IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASSANDRA OSVATICS, on behalf of herself and all others similarly situated, Plaintiff, v. LYFT, INC., Defendant.	Civil Action No. 1:20-cv-01426-KBJ

BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PLAINTIFF'S MOTION TO CERTIFY THE COURT'S MARCH 31, 2021 ORDER FOR INTERLOCUTORY REVIEW PURSUANT TO 28 U.S.C. § 1292(b)

Mark Hanna (Bar No. 471960)
Roseann R. Romano (Bar No. 1034895)
Counsel of Record
Murphy Anderson PLLC
1401 K Street NW, Suite 300
Washington, DC 20005
(202) 223-2620
mhanna@murphypllc.com
rromano@murphypllc.com

Hugh Baran (NY Bar No. 5560420)
Filing Pursuant to LCvR 83.2(c)(1)
National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 10004
(646) 693-8231
hbaran@nelp.org

May 21, 2021

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.D.C. Local Civil Rule 7(o)(5) and Federal Rule of Appellate Procedure 29(a)(4)(A), Amicus Curiae National Employment Law Project states that it is a non-profit corporation, that it has no parent corporations, and that no publicly held corporations own 10% or more of its stock.[†]

[†] Pursuant to D.D.C. Local Civil Rule 7(o)(5) and Federal Rule of Appellate Procedure 29(a)(4)(E), Amicus certifies that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (3) no person—other than Amicus, its members, or its counsel—contributed money intended to fund preparing or submitting this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Other Authorities

STATEMENT OF INTEREST OF AMICUS

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

NELP's close relationships with and support of worker centers and unions, including those representing workers for Lyft and Uber and similar ride-hail companies, and our own research have revealed both the significant impact of Lyft's misclassification on drivers' economic well-being and health, and the staggering impact of misclassification on law-abiding employers and public coffers. NELP submits this brief to bring these facts to light and to assist the Court in deciding Plaintiff's motion seeking interlocutory review of the Court's March 31, 2021 Order by illustrating that this case presents the kind of exceptional circumstances warranting interlocutory review.

A ruling denying certification of the Court's Order compelling arbitration for interlocutory review would undermine Amicus's longstanding policy goals, and those of close partners in community-based worker advocacy organizations in the District of Columbia and throughout the greater D.C. area.

SUMMARY OF ARGUMENT

Plaintiff's motion properly seeks interlocutory review of an "abstract legal issue" that the United States Court of Appeals for the D.C. Circuit "can decide quickly and cleanly without having to study the record." *Elkins v. D.C.* 685 F. Supp. 2d 1, 8 n.2 (D.D.C. 2010) (citation and quotation marks omitted). But the Circuit's ultimate determination of that issue—whether Lyft drivers are workers engaged in interstate commerce for purposes of 9 U.S.C. § 1 (hereafter, "Section 1")—has significant real-world consequences for Lyft drivers, law-abiding employers, and the public.

Absent an interlocutory review of the Section 1 determination here, the significant harms Lyft's misclassification of drivers imposes on its drivers in the District of Columbia—who are largely Black and Latinx people due in part to occupational segregation—will continue, including subminimum wages and perpetuation of health inequities. Moreover, the significant harms Lyft's misclassification imposes on law-abiding employers, as well as state and federal coffers, will continue unchecked. So long as Lyft drivers are blocked from pursuing their claims collectively in court, neither individual arbitration by drivers nor actions by public enforcement agencies will be able to fully redress the harms of Lyft's misclassification. Given these real-world consequences, and the likelihood that the harms of Lyft's misclassification will otherwise evade judicial review, there are "exceptional circumstances" here that "justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment" and warrant certification of the Court's Order for interlocutory review. *Virtual Defense Dev. v. Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001) (citation omitted).

Interlocutory review will not be futile, in part because the D.C. Circuit could adopt a rule requiring further discovery on the Section 1 determination. Such discovery would reveal extensive information concerning the integral role airport transportation plays in Lyft's business, and that interstate trips are an important part of the work Lyft drivers do.

ARGUMENT

I. The Stakes of this Court's Decision on Plaintiff's Motion for Interlocutory Review are High for the District's Ride-Hail Workers, Who Are Disproportionately from Black and Latinx Communities and are Currently Blocked from Seeking Judicial Review of How Lyft's Misclassification Economically Imperils Them.

For years, Lyft has openly defied D.C. and federal law by misclassifying its employees, hiding behind its forced arbitration requirements[1] (which include collective and class-action waivers) and using the Federal Arbitration Act, 9 U.S.C. § 2 *et seq.* ("FAA"), to evade accountability in court. Lyft relies on its unilaterally imposed label of "independent contractor" to argue that its workers are running their own separate businesses, when the reality shows that they are not by any stretch in charge of their work. Whether Lyft drivers will continue to be compelled to arbitration, or whether courts will be able to finally reach the merits of Lyft's misclassification, is thus an issue of exceptional importance to drivers, who are economically imperiled by Lyft's misclassification.

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, Latinx, and Asian workers, are overrepresented due to structural racism.[2] Data on Lyft drivers reflects the broader pattern in other misclassified industries: work for Lyft may be open to all, but workers of color make up a majority of drivers, with Black workers particularly overrepresented. Lyft's continued misclassification of drivers, which will likely continue absent interlocutory review of the Court's Order, will thus have an outsized impact on workers of color.

---

[1] In using the term "arbitration requirement," Amicus rejects the common use of the term "arbitration agreement," which belies the reality that for workers in low-paying jobs, the provisions in such contracts are not bilateral but instead employer-dictated and required as a condition of employment. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1636 n.2 (2018) (Ginsburg, J., dissenting) (noting the Hobson's Choice employees face when such agreements are imposed: "accept arbitration on their employer's terms or give up their jobs.").

[2] 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").

According to the Bureau of Labor Statistics, Black and Latinx workers account for nearly 42% of Lyft, Uber, and other "electronically mediated work" companies' workforces, though they represent less than 29% of the overall U.S. workforce.[3] The Pew Research Center has also found that "Black and Latino workers are more likely to have worked for an online platform."[4] Nationally, Lyft's data indicates that 69% of its drivers are people of color.[5] 22% are Black, African American, or Afro-Caribbean, 29% are Hispanic or Latinx, and 13% are Asian.[6] In the District of Columbia, the company's own data shows that 87% of its drivers are people of color. 41% are Black, African American, or Afro-Caribbean, and 22% are Hispanic or Latinx.[7]

Our federal and state wage and hour laws are a bulwark against the kind of low pay and income instability that have, over time, sustained staggering racial earnings and wealth gaps between white workers and workers of color; in fact, these laws have historically helped close the racial earnings gap between white and Black workers, once they were extended to cover industries in which Black workers were concentrated.[8] In areas with relatively strong minimum hourly

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

[4] ANNETTE BERNHARDT & SARAH THOMASON, U.C. BERKELEY LAB. CTR., WHAT DO WE KNOW ABOUT GIG WORK IN CALIFORNIA? AN ANALYSIS OF INDEPENDENT CONTRACTING, at 17 (June 2017), https://laborcenter.berkeley.edu/pdf/2017/What-Do-We-Know-About-Gig-Work-in-California.pdf.

[5] *See* LYFT, LYFT 2021 ECONOMIC IMPACT REPORT, at 7 (2021), https://drive.google.com/file/d/1jzJt3QI8yvw9dDms3eyk4LH2ejuiHhVM/view.

[6] *Id.*

[7] *See* LYFT, LYFT ECONOMIC IMPACT REPORT 2021: WASHINGTON, D.C., at 1 (2021), https://drive.google.com/file/d/1j4gDWSAsc3DlbaNsdxqR927xfZfv41C2/view.

[8] *See, e.g.*, Ellora Derenoncourt & Claire Montialoux, *Minimum Wages and Racial Inequality*, Q. J. OF ECON. 169, 171 (2021), http://www.clairemontialoux.com/files/DM_QJE_2021.pdf (concluding that more than 20% of the reduction of the racial earnings and income gaps between 1965 and 1980 can be attributed to Congress's 1966 extension of Fair Labor Standards Act coverage to industries and workers previously excluded, including to nearly a third of all Black workers in the United States).

wages, such as the District of Columbia ($15), a guaranteed minimum wage dramatically raises the floor to help narrow the pay and wealth gap for poor people of color.[9]

Yet because they are misclassified as independent contractors, 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 the District's wage and hour laws, ride-hail drivers frequently earn subminimum wages while incurring expenses that cannot be passed onto customers and which companies like Lyft refuse to reimburse. One calculation estimates that Uber drivers, for example, earn an average of $11.77 an hour after 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.[10] Surveys that include both Uber and Lyft drivers have generally found low pay, with no distinction between the two companies.[11] The expenses that ride-hail 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.[12] As a result, many ride-hail drivers are struggling financially.

---

[9] *See* LAURA HUIZAR & TSEDEYE GEBRESELASSIE, NAT'L EMP. L. PROJECT, WHAT A $15 MINIMUM WAGE MEANS FOR WOMEN AND WORKERS OF COLOR, at 1 (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.").

[10] LAWRENCE MISHEL, ECON. POL'Y INST., UBER & THE LABOR MARKET, at 2 (May 15, 2018), https://files.epi.org/pdf/145552.pdf; *see also* JAMES A. PARROTT & MICHAEL REICH, NEW SCHOOL CTR. FOR N.Y.C. AFFAIRS & UC-BERKELEY CTR. ON WAGE AND EMP. DYNAMICS, A MINIMUM COMPENSATION STANDARD FOR SEATTLE TNC DRIVERS, at 38-40 (July 2020), https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf (finding similar earnings for ride-hail drivers in Seattle).

[11] *See, e.g.*, UCLA INST. FOR RESEARCH ON LAB. & EMP. ET AL., MORE THAN A GIG: A SURVEY OF RIDE-HAILING DRIVERS IN LOS ANGELES 21–29 (May 2018), https://irle.ucla.edu/wp-content/uploads/2018/05/Final-Report.-UCLA-More-than-a-Gig.pdf; CHRIS BENNER, U.C. SANTA CRUZ INST. FOR SOC. TRANSFORMATION, ON-DEMAND & ON-THE-EDGE: RIDE-HAILING & DELIVERY WORKERS IN SAN FRANCISCO 28–34 (May 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf.

[12] MORE THAN A GIG, *supra* note 11, at 3.

Absent interlocutory review of the threshold Section 1 issue, Lyft drivers will be unable to pursue their claims collectively in court—meaning that the harms Lyft's misclassification imposes on drivers' economic well-being will not be redressed. While individual drivers could pursue one-by-one arbitrations, the vast majority (98%) of workers simply abandon their claims rather than proceed in arbitration, as NYU Law Professor Cynthia Estlund has demonstrated.[13] That means Lyft will continue to evade both any judicial finding of liability as well as any significant financial consequences in arbitration that would compel it to change its ways.

II. Lyft's Misclassification of Drivers Has Also Had Serious Consequences for Drivers' Health, Particularly Throughout the COVID-19 Pandemic, Which Will Not Be Redressed Absent Interlocutory Review.

By insisting that their drivers are not employees, Lyft also removes 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. 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 drivers—some of whom are living at or near the poverty line—are left to foot the medical bill when workplace injuries arise. For example, nearly 40 percent of ride-hailing drivers surveyed in San Francisco could not pay for a $400 emergency without borrowing money, and nearly 20 percent have no health insurance.[14]

[13] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018), https://scholarship.law.unc.edu/nclr/vol96/iss3/3/.

[14] BENNER, *supra* note 11, at 16-19.

These health inequities have become all the more consequential during the COVID-19 pandemic, which has uniquely wreaked havoc on people of color in the United States.[15] Since the start of the pandemic, the Centers for Disease Control and Prevention ("CDC") has emphasized that employers should "actively encourage sick employees to stay home" to reduce the spread of the virus, including by offering paid sick leave.[16] The CDC specifically urged ride-hail companies to do the same in its mid-April 2020 ride-hail guidance.[17] But because Lyft insists on calling its drivers non-employees, it does not provide paid sick leave.

The CDC's advice is supported by numerous studies that have shown that workers without paid sick days are more likely to go to work with a contagious disease than workers with access to paid sick days.[18] Research has also identified a clear correlation between lack of paid sick leave and the spread of the flu; one study estimates that providing all U.S. workers with paid sick leave can reduce the spread of flu by 6 percent.[19]

---

[15] *See* Mary Van Beusekom, *Studies: People of color bear larger share of COVID-19 burden*, UNIV. OF MINN. CTR. FOR INFECTIOUS DISEASE RESEARCH & POL'Y NEWS (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 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[.]"); *see generally* COVID Tracking Project & Bos. Univ. Ctr. for Antiracist Research, *The COVID Racial Data Tracker* (last updated Mar. 7, 2021), https://covidtracking.com/race.

[16] *See* CDC, *Guidance for Businesses & Employers Responding to Coronavirus Disease 2019 (COVID-19)* (updated Mar. 8, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html; CDC, *Interim Guidance for Businesses & Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)* (updated Feb. 26, 2020), *archived at* https://web.archive.org/web/20200306210106/https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

[17] *See* CDC, *What Rideshare, Taxi, Limo and other Passenger Drivers-for-Hire Need to Know about COVID-19* (as of Apr. 17, 2020), *archived at* https://web.archive.org/web/20200420021220/https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/rideshare-drivers-for-hire.html.

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

[19] Supriya Kumar et al., *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent Based Model*, 103:8 AM. J. PUB. HEALTH 1406–11 (2013); *see also* Stefan Pichler & Nicolas R. Ziebarth, DIW Berlin, *The*

But Lyft never implemented a paid sick leave policy that enabled its drivers to stop working if they were sick with COVID-19. Lyft did offer some sick pay to its drivers, but only if they tested positive for the disease or if their doctor ordered them to self-quarantine.[20] Because Lyft drivers faced the same testing obstacles as other Americans, and lack employer-based health insurance that would enable them to easily see a doctor and obtain an order of quarantine, few were able to access this sick pay benefit.

The terms of Lyft's sick pay policy were also unclear. Lyft initially said it would "provide funds to affected drivers based on the rides they provided on the Lyft platform over the last four weeks," but later said it would only pay "qualifying" drivers "an amount determined by the driver's previous activity on the Lyft platform."[21]

If Lyft properly classified its D.C. workers as employees, it would be required to provide its drivers with up to 56 hours of District-mandated sick leave. D.C. CODE § 32-531.02(a)(1). Because employees may use paid sick leave in increments (i.e., need not take 8 hours in a single day), this leave alone could effectively extend for eight to ten days, if taken in four- to five-hour increments. And during the COVID-19 pandemic, the District mandated that employers provide workers with an additional amount of paid leave up to 80 hours, which if taken in four- to five-hour increments could effectively extend for sixteen to twenty days.[22]

Pros and Cons of Sick Pay Schemes (2015), https://www.diw.de/documents/publikationen/73/diw_01.c.514633.de/dp1509.pdf; ROBERT DRAGO & KENNETH MILLER, INST. FOR WOMEN'S POL'Y RESEARCH, SICK AT WORK: INFECTED EMPLOYEES IN THE WORKPLACE DURING THE H1N1 PANDEMIC (Jan. 2010), http://www.iwpr.org/publications/pubs/sick-at-work-infected-employees-in-the-workplace-during-the-h1n1-pandemic.

[20] *See A Note for the Lyft Driver Community*, LYFT HUB (Mar. 19, 2020), https://www.lyft.com/hub/posts/a-note-for-the-lyft-driver-community.

[21] *See* Dara Kerr, *Lyft pulls bait-and-switch on promised coronavirus sick pay, drivers say*, CNET (Apr. 8, 2020), https://www.cnet.com/news/lyft-quietly-adjusts-its-coronavirus-sick-pay-policy-for-drivers/.

[22] *See* D.C. Act 23-405, Coronavirus Support Second Congressional Review Emergency Amendment Act of 2020, § 104(a)(1), https://code.dccouncil.us/dc/council/acts/23-405.html#%C2%A7104(a)(1); D.C. Act 24-30, Coronavirus

The leave available under these laws would have enabled—and would still enable—thousands of Lyft drivers across the District to stay home when they are sick with COVID-19, or when they fear they were exposed and infected, and seek preventive care/diagnosis[23]—thus helping to limit the spread of the virus and to save lives.

But Lyft has been flouting D.C. law, denying its drivers the right to paid sick days. Lyft drivers have thus been unable to afford to stay home when they are sick, and instead many continued to drive out of sheer financial desperation—putting themselves at risk of a longer, more severe bout of COVID-19, and putting riders and the public at risk of infection. This dynamic was what drove Plaintiff to step up on behalf of herself and other D.C. Lyft drivers systematically denied access to paid sick leave. Compl., ECF No. 2, ¶¶ 2–3.

The inequities created by Lyft's misclassification of drivers are reflected with respect to vaccine access as well. President Biden has called on all employers to "offer full pay to their employees for any time off needed to get vaccinated and for any time it takes to recover from the after-effects of vaccination,"[24] and the CDC has also advised employers to provide paid sick leave for workers to recover from vaccine after-effects as a best practice to encourage vaccination.[25] Some jurisdictions have gone further and mandated that employers provide such paid leave.[26]

Support Emergency Amendment Act of 2021, § 105(a)(1), https://code.dccouncil.us/dc/council/acts/24-30.html#%C2%A7105(a)(1).

[23] D.C. CODE § 32-531.02(b)(2).

[24] The White House, *FACT SHEET: President Biden to Call on All Employers to Provide Paid Time Off for Employees to Get Vaccinated After Meeting Goal of 200 Million Shots in the First 100 Days* (Apr. 21, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/21/fact-sheet-president-biden-to-call-on-all-employers-to-provide-paid-time-off-for-employees-to-get-vaccinated-after-meeting-goal-of-200-million-shots-in-the-first-100-days/.

[25] CDC, *Workplace Vaccination Program*, at "Best Practices" (updated Mar. 25, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html#anchor_1615584361592.

[26] *See, e.g.*, N.Y. LAB. L. 196-C (enacted Mar. 12, 2021); CAL. LAB. CODE § 248.2 (effective Mar. 19, 2021).

But while Lyft touts its offer of free rides to vaccine sites for members of the public,[27] their misclassification of drivers means that if their drivers choose to get vaccinated, they cannot access employer-provided leave, state- or District-mandated paid sick leave, or COVID-19 vaccine leave for the time it takes to get vaccinated (i.e., preventative medical care) and for any time for recovery from vaccine side effects. This is likely deterring many drivers from getting vaccinated at the same rate as workers with paid sick leave, for fear of losing critical days of pay, and contributing to lagging vaccination rates in Black and Latinx communities.[28] In fact, new survey data from the Kaiser Family Foundation finds that 64% of unvaccinated Latinx adults and 55% of unvaccinated Black adults are concerned about missing work due to after-effects of the COVID-19 vaccine, and that 54% of unvaccinated Latinx adults would be more likely to get the vaccine if their employer provided paid time off to get vaccinated and recover from any after-effects.[29]

Absent interlocutory review of the threshold Section 1 issue, Lyft drivers will be unable to pursue their claims collectively in court—meaning that the harms Lyft's misclassification imposes on drivers' health will not be redressed. As noted above, most drivers simply abandon their claims rather than proceed behind closed doors in arbitration. But even if a few drivers proceeded in arbitration and were to prevail in their claims, those arbitration decisions would have no binding or issue-preclusive effect on Lyft that would effectively deter it from continuing to misclassify

[27] Lyft, *Vaccine Access* (accessed May 20, 2021), https://www.lyft.com/vaccine-access.

[28] *See generally* Nambi Ndugga et al., *Latest Data on COVID-19 Vaccinations Race/Ethnicity*, KAISER FAMILY FOUNDATION (May 12, 2021), https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-race-ethnicity/ (finding that across 42 states, the percent of white people who have received at least one vaccine dose was roughly 1.5 times higher than the rate for Black people, and 1.4 times higher than the rate for Hispanic people, as of May 10, 2021); *see also* Meghan McCarty Carino, *Lack of paid sick time could be a barrier to vaccination*, MARKETPLACE (Apr. 19, 2021), https://www.marketplace.org/2021/04/19/lack-paid-sick-time-could-be-barrier-vaccination/.

[29] Samantha Artiga & Liz Hamel, *How Employer Actions Could Facilitate Equity in COVID_19 Vaccinations*, KAISER FAMILY FOUNDATION (May 17, 2021), https://www.kff.org/policy-watch/how-employer-actions-could-facilitate-equity-in-covid-19-vaccinations/.

drivers as independent contractors. Indeed, because those arbitrations are conducted behind closed doors, other Lyft drivers would likely not even learn of the existence of other arbitrations against Lyft, let alone make use of any findings of fact and law reached in those arbitrations.

III. Lyft's Misclassification of Drivers Has Also Harmed Law-Abiding Employers and the Public, Depriving Public Coffers of Millions of Dollars in Payroll Taxes and Unemployment Insurance Payments, and These Harms Will Not Be Redressed Absent Interlocutory Review.

Lyft's misclassification of drivers has imposed significant harms on law-abiding employers and the public. These harms will also not be fully redressed absent interlocutory review of this Court's Order.

When companies like Lyft evade their obligations as employers by misclassifying their workers as independent contractors, law-abiding employers suffer. Independent contractor misclassification, as the United States Treasury Inspector General found, "plac[es] honest employers and businesses at a competitive disadvantage."[30] This is especially a problem in labor-intensive low-wage sectors, where employers can gain competitive advantage by driving down payroll costs.

App-based ride-hail drivers work in a highly price-competitive sector. When companies escape their employer obligations to unlawfully boost profits, they pressure other businesses in the ride-hail sector to shed labor costs. Rampant misclassification creates a "race to the bottom" where firms can remain competitive only by copying these illegal business models.[31] Over time, working

[30] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, ADDITIONAL ACTIONS ARE NEEDED TO MAKE THE WORKER MISCLASSIFICATION INITIATIVE WITH THE DEPARTMENT OF LABOR A SUCCESS 1 (Feb. 20, 2018), https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf.

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

conditions like subminimum wages and the lack of paid sick days become the industry norm that workers are forced to accept.[32]

Law-abiding employers also suffer from inflated unemployment insurance and workers' compensation costs, as free-riding employers that misclassify employees as independent contractors pass off costs to employers that play by the rules. A 2010 study estimated that misclassifying employers shift $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums to law-abiding businesses annually.[33]

Federal, state, and local governments suffer hefty losses of revenue due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.[34] According to a 2009 report by the Treasury Inspector General for Tax Administration, misclassification contributed to a $54 billion underreporting of employment tax, and losses of $15 billion in unpaid FICA taxes and UI taxes.[35] A recently-published 2020 review of findings from thirty-two state studies of independent contractor misclassification demonstrates the staggering scope of these abuses.[36]

---

[32] *See* NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 5 (Oct. 2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf (misclassified workers earn thousands less in pay than properly classified employees doing the same work).

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

[34] Jessica Looman, Wage and Hour Division, U.S. Dep't of Labor, *The True Cost of Misclassification*, U.S. DEP'T OF LAB. BLOG (May 6, 2021), https://blog.dol.gov/2021/05/06/the-true-cost-of-misclassification; Wage and Hour Division, U.S. Dep't of Labor, *Misclassification of Employees as Independent Contractors*, https://www.dol.gov/whd/workers/Misclassification/ (accessed May 20, 2021).

[35] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, WHILE ACTIONS HAVE BEEN TAKEN TO ADDRESS WORKER MISCLASSIFICATION, AN AGENCY-WIDE EMPLOYMENT TAX PROGRAM & BETTER DATA ARE NEEDED, at 8 (Feb. 4, 2009), archived at https://web.archive.org/web/20110429085034/https://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.pdf.

[36] NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION, *supra* note 32.

Absent interlocutory review of the threshold Section 1 issue here, Lyft drivers will be unable to pursue their claims collectively in court—meaning that the harms Lyft's misclassification imposes on law-abiding employers and the public will not be fully redressed. While public agencies are not bound by Lyft's forced arbitration requirements,[37] such agencies are generally under-resourced and ill-equipped to replace the historic role that workers and their attorneys have played in enforcing our employment laws.[38] And Lyft and its chief competitor Uber's scorched-earth tactics in California, where "gig economy" companies collectively spent over $200 million to exempt themselves from the state's employment laws,[39] may well deter public enforcement against Lyft. Lyft alone invested $49 million in the California campaign.[40]

IV. Interlocutory Review of the Court's Order Would Not Be Futile, Particularly If The D.C. Circuit Adopted Either the *Waithaka* or *Singh* Rule.

Certification of the Court's Order compelling arbitration for interlocutory review would not be futile. The D.C. Circuit would have the opportunity to adopt, as a matter of first impression in this Circuit, a legal rule for determining whether a class of transportation workers is engaged in interstate commerce for purposes of Section 1. Such a rule would greatly aid courts in this Circuit in determining whether ride-hail drivers, and other classes of transportation workers, are engaged in interstate commerce and thus not subject to the FAA.

---

[37] *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297-98, 294 (2002) (holding that arbitration clauses did not bind the EEOC because the agency is not a party, and because it did not act as a proxy for the employee); *see also Walsh v. Ariz. Logistics d/b/a Diligent Delivery Systems*, No. 20-15765, 2021 WL 1972613, at *3-4 (9th Cir. 2021) (applying *Waffle House*'s reasoning to find an employer's forced arbitration clause did not bind the U.S. Department of Labor).

[38] *See* Marianne Levine, *Behind the minimum wage fight, a sweeping failure to enforce the law*, POLITICO (Feb. 18, 2018), https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644.

[39] Jeremy B. White, *Gig companies break $200M barrier in California ballot fight*, POLITICO (Oct. 29, 2020), https://www.politico.com/states/california/story/2020/10/29/gig-companies-break-200m-barrier-in-california-ballot-fight-9424580.

[40] George Skelton, *It's no wonder hundreds of millions have been spent on Prop. 22. A lot is at stake*, L.A. TIMES (Oct. 16, 2020), https://www.latimes.com/california/story/2020-10-16/skelton-proposition-22-uber-lyft-independent-contractors.

In particular, the D.C. Circuit could adopt one of two rules from sister circuits that would benefit the interests of ride-hail drivers: the flow-of-commerce rule of the First Circuit in *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020)—under which a finding that Lyft drivers are engaged in interstate commerce is likely[41]—or a rule requiring discovery such as that of the Third Circuit in *Singh v. Uber Techs.*, 939 F.3d 210, 226 (3d Cir. 2019). Whatever rule it adopts, the goals of the FAA will be served by a Circuit-wide rule for determining whether workers are transportation workers engaged in interstate commerce.[42] Interlocutory review of the Court's Order would give the D.C. Circuit the opportunity to adopt such a rule—an opportunity that may not again present itself for years, if ever.

If the D.C. Circuit adopts the *Singh* approach and remands, discovery here would not be futile, as there is significant information relevant to the ultimate Section 1 determination that could be discovered. If discovery were to proceed here, it would show how central airport transportation is to Lyft's business model, both in D.C. and nationwide, despite Lyft's claims to the contrary. Discovery would also likely show that rides crossing state lines are an important part of Lyft's business.

For example, as discovery would reveal, almost nothing about Lyft drivers' relationship with airport transportation is casual or incidental. Lyft drivers' operations at airports have been extensively regulated in many jurisdictions, including by the Metropolitan Washington Airports

[41] At least two district courts that have applied *Waithaka*'s rule to Lyft drivers have found its application supported the finding that Lyft drivers are a class of workers engaged in interstate commerce. *See Haider v. Lyft, Inc.*, No. 20-cv-2997 (AJN), 2021 WL 1226442, at *4 (S.D.N.Y. Mar. 31, 2021) ("Both the quantity and nature of Lyft's connections to hubs of interstate travel lead the Court to conclude that its drivers engage in interstate commerce even when they do not personally cross state lines."); *Islam v. Lyft, Inc.*, No. 20-CV-3004 (RA), 2021 WL 871417, at *10 (S.D.N.Y. Mar. 9, 2021) ("[T]he role Lyft and Uber drivers play in ferrying passengers to and from airports and train stations at the very least lends additional support to the Court's conclusion that they are, as a class of workers, 'engaged in ... interstate commerce.'").

[42] *See generally* Imre Stephen Szalai, *Exploring the Federal Arbitration Act through the Lens of History*, 2016 J. DISP. RESOL. 115, 119 (2016) (a key purpose of the FAA was "to simplify court procedures, relieve overcrowded judicial dockets, and provide for improved, efficient methods of solving disputes.").

Authority.[43] Lyft maintains a detailed description of the rules and regulations its drivers must observe at D.C. area airports, as well as at other airports, on its website.[44] Airport regulations require Lyft to enter into business arrangements with airports that require Lyft to pay licensing fees, as well as access fees that are added to the riders' fare.[45] In the first year Lyft and Uber were operating under D.C.-area airport regulations, these fees generated $4.3 million for the airports.[46]

As discovery would reveal, airport transportation is important enough to Lyft that it has also fought proposed airport ride-hail fee increases, in order to prevent taxis and limos—which were not subject to the surcharges—from cutting into its business, both at D.C.-area airports and in other jurisdictions.[47] Lyft's relationships with airports are so important to the company's business and growth that it has a dedicated team for airport operations.[48] Among other issues, Lyft

[43] *See, e.g.*, Resolution No. 15-24 Amending and Restating Part 5 of the Regulations of the Metropolitan Washington Airports Authority Governing Commercial Ground Transportation Services at the Airports (adopted Sept. 16, 2015), https://www.mwaa.com/sites/default/files/res_15-24.pdf_-_amending_and_restating_part_5_of_the_regulations_of_the_metropolitan_washington_airports_authority_governing_commercial_ground_transportation_services_at_the_airports.pdf.pdf.

[44] *See, e.g.*, *Washington D.C. airport information for drivers*, LYFT HELP (accessed May 18, 2021), https://help.lyft.com/hc/lt/articles/115013082588-Washington-D-C-airport-information-for-drivers.

[45] *See, e.g.*, Andrew Mollenbeck, *Uber, Lyft get OK to serve D.C.-area airports*, WTOP NEWS (Sept. 17, 2015), https://wtop.com/local/2015/09/uber-lyft-get-ok-serve-d-c-area-airports/ (describing required fee structure).

[46] *See* Luz Lazo, *Uber urges MWAA to reconsider the airport fee that you're paying*, WASH. POST (Jun. 29, 2016), https://www.washingtonpost.com/news/dr-gridlock/wp/2016/06/29/uber-urges-mwaa-to-reconsider-that-4-airport-fee-that-youre-paying/.

[47] *See, e.g.*, Lori Aratani, *Uber, Lyft rides could get more expensive at National and Dulles airports*, WASH. POST (Nov. 19, 2019), https://www.washingtonpost.com/transportation/2019/11/19/uber-lyft-rides-could-get-more-expensive-national-dulles-airports/ (Lyft objects to increased fees because they do not apply "equitably to all ground transportation services"); *Uber, Lyft push back against Logan Airport changes proposed by Massport*, WCVB (Apr. 9, 2019), https://www.wcvb.com/article/uber-lyft-push-back-against-logan-international-airport-changes-proposed-by-massport/27091179 (Lyft describes non-application of fees to taxis and limos as its "biggest issue" with proposal).

[48] *Lyft's Aviation Journey & Future of Ridesharing at Airports*, RUNWAY.VC, at 6:20–6:30 (Nov. 20, 2016), https://www.runway.vc/podcasts/category/Runway.VC+Podcast (interview with Lyft Senior Director of Business Operations & Airport Policy Manager Baraki Brock).

negotiates the location of passenger pick-up areas with airports, and shares data with airports about traffic congestion.[49]

Discovery would also reveal Lyft's own data, which reflects how significant airport rides are for the company's business. In 2020, Lyft reported that 67% of riders nationwide used Lyft to get to or from the airport in the previous year.[50] And despite a significant overall decline in air travel due to the COVID-19 pandemic, Lyft still reported in 2021 that 51% of riders nationwide used Lyft to get to or from the airport in the previous year.[51] This number was even higher in the District of Columbia, where Lyft reports that 58% of riders used Lyft to get to or from the airport in the previous year, despite the overall decrease in air travel due to the pandemic.[52]

As discovery would further reveal, there is substantial evidence that Lyft has close arrangements with airlines to transport their passengers. A Delta passenger, for example, can use either their Delta SkyMiles account or their Lyft account to "earn miles on every Lyft ride," and can earn two miles per dollar spent on all airport rides.[53] Passengers of Southwest Airlines can even use the company's proprietary mobile application—in lieu of Lyft's app—to book their Lyft ride up to four hours before their flight.[54]

---

[49] *See id.* at 31:59–33:04; *see also* Harriet Baskas, *As LAX Ends Curbside Pickup, Here's How Other Airports Are Handling Uber, Lyft Congestion*, USA TODAY (Oct. 9, 2019), https://www.usatoday.com/story/travel/news/2019/10/09/lyft-uber-airport-rides-how-lax-other-airports-address-pickups/3912890002/; Luz Lazo, *Uber and Lyft have a new pickup location at Dulles*, WASH. POST (Aug. 24, 2020), https://www.washingtonpost.com/transportation/2020/08/24/uber-lyft-have-new-pick-up-location-dulles/.

[50] *See* LYFT, LYFT ECONOMIC IMPACT REPORT 2020: METHODOLOGICAL SUPPLEMENT, at 15 (Feb. 2020), https://drive.google.com/file/d/1nq7CoMDfNzP0M_oYAW9Hws-TA9CZ4Xdh/view.

[51] *See* LYFT 2021 ECONOMIC IMPACT REPORT, *supra* note 5, at 18.

[52] *See* LYFT ECONOMIC IMPACT REPORT 2021: WASHINGTON, D.C., *supra* note 7, at 2.

[53] *See Delta and Lyft Partnership*, LYFT HELP CENTER (accessed May 18, 2021), https://help.lyft.com/hc/en-us/articles/115012927287-Delta-and-Lyft-partnership; *see also Delta Lyft Partnership* (accessed May 18, 2021), https://www.deltalyft.com/.

[54] *Southwest Mobile*, SOUTHWEST (accessed May 18, 2021), https://www.southwest.com/html/air/products/mobile.html.

Far from the "casual and incidental relationship to interstate transit" of local cab companies, *see United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947), airport transportation is central to Lyft's business model in the District of Columbia and nationwide, as discovery would confirm.

Finally, discovery would also show that even if only two to three percent of Lyft rides cross state lines, that would add up to tens of millions of interstate rides in the United States each year, as the record in one other case involving Lyft revealed. *See Islam*, 2021 WL 871417, at *8. Discovery here would similarly reveal that trips that cross state lines form "an important component" of the work Lyft drivers do, *id.*, even if they are not the majority of total Lyft rides.

CONCLUSION

Certification of this Court's Order will potentially allow thousands of D.C. Lyft drivers to finally hold the company accountable for misclassifying them as independent contractors. Absent an interlocutory appeal, the significant harms Lyft's misclassification imposes on its drivers in the District of Columbia, on law-abiding employers, and on public coffers, will continue unchecked, with drivers blocked from joining together to effectively challenge Lyft's lawbreaking by the company's unilaterally imposed forced arbitration requirements, and public agencies ill-equipped to step into the breach.

Plaintiff's motion therefore squarely presents the type of exceptional circumstances warranting interlocutory review. Amicus urges the Court to grant Plaintiff's motion forthwith.

Respectfully submitted,

Dated: May 21, 2021

/s/ *Roseann R. Romano*
Mark Hanna (Bar No. 471960)
Roseann R. Romano (Bar No. 1034895)
Counsel of Record
Murphy Anderson PLLC
1401 K Street NW, Suite 300

Washington, DC 20005
(202) 223-2620
mhanna@murphypllc.com
rromano@murphypllc.com

/s/ *Hugh Baran*
Hugh Baran (NY Bar No. 5560420)†
National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 10004
(646) 693-8231
hbaran@nelp.org

† Filing papers pursuant to D.D.C. Local Civil Rule 83.2(c)(1), as a member in good standing of the United States District Courts for the Eastern and Southern Districts of New York, and joined by Mr. Hanna and Ms. Romano, members of the Bar of this United States District Court.