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SUPREME COURT OF THE STATE OF WASHINGTON

THE WASHINGTON FOOD INDUSTRY ASSOCIATION,
et al.,
Respondents,

v.

THE CITY OF SEATTLE,
Petitioner.

**BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT
LAW PROJECT, ECONOMIC POLICY INSTITUTE,
JOBS WITH JUSTICE, NATIONAL COUNCIL FOR
OCCUPATIONAL SAFETY AND HEALTH,
AND PUBLIC RIGHTS PROJECT**

IN SUPPORT OF PETITIONERS

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I. INTRODUCTION

Amid the COVID-19 pandemic, the Seattle City Council enacted, and the Mayor of Seattle signed into law, Ordinance No. 126094 (the “Ordinance”), a public health emergency ordinance that requires app-based food delivery companies or “food delivery network companies,” such as Instacart, DoorDash, and Uber Eats, to provide premium pay to their drivers for food deliveries made in Seattle.

The Ordinance narrowly targets a set of workers who, due to their classification (or *misclassification*) as independent contractors, lack ordinary wage protections and social insurance supports. The proper classification of Seattle’s app-based delivery workers is not at issue here, and *amici* will not address it in detail. Nonetheless, to understand why the City of Seattle has a reasonable public policy interest in instituting hazard pay for workers who have been left exposed and vulnerable to the coronavirus, their purported status as independent contractors—and the resulting lack of benefits

and protections—is relevant.

Ordering food and grocery delivery via an app has become very popular during the COVID-19 pandemic. But for workers making the deliveries, the jobs are characterized by abysmally low wages, endemic labor violations, and serious occupational hazards. Because the companies call their workers independent contractors and not employees, workers for app-based delivery companies have trouble gaining the protection of workplace laws and coverage under critical social safety net programs like unemployment insurance, workers' compensation, and paid leave. By insisting on classifying their workers as contractors, delivery network companies have exacerbated the chronic economic insecurity faced by so many workers in Seattle and across the country.

The City's Ordinance is a reasonable and much-needed policy to temporarily elevate the pay of delivery workers—who often receive subminimum wages and cannot set their own rates, despite their supposed independence as small

businesses—during the COVID-19 pandemic.

Because Respondent City of Seattle had a reasonable basis to enact Ordinance No. 126094, and given the facts, the law, and the public policy goals underlying the present dispute—as detailed in Petitioner’s brief and below—*amici* urge the Court to settle the issues in Petitioner’s favor and to dismiss the Complaint in its entirety.

II. IDENTITY AND INTERESTS OF AMICI

Amici curiae are national nonprofit organizations that work to advance workers’ rights and economic justice through legal and policy advocacy. *Amici* are familiar with illegal business practices that exploit workers, such as corporations’ independent contractor misclassification, and have extensive experience advocating on behalf of underpaid workers, including immigrants and workers of color. *Amici* have a strong interest in this case because interruption of the City’s Ordinance will harm app-based delivery workers, who have worked throughout the pandemic while being locked out of ordinary

benefits and protections.

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

The **Economic Policy Institute** (“EPI”) is a nonprofit organization with over 35 years of experience analyzing the effects of economic policy on the lives of working people in the

United States. EPI has studied and produced extensive research on the economic implications of employers misclassifying workers as independent contractors, which is a longstanding, pervasive problem affecting millions of workers and costing government agencies billions of dollars each year. Further, EPI research shows that misclassification is rampant in low-wage, labor-intensive industries where women and people of color are overrepresented. EPI has participated as *amicus curiae* in numerous cases addressing the implications of employer misclassification of independent contractors under federal and state labor and employment laws. EPI strives to protect and improve the economic conditions of working people.

Jobs With Justice Education Fund is a 501(c)(3) nonprofit organization that believes that all workers should have collective bargaining rights, employment security, and a decent standard of living within an economy that works for everyone. We bring together labor, community, student, and faith voices at the national and local levels to win

improvements in people’s lives and shape the public discourse on workers’ rights and the economy. Jobs With Justice has done significant research on the compensation that gig workers for app-based companies—including food delivery network companies—receive, has worked on and supported organizing efforts for gig workers, and has advocated for policy changes to benefit gig workers.

The **National Council for Occupational Safety and Health** (“**COSH**”) is dedicated to promoting safe and healthy working conditions for all working people through organizing and advocacy. Our belief that almost all work-related deaths and serious injuries and illnesses are preventable motivates us to encourage workers to take action to protect their safety and health, promote protection from retaliation under job safety laws, and provide quality information and training about hazards on the job and workers’ rights. A decision against the City of Seattle in this case would put many workers performing dangerous jobs in peril, and by extension would harm the

broader community as well.

Public Rights Project (“PRP”) works at the intersection of community organizing and government enforcement, with a specific focus on catalyzing equitable and community-based enforcement. Spurred by a mission to bridge the gap between the promise of laws and the lived experiences of historically underserved groups, PRP has focused considerable attention advocating for enforcement of needed protections against businesses exploiting workers in the fissured economy as well as connecting government enforcement agencies with organizations that support affected workers. PRP has focused its advocacy efforts on protecting the rights of gig workers, an especially vulnerable group, given the low wages provided and the lack of safety precautions during the COVID-19 pandemic.

Rather than repeat the arguments made by Petitioner, *amici* here seek to highlight the dire working conditions faced by platform delivery workers, in Seattle and across the country, and to underscore the importance of temporary local protections

such as Seattle's premium pay ordinance.

III. STATEMENT OF THE CASE

In June 2020, in response to the COVID-19 pandemic and the hardships it wrought on food delivery workers, the City of Seattle enacted Ordinance No. 126094, requiring food delivery network companies to provide premium pay to their drivers for deliveries made in Seattle. Not long after the bill's passage, the Washington Food Industry Association and Maplebear, Inc. (d/b/a Instacart) sued the City in King County Superior Court, challenging the ordinance and seeking declaratory and injunctive relief and damages.

The City moved to dismiss the case under CR 12(b)(6) for failure to state a claim for relief. The superior court denied the motion with respect to all of respondents' claims except for the tax law cause of action, which the court dismissed. After filing a motion for reconsideration and to certify the matter for immediate interlocutory review, which was denied by the court, the City sought discretionary review directly in this Court.

The Court granted review on July 2, 2021.

IV. ARGUMENT

A. **Workers for app-based delivery companies—mostly poor people of color and immigrants—must labor without access to the most basic workplace protections.**

In Seattle and across the country, app-based delivery workers suffer poor working conditions with low wages and lack access to benefits or protections. Because their employer calls them contractors, workers face obstacles to obtaining the standard employment rights that were meant to be enjoyed by most workers.

While app-based delivery companies advertise relatively high hourly earnings¹, many workers report that their pay is substantially lower than advertised. In an interview of three delivery workers across the country, including one in Seattle, workers noted that the advertised earnings do not include the

¹ See, e.g., DoorDash, *Dasher Pay – Discover how Dashers get paid and how it’s calculated*, <https://dasher.doordash.com/en-us/pay> (last visited Dec. 9, 2021) (“Dashers nationally earn \$25 per hour they work, including 100% of tips.”).

costs of gas, auto insurance, car maintenance, insulated delivery bags, and traffic and parking tickets that they are required to incur—and critically, they do not include the additional coronavirus-related expenses the workers have to incur, such as face masks, hand sanitizer, and other personal protective equipment (“PPE”).²

According to a survey of workers in New York City, delivery workers regularly experience low wages, stolen tips, and rampant theft while on the job.³ App-based delivery workers’ average net pay is \$7.87, and 85 percent of workers

² Patrick Fort, Ruth Tam, *Gig Work: The Fine Print of Food Delivery*, WAMU 88.5, <https://wamu.org/story/21/06/10/gig-work-the-fine-print-of-food-delivery/> (June 10, 2021). These conclusions are consistent with findings from *amici*’s engagement with food delivery and other app-based workers, including PRP’s survey of more than 100 Handy workers providing home cleaning services.

³ Maria Figueroa, et al., *Essential but Unprotected: App-based Food Couriers in New York City*, Cornell University Industrial and Labor Relations School & Workers’ Justice Project (Sept. 14, 2021), <https://img1.wsimg.com/blobby/go/6c0bc951-f473-4720-be3e-797bd8c26b8e/09142021CHARTSLos%20Deliveristas%20Undos-v02.pdf>.

reported that deliveries are their only job.⁴ Because many food deliveries are made on a bike or electric bike, there is significant risk of severe physical injury. 49 percent reported having been in an accident or crash while making a delivery. Of those, 75 percent said they paid for their medical care with their own personal funds.⁵ 54 percent reported having experienced bike theft, and of those, 30 percent said they were physically assaulted during the robbery.⁶ While the exact percentages may differ from city to city, based on *amici*'s experience advocating for and alongside workers across the country, the working conditions for Seattle's app-based workers likely are similar.

Another study, this one focusing on workers for Instacart, underscores the low pay that is typical of app-based delivery workers. Nationwide, Instacart's workers, on average, earn

⁴ *Id.* at 7.

⁵ *Id.* at 8.

⁶ *Id.*

under \$9 an hour after expenses.⁷ An analysis of more than 1,400 samples of pay data provided by Instacart workers found that half of the workers earn less than the federal minimum wage of \$7.25 an hour after expenses.⁸ These calculations do not account for the costs of benefits such as workers' compensation, unemployment insurance, or paid time off, to which workers would be entitled if they were classified as employees. The calculations deduct only payroll taxes (which independent contractors must pay at a higher rate than employees) and unreimbursed gas mileage. And that gas mileage adds up quickly: Instacart reimburses only the distance from a given store to a customer's drop-off location, while leaving workers holding the bag for the miles they must drive

⁷ Kathleen Griesbach, et al., *Algorithmic Control in Platform Food Delivery Work*, 5 *Socius: Sociological Research for a Dynamic World* 1, 9 (2019), <https://journals.sagepub.com/doi/pdf/10.1177/2378023119870041>; *Delivering Inequality: What Instacart Really Pays, and How the Company Shifts Costs to Workers*, Working Washington (Apr. 17, 2019), <https://payup.wtf/instacart/delivering-inequality>.

⁸ *Delivering Inequality*, *supra* note 7.

from the location where they accept a job to the store.⁹ By one estimate, workers drive a median of 5.21 dispatch miles per job, incurring over \$3 per hour in unreimbursed costs.¹⁰ Much of workers' time on the job goes unremunerated, as well. Instacart's app-based workers report spending up to 20 percent of their time on the app waiting for jobs or driving to store locations—all unpaid time spent in service of Instacart's business.¹¹

Low and variable pay, occupational physical hazards, and significant out-of-pocket expenses—these are the working conditions shouldered disproportionately by poor workers of color and immigrants. According to data from the Bureau of Labor Statistics, Black and Latino workers make up almost 42

⁹ *See id.*

¹⁰ *Id.*

¹¹ Griesbach, et al., *supra* note 7 at 9; Chris Benner, *On-Demand and On-the-Edge: Ride-Hailing and Delivery Workers in San Francisco* 32, University of California Santa Cruz Institute for Social Transformation (May 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf.

percent of workers for Instacart and other “electronically mediated work” companies, although they comprise less than 29 percent of the overall U.S. workforce.¹² A recent survey of app-based delivery workers specifically (as opposed to the “electronically mediated” workforce at large) reflected similarly disproportionate demographics. In the California Bay Area, approximately 80 percent of app-based delivery workers are workers of color, and a majority are immigrants.¹³ In New York City, app-based delivery workers are disproportionately immigrant, and moreover tend to come from minority and marginalized groups within their immigrant communities.¹⁴

No person should have to accept jobs with such dismal

¹² Bureau of Labor Statistics, U.S. Dep’t of Labor, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, Monthly Labor Rev. (Sept. 2018),

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

¹³ Benner, *supra* note 11; *Delivering Inequality supra* note 7 at 9-11.

¹⁴ Figueroa, et al., *supra* note 3, at 23.

working conditions. Yet the demographic makeup of app-based delivery work—disproportionately racial and ethnic minorities, immigrants, and people from marginalized backgrounds—make clear that the industry exploits the desperation of those who face exclusions from secure, decent work.¹⁵

B. Even as “independent contractors,” app-based delivery workers cannot set their own rates to make up for the financial costs of the pandemic.

Seattle’s app-based food delivery workers have practically no ability to establish the terms of their work. A real independent businessperson gets to decide when they work, how they work, and for what rate. In ordinary times—or,

¹⁵ See generally Veena Dubal, *The New Racial Wage Code*, Harvard Law and Policy Review 19 (May 28, 2021) (“[R]acial minorities make up a disproportionate majority of the in-person platform workforce not incidentally, but *because of* the predacious practices central to the business models.”); Juliet Schor, *How the Gig Economy Promotes Inequality*, Milken Institute Review (Sept. 18, 2020), <https://www.milkenreview.org/articles/how-the-gig-economy-promotes-inequality> (“For while the trials of gig work are, of course, not the same as being at risk of police violence, low-paid app work has its own kind of violence, whether it’s via extra exposure to the virus, dangerous working conditions, bellicose customers or poverty wages.”).

perhaps better stated, in times before COVID-19—as costs like gas or parking rates go up, a businessperson can choose to pass along those costs to the customer. Now, additional public health-related expenses like face masks and hand sanitizers—what once might have been unusual expenditures—have become the norm during the pandemic. As businesses have taken on these additional costs, they can, and often *must* due to financial pressures, increase costs to the consumer. Yet workers for companies like Instacart, DoorDash, and Uber Eats, who supposedly are independent small businesses, do not have the flexibility to decide to increase their rates to make up for COVID-19-related expenses. Instead, those additional costs are borne directly by workers who, in “good times,” already were confronting devastating financial insecurity and hardship.

Though companies have claimed to provide workers with face masks, hand sanitizer, and thermometers,¹⁶ workers have

¹⁶ Instacart, *Distributing Health & Safety Kits for Shoppers*, Instacart News (Apr. 2, 2020), <https://medium.com/shopper->

had difficulty actually accessing these kits,¹⁷ and some who have been able to receive them have been disappointed with the quality of the PPE, reporting paper-thin masks, inaccurate thermometers, and “moonshine ethyl alcohol” sanitizer.¹⁸ Those who purchase adequate PPE themselves—either because they are unable to access the companies’ purported free offer, or because they are skeptical that the equipment provided will actually work—cannot recoup those costs by passing them on

[news/new-safety-measures-for-the-shopper-community-a153a8dc8a9d](https://medium.com/shopper-news/distributing-health-safety-kits-for-shoppers-a4d023932647); Instacart, *New Safety Measures for the Shopper Community*, Instacart News (May 21, 2020), <https://medium.com/shopper-news/distributing-health-safety-kits-for-shoppers-a4d023932647>.

¹⁷ See, e.g., Johana Bhuiyan, *The Coronavirus Crisis Has Been Great for Instacart. For its Workers, It’s a Different Story*, L.A. Times (Apr. 10, 2020), <https://www.latimes.com/business/technology/story/2020-04-10/instacart-workers-coronavirus-strike-work-conditions>; Arielle Pardes, *Instacart Workers Are Still Waiting for Those Safety Supplies*, Wired (Apr. 18, 2020), <https://www.wired.com/story/instacart-delivery-workers-still-waiting-safety-kits/>.

¹⁸ Pardes, *supra* note 17; *Instacart STILL Isn’t Protecting Their Shopper Community*, Gig Workers Collective (Apr. 25, 2020), <https://medium.com/@GigWorkersCollective/instacart-still-isnt-protecting-their-shopper-community-86060d448b1e>.

to customers, as they could if they were truly running their own businesses.¹⁹

At the same time, workers lack the independence to work when they like or to decline low-paying jobs, as they are punished through behavioral “nudges” on the app. For those who work for Instacart, for example, it is not simply that they choose to log on to the app to work at their own convenience. To even have a chance of making decent pay, workers must carefully navigate the rhythms and beats of the app and its algorithm. In order to have consistently reliable access to work, workers must maintain “early-access status,” which allows them to sign up on Sundays for shifts in the following week. Without this status, workers are left to scrounge for the few (if

¹⁹ In any event, whether delivery network companies are offering adequate PPE does not impact the reasonableness of Seattle’s decision to provide premium pay to delivery workers. Courts have regularly upheld COVID-19 protocols as advancing important public health and safety interests. *See, e.g., Wise v. Inslee*, No. 2:21-CV-0288-TOR, 2021 WL 4951571, at *5 (E.D. Wash. Oct. 25, 2021) (upholding vaccination mandate for state workers).

any) shifts leftover.²⁰ In order to have such status, workers must work a minimum number of hours (at least 90 hours over the preceding three weeks or 25 hours over the preceding three weekends) while adhering to the company’s preferences for where and how they perform that work. They also must adhere to Instacart’s “recommendations” for worker conduct. If a worker cancels a shift within six hours of its start time or leaves the Instacart-designated “work zone” during a shift, for example, she receives too many “reliability incidents” and loses her early-access status.²¹ And early-access status is no perquisite. Workers describe it as nothing short of vital, recounting “wak[ing] up in a cold sweat in the middle of the night to check their app to make sure they still have” the coveted access to consistent work. Without this status, they emphasize, “you’re really not working.”²² Instacart and other delivery workers’ purported flexibility to set their own hours

²⁰ See Griesbach, et al., *supra* note 7, at 9-11.

²¹ *Id.* .

²² *Id.*

and manner of work is illusory: if they do not work as often as their employer would like, adhering to rules set by the company, they can hardly work at all.

Were workers for Instacart, DoorDash, and other food delivery companies true small business owners, they could work at their convenience, negotiate prices with customers to cover for increased expenses (particularly during COVID-19)—simple things that any truly independent businessperson would be able to do.²³ Their inability to do so, while working in an industry characterized by poor pay, underscores the importance of the City’s premium pay ordinance.

C. Given delivery workers’ financial hardships, uniquely due to their classification during an unprecedented public health crisis, the City’s Ordinance is a critical step to ensuring workers are healthy and financially secure during the pandemic.

Already suffering financial insecurity and related hardships before the pandemic, delivery workers have had their

²³ See *Delivering Inequality*, *supra* note 7 (noting that Instacart reimburses only the miles that workers drive from a store to a customer’s location, but not those that workers drive from the place where they accept a job to the store location).

problems multiply since COVID-19. As people “barricade themselves in their homes to practice ‘social distancing,’ delivery workers, typically an overlooked group, have now taken on outsized significance and are on the front lines of the outbreak.”²⁴ Called “coronavirus first responders,” food delivery workers risk on-the-job exposure to disease at almost the same rates as nurses and paramedics.²⁵ These pandemic-related occupational risks are on top of delivery workers’ risk of serious injury from car or bike accidents, as well as the daily stresses and physical strain inherent in the app-based delivery work model.

A survey of New York City app-based delivery workers

²⁴ Kimiko de Freytas-Tamura & Jeffrey E. Singer, *The Delivery Workers Who Risk Their Health to Bring You Food*, New York Times (Mar. 21, 2020), <https://www.nytimes.com/2020/03/19/nyregion/coronavirus-nyc-delivery-workers.html>.

²⁵ Wilfred Chan, *Food Delivery Workers Are Coronavirus First Responders—Here’s How You Can Repay Us*, NBC News (Mar. 22, 2020), <https://www.nbcnews.com/think/opinion/food-delivery-workers-are-coronavirus-first-responders-here-s-how-ncna1164946>.

quantifies the problems of the pandemic. They have been dramatically more vulnerable to the economic and public health consequences of COVID-19. The survey found that “[a]pp-based gig workers are twice as likely as workers who did not engage in app-based gig work to have contracted COVID-19[.]”²⁶ Particularly due to high health care expenses, as well as housing and food insecurity, app-based workers were “twice as likely as employees or even other self-employed workers to experience multiple hardships since the start of the pandemic.”²⁷ And 38 percent of app-based workers reported that they or a family member had contracted COVID-19 compared to 26 percent of regular employees.

Mariah Mitchell, a Seattle-based delivery worker, discussed the financial precarity confronting her and so many

²⁶ Irene Lew, Debipriya Chatterjee, and Emerita Torres, *The Gig is Up: An Overview of New York City’s App-based Gig Workforce during COVID-19* 18, Community Service Society (July 2021), https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Gig_Workers_V10.pdf.

²⁷ *Id.* at 20.

app-based workers during the pandemic: “I can’t self-quarantine because not working is not an option. If I don’t make enough money, I can’t feed my children for the next six weeks. I’m not stopping, fever or no fever. And that’s what most other gig workers would do too, because none of us makes enough money to save up for an emergency like this.”²⁸

Amid this reality, the premium pay ordinance, passed by the City Council and signed into law by the Mayor of Seattle, has had an invaluable positive impact for Seattle’s delivery workers during the pandemic. While delivery workers may be classified by their employers as independent contractors—even without the actual ability to increase rates to make up for coronavirus-related costs—and while they have difficulty accessing statutory rights like a guaranteed minimum wage and paid sick time due to this corporate labeling, the City’s

²⁸ Mariah Mitchell, *I Deliver Your Food. Don’t I Deserve Basic Protections?*, New York Times Opinion (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/opinion/coronavirus-food-delivery-workers.html>.

Ordinance has delivered at least \$600,000 in backpay for delivery workers.²⁹ Interruption of the Ordinance would be nothing short of devastating.

V. CONCLUSION

For these reasons, the Court should dismiss the Respondents' lawsuit and settle the issues in Petitioner's favor.

I certify that the foregoing brief contains 3,722 words, in compliance with RAP 18.17.

Respectfully submitted this 21st day of December, 2021.

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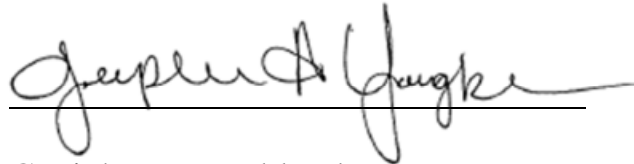
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²⁹ Daniel Beekman, *Seattle's COVID-19 rules have paid off for delivery-app drivers. What's next?*, The Seattle Times (May 16, 2021), <https://www.seattletimes.com/seattle-news/politics/seattles-covid-19-rules-have-paid-off-for-delivery-app-drivers-whats-next/>.

VI. DECLARATION OF SERVICE

I, Genipher Youngblood, hereby declare under penalty of perjury under the laws of the state of Washington that on the date noted below I caused the foregoing document to be filed with the Washington State Supreme Court via the appellate efilng system, which will automatically provide notice of such filing to all required parties.

Signed in Federal Way, WA, this 21st day of December, 2021.

A handwritten signature in black ink, appearing to read "Genipher Youngblood", written over a horizontal line.

Genipher Youngblood

BARNARD IGLITZIN & LAVITT

December 21, 2021 - 11:56 AM

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