and good cause appearing: IT IS HEREBY ORDERED that National Employment Law Project, ACLU of Northern California, et al. (Economic and Racial Justice Advocates) are permitted to file the proposed brief attached to this application as *Amici Curiae*; and PERMISSION IS HEREBY GRANTED to any party to this appeal to serve and file an answering brief within \_\_\_\_ [number] days thereafter.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Presiding Justice