

Nos. A160701 and A160706

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA
FIRST APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC., a Delaware corporation, and LYFT,
INC., a Delaware corporation,
Defendants and Appellants.

**AMICUS CURIAE BRIEF OF GIG WORKERS RISING, MOBILE
WORKERS' ALLIANCE, RIDESHARE DRIVERS UNITED, AND WE
DRIVE PROGRESS IN SUPPORT OF RESPONDENT, THE PEOPLE
OF THE STATE OF CALIFORNIA**

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

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INTRODUCTION

The Amici who submit this brief to the Court do so in order to share something simple: the direct voices of essential workers. The thousands of app-based ride-hail drivers who have joined with Amici do so under a common cause because they recognize that the only way to build a better working environment is to do it together.

The 55,000 ride-hail drivers in Amici's networks have worked for Defendants Uber and Lyft since they began operating in California. During the last several years, workers have taken the lead organizing and advocating for legal protections. Drivers affiliated with Gig Workers Rising, Mobile Workers Alliance, Rideshare Drivers United, and We Drive Progress were an integral part of enacting Assembly Bill 5. Workers shared their testimony about the harms that independent contractor misclassification causes to drivers, their communities, and the public through each step of the legislative process that ultimately led to the law's passage.

Since then – and through the COVID-19 pandemic – Amici have worked tirelessly to secure the protections guaranteed to ride-hail drivers under the law. Among other things, they have aided over 5,000 ride-hail drivers in filing wage-theft claims with the California Labor Commissioner (which are now being prosecuted *en masse* by the state) and helped thousands

of workers navigate the state's complex unemployment insurance system when ride-hailing work dramatically declined in March 2020 with shelter-in-place and the pandemic.

The lived experiences of Amici's drivers is a necessary component of any legal or factual analysis of the issues in this case. The workers brave enough to share their stories here – who have worked for Uber and Lyft since the beginning and between them have performed more than 150,000 rides – represent the hundreds of thousands of others who cannot speak directly to this court. As these drivers can confirm, there is no tension between flexibility and baseline labor protections on the job; this is simply a false choice. Each and every one of them want the protections of California's labor laws and have struggled against companies that deny them.

Defendants' insistence that their businesses are sustained by part-time and occasional drivers who jump on their apps in-between other things is at odds with reality. It is a fact that full-time drivers do the majority of work on the ride-hail applications and bear every basic cost of doing so, from fuel, maintenance, and depreciation on their vehicles, to cell phones and data plans, and cleaning equipment and PPE. Many of these drivers work under the constant and looming threat of being one bad week, one car repair, one illness away from missing a rent payment or putting food on the table.

All of Defendants' attempts to justify their stubborn refusal to acknowledge the employee status of their drivers and to comply with California law relies on labels rather than reality and elevates form over substance. Defendants claim that they are disinterested matchmakers who help two sets of customers – drivers and riders – to find each other is as fanciful as the notion that drivers can simply turn on the app when the mood strikes to magically make money on their own terms. Uber and Lyft control every meaningful aspect of the drivers' work once the app is turned on and exert all control necessary to protect their branded businesses. They decide how much to charge the riders and how to pay the drivers; they use pay guarantees and other financial incentives to make sure drivers are in the right places at the right times to serve their customers; they deploy customer rating tools to perform sophisticated people management functions; and, pointedly, they retain the ultimate authority to terminate drivers whose work performance is below par.

Defendants rejoin by emphasizing features of their apps which they assert prove the autonomy and independence of the drivers and their independent contractor status. However, these arguments take a backseat to one fundamental truth: *whatever changes these companies make today they can undo tomorrow*. And therein lies the harm. Workers on these platforms

face, and have endured, irreparable harms by the companies' actions. In addition to recognized forms of irreparable harm based on the loss of subsistence income, workers (and consumers) would face grave consequences working without basic social safety net programs like paid sick leave, workers' compensation, or unemployment benefits. Losses today cascade into effects that cannot be remedied after trial, which is why the trial court's order must be reinstated and the companies compelled to follow the law.

A. DRIVERS VALUE FAIR, PREDICTABLE WAGES AND LEGAL WORKPLACE PROTECTIONS AS MUCH AS THE FLEXIBILITY TO CHOOSE THEIR OWN WORK SCHEDULE

Defendants' central theme – before this court and below – has been that their drivers value the flexibility to choose their own schedules and do not want to be “employees” under Defendants' control. *See, e.g.*, Uber Opening Brief at 12. The many thousands of drivers affiliated with Amici reject the false dichotomy posited by Defendants between flexible work arrangements and employee status. In truth, ride-hail drivers – most especially those who earn all or nearly all of their family income driving for Uber and Lyft – value and want *both*.

Defendants' briefing makes clear that their portrait of the driver workforce is myopically focused on part-time and casual drivers to the exclusion of their full-time drivers who are the real backbone of their

business. Uber’s own studies of ride-hail platforms indicate that fully 46 percent of the hours driven are logged by *full-time drivers* who make up only 22 percent of the driver workforce. See M. Keith Chen, et al. *The Value of Flexible Work: Evidence from Uber Drivers*, NBER Working Paper no. 23296, (June 2019).¹ And, it is well documented that these drivers – who perform a majority of the work – live precariously on the unpredictable earnings garnered from their labor. See Benner, *On-Demand And On-The-Edge: Ride-Hailing And Delivery Workers In San Francisco*, Institute for Social Transformation UC Santa Cruz (May 2020) at 16 (<https://tinyurl.com/BennerStudy>) (documenting significant financial struggles experienced by full-time ride-hail drivers including the inability to handle an emergency expense of \$400, lack of health insurance, and reliance on public assistance to make ends meet) (“Benner”).

Thus, while scheduling flexibility is undeniably important to full and part-time drivers alike, fair, predictable earnings and access to critical workplace benefits like health insurance, workers’ compensation, and

¹ The Chen study – like other academic research funded by Uber – has been roundly criticized for being grounded in proprietary data making the analyses impossible to replicate. See Horan, *Uber’s “Academic Research Program”: How to Use Famous Economists to Spread Corporate Narratives*, ProMarket U. Chi. Stigler Center (Dec. 2019) (<https://tinyurl.com/PROMARKET-HORAN>).

unemployment benefits are as – and in some cases more – important to Defendants’ workforce.

Saori Okawa, who has driven over 7,600 rides for both Uber and Lyft, put it this way:

I know how valuable it is to control your work schedule, but that type of flexibility is not at odds with providing basic workplace protections. Yet, it’s Uber and Lyft that have made the current work *inflexible*, by cutting driver fares, flooding neighborhoods with cars, and taking higher and higher cuts from each ride. A living wage produces far more flexibility than just choosing when I get to work.

Telephone interview, Sept. 16, 2020.

Edgar Gonzalez, a Lyft Driver in Los Angeles who has provided over 600 rides, much of them part-time as a student, indicated:

The work isn’t flexible for everyone. I have a heart condition that requires regular medical attention. When I stop driving to make my doctor’s appointments, I don’t get paid sick days to take time off; I just end up working double. In addition, when I started driving, I did so while I was also going to college. But the best days and times to drive would many times conflict with my class schedule. If I knew in advance when I could work, I could have shaped my work around going to school, rather than the other way around.

Telephone interview, Sept. 16, 2020.

Ebrahim Wasil – who has driven for Uber and Lyft since 2013 – equally commented:

I have kids in school, so having a flexible schedule is important to me. But my kids are done with school at the same time every day, so

predictability is also important. And flexibility doesn't mean much if the worst happens; what if we get in accidents or we get sick? Real flexibility would mean paid leave, the ability to negotiate over rates, and having security at work. What if a customer is racist and verbally assaults me or gives me a bad rating? If that happens, I get deactivated and have nothing to fall back on.

Telephone interview, Sept. 16, 2020.

Derrick Baker, an Uber driver in San Francisco with over 4,500 rides logged on the application, explained:

We're driven into the ground on these apps. When I started, I thought working for Uber was a great deal. But then things came into focus. Every year since I started I was making less and less money, putting in more and more hours, with nothing to show for it but thousands of miles on my car. After accounting for expenses like wear and tear on my car, phone bills, and fuel (all costs I cover), I'd be lucky to break \$10 and hour.

Telephone interview, Sept. 16, 2020.

Independent studies of ride-hail drivers in the San Francisco Bay Area and Los Angeles confirm that these drivers' views are widely shared by most Uber and Lyft drivers. For example, 63 percent of the drivers surveyed in the Benner study stated they wanted public officials to enforce misclassification laws in California to ensure that drivers receive basic workplace protections, Benner *supra*, at 24, and close to ninety percent of drivers indicated that fair pay was extremely or very important to them – nearly identical to the number of workers who said the same about flexible schedules. *Id.* at 67; *see*

also, Waheed, et al., *More than a Gig: A Survey of ride-hailing Drivers in Los Angeles*, UCLA Labor Center (May 2018) (“Waheed”)

(<https://tinyurl.com/UCLA-Waheed>) (90 percent of survey respondents report wanting control over their work *as well as* the benefits of employee status).

Amici have interviewed and worked with thousands of drivers who, like the drivers above, report they had to drive longer hours just to earn the same pay due to repeated cuts in ride-fares and other changes in Defendants' pay practices, undercutting the notion that these full-time drivers have any genuine flexibility over their hours or control over their conditions. Of course, nothing in the law prevents app-based companies like Uber and Lyft from providing workers with flexible work arrangements and providing the basic workplace protections that Assembly Bill 5 has now extended to them.

Eduardo,² an Uber Driver from Bellflower, California, explains why these benefits are so critical to workers:

After pay was cut in 2018, I had to drive longer and longer hours to make the same amount of money. Sometimes I'd drive 12 to 15 hour days, five days a week. I started developing extreme knee pain that became unbearable, which sent me to the emergency room. After a five day hospital stay and two months of physical therapy, I was finally diagnosed with gout, a condition exacerbated by prolonged sitting. Throughout this ordeal, I had no access to sick leave for my emergency room stay and no access to paid family leave or disability insurance

² Eduardo provided only his first name for fear of retaliation for speaking out about working conditions.

during my recovery. This will likely force me back to work sooner than my doctor recommended since I have no other way to provide for my family.

Email statement sent on Sept. 17, 2020.

Eduardo's story is not uncommon. Forty percent of ride-hail workers surveyed in the Benner study reported that they worked more than 12 straight hours in a shift several times a month, a situation that not only would entitle them to time and half or double-time overtime premiums, but can put drivers at risk of positional stress injuries or even collisions after long hours on the road. *See Benner supra* at 35. Paid sick and family leave are workplace benefits that ensure continued income to workers, like Eduardo, who are temporarily ill and need time off to heal and recover.

Amici's members equally value how Assembly Bill 5 now provides them access to crucial state unemployment insurance benefits. During the COVID-19 pandemic, more than ever before, unemployment insurance has become a critical lifeline for displaced ride-hail drivers as work available to them has decreased by 76 percent, if not more. *See Benner supra* at 62; see also Lee, *Uber Racks Up Another Loss As Ride Business Shrinks By 75%*, Financial Times (Aug. 6, 2020) (<https://tinyurl.com/Lee-FT-Aug-6>). Yet, the path to accessing benefits has been challenging, in no small part due to Defendant's

own actions. Carlos Ramos, a Lyft driver with 10,343 rides to his name, knows this situation all too well:

I applied for state unemployment benefits right when the pandemic hit. I had fought to help pass AB 5 in California, so I knew I was entitled to benefits. But because Lyft failed to supply wage information like any other employer, I fought for months to receive benefits, only recently receiving them in July. The Employment Development Department now considers me to be an employee of Lyft, something that I knew from the start.

Telephone interview, Sept. 18, 2020.

Amici have assisted thousands of drivers navigating California's complex unemployment insurance system, which Uber and Lyft – by misclassifying their drivers as independent contractors – have gravely undermined. As Carlos's experience confirms, both companies failed to provide wage information to the state's Employment Development Department and contribute to the unemployment insurance trust fund. Uber even made direct appeals to the governor's office requesting that state officials *not* encourage workers to apply for state unemployment benefits. See Sam Harnett, "*Uber and Lyft Aren't Paying for Drivers' Unemployment: You Are, Confirms Newsom*," KQED (April 15, 2020) (<https://tinyurl.com/SamHarnettKQED>).

Similarly, the drivers Amici represent recognize the value of social insurance programs like workers' compensation. The story of Edan Alva, a Lyft driver with 10,522 rides to date, is telling:

I would work these incredibly long shifts day after day. Then it all caught up to me. I started experiencing neck and back pain; I couldn't even turn my head to drive safely. When I went in to see a doctor they mentioned how I had developed positional stress injuries from sitting for too long in one fixed position. This is an injury that developed from my time on the job. I should be protected by workers' compensation for common injuries so that I can get healthy without risking my income if I have to temporarily get treatment or stop driving.

Telephone interview, Sept. 16, 2020. This lived experience illustrates the recent survey data and findings that app-based ride-hail drivers value workers' compensation and view it as a vital workplace benefit that can't simply be replaced by cash. *See Benner supra* at 24; *Waheed supra* at 44.

And, as COVID-19 ravaged employment opportunities and made normal driving a life-risking endeavor for many, drivers engaged with Amici have been left to fend for themselves. As driver Mekela Edwards describes:

During this pandemic, drivers are taking extra steps to make sure we're safe and passengers are safe. But we seem to be alone in this regard. I was disinfecting my car after every ride, but Uber and Lyft paid me nothing for my time cleaning. This can't possibly be the right incentive if you want to make sure drivers go the extra mile to keep everyone safe.

Telephone interview, Sept. 18, 2020.

Indeed, while Uber and Lyft have proudly emphasized – here and in the press – that their drivers are “essential workers” whose jobs are threatened by the trial court’s injunction, they have done little to nothing to protect them from the potential life-threatening danger of COVID-19. Instead of providing or reimbursing drivers for the most basic personal protective equipment, Lyft, for example, decided to sell masks and other equipment to drivers. See Kari Paul, “Lyft Sparks Uproar After Opening Store to Sell Masks to its Drivers,” *The Guardian* (July 17, 2020) (<https://tinyurl.com/KariPaulGuardian>). Saul Navarro, a Bakersfield Lyft driver with 11,469 rides behind him, put it simply:

We were asked to take an extraordinary risk for less than ordinary income. I had already been working long hours, seven days a week, driving my vehicle into the ground without a single dollar of reimbursement when the pandemic hit. And suddenly, it felt like we were left with nothing.

Telephone interview, Sept. 16, 2020. Uber, for its part, has done even less. Steve Gregg, an Uber driver who has amassed over 16,000 rides in the Bay Area, explained:

The moment the pandemic hit, we were told to roll down the windows and stay far away from passengers (an impossible task in a small car). Uber then made a big deal about the masks they handed out or the new sick leave program they implemented. *But when the masks ran out, they never resupplied workers.* And to get sick leave, you needed a positive COVID-19 diagnosis, which was impossible to get. I have serious underlying medical conditions, so I was literally forced to weigh

my own life or my ability to keep a roof over my head because there was no leave waiting, no new safety procedure that would protect me.

Telephone interview, Sept. 15, 2020. Saori felt she had no choice but to stop working for Uber when the pandemic hit:

All of their hubs closed. You couldn't talk to anyone on their support line. The company ran out of face masks and it wasn't possible to work safely at that point. It was like we were abandoned.

Telephone interview, Sept. 16, 2020.

B. LONGSTANDING AND RECENT BUSINESS PRACTICES BY BOTH UBER AND LYFT CONFIRM THAT DRIVERS ARE THEIR EMPLOYEES.

Drivers regularly tell Amici that working for Uber and Lyft leaves them frustrated, confused, and defeated. Far from promoting entrepreneurial opportunity and a path to wealth creation, drivers face an obscure pricing model, are manipulated by payment incentives and fixed-pricing structures, and are left unprotected if things go wrong. And, as described below, both companies reserved the right to make changes to the rules of engagement on their applications on a whim and to “deactivate” drivers – Uber and Lyft speak for “fire” – without reason or warning.

As the trial court aptly observed, Defendants' characterization of their drivers as fee-paying customers “blinks economic reality,” see AA (Vol.9) at 2904, a perspective that finds full support in the facts and the lived experiences of the many thousands of drivers represented by Amici. At the

same time, Defendants’ repeated refrain that they are merely technology companies in the business of making “matches” between riders and drivers in a proverbial “on-line marketplace” – no different than companies like eBay – has none.

1. Uber and Lyft’s Claim that drivers are not employees, but fee-paying “customers” who pay Uber and Lyft for *their* services is pure fiction

Notably, every one of the dozens of Amici’s members who have lent their voice and perspective to this brief – when asked whether they perceived themselves to be fee-paying customers of Uber and Lyft on par with passengers – expressed surprise by such a notion.

Muhammed Alnajar – who has driven for Uber since 2014 – put it bluntly:

I do not feel like a customer of Uber. If we are customers of Uber, why don’t we have all the same rights? Any complaint from a customer will stop us from continuing to work; but if we complain about anything, they won’t even investigate.

Telephone interview, Sept. 16, 2020.

The driver compensation schemes constructed by Uber and Lyft (although slightly different from one another) do not square with Defendants’ “driver-as-fee-paying-customer” theory. This argument necessarily stands or falls on Defendants’ ability to show that *they* do not pay drivers for their

work, the riders do, since even Defendants would have to admit that the notion of a business paying one customer to provide services to another customer in its name is nonsensical. And therein lies the rub.

It is *undeniable* that Uber and Lyft have always reserved to themselves the unilateral right to both set and change the price of rides and the components of the drivers' compensation. Jerome Gage, a Lyft driver who has provided 13,549 rides since 2016 in Los Angeles, puts it simply:

We have no control over price. None. It's dictated by the company and has gone down every year I have been working. For Lyft, I would be paid on a per mile, per minute basis. But Lyft controls the total price of the ride and pockets the difference when they charge passengers more. How can they argue that I'm essentially a business owner if I can't actually manage the price and make a profit off of the service I provide?

Telephone interview, Sept. 16, 2020. Yasser Bazian, a long-time driver with nearly 3,000 rides on the Uber platform, confirms the same:

Even if I knew the price of the Uber ride in advance, I can't really change it. The company sets the base fare for all rides and they have conditioned passengers with artificially low prices, so we're actually in a race to the bottom with ourselves.

Telephone interview, Sept. 16, 2020.

The related argument that drivers are paid exclusively by passengers – with Defendants providing a ministerial function of collecting and distributing funds like a credit-card company – is equally disconnected from

reality. In fact, both companies have *always* paid drivers with a combination of per-ride pay (whether keyed to time and distance, a percentage-based commission, or both) *and also* with performance-based incentives and guarantees *that come straight from the company's coffers*. Importantly, Amici's members who have driven full-time for Uber and Lyft as a primary occupation report that these incentives and guarantees are an essential component of their pay, without which they could not support themselves or their families. Jerome Gage, who drives for Lyft, put it plainly:

The bonus pay is all that matters. If you're not working a bonus, you're not making money; and all drivers know it. But what's worse is the way they manipulate the drivers with the cash incentives. Lyft knows when there is a spike in demand – like when it's late at night and folks are leaving bars downtown. So Lyft “surges” drivers to a certain geography with bonus incentives, like hitting a certain number of rides. But the rides dry up quickly and you sometimes never hit the number you need in a reasonable time, so you have to stay on the road longer and longer to justify going out in the first place. It's like I'm a hamster in an experiment, just running on a wheel.

Telephone interview, Sept. 16, 2020.

This incentive pay is explicitly intended to entice drivers to work in specific locations and on particular days and hours so that Uber and Lyft can provide 24/7 on-demand transportation services to their *actual* customers, the riders. Steve Gregg, mentioned above, who drives for Uber, confirmed the same:

Before you even pick up a ride, you can see a heat map on the app that tells you where to go and how much of a bonus you'll earn. But many times it doesn't materialize. I frequently worked in San Francisco and would get pulled to the Richmond District, a residential area of the city, thinking I'd get a bonus since I see it highlighted in the app. But by the time I'm in the neighborhood, the bonus is gone and Uber got what they wanted – a driver in an underserved neighborhood for no additional money spent. It just felt like a bait-and-switch.

Telephone interview, Sept. 16, 2020.

Uber's recent changes to how drivers are paid – implemented after this case was filed for the express purpose of improving its litigation position here and elsewhere – actually makes its position worse. For example, Uber's "Set Your Own Price" feature gives drivers the option to vary Uber's default price in a range between .5 and 5 in fixed multiples of .1, or to leave the default in place. Importantly, the application is programmed to *discourage* drivers from using the feature, warning that they could lose out on work if they set a price that exceeds the default. As current driver Mostafa Maklad, who has logged 15,416 rides and is familiar with the feature, notes:

This new pricing feature was only just recently added to the app. But really, it's more of the same. Drivers have the option of increasing the fare charged to riders from 1.1 times to 5 times the base fare (in one-tenth increments). Yet, there is no way for a driver like me to change the base fare. What's more, drivers understand that this feature only drives prices down in two ways. First, I'd be forced to select the lowest prices to get rides (since I'd be undercut by others if I set the price too high). Second, if I happen to set a higher fare and still get a ride, dissatisfied riders will simply rate me lower, leading to fewer ride requests from Uber. There's no good option.

Telephone interview, Sept. 18, 2020. Crucially, the “Set Your Own Price” feature does not permit drivers to deviate from the range set by Uber *let alone* allow them to negotiate with passengers or to compete with each other freely by setting their own prices without Uber’s involvement, like true “independent contractors” would otherwise be able to do. As Yasser Bazian, an Uber driver mentioned above, says:

Drivers simply cannot bargain over the price of a ride. It’s not possible. And I’ve read the agreement Uber made me sign to drive back in January. In it, we’re told we can “negotiate” a rate with the customer, but only if it’s *lower* than the rate set by the company. Also, when I started driving in 2012, there was no way to get a tip through the app or accept one from a passenger in person, even if offered. Every option was closed off.

Telephone interview, Sept. 18, 2020.

In reality, then, Uber’s “Set Your Own Price” feature *does not* represent a relinquishment of control over the drivers, as the timing of its implementation indicates was its purpose. Instead, the program *confirms* that Uber retains ultimate and absolute control over the pricing for its transportation services and the compensation of its drivers, much the same as Lyft.

Uber’s newly minted “subscription” feature – called “Drive Pass” (like other changes, introduced after this lawsuit was filed) – also refutes, rather than supports, Uber’s claim that drivers are “fee-paying customers” and not

employees. Drive Pass, which is currently being tested in a small handful of California cities,³ is designed to charge drivers a \$3.00 fee for every ride request sent to them in the application during a seven-day period and can be purchased in increments of 10, 50, or 100 ride requests.⁴ When the pass is active, Uber increases the drivers' commission to 100% on every complete ride.

The catch, of course, is that the \$3.00 fee is charged against all consecutive rides *offered* by the application in the seven-day window – whether accepted, declined, or cancelled. Since drivers have no control over the number of rides they will be offered or the ultimate fare, in reality, the Drive Pass is just one more financial incentive created by Uber for drivers to accept all rides, changing their behavior to meet Uber's business objectives. This alone dismantles Uber's claim that the purported "subscription" is proof that its relationship with its drivers is purely transactional. Instead, this feature represents one more way for Uber to assure a steady supply of drivers

³ Sacramento, Orange County, San Diego, and San Francisco, California (though San Francisco drivers are temporarily unable to access the feature). See Uber Technologies, "How Does Drive Pass Work?" (access on Sept. 19, 2020) (<https://tinyurl.com/DrivePass>).

⁴ Uber introduced the Drive Pass at a discounted introductory rate of less than \$3.00 a ride. At some point, Uber will presumably begin charging the full fee.

to provide on-demand transportation to Uber’s real customers, the riders.⁵

Current driver Mostafa Maklad, mentioned above, explained it this way:

I’m one of the few drivers who live in an area where this feature is offered, so I bought a pass. It turns out, however, that since you can’t select for the types of rides you get offered, the subscription service is little better than just driving normally. Given the pandemic, I’m driving smaller trips in San Francisco, so at the end of my drive pass period, I ended up with maybe \$2 more than if I had just logged on and driven. In addition, the pass is only available for seven days before it expires. So in effect, I’m committing to a week-long work schedule that’s the opposite of the flexibility the company says I have.

Telephone interview, Sept. 18, 2020.

2. Similarly, arguments that Uber and Lyft are disinterested platforms, like eBay or Thumbtack, defy common sense.

Defendants’ repeated comparison of their on-demand transportation businesses to familiar on-line marketplaces (which they call “multi-sided platforms”) – like Thumbtack or eBay – does not survive even the most cursory scrutiny. *See* Uber Opening Brief at 3; Lyft Opening Brief at 36. Thumbtack and eBay (and others like AirBnB) operate what can best be described as electronic bulletin boards. Skilled individuals and small businesses (e.g., handymen, dog groomers, DJs, etc.) use the Thumbtack site to generate job leads, while eBay sellers use the site to publicize items for

⁵ In any case, Amici urge the court to disregard this new Drive Pass feature as they analyze Uber’s arguments regarding its driver’s employment status, since the feature is not even available for a vast majority of its driver base.

sale. Thumbtack “Pros” put up a profile on the site and pay fees to Thumbtack for clicks on their profile. Whether they are hired for the job or not, and the final cost for their services, is strictly between them and the customer. Similarly, eBay has virtually no say over what the sellers can offer on the site or at what price. Sellers on the eBay platform decide how they wish to be paid for a sale and provide instructions to eBay for checkout. The fees they pay to eBay for listings and sales are typically paid monthly per invoice. Ratings on both sites are posted on the site directly by consumers with the idea that good service will be rewarded, and poor service punished, purely through market forces by consumers themselves.

These modern on-line marketplaces cannot be fairly compared to transportation businesses built by Uber and Lyft. While these businesses all use technology and algorithms to perform functions once performed by people, the similarities to Uber and Lyft end there. Abdullah Saleh, who has driven for both Uber and Lyft, put it this way:

If you are truly a seller you should get to determine the price, how much you sell, who you sell to, and have actual autonomy. With Uber and Lyft, I don't set my rates, I don't get to negotiate over the split between the driver and Uber and Lyft, I don't know much they are charging the riders, and I don't get to really decide what my schedule is because of surges that dictate when it will be profitable to drive.

Telephone interview September 18, 2020.

Unlike Thumbtack Pros and eBay sellers, Uber and Lyft drivers do not prospect for leads, promote themselves on Defendants’ website, or develop their own clientele. Rather, *Defendants* have used their application to build *their* on-demand transportation businesses; for drivers, the application is an electronic dispatcher that offers them one job at a time. As Uber and Lyft driver Muhammed Alnajar, pointedly notes:

We only have seconds to accept a ride when it comes through. If you don’t stop everything you’re doing and accept the ride, it’s gone. And while Uber now says workers won’t be deactivated for low acceptance rates, if you decline too many bad jobs, the company tells you – through an automated message – that you will get more rides if your acceptance rate is high and fewer if it’s low. So what’s the difference from being deactivated if the company can just stop sending me ride requests?

Telephone interview, September 17, 2020.

Nor do the drivers set their own prices, negotiate other terms with passengers, or bill or collect payment from riders; instead, they are paid *by Defendants* for work performed in amounts calculated according to criteria devised entirely *by Defendants* (which – not surprisingly – has changed from time to time to meet specific business and litigation needs). Amounts deducted from driver pay – which both companies now call “service fees” – are, in reality, net sales revenue realized to Defendants after paying the drivers’ commissions which Defendants now call by a different name to fit their legal theory.

And, where consumer ratings in other online markets like eBay or Thumbtack serve as a decision-making tool for consumers, Uber and Lyft's five-star rating systems are used as a management tool to monitor the drivers, manage work performance, and protect their brands. Tellingly, only very shortly before this lawsuit was filed, it was still the case that drivers whose ratings fell below the companies' standards were warned about performance problems and "deactivated" – i.e. terminated – when passenger ratings fell below the company standard. Cherri Murphy, a Bay Area Lyft driver with over 12,000 rides has personal experience in this regard:

They call it "deactivation," but it's like being fired or suspended, just like any other job. And they wield that power without regard for their driver's well-being. For example, on one occasion I was verbally assaulted by an intoxicated passenger who ended up stealing my phone after I asked her to exit my vehicle. Instead of investigating the incident, Lyft suspended my account based on the same passenger's complaint. I was able to restore my access, but only after an aggressive plea to the company.⁶

Telephone interview, Sept. 16, 2020. Jamal Khoshnood, an Uber driver in the South Bay area, confirms the same:

I drove for Uber for over two years. I've had my fair share of bad passengers, but nothing dramatic. After a few bad reviews, I received an email notice about my declining ratings. Then, without warning, I was kicked off the app. I called the company and they had no answer.

⁶ Indeed, Cherri's experience is not unique as survey data suggest that nearly half of ride-hail drivers (43%) report experiencing harassment from a passenger. See Benner *supra* at 35.

When I worked in the taxi industry, if your job was about to be eliminated, you had some process to go before a committee and defend yourself. Here, I can't prove anything. I'm just cancelled, out of a job.

Telephone interview, Sept. 17, 2020.

Thus, Defendant's resolute claim that they are disinterested intermediaries who merely "match" passengers looking for rides with independently established driving professionals distorts reality. Under any reasonable interpretation of the facts, on-demand transportation is undeniably Appellants' business, and drivers are their employees, not their customers. Once drivers turn on the app, Uber and Lyft retain all necessary control over their work assignments, their compensation, the location where the work will be performed (since base pay without a bonus makes no economic sense for most drivers) and, ultimately, whether they will have a job at all. And Appellants retain and exercise this control to meet their own business objectives and protect their branded product: reliable on-demand transportation to *their* riding customers.

C. PRELIMINARY RELIEF IS NEEDED TO PROTECT DRIVERS – WHO ALREADY LIVE PRECARIOUSLY CLOSE TO THE EDGE – FROM CONTINUED IRREPARABLE HARM ESPECIALLY IN THE CONTEXT OF THE COVID-19 PANDEMIC

- 1. A significant share of drivers are full-time income earners for whom loss of any part of their subsistence wages represents irreparable harm.**

Amici's members are, by and large, subsistence earners who depend on every penny of income received from their driving work to provide food and shelter for their families. *See Waheed supra* at 14, 24 (finding that 66 percent of surveyed drivers depend on driving for their main source of income and 44 percent report having trouble covering expenses like fuel and car maintenance, the very things that make their earnings possible) *and Benner, supra* at 28 (as many as 20 percent of drivers surveyed likely net *zero* dollars after accounting for expenses).

For these workers, *any* unexpected expense, illness, or injury precluding them from working threatens financial catastrophe. Tammie Jean Lane, a four-year veteran of Lyft and Uber, know this all too well:

A year before I started working for Uber and Lyft, I was diagnosed with lung cancer and had part of my lungs removed. I started working for the companies since I thought it would be a flexible job that would work around my recovery. It couldn't be further from the truth. With rate cuts and bonus reductions, I'd drive myself to the bone. My recovery required continued appointments and check-ins, but I didn't have sick leave to stop working. If I stop working, I lose money and can't afford

the medications I take on a regular basis. I'm racked with anxiety and feel like I'm one bad day away from it all falling apart.

Telephone interview, Sept. 17, 2020. Similarly, Cherri Murphy and Jerome Gage, drivers in San Francisco and Los Angeles (mentioned above) can both detail how their work for Uber and Lyft is not just a side-gig:

I know I can log onto the app whenever I want, but as any full-time driver will tell you, if you're relying on it for your livelihood, that's not the reality. You simply have to log in and work and if life gets in the way – you get sick, you get hurt, your family needs you – there's no backstop. We're really on the knife's edge.

Cherri, telephone interview, Sept. 18, 2020.

When you've driven as much as I have, you see how the system really works. A bunch of drivers log-in to work a weekend here or there, but prior to the pandemic I was on the app consistently, trying to earn against thousands of other drivers on the road. And this is the way Lyft likes it. Keep us all in competition, but for those who rely on this work for our livelihoods, there is no option to just work a few hours on a random afternoon.

Jerome, telephone interview, Sept. 18, 2020.

Defendants insist further that the injunction cannot stand because reclassification of the drivers as employees will reduce the work opportunities of occasional and part-time drivers who supplement their income driving for Uber and Lyft. Yet, this ignores the significant and well-documented harms that misclassification causes to individual workers, their families, and communities. These harms are experienced most acutely by full-time drivers who perform upwards of 46 percent of Defendants' work, *see* Chen, *supra*. at

4, the majority of whom rely on their driving income to support themselves *and* their families. *See* Benner *supra* at 16; Waheed *supra* at 16. Uber and Lyft drivers live so close to the edge that nearly half (45%) of all drivers in one survey said that they couldn't handle an unexpected expense of \$400. *See* Benner *supra* at 16. Nearly a third of drivers reported needing to sleep in their cars before or after engaging in app-based work. *Id.* at 35. Loss of subsistence wages and social safety net benefits has, for many decades, been recognized by courts to constitute irreparable harm *as a matter of law*. *See* Appellees Brief at 64-65.

2. Workplace safety-net programs like unemployment insurance and workers' compensation provide crucial protections for low-wage workers without other sources of support when illness and injury strike.

As workers labor for Defendants, being misclassified as an independent contractor negates access to critical social safety net programs. Without access to them, workers face dire trade-offs, such as foregoing meals if their unemployment benefits are delayed or potentially compounding their physical injuries if they cannot access workers' compensation.

For example, due to his misclassification as an independent contractor, Saul Navarro, a Bakersfield Lyft driver, applied for state unemployment benefits in March and has only now begun receiving benefits:

It was incredibly stressful. I had \$30 to my name when the benefits were finally approved. When I applied I found out that the state didn't have my wage information, so I had to fight for almost four and a half months to get benefits I was entitled to under the law. The Employment Development Department eventually found Lyft to be my employer and I did not have to falsely claim that I was an independent contractor to receive federal benefits.

Telephone interview, Sept. 16, 2020. What's more, drivers live moment to moment on the application, unsure if they are going to earn enough to keep afloat. As the Benner survey confirms, one-in-five drivers are likely earning zero dollars in net income, an appalling outcome, when the expenses driver's shoulder are properly accounted for. Benner *supra*, at 28. Edan Alva knows this all too well:

Before the pandemic, I'd drive knowing that I had to hit the same earnings target each day or I'd start missing my rent payments. I was one illness away from potentially putting my family out on the street. And without sick leave, I was forced to continue driving, even when I wasn't 100%. Now in a pandemic, it's inexcusable that workers are left without basic protections.

Telephone interview, Sept. 17, 2020.

Uber and Lyft drivers perform extremely dangerous work and are exposed to significant job-related hazards and injuries. But, because they are misclassified as independent contractors, they do not have workers' compensation benefits to cover medical expenses and paid time off when they are hurt on the job or become ill and cannot work. Drivers experience tens of thousands of traffic accidents and nearly 4,000 deaths every year in

California along with ordinary workplace ailments like repetitive stress injuries resulting from poor ergonomics and muscle pain associated with long hours of sedentary driving.⁷ In addition, professional drivers labor in disproportionately dangerous work environments and are especially vulnerable to violent crime that can result in serious injury or death.⁸ For any working person – let alone a subsistence earner – loss of workers’ compensation insurance, which includes medical care and wage replacement, cannot be remedied at some future time with an award of monetary damages.

The availability of workers’ compensation insurance and benefits for Uber and Lyft drivers are more important now than ever in the context of the current public health crisis. Recognizing the high degree of risk essential workers undertake simply by reporting for work during the pandemic, and the urgent need of all employees exposed to COVID-19 to have access to prompt and efficient medical treatment, Governor Newsom issued Executive

⁷ See, e.g. Bartel, et. al., *Stressful by Design: Exploring Health Risks of Ride Share Work*, *Journal of Health & Transport*, 14 (2019) (qualitative study finding ride–share work promotes poor physical and mental health arising from long hours of sedentary behavior, repetitive movement, and poor nutrition and hydration, stress of managing road conditions, navigation, financial and work insecurity, and passenger demands).

⁸ See e.g. Menendez, Socias–Morales & Daus, *Work–Related Deaths in the U.S. Taxi and Limousine Industry 2003–2013: Disparities within a High–Risk Population*, *J. Occup. Environ. Med.* Vol. 59(8):786–774 (Aug. 2017).

Order N-62-20. That order mandated that employees who contract any COVID-19 related illness shall be presumed eligible for workers compensation benefits if certain conditions are met (which has since been codified and extended legislatively).⁹

Designated as essential workers in California, there are Uber and Lyft drivers who have continued to work throughout the pandemic. They have delivered essential workers like nurses and other health professionals, first responders, grocery clerks, and others to and from their jobs each day, helping to ensure that our economy can continue to function. Having close contact with *any* passengers in the enclosed space of a passenger vehicle – let alone the essential workers who are at high risk of exposure – has equally put the Uber and Lyft drivers who have continued to work at a significantly increased risk of exposure to COVID-19. While drivers have the same need for access to prompt and efficient workers’ compensation benefits as all other essential workers, including both the ability to take time off with pay and obtain medical care, those benefits will be denied to them absent the Court’s injunction.

⁹ See Senate Bill 1159 (Hill), Reg. Sess. (2019–2020).

CONCLUSION

Amici share their perspective today for a simple reason. Behind the abstractions and cold legalese are people. They have organized, marched, testified, and struggled not to simply change a few words in the Labor Code, but because they demanded dignity, security, and predictability while providing their labor. They are not “customers” of a “multi-sided platform;” they’re employees of some of the wealthiest transportation corporations on the planet. These workers have not been fooled by clever phrases invented by economists to justify wage theft. Instead they’ve used their voices and their feet to report what they see with their own two eyes: precarity and unpredictability.

Virtually none of the drivers affiliated with Amici have felt that they fully control their work on the applications. They can’t set their own pricing; they don’t choose their customers; they have no path to build or secure wealth; and they face an asymmetric employer that manipulates them with cash bonuses, monitors them with sophisticated rating’s systems, and can terminate them with the flip of a switch. At the same time, drivers pay nearly every cost and bear nearly all of the risk of the business without a safety net when things inevitably go wrong. Defendants’ eleventh hour changes to their applications in response to litigation and legislation only serve to reveal the

depth of control these companies have over the day-to-day lives of their employees.

Nothing in the law prevents workers from maintaining flexibility while retaining core benefits and rights that ensure workers remain healthy and protected at work. Amici respectfully urge this Court to hold these worker's stories at each stage of this litigation and to hold Uber and Lyft accountable.

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Respectfully submitted,

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and We Drive Progress*