UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NOS. 20-15689, 20-15700

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

v.

LYFT INC.,

Defendant - Appellee/Cross-Appellant.

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

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

FIRST BRIEF ON CROSS-APPEAL OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Local Rule 34(a), Plaintiff-Appellants respectfully request oral argument. The extremely important issues presented in this case include issues of first impression for this Court and implicate public well-being, and Appellants believe that oral argument will greatly assist the Court.

INTRODUCTION

This appeal raises substantial questions of both California and federal law, regarding the availability of preliminary injunctive relief and a defendant's ability to thwart a preliminary injunction through the imposition of an arbitration agreement. This Court is tasked with deciding whether Defendant-Appellee Lyft, Inc. ("Lyft"), can simply ignore repeated admonishments to comply with the California Labor Code – first, in the form of the California Supreme Court's decision in Dynamex Operations W., Inc. v. Superior Court, 4 Cal.5th 903, 957-58 (2018) and, now, through the enactment of Assembly Bill No. 5 ("A.B. 5") – by perpetually wielding its arbitration agreement to avoid adjudication on the merits of drivers' misclassification claims, even when the practice threatens to exacerbate a global pandemic because the company refuses to provide state-mandated paid sick leave to its employee drivers.

As the District Court acknowledged, Lyft's practice of misclassifying its drivers as independent contractors runs afoul of the "ABC" test for employee status enunciated in Dynamex, 4 Cal.5th 903, 957-58, and now contained in Cal. Lab. Code. § 2750.3. See ER0006 ("While the status of Lyft drivers was previously uncertain, it is now clear that drivers for companies like Lyft must be classified as employees."). Despite this clarity,

in a show of willful obstinance, Lyft has refused to comply with the law. ER0009 ("But rather than comply with a clear legal obligation, companies like Lyft are thumbing their noses at the California Legislature").

Lyft's business model – like that of the "gig economy" more generally – is premised on the misclassification of its drivers. But now COVID-19 has toppled this house of cards and revealed the undeniable damage done by Lyft and the entire gig economy's degradation of labor standards, which impacts not only the drivers but the public at large as well, particularly given that Lyft's denial of state-mandated sick pay (based upon its drivers' misclassification as independent contractors) is contributing to the spread of COVID-19 by compromising drivers' ability to stay home if they are feeling sick. Lyft's misclassification of its drivers can and should be enjoined now.

As described further below, the District Court had the power to, and should have granted Plaintiffs' motion for a preliminary injunction, notwithstanding Lyft's arbitration clause. The District Court could have entered a preliminary injunction before deciding whether Plaintiffs' claims would ultimately be compelled to arbitration. Moreover, the District Court erred in holding that Lyft's arbitration clause was enforceable against Plaintiffs, both because Plaintiffs sought public injunctive relief, which cannot be thwarted through arbitration, see McGill v. Citibank, N.A., 2 Cal.

5th 945, 956 (2017) (and the District Court had the jurisdiction to decide this issue)[1], and because Lyft drivers are transportation workers who are exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, see Cunningham v. Lyft, Inc., 2020 WL 1503220, at *7 (D. Mass. March 27, 2020) (holding Lyft drivers to be exempt from FAA under transportation worker exemption), appeal pending Case No. 20-1357 (1st Cir.); see also Waithaka v. Amazon.com, Inc., 2020 WL 4034997 (1st Cir. July 17, 2020) (Amazon drivers are also exempt from FAA, even though they themselves do not cross state lines). Contrary to the District Court's conclusion below, Plaintiffs have standing to pursue their claim for public injunctive relief in federal court. See Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 969–70 (9th Cir. 2018).

Lyft is plainly a transportation company, and its drivers provide transportation services within the usual course of Lyft's business, under Prong B of the three-part "ABC" test enunciated in Dynamex and codified in Cal. Lab. Code § 2750.3(a)(1). The District Court had no trouble reaching this conclusion, and neither have previous courts confronted with the question. ER00009 ("drivers provide services that are squarely within the

[1] In McGill, the California Supreme Court held that an arbitration agreement cannot thwart pursuit of public injunctive relief. See discussion infra at Part III(A-B).

usual course of the company's business and Lyft's argument to the contrary is frivolous."); see also Cotter v. Lyft, 60 F.Supp.3d 1067, 1069 (N.D. Cal. 2015) ("[T]he argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one").[2] Dynamex and A.B. 5 both explicitly recognized the harm that independent contractor misclassification wreaks on the workplace, as well as the public at large, and chose to adopt the Massachusetts version of the "ABC" test – which has been recognized as the strongest test in the nation for combatting independent contractor misclassification[3] – in part to send a pointed message

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[2] Considering the same practice of misclassifying drivers as independent contractors perpetrated by Lyft's competitor, Uber, the court in O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1144 (N.D. Cal. 2015), noted that "it strains credulity to argue that Uber is not a 'transportation company' or otherwise is not in the transportation business." Courts have found the insincerity of such self-serving characterizations and "gig economy" companies' resulting inability to satisfy Prong B, self-evident. See also People of the State of California v. Maplebear, Inc., Case No. 2019-48731, at *4 (Cal. Sup. Ct. Feb. 18, 2020), appeal pending Case No. D077380 (Cal. App. 4th Dist.) (granting preliminary injunction, enjoining Instacart from classifying its shoppers as independent contractors, finding likelihood of success on the merits of claim that Instacart shoppers are employees under Prong B) [hereinafter "Instacart Injunction Order"] (Ex. B to concurrently filed Request for Judicial Notice [hereinafter RJN]).

[3] See, e.g., DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) pp. 204-05; see also Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes* (2015) 18 U.PA. J.L. & SOC. Change 53 (both

to companies like Lyft to stop its misclassification. Indeed, the legislature specifically rejected Lyft's attempt to lobby for an exemption to the test.[4]

Nevertheless, Lyft has evaded enforcement efforts through repeated use of its arbitration agreement.[5] A preliminary injunction requiring Lyft to abide by the law and provide sick leave to its drivers (to which they would be entitled under state law as employees) could, quite literally, save lives;

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cited in Dynamex Operations W., Inc. v. Superior Court, 4 Cal.5th 903, 957-58 (2018)).

[4] Alexia Fernández Campbell, California Just Passed a Landmark Law to Regulate Uber and Lyft, Vox, Sept. 18, 2019, https://www.vox.com/2019/9/11/20850878/california-passes-ab5-bill-uber-lyft.

[5] The undersigned Plaintiffs' counsel has been challenging Lyft for misclassifying its drivers in California since 2013. See Cotter v. Lyft, Inc., C.A. No. 13-cv-04065-VC (N.D. Cal.); Talbot v. Lyft, Inc., Case No. 18-566392 (Cal. Sup. Ct.) (filed in the wake of Cotter).

In Seifu v. Lyft, Inc., Case No. 712959 (Cal. Sup. Ct. Los Angeles), stayed pending appeal, Case No. B301774 (Cal 2d App.), the undersigned counsel submitted a PAGA letter nearly two years ago, the day that the California Supreme Court decided Dynamex. Although Plaintiff filed that case as a PAGA-only claim, which the California Supreme Court has ruled cannot be thwarted through arbitration, see Iskanian v. CLS Transp. Los Angeles, LLC 59 Cal.4th 348 (2014), Lyft nevertheless moved to compel that case to arbitration. When the court correctly denied Lyft's frivolous motion to compel arbitration, Lyft then proceeded to file a frivolous appeal, simply to delay the proceeding and thereby obtained a stay of the Seifu action. Thus, despite Plaintiffs' counsel's diligence in attempting to bring Lyft into compliance with California law, Lyft has repeatedly wielded its arbitration clause in order to forestall any court ruling regarding the legality of its decision to classify its drivers as independent contractors and thereby deprive them of all their rights under the Labor Code.

yet the District Court below found itself unable even to consider the request because of Lyft's arbitration agreement. But a District Court is not required (nor should it be allowed) to abdicate its equitable powers under such dire circumstances due to an arbitration agreement. Although the U.S. Supreme Court has repeatedly countenanced the use of arbitration agreements to block class action litigation over the past decade, it has not addressed a situation such as this, where a defendant's conduct—even when blatantly violating state law in a way that exacerbates a global pandemic—evades having that conduct enjoined by use of an arbitration clause. The District Court should have adjudicated Plaintiffs' request for preliminary injunctive relief and, because Plaintiffs met the standard, it should have issued the injunction. Moreover, even if the court had to address the arbitration agreement in order to rule on the motion for preliminary injunction, it should have found that the agreement was not enforceable here for the reasons described further below. This Court should reverse.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case pursuant to the Class Action Fairness Act of 2005 because diversity of citizenship exists between the proposed class of California Lyft drivers and Lyft Inc., a Delaware corporation with its principal place of business in California, the number of,

proposed class members is 100 or greater, and the amount in controversy exceeds $5 million. See 28 U.S.C. § 1332(d).

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because this is an appeal from a final judgment. ER0005.[6] This Court also has jurisdiction under 28 U.S.C. § 1292(a)(1) insofar as this is an appeal from an order denying preliminary injunctive relief, as entered by the District Court on April 7, 2020. ER0010-11; ER0005. Plaintiffs' appeal is timely under Rule 4(a) of the Federal Rules of Appellate Procedure, because Plaintiffs filed their Notice Appeal with the District Court on April 14, 2020, ER0001-2,[7] within 30 days of the entry of the Orders denying the preliminary injunction and dismissing the case. ER0005-23.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs have established the prerequisites to obtain a preliminary injunction, enjoining Lyft from continuing to misclassify its drivers as independent contractors and thereby deny them state-mandated

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[6] An order compelling arbitration and dismissing the action is immediately appealable. Green Tree Financial Corp. Alabama v. Randolph, 531 U.S. 79, 89 (2000); Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1073-73 (9th Cir. 2014).

[7] Plaintiffs originally filed the Notice of Appeal on April 7, 2020, see ER0003-4, and re-filed a week later in order to correct an error, see ER0001-2.

sick pay during a global pandemic;

2. If the Court decides that the enforceability of Lyft's arbitration clause needed to be addressed first, whether Lyft can shield itself through arbitration from enforcement of the California Labor Code, despite the California Supreme Court's holding in McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017), that a request for "public injunctive relief" cannot be thwarted by use of an arbitration agreement;
3. Whether Plaintiffs' request that Lyft be ordered to properly classify its drivers as employees so that they can obtain state-mandated sick pay during a global pandemic (thus assisting drivers who are feeling sick to stay home so they do not spread the coronavirus) constitutes "public injunctive" relief that they may pursue in federal court;
4. Whether Plaintiffs' claims could not be compelled to arbitration in any event because Lyft drivers are exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, under the Section 1 transportation worker exemption.

STATEMENT OF THE CASE

Plaintiff John Rogers filed this case on March 11, 2020, in San Francisco Superior County Superior Court, on behalf of himself and other

individuals who have worked as Lyft drivers in California, alleging that Lyft has misclassified them as independent contractors in violation of the Labor Code, Cal. Lab. Code § 2750.3, and, as a result, has violated Cal. Lab. Code § 246 by denying its drivers state-mandated sick leave. See ER0634, ¶33.[8] Section 246 mandates that an employee who works for the same employer for 30 days or more within a calendar year accrues sick leave at a rate of at least one hour of sick time for every thirty hours worked, which may be capped at 24 hours. See Cal. Lab. Code § 246. Plaintiff alleged that Lyft, as a matter of policy, denies all its drivers this state-mandated sick leave. ER0633, ¶30.[9]

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[8] Plaintiffs further alleged that Lyft has misclassified its drivers as independent contractors in violation of Cal. Lab. Code § 2750.3 and has thereby improperly required them to bear their own expenses, in violation of the Cal. Lab. Code § 2802, and has further failed to provide paid sick leave in violation of Cal. Lab. Code § 246 and Los Angeles Paid Sick Leave Ordinance and San Francisco Paid Leave Ordinance, and, by engaging in the foregoing unlawful business practices, is in violation of Cal. Bus. & Prof. Code § 17200 *et seq.* (the "UCL"). ER0497-98, ¶¶ 37-40.

[9] Lyft put in place an ad hoc system to provide drivers who had been diagnosed with COVID-19 or put under quarantine by a public health agency with financial assistance, but the assistance proved difficult for drivers to obtain. 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/ (last accessed July 23, 2020); *Helping Lyft's Driver Community*, Lyft, https://www.lyft.com/safety/coronavirus/driver (last accessed July 23, 2020). Specifically, the policy required documentation of a diagnosis (when tests were infamously scarce in the early days of the

The action was prompted by the global pandemic of COVID-19. Plaintiff filed the action the same day the World Health Organization declared the spread of COVID-19 a global pandemic and as public health agencies began to issue directives that anyone who feels ill should stay at home and not go to work and that people should begin social distancing (with the exception of essential workers, like Lyft drivers, who were permitted to continue working).[10] Plaintiff moved on an *ex parte* basis for an immediate preliminary injunction enjoining Lyft from denying paid sick leave. ER0638 at Dkt. 1-6.

However, Lyft constructed multiple procedural hurdles to delay adjudication. First, Lyft removed the action to federal court at the last minute, just as the *ex parte* hearing was about to begin in state court.

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pandemic) or documentation of a public health agency ordering the quarantine, which led to drivers such as Lyft driver Abdulwahab Odunga, being unable to obtain funds despite being plainly eligible. ER0107, ¶¶ 11-14 (attesting to his application being rejected because he did not have an order from a public health agency). Cal. Lab. Code § 246 contains no such stringent document requirement and may, in fact, be used for preventative car. See ER0170.

[10] See World Health Organization, WHO Director-General's opening remarks at the media briefing on COVID19-11 March 2020, https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-mediabriefing-on-covid-19---11-march-2020 (last accessed March 11, 2020); *What to Do If You Are Sick*, Ctr. For Disease Control and Prevention, updated May 8, 2020, https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html.

ER0638 at Dkt. 1. Plaintiff immediately re-briefed the request and filed an Emergency Motion for Preliminary Injunction the next day, see ER0560-583 (filed March 20). Plaintiff requested an expedited briefing schedule on the motion, which the District Court granted. ER0639 at Dkts. 13, 18. Lyft immediately moved to compel arbitration of Plaintiff's claims, see ER0640 at Dkt. 19, and requested that the District Court extend the briefing schedule, id. at Dkt. 20. The Court kept the schedule short, setting briefing to be completed on March 27, 2020. ER0640 at Dkt. 22. Plaintiff filed a First Amended Complaint in the midst of briefing, on March 27, 2020, adding Plaintiffs Amir Ebadat and Hany Farag, and alleging further Labor Code claims and violations of Los Angeles and San Francisco paid sick leave ordinances; and alleging the violation of Cal. Lab. Code § 246 as a predicate for a claim brought pursuant to the Bus. & Prof Code § 17200 *et seq* (the "UCL"), under which Plaintiffs could pursue public injunctive relief. ER0497-98, ¶¶ 8-9, 37-40.

In the Emergency Motion, Plaintiffs argued that they easily satisfied all four requirements for obtaining a preliminary injunction: (1) Plaintiffs raised a serious question on the merits of the drivers' misclassification claim in light of Lyft's obvious inability to carry its burden under Prong B of the "ABC" test, Cal. Lab. Code § 2750.3, as well as questions regarding drivers'

entitlement to paid sick leave under California law; (2) Plaintiffs, other Lyft drivers, and the general public will suffer irreparable injury in the absence of a preliminary injunction because Lyft's refusal to provide drivers with state-mandated paid sick leave contributes to the spread of COVID-19; (3) such injury outweighs any harm to Lyft if it is required to comply with the law, as Lyft can afford to pay its workers in compliance with the law (or should not be allowed to operate if it will not follow the law); and (4) enjoining Lyft's unlawful conduct, which is exacerbating a global pandemic, will undoubtedly serve the public interest. ER0574-82. Plaintiffs emphasized the obviousness of the first factor and the urgency of the second factor: that lack of paid sick leave presented serious and irreparable harm to drivers and the public by contributing to the spread of COVID-19. Plaintiff Ebadat attested to feeling sick with COVID-19 symptoms but continuing to drive for Lyft due to financial precarity and lack of paid leave, See ER0228, ¶¶ 5-9, and Plaintiff Farag attested to being worried he contracted the virus but continuing to driver also due to lack of paid sick leave, ER0227, ¶¶ 6-8. Many Lyft and other gig economy drivers echoed the sentiment.[11]

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[11] Alexis C. Madrigal, *The Gig Economy Has Never Been Tested by a Pandemic*, the Atlantic, Feb. 28, 2020, https://www.theatlantic.com/technology/archive/2020/02/ coronavirus-gig-economy/607204/; See also Mariah Mitchell, *I Deliver Your Food, Don't I Deserve Basic Protections*, N.Y. TIMES, March 17, 2020,

The public sounded the alarm bells. Articles warned of drivers becoming "vector[s]" of this life-threatening disease.[12] Fifteen Attorney Generals, including California Attorney General Xavier Becerra, signed onto a letter urging companies to provide paid sick leave during the pandemic. ER0260-66. Two U.S. Senators similarly emphasized the importance of paid sick leave to protecting the public. ER0267-69. In a similar case brought by Massachusetts Lyft drivers (alleging misclassification and denial of paid sick leave during the pandemic), the Massachusetts Attorney General took the unusual step of submitting, at the district court level, an amicus brief in support of Plaintiffs' Emergency Motion seeking the same relief that Plaintiffs seek here. Cunningham v Lyft, Inc., Case No. 1:19-cv-11974-IT,

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https://www.nytimes.com/2020/03/17/opinion/coronavirus-fooddelivery-workers.html?referringSource=articleShare (last accessed March 17, 2020); Tyler Sonnemaker, *'In order to Make a Living I must Put Myself and My Community in Danger': Uber Drivers Say the Company's Inconsistent Sick Pay Policy is Pushing Them to Keep Working – Even if They Get Sick*, BUSINESS INSIDER, Apr. 7, 2020, https://www.businessinsider.com/uber-drivers-coronavirus-pay-policy-pushingsick-drivers-to-work-2020-4; THE RIDESHARE GUY, March 17, 2020, https://therideshareguy.com/uber-drivers-cansurvive-the-coronavirus/ ("Sickness is not an option for me because not working is not an option. If I do get sick, I will have to continue to work or I will lose my ability to exist"); id. (""We need sick pay! How am I to pay my bills?").

[12] Alexis C. Madrigal, *The Gig Economy Has Never Been Tested by a Pandemic*, The Atlantic, Feb. 28, 2020 https://www.theatlantic.com/technology/archive/2020/02/coronavirusgig-economy/607204/ (cited ER000868, n. 24).

Dkt. 94-1 (ER0247-259). These pleas were based on a wealth of studies confirming that lack of state-mandated paid sick leave contributes to the spread of disease,[13] which the California legislature expressly agreed with in enacting paid sick leave, spelling out the public impact of the Act.[14]

Plaintiffs further argued that: (1) the District Court had the authority to issue the preliminary injunction, notwithstanding questions of arbitrability; and that, even if the Court had to consider the enforceability of Lyft's arbitration clause, the clause would not be enforceable because: (2) Plaintiffs' request sought public injunctive relief within the meaning of McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017), under which Lyft cannot use its arbitration clause to prevent the issuance of an injunction that is necessary for the public good; and (3) Lyft drivers are transportation workers exempt from the Federal Arbitration Act, 9 U.S.C. § 1.

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[13] See, e.g., Stefan Pichler, Katherine Wen & Nicolas Ziebarth, *Positive Health Externalities of Mandating Paid Sick Leave,* ResearchGate, Feb. 2020, https://www.researchgate.net/publication/336832189_Positive_Health_Externalities_of_Mandati ng_Paid_Sick_Leave.

[14] See 2014 California Assembly Bill No. 1522, California 2013–2014 Regular Session, § 1(e) (recognizing that "paid sick days will have an enormously positive impact on the public health of Californians by allowing sick workers paid time off to care for themselves . . . reducing the likelihood of spreading illness to other members of the workforce.") (emphasis supplied).

The District Court conducted a videoconference hearing on the motions on April 2, 2020, see ER0642 at Dkt. 39, and issued its decision on April 7, 2020, ER0006-23. In its April 7, Order, which Plaintiffs challenge in this appeal, the District Court denied Plaintiffs' emergency motion for injunctive relief. ER0010-11. The court refused to adjudicate the preliminary injunction request prior to deciding Lyft's motion to compel arbitration. ER0010. The Court then proceeded to grant the motion to compel arbitration (despite Plaintiffs' contention that Lyft drivers are exempt from the Federal Arbitration Act under the Section 1 transportation worker exemption), except as to the public injunctive relief claim, which the District Court remanded to California state court based on its conclusion that Plaintiffs lacked Article III standing to pursue the claim in federal court. ER0023.

SUMMARY OF THE ARGUMENT

The District Court erred in denying Plaintiffs' request for a preliminary injunction. First, the District Court had the power to grant preliminary injunctive relief, before even considering the enforceability of Lyft's arbitration agreement. See infra, Part II(A). Because Plaintiffs easily satisfied all four requirements for obtaining a preliminary injunction, an injunction should have issued, based on the preliminary injunction standard

set forth in Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–39 (9th Cir. 2011). See infra Part II(B).

Second, even if the District Court needed to consider arbitrability prior to ruling on the injunction, that would be no bar to an injunction because Plaintiffs' request sought public injunctive relief, which Plaintiffs have standing to bring in federal court and which cannot be thwarted through the use of an arbitration clause. See infra Part III(A). Plaintiffs also cannot be compelled to arbitrate their claims against Lyft because Lyft drivers are exempt from the Federal Arbitration Act, under the Section 1 transportation worker exemption, 9 U.S.C. § 1. See infra Part III(B). For these same reasons, the court should have denied Lyft's motion to compel arbitration.

ARGUMENT

I. Standard of Review

In the Ninth Circuit, an "order granting or denying [a preliminary] injunction will be reversed only if the district court abused its discretion." Zepada v. United States I.N.S., 753 F. 2d 719, 724 (9th Cir. 1983). "A district judge may abuse his discretion [by] apply[ing] incorrect substantive law or an incorrect preliminary injunction standard." Id. Whether the District Court applied the correct substantive law or preliminary injunction

standard is subject to *de novo* review. Toyo Tire Holdings of Americas Inc. v. Continental Tire North America, Inc., 609 F.3d 975, 979 (9th Cir. 2010). Questions of statutory interpretation, which may underlie incorrect application of substantive law, are also reviewed *de novo*. United States v. Youssef, 547 F. 3d 1090, 1093 (9th Cir. 2008).

An order granting or denying a motion to compel arbitration is also subject to *de novo* review. Bushley v. Credit Suisse First Boston, 360 F.3d 1149, 1152 (9th Cir. 2004). An order compelling arbitration and dismissing the action is immediately appealable. Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1073-73 (9th Cir. 2014).

Thus, both orders (the denial of the preliminary injunction and the granting of the motion to compel, which resulted in dismissal of the action, see ER0005), are immediately appealable, and all aspects of the District Court's rulings below are subject to *de novo* review.

II. The District Court Erred in Denying Plaintiffs' Request for a Preliminary Injunction

A. The District Court Had the Authority to Issue a Preliminary Injunction, Notwithstanding Lyft's Pending Motion to Compel Arbitration

The District Court misread Ninth Circuit case law in holding that "[i]t would not be appropriate to plow ahead on the motion for a preliminary injunction before ruling on [Defendant's] motion to compel." ER0010. The

District Court cited to Toyo Tire, 609 F.3d at 981, as establishing that a "district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process"; however, the District Court appears to have misread this language as limiting its ability to issue preliminary injunctive relief. This reading of the case and its application to the facts was misguided.

First, in Toyo Tire, the Ninth Circuit specifically considered the question of whether a district court maintained its equitable power to issue preliminary injunctive relief when: (1) the parties had agreed to arbitrate the claims; and (2) the arbitrator had the ability to grant interim injunctive relief. 609 F.3d at 979-80. In contrast, here, as the District Court found, the explicit terms of arbitration agreement *foreclose* the arbitrator from awarding Plaintiffs the injunctive relief they seek – namely an order enjoining Lyft from misclassifying its drivers as independent contractors and providing them with paid sick leave, so as to protect themselves and the public from spread of the coronavirus. ER0018 (citing to Lyft's Arbitration Agreement Section 17(b) waiver to the right to pursue class, collective, or representative claims, (ER0640 at Dkt. 19-2)). This case thus presents a distinct question from that decided in Toyo Tire or its predecessor Simula,

Inc. v. Autoliv, Inc., 175 F. 3d 716 (9th Cir. 1999), insofar as Plaintiffs seek public injunctive relief that is altogether unavailable to them in the arbitral forum. See Part III(A).[15]

In any event, Toyo Tire does not establish a limitation on a district court's power to grant preliminary injunctive relief simply because there is a pending motion to compel arbitration. Instead, Toyo Tire is an affirmation and expansion of the holding rendered by the Ninth Circuit in PMS Distributing Co. v. Huber & Suhner, A.G., 863 F.2d 639, 641-42 (9th Cir. 1988), cited at ER000010, which held that district courts retain jurisdiction and are empowered to grant preliminary relief even after an order compelling arbitration. In PMS Distributing, the Ninth Circuit expressly followed the reasoning set forth by the First Circuit: "[A] district court can grant injunctive relief in an arbitrable dispute pending arbitration, provided the prerequisites for injunctive relief are satisfied." Id. at 641-42 (quoting

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[15] The District Court also misapplied its understanding of Toyo Tire to the facts of the case, believing that Plaintiffs' request was one that sought to alter the status quo, and therefore could not be issued under Toyo Tire (and further constituted a request for a mandatory injunction, which is "particularly disfavored"). ER0011 (quoting Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015) (en banc)). This characterization is incorrect. Plaintiffs here are requesting that Lyft comply with the "ABC" test, which has been the law for mor e than two years; Lyft should already be complying, and its obstinance should not establish an alternative status quo that prevents consideration of a preliminary injunction request.

Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 51 (1st Cir.1986)). The Ninth Circuit explicitly "adopt[ed] the approach of the … First Circuit[] as indicated". Id. at 642. Subsequent case law makes clear that under this majority approach, preliminary injunctive relief remains available even if the claim may be subject to arbitration. See Cunningham v. Lyft, Inc., 2020 WL 1323101, at *1 (D. Mass. March 20, 2020), appeal pending, Case No. 20-1379 (1st Cir.) (adjudicating preliminary injunction motion prior to motion to compel arbitration and citing Next Step Medical co., Inc. v. Johnson & Johnson Intern., 619 F.3 67, 70 (1st Cir. 2010)); Capriole v. Uber Techs. Inc., 2020 WL 1323076, at *1 (D. Mass. March 20, 2020), appeal pending Case No. 20-1386 (1st Cir.) (same); Braintree Laboratories Inc. LLC v. Citigroup Global Markets, Inc., 622 F.3d 36, 40 (1st Cir. 2010) ("District courts have the authority to issue injunctive relief even where resolution of the case on the merits is bound for arbitration.").[16]

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[16] A wealth of precedent across Circuits, including the Seventh and Second, which this Circuit explicitly adopted in PMS Distributing, supports the District Court's ability to adjudicate a preliminary injunction motion or issue a preliminary injunction *prior* to deciding a motion to compel arbitration. See Janvey v. Aguire, 647 F. 3d 585, 593-95 (2d Cir. 2011); Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1380 (6th Cir. 1995) ("We adopt the reasoning of the First, Second, Third, Fourth, Seventh, **and arguably the Ninth**, Circuits and hold that in a dispute subject to mandatory arbitration under the Federal Arbitration Act, a district court has subject matter jurisdiction under § 3 of the Act to grant preliminary injunctive relief provided that the party seeking the relief satisfies the four

Importantly, the preliminary injunction analysis remains unaltered even where a party's preliminary injunctive relief request seeks to alter the status quo. See Braintree Laboratories, 622 F.3d 36, 40-41 (1st Cir. 2010) (holding that, even where issues of arbitrability loom, "the exigencies should still be measured according to the same four-factor test, as '[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.'") (quoting Crowley v. Local No. 82, 679 F.2d 978, 996 (1st Cir. 1982), rev'd on other grounds by 467 U.S. 526, 104 S.Ct. 2557, 81 L.Ed.2d 457 (1984) (quoting Canal Auth. v. Callaway, 489 F.2d 567, 576 (5th Cir.1974)). The Ninth Circuit agreed that, as long as jurisdiction remains, the analysis to determine whether a plaintiff has established a need for interim relief is unaltered. PMS Distributing, 863 F.2d at 642 ("The fact that a dispute is arbitrable and that the court so orders … does not strip it of authority to grant a writ of possession pending the outcome of the arbitration so long as the criteria for such a writ are met.")

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criteria which are prerequisites to the grant of such relief") (emphasis supplied); Ortho Pharmaceutical Corp. v. Amgen, Inc., 882 F. 2d 806, 812, 814 (3d Cir. 1989); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton, 844 F.2d 726, 727 (10th Cir. 1988); Roso-Lino Beverage Distributors Inc. v. Coca-Cola Bottling Co. of New York, 749 F. 2d 124, 125 (2d Cir. 1984); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1052 (4th Cir. 1985); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983).

(emphasis supplied). The Toyo Tire case sought to enlarge district courts' understanding of their equitable powers under PMS Distributing:

> The importance of the courts' ability to issue interim injunctive relief is even more apparent now than when we decided PMS twenty-two years ago. We assume that parties ordinarily choose to arbitrate [] to lower costs and increase efficiency and speed. However, arbitration's promised speed and efficiency frequently do not materialize in practice. Moreover, one party to the arbitration often has an incentive to delay arbitration proceedings to its own advantage.

Toyo Tire, 609 F.3d at 980-81 (internal citations omitted). Indeed, Lyft's actions have realized the very concern articulated by the Ninth Circuit in Toyo Tire: Lyft has, thus far, successfully delayed adjudication on its misclassification claim by wielding its arbitration agreement.

Courts need not countenance this strategy. A California Superior Court recently issued a preliminary injunction enjoining another gig economy company, Instacart, from continuing to misclassify its workers as independent contractors under the "ABC" test that California has adopted from Massachusetts, *before* addressing the company's motion to compel arbitration. See People of the State of California v. Maplebear, Inc., Case No. 2019-48731, at *2, 4 (Cal. Sup. Ct. Feb. 18, 2020), appeal pending Case No. D077380 (Cal. App. 4th Dist.). The District Court here was wrong to find itself precluded from issuing a preliminary injunction, and this Court

should therefore reverse and hold that the District Court should have considered the merits of Plaintiffs' motion.

B. Plaintiffs Established the Four Factors Required for a Preliminary Injunction

1. Plaintiffs raised "serious questions" as to the merits

Plaintiffs easily satisfied the first factor needed for a preliminary injunction to issue: raising a "serious question" on the merits of their misclassification claim. See Cottrell, 632 F.3d at 1134–39 (explaining the Ninth Circuit's sliding scale approach when Plaintiffs establish that the balance of equities tips in their favor, see infra Part II(B)(3)).

Under the Dynamex "ABC" test, as now embodied in Cal. Lab. Code. § 2750.3, workers who perform services for a putative employer are presumed to be employees, unless the defendant can prove all three prongs of the "ABC" test. See Cal. Lab. Code. § 2750.3(a)(1); Dynamex, 4 Cal.5th at 957-58 (emphasizing employer must establish "*each*" of the three prongs). Dynamex expressly adopted the test in order to tighten the strictures of California's employee test and streamline the employee status analysis. Id. at 964 (explaining that the "ABC" test would " provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis.").

Here, the likelihood of success factor is particularly strong under Prong B, which requires Lyft to show that "[t]he person performs work that is outside the usual course of the hiring entity's business" Cal. Lab. Code § 2750.3; Dynamex, 4 Cal.5th at 959.[17] Despite Lyft's attempt to portray itself as a "technology platform", rather than a transportation company, it

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[17] The test requires the putative employer prove all three of these prongs:

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Cal. Lab. Code § 2750.3.

Not only is it obvious, as the District Court recognized, that Lyft cannot satisfy Prong B of this test, but it is particularly clear that this test was legislatively codified with an intent of applying to gig economy companies, including Lyft in particular. The author of A.B. 5 has clearly stated her intent that Cal. Lab. Code § 2750.3 be applied to Lyft, and the public debate regarding the passage of A.B. 5 makes clear that the legislature aimed to stop Lyft and other gig economy companies from continuing to misclassify their workers. See Lorena Gonzalez, The Gig Economy Has Costs. We Can No Longer Ignore Them, Wash. Post, Sept. 11, 2019, https://www.washingtonpost.com/opinions/2019/09/11/gig-economyhas-costs-we-can-no-longer-ignore-them/ ("It is time to stand up for workers like my [Lyft] driver Joseph"); Kate Conger and Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES, Sept. 11, 2019 ("California legislators approved a landmark bill on Tuesday that requires **companies like** Uber and **Lyft** to treat contract workers as employees") (emphasis supplied).

will not be able to deny that it is in the same course of business as its vast legion of drivers, as numerous courts have foreshadowed. ER0009 ("drivers provide services that are squarely within the usual course of the company's business and Lyft's argument to the contrary is frivolous."); Cotter v. Lyft, 60 F.Supp.3d 1067, 1069 (N.D. Cal. 2015) ("[T]he argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one").[18]

Both the California and Massachusetts Attorney General agree that Lyft cannot satisfy Prong B of the "ABC" test.[19] The company has held itself out as a transportation company[20], and it is treated and behaves as a transportation company.[21] Because the "ABC" test is conjunctive and a

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[18] Making this conclusion even more clear, Lyft drivers have already been held to be employees under the "ABC" test by the California Public Utilities Commission. See Ex. C to RJN.

[19] See People of the State of California v. Uber Techs. Inc, et al., Case No. 20-584401 (Cal. Sup. Ct.) (filed June 25, 2020) (Ex. A to RJN) (California Attorney General asserted in motion for preliminary injunction seeking classification of Uber drivers as employees, "The plain facts compel the conclusion that [Uber's] "usual course" of business is providing rides to Passengers."); ER0247-259 (amicus filed in support of Massachusetts Lyft drivers' request for a preliminary injunction, urging the Massachusetts district court to enjoin Lyft's misclassification and ongoing denial of paid sick leave).

[20] See Cal. AG Mot. at 22 (Ex. A to RJN) (noting Lyft trademarked the slogan "Your Friend with a Car").

[21] Id.

defendant's failure to carry its burden under Prong B is dispositive, courts in Massachusetts (using the same "ABC" test) have regularly granted summary judgment on employee status based on an alleged employer's inability to carry its burden under Prong B.[22] There can be no serious question here that Plaintiffs established a serious question on the merits of showing that Lyft drivers have been misclassified under the California Labor Code.[23]

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[22] Massachusetts courts have frequently looked to logic and commonsense in determining a defendant's usual course of business and finding liability for misclassification based upon the defendant's inability to establish Prong B. See, e.g., Carey v. Gatehouse, 92 Mass. App. Ct. 801, 807, 813–14 (2018) (affirming summary judgment to newspaper delivery drivers, considering such factors as how the business holds itself out and whether the services provided by the plaintiffs are core to the business or merely incidental); Schwann v. FedEx Ground Package Sys., Inc., 2013 WL 3353776, *5 (D. Mass. July 3, 2013) (rejecting FedEx's attempt to characterize itself as a "logistics" company rather than a "delivery" company; " FedEx advertises that it offers package pick-up and delivery services and its customers have no reason to believe otherwise"), rev'd on other grounds, 813 F.3d 429 (1st Cir. 2016); Awuah v. Coverall North Am., 707 F.Supp.2d 80 (D. Mass. 2010) (rejecting defendant's contention that it was in the "franchising" business, rather than the cleaning business); Chaves v. King Arthur's Lounge, 2009 WL 3188948, *1 (Mass Super. July 30, 2009) (holding that adult entertainment was, based on common sense, the defendant strip club's usual course of business).

[23] Plaintiffs also established at least a likelihood of prevailing on the success of their arguments that Lyft's arbitration clause should not have prevented them from obtaining the injunction. These arguments are addressed infra Part III.

2. Plaintiffs established that Lyft's misclassification of drivers causes irreparable harm to drivers and the public

a. Lyft's misclassification causes irreparable harm to its drivers

Lyft's misclassification of its drivers causes substantial injury to the drivers. Loss of basic employee protections cannot be remedied after the fact. For instance, if a driver is forced to continue working because he cannot afford to stay home without paid sick leave, the harm of having continued to work through illness, e.g. transmitting COVID-19, cannot be remedied later through monetary damages. Moreover, the California Labor Commissioner has clarified that § 246 allows paid sick leave to be used for preventative care. ER0170. Thus, the statute would allow drivers to spend more time at home during the pandemic if their concern is not spreading the virus but instead contracting the virus themselves from passengers. Indeed, Lyft drivers have been particularly vulnerable during the crisis, as their job requires them to come into close interaction with the public.

COVID-19 has made abundantly clear that basic employee protections like paid sick leave *prevent* a range of harms including immediate destitution (that can cascade into bad credit, missed meals, eviction) that companies

cannot erase through later payment.[24] Nevertheless, Lyft may persist that drivers are, at bottom, seeking a money payment for time missed while sick. But courts have recognized that an employee's failure to receive wages when due can comprise "irreparable injury" in extreme circumstances.[25] Further, courts have found that a defendant's failure to make payments that negatively impact a plaintiff's health, whether by preventing the plaintiff from being able to seek treatment or comply with treatment, can likewise

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[24] Moreover, that the UCL provides for injunctive relief for any unlawful business practice, including violating Cal. Lab. Code § 246, suggests Plaintiffs may not be required to show irreparable harm at all, in light of a presumption that any violation of the statute constitutes irreparable harm. See American Fruit Growers, Inc., v. United States, 105 F.2d 722, 725 (9th Cir. 1939). See also Atchison, T. & S.F. Ry. Co. v. Lennen, 640 F.2d 255, 258–259 (10th Cir.1981) ("it is not necessary that the [Plaintiff] Railroads show that they will suffer irreparable harm if the injunction is denied. When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown.").

[25] See, e.g., Roland Machinery Co. v. Dresser Industries, Inc., 749 F. 2d 380, 386 (7th Cir. 1984) (finding irreparable harm when damages "may come too late to save plaintiff's business. He may go broke while waiting, or may have to shut down his business"); Donohue v. Mangano, 886 F. Supp. 2d 126, 153-54 (E.D.N.Y. 2012) ("'For a poor man ... to lose part of his salary often means his family will go without the essentials.'") (quoting Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342 n. 9, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (quoting statement of Congressman Gonzales, 114 Cong. Rec. 1833)); Aguilar v. BaineService Systems, Inc., 538 F. Supp. 581, 584 (S.D.N.Y. 1982) (finding a showing of irreparable harm under Rule 65 due to lost wages).

constitute irreparable harm.[26] Dangerous working conditions can also constitute irreparable harm. See, e.g., Dominion Energy Transmission, Inc. v. 0.11 Acres of Land, More or Less, in Doddridge Cty, W. Va., 2019 WL 4781872 at *5 (N.D. W. Va. Sept. 30, 2019).

Again, both the California and Massachusetts Attorney Generals have agreed that Lyft's misclassification of its drivers results in irreparable harm to the drivers. See ER0253, ER0255-58; Cal. AG Mot. at 33-37 (Ex. A to RJN). Lack of paid sick leave means that "drivers face the untenable position of choosing to continue providing transportation services to

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[26] See Harris v. Blue Cross Blue Shield of Missouri, 995 F. 2d 877, 878-79 (8th Cir. 1993) (finding irreparable harm when plaintiff was denied insurance coverage that could provide "the only possibility of long-term control or care" of plaintiffs' health); Boldon v. Humana Ins. Co., 466 F. Supp. 2d 1199, 1207-1208 (D. Ariz. 2006) (finding also that denial of insurance coverage constitutes irreparable harm when plaintiff faced liver-threatening liver cancer); B.E. v. Teeter, 2016 WL 3033500 at *5 (W.D. Wash. May 27, 2016) (finding that denial of Medicaid services constituted irreparable harm because it creates "(1) substantial risk to plaintiffs' health; (2) severe financial hardship; (3) inability to purchase life's necessities; and (4) anxiety associated with uncertainty") (quoting LaForest v. Former Clean Air Holding Co., Inc., 376 F. 3d 48, 55 (2d Cir. 2004)); International Schools Services, Inc. v. AAUG Ins. Co., Ltd., 2010 WL 4810847, at *5 (S. D. Fla. Nov. 19, 2010) (finding irreparable harm to employees when health care insurer stopped covering payment of claims; "[t]he death of a child, the loss of a limb, or prolonged suffering due to lack of treatment cannot be undone by monetary means") (internal quotation marks and citation omitted); Sluiter v. Blue Cross Blue Shield of Mich., 979 F. Supp. 1131, 1145 (E.D. Mich. 1997) ("each plaintiff will suffer irreparable harm without this preliminary injunction because she will be unable to receive the course of treatment recommended by her physician").

members of the public while they, or their household family members, are in compromised medical condition or risk losing all means of financial support." ER0258. As the California Attorney General has explained: "When economically vulnerable Drivers are denied their legally required wages and benefits, they are left precariously juggling the necessities of life, including food, housing, and transportation," and are left unable to meet their basic needs. Cal. AG Mot. at 37 (Ex. A to RJN) (internal citations omitted). The harm to the drivers is apparent.

b. Lyft's misclassification of its drivers also causes irreparable harm to the public

The harm done to the public as a result of Lyft's misclassification of its drivers and denial of paid sick leave during a pandemic cannot be understated.[27] First, misclassification harms the public – period – because of the degradation of labor standards, drain on the public coffers, and harm to law-abiding competitors. Dynamex, 4 Cal.5th at 913 (explaining that independent contractor misclassification gives businesses an unfair competitive edge and "deprives federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to

[27] The District Court expressed skepticism regarding Plaintiffs' argument that they sought public injunctive relief within the meaning of McGill, ER0023, which Plaintiffs address infra Part III(A).

which they are entitled"); see also A.B. 5 § 1 (agreeing and declaring independent contractor misclassification contributes to "the erosion of the middle class and the rise in income inequality."). The California Attorney General has likewise asserted, "an astonishing range of violations and associated harms—to Drivers, law-abiding businesses, and the public—flow from [Uber's] unlawful misclassification of their Drivers. (See Dynamex, supra, 4 Cal.5th at pp. 912–913.)." Cal. AG Mot. at 32, 40 (Ex. A to RJN). This degradation of labor standards alone constitutes irreparable harm to the public. See Maplebear, Inc., Case No. 2019-48731, at *4 (Ex. B to RJN) (finding that workers "and the public will be irreparably harmed [by Instacart's misclassification] unless a preliminary injunction" issues).

Now Lyft's refusal to provide its drivers with state-mandated paid sick leave has created an even more acute type of irreparable harm to the public by undermining an important public health tool at a time when public health tools are most urgently needed (and should be most strictly enforced). But Lyft has "thumb[ed]" its nose at its obligations under the law, ER0009, shoring up the gig economy's obstinance and continuing to build a class of gig workers, who have largely been deemed essential during this pandemic and whose lack of employee protections will impede the public fight against COVID-19.

As of this writing, California has had 424,051 cases of COVID-19 and 67,031 deaths. See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=Top%20Stories&pgtype=Homepage (last accessed July 23, 2020). The Governor was among the first to declare COVID-19 a state of emergency and issued an executive order to shelter-in-place in order to "limit the spread of this highly contagious and potentially deadly virus.[28] California has begun re-opening its economy but, due to a sharp rise in COVID-19 cases, counties are considering "shelter-in-place 2.0".[29] Through it all, Lyft drivers have continued to work, as they have been deemed essential.[30]

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[28] California, Exec. Office of the Governor [Gavin Newsom]. Exec. Order: Proclamation of a State of Emergency (issued March 4, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf; see also Exec. Order No. 33-20 (issued March 19, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf (issuing shelter-in-place).

[29] See, e.g., Aldo Toledo, *As the Sole County Open For Business, San Mateo County Braces for Possible New Restrictions*, The Mercury News, updated July 21, 2020, https://www.mercurynews.com/2020/07/20/as-the-sole-county-open-for-business-san-mateo-county-braces-for-possible-new-restrictions/ (last accessed July 22, 2020) (quoting San Mateo County Supervisor David Canepa).

[30] *Essential Workforce*, California State Public Health Officer, issued April 28, 2020, Item No. 6 (Transportation and Logistics Sector)

Lyft argued, and the District Court appeared taken with, three arguments: (1) that the paid sick leave its drivers accrued under Cal. Lab. Code § 246 was de minimis, and the law should therefore not be enforced; (2) that drivers' access to benefits under the federal Families First Coronavirus Act ("FFCRA") and the Coronavirus Aid, Relief, and Economic Security ("CARES") Act would purportedly be jeopardized if drivers were reclassified under state law; and (3) that emergency federal legislation negated any showing of irreparable harm here because emergency federal benefits, Lyft argued, ameliorates the harm to drivers and the public by providing tax sick leave credits, family leave tax credits, unemployment benefits, and possible small business loans, to independent contractors. See ER0007-8. These arguments were incorrect and should not have been a basis for denying Plaintiffs' motion.

First, *any* additional time drivers can afford to stay home, as would be allowed even by the modest amount of paid sick leave provided by California law (24 hours, see Cal. Lab. Code § 246), can incrementally save lives (and for drivers who split their time between driving for Uber and Lyft, the provision of 24 hours from each company constitutes more than a week

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https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf (last accessed July 22, 2020.

of paid sick leave). Further, local ordinances provide more substantial sick leave for employees: the San Francisco Paid Sick Leave Ordinance and the Los Angeles Paid Sick Leave Ordinance allow employees to use up to 48 hours of sick leave annually, and San Francisco Public Health Emergency Leave Ordinance (SF PHELO) and Los Angeles COVID-19 Supplemental Paid Sick Leave ordinance (Article 5-72HH) provide up to 80 hours of supplemental paid sick leave. The District Court was wrong to assume that only "a handful of drivers might qualify for three days' worth of sick pay per year," ER0007, as the statistics presented by Lyft only spoke in terms of percentages; since there are hundreds of thousands of Lyft drivers across the State of California, even if only a small percentage would be eligible for the state-mandated sick leave, that would still likely be tens of thousands, if not more, drivers. Further, the statistical analysis that Lyft used only considered drivers' "active time" (between accepting and completing a ride), while drivers in actuality work many more hours (including driving to active areas and performing the unpaid work of cleaning and maintaining their vehicles). See ER0465-66, ¶¶ 18. In any event, the California legislature has determined that even part-time employees shall be entitled to accrue paid sick leave; Lyft's argument thus fails as a matter of law.

Second, reclassification of drivers as employees under state law does not affect drivers' access to benefits provided by the emergency federal legislation because their employee status for the purpose of accessing federal benefits is determined under federal law.[31]

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[31] It is well recognized that it is more difficult to prove employee status under federal law than under the "ABC" test. While the "ABC" test requires the alleged employer to prove all three prongs of the test, federal tests involve balancing of multiple factors. The Department of Labor has recently issued an opinion letter finding gig workers not to be employees, Opinion Letter, FLSA2019-6, Dep't of Labor (dated Apr. 29, 2019), and the federal IRS test considers 21 factors. See 26 CFR § 31.3401(c); see generally James L. Rigelhaupt Jr., Annotation, *What Constitutes Employer–Employee Relationship for Purposes of Federal Income Tax Withholding,* 51 A.L.R.Fed. 59 § 19 (1981 & Supp.1990). Indeed, California adopted the "ABC" test specifically with the goal of making it easier for workers to obtain employee protections under California law than under multi-factor tests. Dynamex, 4 Cal.5th at 964.

A number of courts have recognized that workers can be classified differently under different tests. See California Trucking Association v. Su 903 F. 3d 953, 959 n. 4 (9th Cir. 2018); Ives Camargo's Case, 479 Mass. 492, 495-96 (2018) (holding workers to be independent contractors under multi-factor workers comp test, even though they would be employees under "ABC" wage law test). In Massachusetts, a federal court considering the same injunction request brought by Lyft drivers flatly rejected the argument that classification of drivers as employees under state law could jeopardize, or have any impact at all on, the drivers' classification for the purpose of obtaining emergency federal benefits. See Cunningham v. Lyft, Inc., 2020 WL 2616302, at * n. 7 (D. Mass. May 22, 2020) ("That each statutory scheme provides its own requirements as to whether a worker is covered as an employee under the particular statute undermines Lyft's contention that awarding drivers earned sick time under M.G.L. c. 149, § 148C could have a detrimental effect on the drivers' ability to access new federal and state benefits.").

Third, the federal legislation does not negate a showing of irreparable harm or displace the need for state protections; the federal emergency legislation was explicitly intended to *supplement*, not *supplant*, basic state law employee protections.[32] In any event, the federal benefits proved difficult to obtain and what Lyft drivers needed was cash in the moment, not complicated applications that (hopefully) provided later tax credits.[33]

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[32] See Pub. L. No. 116-127, 134 Stat. 178, § 5107 (FFCRA), Rules of Construction ("Nothing in this Act shall be construed (1) to in any way diminish the rights or benefits that an employee may be entitled to under any (A) other Federal, State, or local law"); see also 85 Fed. Reg. 19326 (pub. Apr. 6, 2020) (to be codified at 29 C.F.R. § 826), C.F.R. § 826.160(a) (a worker's "entitlement to, or actual use of, Paid Sick Leave under the [Emergency Paid Sick Leave Act, div. E of the FFCRA] is in addition to—and shall not in any way diminish, reduce, or eliminate—any other right or benefit including regarding Paid Sick Leave, to which the [worker] is entitled under … [a]nother Federal, State, or local law, except the FMLA as provided in § 826.70; ….") (emphasis added); id. § 826.160(b) ("Sequencing of Paid Sick Leave. (1) A[] [worker] may first use Paid Sick Leave before using any other leave to which he or she is entitled by any: (i) other Federal, State, or Local law; ….").

[33] The tax credits and small business loans required applicant sophistication, which Plaintiffs presented evidence would make them particularly difficult for Lyft drivers to obtain. See generally "Covid-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs," IRS (accessed Apr. 7, 2020); available at: https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-providedby-small-and-midsize-businesses-faqs#basic. ["IRS FAQs"]; Small Business Administration, "COVID-19 Economic Injury Disaster Loan Application," Disaster Loan Assistance Portal, OMB Control # 3247-0406, available at: https://covid19relief.sba.gov/ (discussed ER00083-84). Indeed, the S.B.A. applications proved difficult for even sophisticated applicants to access: the first round of funding ran out and the

Plaintiffs provided declarations and articles confirming difficulties in Lyft drivers accessing these federal benefits. See Declarations of Abdulwahab Odunga, Reynaldo Fuentes, and Anne Kramer ER0104-117; see also ER0134-168 (documenting that state unemployment offices were simply overrun with applications and that gig workers still experienced particular difficulty in accessing unemployment). And now those benefits are set to expire[34] – while the pandemic rages on. Lyft's ad hoc system of paid sick leave (which did not follow California law), too, proved difficult to obtain. see ER0107, ¶¶ 11-14.

None of Lyft's arguments effectively refute the assertion that state-mandated paid sick leave provides vital protection, which could have prevented earlier transmissions of COVID-19; which could still provide added protection by being layered atop the federal benefits; and which may eventually provide the only life-saving, sick leave protections when the

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website promptly crashed upon opening a second round. See Stacey Cowley, *Bankers Rebuke S.B.A. as Loan System Crashed in Flood of Applications*, N.Y. Times, Apr. 27, 2020, https://www.nytimes.com/2020/04/27/business/sba-loan-system-crash.html.

[34] *Advisory: Unemployment Insurance Program Letter No. 15-20*, U.S. Dep't of Labor, April 4, 2020, https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20.pdf (stating that the Pandemic Unemployment Compensation Program is set to expire on or before July 30, 2020).

federal benefits expire. Even if the state-mandated paid sick leave only keeps some (thousands or tens of thousands of) drivers off the road for a few days they would otherwise work, this leave would stave off irreparable harm by preventing further untold amounts of transmission of this potentially fatal disease, which has upended life in this country and around the world.

3. Plaintiffs have established that the harm to Lyft drivers and the public outweighs any harm to Lyft should an injunction issue and that the public interest weighs in favor of issuing an injunction

The final two factors in the preliminary injunction analysis indisputably favor the issuance of a preliminary injunction. The balancing of equities factor is measured by examining "interest of all parties and weigh[ing] the damage to each." L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F. 2d 1197, 1203 (9th Cir. 1980). Here, there can be no serious contention that the harms outlined above outweigh any harm to Lyft in being made to comply with the law. Lyft was recently valued at $28 billion in March 2019 and, at the end of 2019, reported $2.8 billion in cash on hand.[35] Lyft cannot claim that it cannot afford to pay its drivers in

[35] Carl O'Donnell and Joshua Franklin, Lyft Valued at $24.3 Billion in First Ride-Hailing IPO, Reuters, March 28, 2019, https://www.reuters.com/article/us-lyft-ipo/lyft-valued-at-24-3billion-in-first-ride-hailing-ipo-idUSKCN1R92P4(last accessed Sept. 12, 2019); Lyft Cash On Hand 2017-2019, MacroTrend, https://www.macrotrends.net/stocks/charts/LYFT/lyft/cash-on-hand.

compliance with the law, and profiting from illegal activity is not an argument against compliance. See Maplebear, Inc., Case No. 2019-48731, at *4 (Ex. B to RJN) ("It bears repeating that the [adoption of the "ABC" test in Dynamex] is now nearly 2 years old. While change is hard, defendant cannot legitimately claim surprise or that it has not had time to adjust its business model.").

As to the public interest, the District Court agreed that the public interest weighs in favor of enjoining Lyft's misclassification of its drivers as independent contractors. ER0007 ("Sick leave policies, the plaintiffs correctly note, generally decrease the chances that people will go to work sick. And especially during this health crisis, the public interest favors more access to paid sick leave so that people will avoid going to work sick—especially when "going to work" means occupying close quarters in a car with other people.").

This Court should recognize the imminent and ongoing harm to the public of Lyft's obstinate refusal to comply with California law and rule that Plaintiffs have met the standard for a preliminary injunction to issue.

III. Even if the District Court Needed to Address Lyft's Motion to Compel Arbitration Before Considering Plaintiffs' Motion for Preliminary Injunction, the District Court Erred in Granting Lyft's Motion to Compel Arbitration

There are two additional reasons why Lyft's arbitration clause should not have prevented the issuance of a preliminary injunction below, or at the least, two reasons Plaintiffs were likely to succeed in overcoming Lyft's arbitration clause. First, Lyft cannot wield its arbitration clause to block the issuance of "public injunctive relief," which Plaintiffs had Article III standing to pursue. See infra, Part III(A). Second, Lyft drivers are exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, under the transportation worker exemption to the Act. See infra, Part III(B).

A. Plaintiffs' Request for an Injunction Constitutes a Request for Public Injunctive Relief

In McGill v. Citibank, N.A., 2 Cal.5th 945, 956 (2017), the California Supreme Court held that the right to pursue public injunctive relief could not be waived wholesale through a predispute arbitration agreement.[36] The

[36] In reaching this conclusion, the Court built on the Broughton-Cruz rule, see Cruz v. PacifiCare Health Systems, Inc., 30 Cal.4th 303, 315-16 (2003), and Broughton v. Cigna Healthplans of Cal., 21 Cal.4th 1066, 1077 (1999), which established that agreements to arbitrate claims for public injunctive relief brought pursuant to the Consumer Legal Remedies Act ("CLRA") Cal Civ. Code §§ 1750 et seq., the Unfair Competition Law ("UCL") Cal Bus. & Prof. Code §§17200 et seq., or the false advertising law, are not enforceable in California. McGill, 2 Cal.5th at 956. The Broughton-Cruz rule established that public injunctive relief could not be thwarted

Court defined public injunctive relief as "injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." Id. at 951. The "evident purpose" of public injunctive relief is "to remedy a public wrong." Id. at 961 (quoting Broughton v. Cigna Healthplans of California, 21 Cal. 4th 1066, 1080 (1999)). McGill held that pursuit of public injunctive relief could not be waived through a predispute arbitration agreement because such waiver "would seriously compromise the public purposes the statutes were intended to serve." Id.[37]

1. The District Court erred in holding Plaintiffs lacked Article III standing to pursue public injunctive relief

The District Court recognized that the terms of Lyft's arbitration agreement waived Plaintiffs' right to pursue public injunctive relief in the arbitral forum, and that the enforceability of this waiver was for a court to decide. ER0018-19 (citing ER0650 at Dkt. 19-2, Section 17(b)). In other

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through arbitration; the McGill rule further established that public injunctive relief sought under these statutes cannot be waived wholesale through a predispute arbitration agreement, making the rule one of general applicability. Plaintiffs bring their claim for public injunctive relief pursuant to the UCL.

[37] In Blair v. Rent-A-Ctr., Inc., 928 F.3d 819, 827 (9th Cir. 2019), the Ninth Circuit held that the McGill rule against waivers of public injunctive relief is not preempted by the FAA because it "is a generally applicable contract defense."

words, whether Plaintiffs pursued public injunctive relief within the meaning of McGill (and thus could not be compelled to waive pursuit of that relief), had to be adjudicated in court (not arbitration). However, the District Court declined to adjudicate the question of whether Plaintiffs sought public injunctive relief, finding that Plaintiffs lacked Article III standing, on the premise that public injunctive relief is designed to primarily remedy harm to the public (not the plaintiffs). ER0021. The District Court therefore severed and remanded the claim for public injunctive relief to California Superior Court. ER0022-23. As set forth below, the District Court was incorrect to conclude Plaintiffs lacked Article III standing on this claim and, because Plaintiffs plainly sought public injunctive relief, their claim should have proceeded to adjudication in federal court.

The District Court was wrong to find Plaintiffs lacked Article III standing when pursuing pursue injunctive relief for two reasons. First, as the District Court ceded, "Plaintiffs may sometimes request public injunctive relief [in federal court] in the course of combating an actual and imminent threat of future harm to themselves." ER0021 (citing Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 969–70 (9th Cir. 2018)). As discussed supra Part (B)(2)(a), Plaintiffs experienced (and continue to experience) a "concrete, particularized, and actual or imminent" injury, see Clapper v. Amnesty

International USA, 568 U.S. 398, 409 (2013) (quoted ER000020).[38] This showing thus brings the case under Davidson, where the Ninth Circuit held that a previously deceived consumer had standing to pursue public injunctive relief:

> In some cases, the threat of future harm may be the consumer's plausible allegations that she ***will be unable to rely*** on the product's advertising or labeling in the future, ***and so will not purchase the product although she would like to***. In other cases, the threat of future harm may be the consumer's plausible allegations that she ***might purchase the product in the future***, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved.

889 F.3d at 969-70 (internal citation omitted) (emphasis supplied). Here, both Plaintiffs and the general public (including consumers and competitors) will be unable to rely on Lyft to comply with the requirements of Cal. Lab. Code § 246 and will suffer the same harm: harm to health.

Further, the District Court erred in its legal analysis of the standing question. The District Court relied heavily on Hollingsworth v. Perry, 570 U.S. 693, 714-15 (2013) (cited ER0020-21), where the Supreme Court

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[38] Plaintiffs additionally meet the two other standing requirements to seek injunctive relief in Article III courts: Plaintiffs have shown "a sufficient likelihood that [they] will again be wronged in a similar way," (as they are likely to drive for Lyft again, and the public is likely to continue using Lyft's transportation services, and the pandemic continues), see City of Los Angeles v. Lyons, 461 U.S. at 111, 103 (1983), and that the harm is traceable to Lyft's denial of paid sick leave, see Friends of Earth, Inc. *v.* Laidlaw Environmental Services (TOC), Inc., 528 U. S. 167, 180–181 (2000).

refused to adjudicate the constitutionality of Proposition 8 (the ballot initiative passed by California voters in 2008 to amend the state constitution to ban same-sex marriage), because proponents of Proposition 8 lacked standing to defend the law in the place of California public officials (who refused). Id. at 701. This rendered the dispute a "generalized grievance", a conclusion that turned on agency questions related to whether the proponents could represent the state interest. Id. at 715. This case hardly presents the same concern of a "generalized grievance" (threatening to coerce the Court into usurping the legislature's role); rather, the injunctive relief request here simply asks the Court to enforce repeated mandates by the State. To refuse the invitation, *particularly in a case where the defendant has removed the action to federal court*, threatens to undermine the enforcement of state-granted substantive rights:

> As the [Machlan v. Procter & Gamble Co., 77 F. Supp.3d 954, 961 (2015)] court aptly recognized, "[a]**llowing a defendant to undermine California's consumer protection statutes and defeat injunctive relief simply by removing a case from state court is an unnecessary affront to federal and state comity** [and] ... an unwarranted federal intrusion into California's interests and laws." 77 F.Supp.3d at 961… This is because "the primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction," In re Tobacco II, 46 Cal.4th 298, 93 Cal.Rptr.3d 559, 207P.3d 20, 34 (2009)—a principle the California Supreme Court recently reaffirmed. See McGill [2 Cal 5th at 951].

Davidson, 889 F.3d at 970 (emphasis supplied). The District Court thus

erred in discerning and applying a bright-line rule prohibiting pursuit of public injunctive relief provided for by the UCL in federal court.[39]

2. Plaintiffs' request constitutes public injunctive relief

The District Court then chose to sever and remand the claim to state court, a strategy offered by Davidson, 889 F.3d at 970 n. 6, and, in doing so, expressed skepticism that Plaintiffs' claim would be deemed one for public

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[39] It was also a legal error to analogize the present case to Summers v. Earth Island Institute, 555 U.S. 488, 494 (2009) (cited ER0022). In Summers, which addressed organization standing, the Supreme Court held that *because the organization won a preliminary injunction* in the district court (and only thereafter settled), which eliminated the possibility of imminent injury, the plaintiff lacked standing to challenge the basis for threatened action. Id. at 494. This holding cannot be extended to the circumstances here, where Plaintiffs have been denied the opportunity to adjudicate a preliminary injunction motion, and harm to the public remains.

Likewise, extending the holding of Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 73–74 (2013), to the case here is inappropriate. In Genesis, as in Summers, the plaintiff was offered full relief, in the form of a Rule 68 offer of judgment. Id. at 72-73. The individual plaintiff's standing was thus extinguished. Id. The Court went on to distinguish the action, a collective action brought under the Fair Labor Standards Act (which utilizes an opt-in mechanism), from Rule 23 actions where the class may maintain standing even if the individual class representative is afforded complete relief. Id. at 75, 78. This instant case may likewise be distinguished on the same grounds, as Plaintiffs pursue public injunctive relief analogous to a representative action akin to that brought under the Private Attorneys General Act ("PAGA"), to enjoin unlawful violations of the Labor Code, which the California Supreme Court has held cannot be extinguished by affording the representative complete individual relief. Cf. Kim v. Reins International California, Inc., 9 Cal. 5th 73, 90-91 (2020) (holding that a PAGA representative who settles her individual claims, maintains standing to pursue her PAGA action).

injunctive relief that would survive in court. ER0022-23. The District Court cited Clifford v. Quest Software Inc., 38 Cal. App. 5th 745, 755 (Ct. App. 2019), as grounds for this skepticism. Id. However, Clifford is plainly distinguishable. To begin with, Clifford did not address an independent contractor claim at all, but rather addressed an overtime misclassification claim, which does not carry the attendant harm and complete deprivation of basic employee protections as independent contractor misclassification, like paid sick leave. 38 Cal. App. 5th at 755. Further, the plaintiff in Clifford did not allege total denial of paid sick leave in the midst of a global pandemic during which he had to continue to work in order to provide essential services. The lone California Court of Appeal case addressing public injunctive relief in the employment context should not be read as foreclosing the availability of public injunctive relief *writ large* in *all* employment cases, and certainly not when arising under the dire circumstances presented here. The Massachusetts Attorney General, whose viewpoints and actions have mirrored that of the California Attorney General in pressing for companies to provide paid sick leave and in attempting to hold Uber and Lyft's feet to the fire, see supra pp. 25 & note 19, has agreed with Plaintiffs here, that an order enjoining Lyft's misclassification and mandating that Lyft acknowledge drivers' accrued sick

leave and allow drivers to use sick leave, would constitute public injunctive relief. ER0257-58 ("Here, the risk of harm to [Lyft's] drivers and to the general public is readily apparent").

Common sense dictates that an injunction that would prevent further harm to public health, by enforcing a state-mandated paid sick leave and thereby stemming the spread of a global pandemic, constitutes public injunctive relief. See McGill, 2 Cal. 5th at 951.[40] The pandemic has all too plainly taught us that harming workers' health by denying paid sick leave is not a "private dispute" but constitutes a "public wrong" that puts us all in danger. The number of drivers who contributed to the spread of COVID-19 in California because they, like Plaintiff Ebadat, felt sick but continued to drive due to lack of paid sick leave, remains untold. Lack of paid sick leave

[40] In McGill, the plaintiff sought to enjoin Citibank's marketing of its "credit protector" plan, which promised to defer (or credit) credit payments when a qualifying event like the loss of employment occurred. 2 Cal. 5th at 952. McGill sued Citibank in 2011 for its marking of the plan and mishandling of her claim under the plan when she lost her job in 2008. Id. at 953. In other words, McGill sought to enjoin an unlawful business practice that put her, and other consumers, in a financially precarious position, having relied on the plan to offer deferment or credit as promised, in the event of job loss. Similarly, here Plaintiffs seek to enjoin an unlawful business practice that engenders financial insecurity and endangers the health of those swept into Lyft's business model – drivers, passengers, and the public at large, who face a heightened risk of contracting COVID-19 because of the ways in which drivers may spread the disease.

may have caused (and may continue to cause) preventable deaths. There is no reason to allow this threat to continue.[41]

B. Lyft's Motion to Compel Arbitration Should Also Have Been Denied Because Lyft Drivers Fall Under the Transportation Worker Exemption to the Federal Arbitration Act

As an alternative basis for denying Lyft's motion to compel arbitration, the District Court should have recognized that Lyft drivers fall within the transportation worker exemption to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1. A federal court addressing this exact same issue recently agreed that Lyft drivers fall under this exemption and cannot have their claims compelled to arbitration. See Cunningham v. Lyft, Inc., No. 2020 WL 1503220, at *6-7 (D. Mass. Mar. 27, 2020), appeal pending, Case No. 20-1357 (1st Cir.).

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[41] On remand, the Superior Court denied the plaintiffs' public injunctive relief request based on the incorrect conclusion that it was bound by the Court of Appeal's decision in Clifford and the Superior Court largely simply followed the federal court's analysis that (even though the federal court believed it did not have jurisdiction to decide the issue) strongly suggested that such relief would not be warranted, as described. See Rogers v. Lyft Inc., Case No. 20-583685, Order Granting Motion to Compel Arbitration and Stay and Denying Application for Emergency Injunctive Relief, at *5-8, (Sup. Ct. Cal. April 30, 2020) [Docket No. 92-1]. The Superior Court decision is pending review on appeal, see Case No. A160182 (Cal. App. Ct. 1st Dist.).

The Section 1 transportation worker exemption provides that the FAA shall not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Thus, to qualify for this exemption, an individual: (1) must work for a business pursuant to a "contract of employment"; (2) be a "transportation worker"; and (3) be "engaged in interstate commerce." Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118 (2001)).[42] Here, Lyft did not contest that Plaintiffs worked pursuant to a "contract of employment" as that phrase was interpreted by the Supreme Court in New Prime, Inc., 139 S. Ct. at 538, 543-44 (holding that "contracts of employment" include contracts of both employees and independent contractors). Thus, the court focused on the second and third prongs of this test – namely, whether Lyft drivers qualify as "transportation workers" who are "engaged in interstate commerce."

[42] The law is now clear that the applicability of this exemption is for a court to determine, not an arbitrator. See Oliveira v. New Prime, Inc., 139 S. Ct. 532, 538 (2019).

1. The District Court Correctly Found That Lyft Drivers Are Transportation Workers Within The Meaning of Section 1 Even Though They Transport Passengers, Not Goods

The District Court correctly rejected Lyft's argument below that only workers who "transport goods (as opposed to people)" can qualify as "transportation workers" under Section 1. ER0013. The Third Circuit recently reached the same conclusion, holding that workers who transport passengers may also qualify for the exemption. Singh v. Uber Technologies, Inc., 939 F.3d 210, 221 (3d Cir. 2019) (noting that "nothing in the residual clause of § 1 suggests that it is limited to those who transport goods, to the exclusion of those who transport passengers" and "[i]n fact, the text indicates the opposite."). The Singh court noted that the other two enumerated categories of workers -- railroad employees and seamen -- transport both goods and passengers. Id. at 221-22. The First Circuit recently joined the Third Circuit in this conclusion, noting that "those who transported goods or passengers that were moving interstate" were considered to be "engaged in interstate commerce" at the time of the FAA's passage in 1925. Waithaka v. Amazon.com, Inc., 2020 WL 4034997, at *6 (1st Cir. July 17, 2020) (emphasis added). Here, the District Court correctly followed the reasoning adopted in Singh, Waithaka, and Cunningham in concluding that "the goods-passengers distinction is nowhere to be found in

the statutory text [of Section 1], which refers to 'foreign or interstate commerce'" and thus, "Section 1 is not limited to classes of workers who transport goods in interstate commerce." ER0013.

2. The District Court Erred in Holding That Lyft Drivers Are Not "Engaged in Interstate Commerce" Within the Meaning of Section 1

The District Court, however, then erred in concluding that Lyft drivers are not "engaged in interstate commerce" as that phrase is used in Section 1 of the FAA, notwithstanding the fact that some Lyft drivers do transport drivers across state lines and that many Lyft drivers routinely transport passengers to and from airports, bus terminals, and the like as part of the passengers' continuous interstate journeys.[43] Numerous courts have recognized that workers are "engaged in interstate commerce" within the meaning of Section 1, even if they themselves do not cross state lines, but instead transport goods (or passengers) who cross state lines "within the

[43] Whether Lyft drivers are "engaged in interstate commerce" must be analyzed in reference to the class of workers that the individual belongs to, rather than the particular work of the individual plaintiff. See Singh, 939 F.3d at 227; Bacashihua v. U.S. Postal Service, 859 F.2d 402, 405 (6th Cir. 1988). The District Court recognized as much in its order below. ER0015-16 ("The plaintiffs' personal exploits are relevant only to the extent they indicate the activities performed by the overall class.").

flow of interstate commerce."[44]

Indeed, the First Circuit recently reached the same conclusion with respect to so-called "gig economy" delivery drivers for Amazon who used an application on their phone to arrange for the delivery of packages to customers. In Waithaka v. Amazon.com, Inc., 2020 WL 4034997, at *4-5, the First Circuit looked to the Supreme Court's interpretations in Circuit City and New Prime to determine what it means to be "engaged in" interstate commerce under Section 1. The Court held that it had to "interpret the Section 1 exemption according to the 'fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.'" Id. at *5

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[44] See, e.g., Muller v. Roy Miller Freight Lines, LLC, 23 Cal. App. 5th1056, 1065-69 (Cal. Ct. App. 2019); Nieto v. Fresno Beverage Co., Inc., 33 Cal. App. 5th 274, 281-85 (Cal. Ct. App. 2019), reh'g denied (Mar. 27, 2019) (intrastate liquor delivery driver who transported items solely within California found to be exempt under Section 1); Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988) (postal worker, who made only intrastate deliveries, was engaged in interstate commerce); Palcko v. AirborneExpress, Inc., 372 F.3d 588, 593-94 (3rd Cir. 2004) (supervisor who merely supervised drivers making intrastate deliveries in the "Philadelphia area" was exempt); Rittmann v. Amazon.com, Inc., 383 F. Supp. 3d 1196, 1201 (W.D. Wash. 2019) (holding "gig economy" last-mile delivery drivers for Amazon were exempt, even where they did not cross state lines), appeal pending, Case No. 19-35381 (9th Cir.); Hamrick,et al. v. US Pack Holdings, LLC, et al., Civ. A. No.6:19-cv-137 (M.D. Fla. August 15, 2019) Dkt. 88, at *4; Christie v. Loomis Armored US, Inc., 2011 WL 6152979, *3 (D. Colo. Dec. 9, 2011); Ward v. Express Messenger Sys. Inc. dba Ontrac, Civ. A. No. 1:17 -cv-02005 (D. Co. Jan. 28, 2019), Dkt. 118.

(quoting New Prime Inc., 139 S. Ct. at 539). "Consistent with the approach used in Circuit City,"[45] the First Circuit looked to the Supreme Court's "interpretation of a similar jurisdictional phrase in the Federal Employers' Liability Act (the 'FELA')", which was passed in 1908 and interpreted by the courts in the years leading up to the FAA's passage in 1925. Id. at *6. As the First Circuit acknowledged in Waithaka, see id. at *7-8, cases decided under the FELA illustrate that, at the time it enacted the FAA, Congress's understanding of the phrase "engaged in interstate commerce" included intrastate transportation of goods that were bound for out-of-state or coming from out-of-state (or even work that did not involve the physical transportation of goods at all where that work was "so closely related to" interstate transportation "as to be practically a part of it.", see Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 542, 544 (1924)). Thus, a "class of

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[45] While interpreting the phrase "engaged in commerce" in Section 1, the Supreme Court in Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 116 (2001), noted that phrases such as "in commerce" or "engaged in commerce" were "often-found words of art…." The Circuit City Court cited favorably to "a pair of cases decided in the 1974 Term concerning the meaning of the phrase 'engaged in commerce' in § 7 of the Clayton Act", which was passed in 1914, some years prior to the FAA. The Circuit City court noted that "the phrase 'engaged in commerce'…'means *engaged in the flow of interstate commerce*…'" Id. at 117; see also id. at 118 (noting that the "engaged in commerce" language "denote[s] only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.")).

workers engaged in foreign or interstate commerce" in 1925 would be understood to include workers transporting goods or passengers within the flow of interstate commerce even if they themselves did not physically cross state lines (i.e. workers transporting passengers within a single state as part of a larger interstate journey).

For example, in Philadelphia & R.R. Co. v. Hancock, 253 U.S. 284, 285 (1920), the Supreme Court held that that even where "[t]he duties of [a train crew member] never took him out of Pennsylvania", and he solely transported coal to a destination two miles away, he was nonetheless engaged in interstate commerce under FELA because the coal he was transporting was bound for another state. Similarly, in Burtch, the Supreme Court held that workers who unloaded freight from trains that had transported the freight from out of state were engaged in interstate commerce because the work was "so closely related to" interstate transportation "as to be practically a part of it." 263 U.S. at 544. Both Burtch and Hancock demonstrate that the analysis (as Congress would have understood when it enacted the FAA) focuses *on the flow* of goods or passengers interstate and does not require that the workers physically cross state lines.

Relying on these decisions, the First Circuit in Waithaka concluded:

> The original meaning of the phrase "engaged in ... interstate commerce," revealed by the FELA precedents, and the text, structure, and purpose of the FAA, all point to the same conclusion: Waithaka and other last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers "engaged in ... interstate commerce," regardless of whether the workers themselves physically cross state lines.

Waithaka, 2020 WL 4034997, at *11. Here, as in Waithaka and the FELA decisions cited above, Lyft drivers routinely transport passengers within the flow of interstate commerce by taking them to or picking them up from the airport, train stations, or bus terminals as one part of a larger, continuous interstate journey. ER0495, ⁋ 31; ER0223, ⁋ 6 ("I often take rides to and from the San Jose Airport. Recently, I have had Lyft and Uber riders returning from Japan, New York City, and several Canadian riders …"); see also cases cited infra, pp. 60 (noting that even where drivers only occasionally crossed state lines, they were "engaged in interstate commerce" under Section 1).[46]

[46] Lyft drivers frequently pick up and drop off passengers at the airport (as well as bus terminal and train stations) and account for a large amount of the ground transportation at airports in California. See "California airport information for drivers," (last accessed July 21, 2020), available at: https://help.lyft.com/hc/en-us/articles/115013081008-California-airport-information-for-drivers (describing detailed regulations and instructions for picking up or dropping off at 45 different California airports); see also Susan Carpenter, "Los Angeles Rethinks Taxis as Uber and Lyft Dominate the Streets" N.Y. Times (Jan. 12, 2020), available at: https://www.nytimes.com/2020/01/12/business/los-angeles-taxis-uber-

As noted, another federal court considering this very question concluded that Lyft drivers are "engaged in interstate commerce" within the meaning of Section 1 because they transport passengers within the flow of interstate commerce even when they do not cross state lines. Cunningham v. Lyft, Inc., No. 2020 WL 1503220, at *6-7 (D. Mass. Mar. 27, 2020), appeal pending, Case No. 20-1357 (1st Cir.). The Cunningham court concluded that Lyft drivers "help facilitate [passengers'] movement, as the first or last leg of the journey, including into or out of Massachusetts… Therefore, the Lyft drivers are part of the chain of interstate commerce, enabling their passengers to leave or enter Massachusetts." Id. at *7 (internal citation omitted).[47]

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lyft.html (noting that "taxis handled just 22 percent of pickups at [LAX in 2019]; Ride-hailing businesses [like Lyft and Uber] claimed the rest.") Moreover, it is not disputed that Lyft drivers sometimes cross state lines in the course of their duties. See, e.g., Keane, Sean "Lyft's longest ever ride was a 639-mile drive from Colorado to Iowa" (Sept. 19, 2018), available at: https://www.cnet.com/news/lyft-reveals-disneyland-happy-hour-stats-to-celebrate-1-billion-rides/ (describing Lyft ride across state lines); Scalzi, John, "My 300 Mile Lyft Ride From Chicago to Bradford" (July 23, 2019), available at: https://whatever.scalzi.com/2019/07/23/my-300-mile-lyft-ride-from-chicago-to-bradford/ (same).

[47] In Cunningham, the court also considered the eight factors set forth by the Eighth Circuit in Lenz v. Yellow Transp., Inc., 431 F.3d 348 (8th Cir. 2005), as modified to consider transportation of passengers, and found "a number of the factors" were met: "Plaintiffs works in the transportation industry. The vehicles that Plaintiffs use are central to Plaintiffs' job duties and are vital to Lyft's commercial enterprise. There is also a complete nexus between Plaintiffs' duties and the vehicle they respectively use to carry out

However, notwithstanding the highly persuasive reasoning of the Cunningham court and the numerous decisions cited above, the District Court here nonetheless concluded that Lyft drivers are not "engaged in interstate commerce", relying exclusively on a distinguishable Supreme Court decision decided *decades after* the FAA was passed, United States v. Yellow Cab Co., 332 U.S. 218 (1947), overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984). There, in the context of a decision under the Sherman Anti-Trust Act, the Supreme Court concluded that Chicago taxicabs were not involved in the stream of interstate commerce "when local taxicabs merely convey interstate train passengers

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those duties." 2020 WL 1503220, at *7. Because the court found that Lyft drivers directly continued the flow of interstate commerce (that facilitating the flow of interstate commerce through intrastate trips was not "incidental" to the work of Lyft drivers but "essential to their work"), the court found that the Lenz factors weighed in favor of finding that the drivers engaged in interstate commerce. Id. (holding that for transportation workers who transport passengers, the "critical question" is "whether they transport passengers that travel interstate."). Plaintiffs further submit that, with the growing importance of the "gig economy", a strike by Lyft drivers (and other similar gig workers) could very well now disrupt the national economy (seventh Lenz factor), further bolstering the court's conclusion in Cunningham.

Here, the District Court erroneously held that "[e]ven assuming that the Lenz factors are relevant in this context, ... there is no need for recourse to an indeterminate balancing test in light of the Supreme Court's analysis in Yellow Cab." ER000018, n. 3. As set forth infra, pp. 58-63, the District Court's reliance on United States v. Yellow Cab Co., 332 U.S. 218 (1947) is misplaced, and its dismissal of the Lenz factors was error.

between their homes and the railroad station in the normal course of their independent local service." Yellow Cab Co., 332 U.S. at 233.

Contrary to the District Court's conclusion below, Yellow Cab does not control the transportation worker exemption analysis in this case. As set forth supra, pp. 53-56, at the time Congress enacted the FAA in 1925, case law under FELA interpreted the phrase "engaging in interstate commerce" to include intrastate transportation that was one part of a continuous interstate journey or had a strong nexus with the interstate journey. See, e.g., Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 542, 544 (1924); Philadelphia & R.R. Co. v. Hancock, 253 U.S. 284, 285 (1920); see also Philadelphia & R R Co v. Polk, 256 U.S. 332, 334 (1921). Because these cases were decided shortly *before* the enactment of the FAA, they provide the relevant guidance as to what Congress intended when it enacted the FAA, not Yellow Cab, which was decided several decades later. The Supreme Court recently noted that "it's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... *at the time Congress enacted the statute*.'" New Prime Inc, 139 S. Ct. at 539 (quoting Wisconsin Central Ltd. v. United States, 138 S.Ct. 2067, 2074 (2018)) (emphasis added). The First Circuit's decision in Waithaka reinforces this conclusion, by resting its decision on

the "original meaning of the phrase 'engaged in ... interstate commerce,' [in 1925 as] revealed by the FELA precedents…" Waithaka, 2020 WL 4034997, at *11. The District Court erred in placing more weigh on Yellow Cab than on decisions that directly informed Congress's understanding of the phrase "engaged in interstate commerce" when the FAA was passed.

Furthermore, Yellow Cab is distinguishable on the facts. There, the Chicago ordinance explicitly limited the cab drivers to transportation within the city limits, see Yellow Cab, 332 U.S. at 230-31, whereas here, it is undisputed that Lyft drivers provide service anywhere and routinely cross city limits, sometimes even crossing state lines. See supra, n. 46. Indeed, the District Court itself admitted that Lyft allows "people to 'hail' rides from its drivers from pretty much anywhere to pretty much anywhere." ER0017 (emphasis added). Thus, Lyft drivers are not providing the same type of purely "local" service as the cab drivers in Yellow Cab.

Moreover, the District Court erred in discounting the fact that some Lyft drivers do transport passengers across state lines, which further distinguishes them from the taxi drivers in Yellow Cab who never left the Chicago city limits. Indeed, some courts have held that even if a small amount of the drivers' work is across state lines, that minor amount of interstate transportation is sufficient to qualify them for the Section 1

exemption. See Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012) (where truckers estimated making a few dozen interstate deliveries out of 1500 to 1750 deliveries each year, the court held that "[a]lthough Illini Concrete was primarily engaged in operations within Illinois, its truckers occasionally transported loads into Missouri. This means that the truckers were interstate transportation workers within the meaning of § 1 of the FAA.") (emphasis added); Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Cartage Co., 84 F.3d 988, 993 (7th Cir. 1996) (Section 1 exemption applied even where defendant was "primarily engaged in local trucking and *occasionally* transports cartage across state lines") (emphasis added); see also Vargas v. Delivery Outsourcing, LLC, 2016 WL 946112, at *4 (N.D. Cal. Mar. 14, 2016) ("Delivery drivers may fall within the exemption for 'transportation workers' even if they make interstate deliveries only 'occasionally.'"); Siller v. L & F Distributors, Ltd., 109 F.3d 765, *2 (5th Cir. 1997) (finding interstate commerce where only "approximately 39% of the truckloads … contained some out-of-state products"). Here, Lyft does not deny that its drivers do sometimes cross state lines; Lyft does not restrict cross-state trips and contemplates that riders will seek long trips. See supra, n 46. The District Court erroneously ignored this fact in its analysis below, concluding that "[i]nterstate trips that occur by

happenstance of geography do not alter the intrastate transportation function performed by the class of workers." Id.[48]

The District Court apparently concluded that the fact that Lyft drivers occasionally make interstate trips and frequently make trips to airports as part of a larger interstate journey does not qualify them as "engaged in interstate commerce" because Lyft's transportation business is not *specifically directed* at "interstate" travel; according to the District Court "if Lyft's focus were the service of transporting people to and from airports",

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[48] In support of this assertion, the District Court cited the Eleventh Circuit's decision in Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286, 1290 (11th Cir. 2005). But the Hill case is clearly distinguishable; the case involved an "account manager" for a business that rented furniture and appliances to customers on a 'rent-to-own' basis. Id. at 1288. The briefing makes clear that Hill's job duties included "calling customers when their accounts were past due[,]… answering phone calls, reviewing past due accounts, cleaning the showroom, restroom, work areas, and merchandise, making the merchandise available for rent after return from customers, and distributing brochures." See Brief of Defendant-Appellee, Hill v. Rent-A-Ctr., Inc., 2004 WL 3314614, *6 (C.A.11). Making "deliver[ies] of goods to customers out of state in his employer's truck" was merely one very small and "incidental" part of his overall job duties. Hill, 398 F.3d at 1288-89. Thus, the Hill decision speaks to whether a worker qualifies as a "transportation worker" at all -- not whether he or she is "engaged in interstate commerce." See Zamora v. Swift Transp. Corp., 2008 WL 2369769, at *9 (W.D. Tex. June 3, 2008), aff'd, 319 F. App'x 333 (5th Cir. 2009) (describing the basis for the court's holding in Hill as being "that the employee was not employed in the transportation industry" and Hill was therefore "not relevant to the instant case," where plaintiff was a truck terminal manager). By contrast, there can be no question that Lyft drivers are transportation workers employed in the transportation industry. Thus, Lyft drivers are far more like the delivery drivers in Int'l Bhd. of Teamsters Local Union No. 50, 702 F.3d at 957, whose occasional interstate deliveries were sufficient to render them exempt under Section 1, than they are like the account manager in Hill who was not a transportation worker at all.

the plaintiffs might qualify for the exemption. ER0016. But this reasoning is contrary to numerous decisions, including the district court in Cunningham. Indeed, the only case the District Court cites in support of its dubious reasoning is Yellow Cab, which is distinguishable for the reasons described above.

In sum, the District Court erred in finding Plaintiffs are not transportation workers engaged in interstate commerce and therefore exempt from the FAA. As in Cunningham and Waithaka, here, the District Court should have found that Lyft drivers are "engaged in interstate commerce" because they are integral to modern-day interstate transportation, and they perform vital "last-mile" transportation of passengers on their interstate journeys. Contrary to the District Court's ruling below, the Supreme Court's decision in Yellow Cab does not mandate a different result. That case, decided two decades after the FAA's passage, is not as persuasive as the FELA cases of the 1920's, and Yellow Cab itself makes clear that whether particular transportation of goods or passengers is within the flow of interstate commerce is highly contextual and will be marked by "practical considerations." 332 U.S. at 231. Here, a practical approach counsels in favor of recognizing that in this day and age, like the "seamen" and "railroad

employees" enumerated in Section 1, Lyft drivers are a critical part of the interstate transportation system.

3. If The FAA Does Not Apply, Then Arbitration Cannot Be Compelled Because The Arbitration Provision is Unenforceable Under State Law

Finally, if Lyft drivers are exempt from the FAA under the transportation worker exemption, Lyft cannot enforce its arbitration agreement under state law. Because Lyft's agreement does not provide for any state's arbitration law to govern its agreement in the absence of the FAA, see ER0534, ER0545[49], Lyft cannot compel arbitration of the drivers' claims. A number of courts have concluded that, if an the agreement specifies that the FAA will apply to the arbitration provision and does not supply an alternate state's law to govern if the FAA does not apply, there is no meeting of the minds and no clear intent to arbitrate at all in the event the FAA does not apply. See Nieto, 33 Cal. App. 5th at 285-86; Rittmann, 2019 WL 1777725, *5 (because in the absence of the FAA "it is not clear what law to apply to the Arbitration Provision or whether the parties intended the Arbitration Provision to remain enforceable in the event that the FAA was found to be inapplicable, the Court finds that there is not a valid agreement

[49] The agreement specifies that "[e]xcept as provided in Section 17, this Agreement shall be governed by the laws of the State of California." ER0545. Section 17 is the arbitration agreement.

to arbitration"); Ward, Civ. A. No. 1:17-cv-02005, Order on Motion to Compel Arbitration, Dkt. 118 at 11-12 (D. Co. Jan. 28, 2019) (denying motion to compel arbitration because plaintiffs fell within transportation worker exemption); see also Easterday v. USPack Logistics, LLC, Civ. Act. No. 1:15-cv-07559, Order at *14-18, Dkt. 194 (D.N.J. April 27, 2020) (holding that where an arbitration clause states that the FAA shall govern, but does not provide for what state's arbitration law will govern in the event that the FAA is held not to apply, then the arbitration agreement will not be enforceable).

Moreover, even if the Court were to decide that California law would apply[50], in the absence of the overlay of federal preemption under the FAA, Lyft's arbitration agreement cannot be enforced under the California Arbitration Act ("CAA"), Cal. Code Civ. P. § 1281, *et seq*., because it contains a class waiver that would not pass muster under Gentry v. Superior Court, 42 Cal. 4th 443, 466 (2007). Specifically, the factors set forth in Gentry -- "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of

[50] Lyft has waived any argument that its agreement is enforceable under California law. The District Court recognized in its decision below that "Lyft hasn't argued here that the plaintiffs can be compelled to arbitrate under California law if they are exempt transportation workers." See ER0012, n. 2.

the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to [wages]" -- all counsel in favor of finding Lyft's class action waiver is unenforceable. Id. at 463.

At least two courts (including the First Circuit Court of Appeals in Waithaka) have already held that, where drivers were exempt from the FAA under Section 1, state law prohibited the class action waivers in the drivers' agreements, rendering the agreements unenforceable. See Waithaka, 2020 WL 4034997, at *17 (noting that Massachusetts "would [] invalidate a class waiver in an employment contract, like that of Waithaka, not covered by the FAA. … Notwithstanding the Supreme Court's view that such state policies must give way when the FAA governs a dispute, the policies remain intact where, as here, the FAA does not preempt state law."); Cunningham, 2020 WL 1503220, at *8-9 (concluding that Lyft's arbitration agreement is unenforceable under Massachusetts law) (emphasis added). The same is true here; in the absence of the FAA, California law, stripped of the overlay of federal preemption, renders Lyft's class action waiver unlawful.

CONCLUSION

For the reasons discussed here, this Court should reverse the District Court's order below and enter an order requiring the entry of an appropriate preliminary injunction, enjoining Lyft from continuing to flout California law by misclassifying its drivers as independent contractors and thereby denying them paid sick leave. The District Court had the power to issue an injunction prior to ruling on Lyft's Motion to Compel arbitration, and Plaintiffs met the four requirements for a preliminary injunction. Even if the District Court needed to first rule on the enforceability of the arbitration clause, it should have denied Lyft's motion to compel arbitration, since Plaintiffs sought public injunctive relief and because Uber drivers are exempt under the FAA's Section 1 transportation worker exemption.

The District Court should have granted Plaintiffs' motion for a preliminary injunction, and it should have denied Lyft's motion to compel arbitration. This Court should reverse.

Respectfully submitted,

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By their attorneys,

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UNITED STATES COURT OF APPEALS
For the Ninth Circuit
Appeal Nos. 20-15689, 20-1570

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Nos. 20-15689, 20-15700

CERTIFICATE OF SERVICE

I, Shannon Liss-Riordan, hereby certify that this brief was filed through the United States Court of Appeals for the Ninth Circuit ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), including the following counsel of record for Defendant –Appellee:

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