

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

APPEAL NO. 20-1373, 20-1379, 20-1544, 20-1549, 20-1567

Nos. 20-1373, 20-1379

MELODY CUNNINGHAM, individually and on behalf of all others similarly situated;
FRUNWI MANCHO, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees/Cross-Appellants,
MARTIN EL KOUSSA, individually and on behalf of all others similarly situated;
VLADIMIR LEONIDAS, individually and on behalf of all others similarly situated,
Plaintiffs

v.

LYFT, INC.; LOGAN GREEN; JOHN ZIMMER
Defendants-Appellants/Cross-Appellees

Nos. 20-1544, 20-1549, 20-1567

MELODY CUNNINGHAM, individually and on behalf of all others similarly situated;
FRUNWI MANCHO, individually and on behalf of all others similarly situated;
MARTIN EL KOUSSA, individually and on behalf of all others similarly situated;
VLADIMIR LEONIDAS, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees/Cross-Appellants,

v.

LYFT, INC.; LOGAN GREEN; JOHN ZIMMER
Defendants-Appellants/Cross-Appellees

On Appeal from the United States District Court for the District of Massachusetts
Case No. No. 1:19-cv-11974, The Honorable Indira Talwani

**BRIEF OF AMICI CURIAE
NATIONAL EMPLOYMENT LAW PROJECT, MASSACHUSETTS
COALITION FOR OCCUPATIONAL SAFETY & HEALTH,
JUSTICE AT WORK, & NEW YORK TAXI WORKERS ALLIANCE
IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1, Amici Curiae National Employment Law Project, Massachusetts Coalition for Occupational Safety & Health, Justice at Work, and New York Taxi Workers Alliance state that they are non-profit corporations, that they have no parent corporations, and that no publicly-held corporations own 10% or more of their stock.[†]

[†] Pursuant to Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(E), Amici certify that: (1) all parties have consented to the filing of this brief; and (2) no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person—other than Amici, their members, or their counsel—contributed money intended to fund preparing or submitting this brief.

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STATEMENT OF INTEREST OF AMICI

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

The Massachusetts Coalition for Occupational Safety & Health (“MassCOSH”) works to ensure that all workers can earn a fair wage, be treated with respect and dignity, and return home to their families after a day’s work alive and well. MassCOSH believes that those who are disproportionately impacted by workplace abuses, injuries, and fatalities—people of color, immigrants, and youth—must be leaders and organizers in the struggle for worker rights. MassCOSH’s constituents are 100% low income, 50% women, 95% do not speak English and/or have very low literacy; 85% are Latino/Spanish-speakers and a combined 15% are Brazilian, Cape Verdean or African. Nearly all its constituents

work as day laborers or temporary workers, averaging 60-hour-work weeks at multiple jobs, including jobs in ridesharing, to make ends meet. Many of these workers are misclassified as independent contractors and cannot access the workplace protections—like a safe and healthy workplace and mandated sick pay—that properly classified employees enjoy. MassCOSH therefore has a strong mission-driven interest in ensuring that employees like the plaintiffs here receive the rights to which they are entitled.

Justice at Work, a legal non-profit headquartered in Boston and founded to support organizations of workers in low-paying jobs, envisions a future in which all workers have the power to ensure safe and healthy conditions, fair wages, dignity, and respect. Justice at Work represents and advocates for, through support for the organizations they are affiliated with, workers who include those in temporary and otherwise insecure positions, who frequently face unsafe workplace conditions, sub-minimum wages, harassment, and discrimination. These workers are often misclassified as independent contractors and denied employee protections, including as rideshare workers. Justice at Work thus has a compelling interest in ensuring that workers, like the plaintiffs in this case, are properly classified as employees, and receive the protections proper classification affords them.

The New York Taxi Workers Alliance (“NYTWA”) is a membership-based, non-profit organization founded in 1998 to improve the lives and working conditions

of professional taxi and for-hire vehicle (“FHV”) drivers. While the NYTWA previously served mostly yellow cab drivers, with the recent growth of app based FHV services such as Lyft and Uber, drivers for app-based FHV services now make up roughly half of NYTWA’s 21,000 members. NYTWA has developed significant expertise as to how Lyft’s corporate practices endanger drivers’ health, and their economic well-being, and has supported its members’ litigation to challenge their misclassification by Uber and Lyft. The NYTWA has a strong interest in this case because the ability to hold Lyft accountable before a judge and jury, which is critical to NYTWA members’ ability to obtain proper health and safety protections from these companies, depends on a sound interpretation of Section 1 of the Federal Arbitration Act, and a finding that Lyft drivers are exempt from the Act’s coverage.

A ruling in favor of Lyft in this case would undermine Amici’s longstanding policy goals, and those of close partners in community-based worker advocacy organizations across the First Circuit.

SUMMARY OF ARGUMENT

This past spring, as the COVID-19 pandemic was unfolding in Massachusetts and across the country, Plaintiffs Melody Cunningham, Frunwi Mancho, Martin El Koussa, and Vladimir Leonidas, on behalf of themselves and other Lyft drivers, sought emergency reclassification as employees under Massachusetts law in order to access state-mandated paid sick leave and protect both their and the public’s health during this pandemic. Lyft attempted to shunt its drivers’ urgent claims into a private, secret forum, and to force Plaintiffs to pursue those claims individually under its forced arbitration requirements.¹

The district court correctly held that Lyft drivers were transportation workers engaged in interstate commerce and not subject to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (“FAA”)—thereby refusing to allow Lyft to use its arbitration requirement to evade accountability in court. But it incorrectly denied urgently needed injunctive relief, effectively allowing Lyft to escape its legal obligation to provide paid sick days in the midst of a dangerous pandemic.

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

That decision overlooked the high risk of coronavirus infection that Lyft drivers face every day. Since then, Lyft has failed to protect its workers from the spread of the virus, further endangering workers' and the public's health. And now, perched on the cusp of a hard winter, Massachusetts COVID-19 infections are surging to levels not seen since the pandemic's previous mid-April peak. *See Massachusetts Covid Map & Case Count*, N.Y. TIMES (accessed Nov. 11, 2020), <https://www.nytimes.com/interactive/2020/us/massachusetts-coronavirus-cases.html>.

Amici submit this brief not to repeat arguments made by the parties, but to provide the Court with additional research and perspective, and illustrate five points: (1) Lyft drivers labor in dangerous conditions that put them at high risk of COVID-19 infection; (2) Lyft has failed to protect its drivers from the start of this pandemic up to the present time, harming its drivers, customers, and the public; (3) Lyft's misclassification of its drivers harms state coffers, law-abiding employers, and the broader public; (4) this Court's *Waithaka* decision provides certainty as to Section 1's scope; and (5) Lyft's corporate behavior shows that airport transportation is central to its business and to its drivers' work.

Without access to critical days of paid sick leave under Massachusetts law, Lyft drivers will continue driving during this pandemic, jeopardizing their and the public's health. Lyft's lawbreaking also imposes a range of other harms on law-

abiding employers and the public. Plaintiffs are entitled to both a preliminary injunction and public injunctive relief under Massachusetts law.

For years, Lyft has openly defied Massachusetts law by misclassifying its employees, using its forced arbitration requirements (which include collective and class-action waivers) as a shield and using the FAA to evade accountability. But last year the U.S. Supreme Court unanimously held that under 9 U.S.C. § 1 (“Section 1”), the “contracts of employment” of transportation workers engaged in interstate commerce are not subject to the FAA, regardless of whether workers are misclassified as independent contractors. *New Prime v. Oliveira*, 139 S. Ct. 532, 543–44 (2019).

As this Court recently held, drivers who transport goods or passengers within the flow of interstate commerce are a class of workers engaged in interstate commerce under 9 U.S.C. §1, and thereby not subject to the FAA. *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020). The Court should affirm this sound holding here because airport transportation is central to Lyft drivers’ work. Finally, because Lyft drivers’ forced arbitration requirements are not subject to the FAA, they must be examined under Massachusetts law. Under Massachusetts Supreme Judicial Court precedent, Lyft’s class action waivers are unenforceable.

ARGUMENT

I. Lyft Drivers Labor in Working Conditions That Create a High Risk of COVID-19 Infection and Death—Particularly Imperiling Black and Latinx Drivers.

Lyft drivers work in an environment in which it is generally physically impossible to socially distance from passengers—a car that puts them at a high risk of contracting COVID-19. Moreover, Lyft drivers disproportionately come from Black, Latinx, and other communities of color that are already more vulnerable to severe illness and death from COVID-19. Lyft and other rideshare drivers remain at serious risk of contracting coronavirus on the job, spreading it to their families and communities, and getting sick and dying from COVID-19.

On March 4, 2020, the Centers for Disease Control and Prevention (“CDC”) informed the public that the main route of transmission of COVID-19 is through droplets in the air spread by an infected person’s coughs or sneezes.² Soon thereafter, significant evidence began to emerge about the enormous risk of transmission from infected individuals who are pre-symptomatic and asymptomatic. *See* Caroline Chen, *What We Need to Understand About Asymptomatic Carriers if We’re Going to Beat Coronavirus*, PROPUBLICA (April 2, 2020), <https://www.propublica.org/>

² *See* CDC, *Coronavirus Disease 2019 (COVID-19): How It Spreads* (updated Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>; *March 4, 2020 version archived at* <https://web.archive.org/web/20200328191833/https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

article/what-we-need-to-understand-about-asymptomatic-carriers-if-were-going-to-beat-coronavirus. Researchers further clarified that normal speaking and breathing can also spread respiratory droplets. *Id.*

Based on the early evidence, the CDC issued guidelines that all employers should ensure workers stay six feet apart from others and from customers, wear masks when unable to socially distance, regularly wash their hands with soap and warm water (or where unavailable provide hand sanitizers), and regularly disinfect shared surfaces.³

The most fundamental of the CDC's recommendations, physical distancing, is impossible to implement in most passenger automobiles, as the distance between the driver's seat and the back seat is less than six feet.⁴ The typical Lyft, in other

³ See CDC, *Interim Guidance for Businesses & Employers Responding to Coronavirus Disease 2019 (COVID-19)*, (updated May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; *Mar. 6, 2020 version archived at* <https://web.archive.org/web/20200306210106/https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

⁴ See CDC, *Protect Yourself When Using Transportation* (updated Oct. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/using-transportation.html>; *May 26, 2020 version archived at* <https://web.archive.org/web/20200526224621/https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/using-transportation.html> (urging rideshare passengers to sit in the back seat in larger vehicles such as vans or buses in order to remain at least 6 feet away from the driver); Ridester, *Driving for Uber/Lyft in the age of coronavirus – and how to get through it*, AUTOBLOG (Apr. 6, 2020), <https://www.autoblog.com/2020/04/06/coronavirus-uber-lyft-rideshare-driver-survey-results-safety/> (“[I]t’s not feasible to

words, is not a socially distant workplace. When an infected passenger coughs, sneezes, breathes, or speaks, they emit respiratory droplets containing the virus that can infect their driver—and vice versa. Within a car’s enclosed space, virus particles may be able to linger in the air and infect the driver. *See* Apoorva Mandavilli, *The Coronavirus Can Be Airborne Indoors, W.H.O. Says*, N.Y. TIMES (Jul. 9, 2020), <https://www.nytimes.com/2020/07/09/health/virus-aerosols-who.html>.

Lyft drivers also face a higher risk of COVID-19 infection because they are disproportionately from Black and Latinx communities, the populations hardest-hit by the coronavirus.⁵ According to the Bureau of Labor Statistics, Black and Latinx workers account for nearly 42% of Lyft, Uber, and other “electronically mediated work” companies’ workforces, though they represent less than 29% of the overall

stay the recommended six feet away from your passengers in a normal-size vehicle.”).

⁵ *See generally* COVID Tracking Project & Bos. Univ. Ctr. for Antiracist Research, *The COVID Racial Data Tracker* (accessed Nov. 12, 2020), <https://covidtracking.com/race>; Richard A. Oppel et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (Jul. 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

U.S. workforce.⁶ In Boston, Lyft's biggest market in Massachusetts, the company's own data shows that most of its drivers are people of color.⁷

Due to systemic racism and policy choices that extend far beyond the workplace, Black, Latinx, and other workers of color have a higher likelihood of underlying health conditions which put them at increased risk of death or serious complications from COVID-19. *See* ELISE GOULD & VALERIE WILSON, ECON. POLICY INST., BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS—RACISM AND ECONOMIC INEQUALITY 8–9, 26 (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/>; Young-Jin Kim, *Coronavirus Disproportionately Impacting Black, Hispanic Residents in Mass., Data Shows*, NBC BOS. (June 21, 2020), <https://www.nbcboston.com/news/coronavirus/these-numbers-show-how-the-coronavirus-is-disproportionately-impacting-black-hispanic-residents-in-mass/2146668/>.

⁶ Bureau of Labor Statistics, U.S. Dep't of Labor, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, MONTHLY LAB. REV. (Sept. 2018), <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-thecontingent-worker-supplement.htm>.

⁷ *See 2020 Economic Impact Report: Boston*, LYFT (accessed Nov. 8, 2020), <https://www.lyftimpact.com/stats/cities/boston> (65% of Lyft's Boston drivers identify with a minority group, compared with 30% of Boston population in 2018).

II. Lyft Has Failed to Adequately Protect Its Drivers From COVID-19, Even As the Dangers of the Virus Became More Evident.

Because a large portion of their work involves transporting passengers to and from airports, Lyft and other rideshare drivers were at heightened risk of COVID-19 infection during the early weeks of the pandemic, when international travelers were still regularly riding, unmasked, to and from airports using rideshare services. *See* Peter Jakobowicz, *Coronavirus Diaries: What Your Lyft Driver is Thinking Right Now*, SLATE (Mar. 9, 2020), <https://slate.com/human-interest/2020/03/coronavirus-ride-sharing-uber-lyft-advice.html>.

As COVID-19 became known to Lyft and other employers, Lyft urged drivers to regularly clean their vehicles, but did not pay drivers for this time, provide masks or protective equipment, or otherwise offer detailed guidance for how they could protect themselves. *See id.* (Lyft’s guidelines were to “Take care of yourself,” “Keep your car clean,” and “Stay informed”). Overall, Lyft maintained there was “no indication of a unique risk to members of the Lyft community.” Ryan Broderick, *Ride-Hail And Delivery Apps Like Uber And Postmates Are Tight-Lipped About What They’ll Do When The Coronavirus Hits The United States*, BUZZFEED NEWS (Feb. 28, 2020), <https://www.buzzfeednews.com/article/ryanhatesthis/ride-hail-and-delivery-apps-like-lyft-and-doordash-arent>.

As U.S. states began implementing stay-at-home orders and shuttering vast portions of their economy, rideshare drivers were labeled “essential workers,”

including in Massachusetts. *See* Mass. COVID-19 Order No. 13 (Mar. 23, 2020), <https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download>; Ex. A to Mass. COVID-19 Order No. 13 (Mar. 23, 2020), at 5, <https://www.mass.gov/doc/covid-19-essential-services/download> (including workers “critical to operating . . . Transportation Network Companies (TNCs)” among essential workers allowed to provide essential services while non-essential workplaces were closed under Massachusetts Governor’s Executive Order No. 13).

This designation was attributed to the drivers’ critical role in facilitating “continuity of operations for essential workforces, and other essential travel.” Ex. A to Mass. COVID-19 Order No. 13, at 5. Still, as the pandemic escalated into a full-blown public health emergency, Lyft did not require its drivers or riders to wear face coverings, much less provide drivers with other protective gear or cleaning supplies. *See Lyft’s latest info on Coronavirus*, LYFT (updated Mar. 9, 2020), *archived at* <https://web.archive.org/web/20200310060807/https://www.lyft.com/safety/coronavirus> (advising drivers that masks were not recommended by the CDC, but should be worn by those showing symptoms).

Drivers were, in other words, largely left on their own. Some drivers fashioned makeshift partitions with plastic sheeting and tape. *See, e.g.*, Yaron Steinbuch, *Lyft driver crafts crude coronavirus containment compartment in car*, N.Y. POST (Mar.

10, 2020), <https://nypost.com/2020/03/10/lyft-driver-crafts-crude-coronavirus-containment-compartment-in-car/>. But most drivers, with families to feed and no guidance, requirements, or resources from Lyft to help them, continued driving—despite the health risks surrounding them. *See, e.g.*, Sarah Holder, *The Human Cost of Calling an Uber Right Now*, BLOOMBERG CITYLAB (Mar. 24, 2020), <https://www.bloomberg.com/news/articles/2020-03-24/the-human-cost-of-calling-an-uber-right-now> (quoting California Lyft driver Edan Alva saying getting sick was the least of his priorities, because he “live[s] pretty much from road to mouth.”). A survey of 397 full-time Uber and Lyft drivers found that 57% of respondents planned to keep driving, despite the obvious health risks in doing so. Zachary Crockett, *Amid a pandemic, Uber drivers choose between health and livelihood*, THE HUSTLE (Mar. 22, 2020), <https://thehustle.co/coronavirus-uber-lyft-drivers/>.

Lyft took some steps that limited workers’ exposure, such as ending pooled rides involving multiple passengers. *See* Shannon Bond, *Uber, Lyft Halt Shared Carpool Service in U.S. and Canada*, NPR (Mar. 20, 2020), <https://www.npr.org/2020/03/17/817240060/uber-lyft-halt-shared-carpool-service-in-u-s-and-canada>. But Lyft also took other steps that increased the likelihood of its drivers being exposed, including encouraging drivers to undertake risky trips bringing healthcare workers and patients to and from hospitals. *See* Holder, *supra*; *Doing more for patients and healthcare organizations amid the COVID-19 crisis*,

LYFT BLOG (Apr. 6, 2020), <https://www.lyft.com/blog/posts/doing-more-for-patients-and-healthcare-organizations>; *Rideshares Are Also Ambulances. Yes, Even During Coronavirus*, DIGBOSTON (Mar. 21, 2020), <https://digboston.com/rideshares-are-also-ambulances-yes-even-during-coronavirus/> (New England rideshare driver estimates 25% of his rides are “non-emergency” medical pickups).

In addition, because Lyft and other rideshare companies misclassify their employees as independent contractors, rideshare drivers in Massachusetts and around the country faced weeks and even months in which they were unable to access unemployment benefits. See Rebecca Rainey, *Millions of Gig Workers Are Still Waiting for Unemployment Benefits*, POLITICO (Apr. 30, 2020), <https://www.politico.com/news/2020/04/30/millions-of-gig-workers-are-still-waiting-for-unemployment-benefits-225844> (reporting Lyft’s withholding of payroll data prevented workers from timely receiving benefits). Thus, despite a significant drop-off in rideshare demand in the pandemic’s first months, many rideshare drivers had no choice but to continue working and exposing themselves to COVID-19. See, e.g., Adrian Ma, *Advocates for Uber and Lyft Drivers Urge Legal Action as Coronavirus Response Saps Ridership*, WBUR (Mar. 19, 2020), <https://www.wbur.org/bostonmix/2020/03/19/uber-lyft-coronavirus-drop-in-riders> (Boston Lyft driver Joel Paul discusses the dilemma of whether to go without pay or continue to drive and risk COVID-19 infection); Joshua Emerson Smith, *A COVID-*

19 death renews questions of Uber and Lyft's responsibility to drivers, SAN DIEGO UNION-TRIBUNE (Jul. 24, 2020), <https://www.sandiegouniontribune.com/news/transportation/story/2020-07-24/uber-driver-dies-covid-19>.

In early April, the CDC recommended all Americans wear face coverings when they were in public settings and could not otherwise socially distance. Chris Megerian et al., *CDC recommends wearing face masks during coronavirus pandemic*, L.A. TIMES (Apr. 3, 2020), <https://www.latimes.com/science/story/2020-04-03/cdc-recommends-wearing-face-masks-during-coronavirus-pandemic>. In mid-April, the CDC issued guidance that both acknowledged the physical impossibility of social distancing in all but large vehicles and offered clear recommendations to rideshare drivers and their employers, such as requiring that drivers and passengers wear face coverings and installing partitions between drivers and passengers.⁸

Lyft did not, however, provide its drivers with adequate face coverings, other protective gear, or cleaning products. Instead, Lyft told its drivers that supplies were available “on a first-come, first-served basis” and that drivers could only receive “one face mask and one sanitizing product per week.” See Dara Kerr, *Uber and Lyft drivers: Give us safety gear to protect us from COVID-19*, CNET (Apr. 16, 2020),

⁸ See CDC, *What Rideshare, Taxi, Limo and other Passenger Drivers-for-Hire Need to Know about COVID-19* (Apr. 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/rideshare-drivers-for-hire.html> (hereafter “CDC Rideshare Guidance”).

<https://www.cnet.com/news/uber-and-lyft-drivers-give-us-safety-gear-to-protect-us-from-covid-19/>. In a late April survey of 1,087 rideshare drivers, 68% reported that their rideshare employer did not provide gloves, sanitizing products, or other protective equipment. Mobile Workers Alliance & We Drive Progress, *Rideshare Driver Covid-19 Survey Data Brief* (May 6, 2020), https://static1.squarespace.com/static/5e8512b7cebf196b1ec5c42d/t/5eb22368fa094f2b1b433c58/1588732778079/FINAL+Rideshare_Driver_Survey_Memo.pdf.

On May 1, 2020, Massachusetts Governor Charlie Baker issued COVID-19 Order No. 31, requiring face coverings to be worn in public settings where social distancing is not possible, including by rideshare drivers and passengers during a ride. COVID 19 Order No. 31, at 2 (May 1, 2020), <https://www.mass.gov/doc/may-1-2020-masks-and-face-coverings/download> (“All persons are also required to wear masks or cloth face coverings when providing or using the services of any taxi, car, livery, ride-sharing, or similar service . . .”).

But Lyft still did not endeavor to provide rideshare drivers with sufficient face coverings. Instead, on May 7, 2020, Lyft announced a health safety program that would require its drivers and riders to complete a “health safety certification” before using Lyft, ostensibly requiring both passengers and drivers to wear face coverings. Moira Warburton & Tina Bellon, *Lyft to require passengers and drivers to wear masks*, REUTERS (May 7, 2020), <https://www.reuters.com/article/us-health->

coronavirus-lyft/lyft-to-require-passengers-and-drivers-to-wear-masks-idUSKBN22K07Q.

Enforcement of this requirement, however, has been spotty. Rideshare drivers have reported that they can do little about customers who refuse to wear masks. *See, e.g.,* Eric Graves, *Rideshare driver struggles with requiring masks*, WAFF48 NEWS (Jun. 30, 2020), <https://www.waff.com/2020/06/30/rideshare-driver-struggles-with-requiring-masks/>. Some Lyft drivers who attempt to enforce the mask requirements have been attacked by customers and had police called on them. *See, e.g., Caught On Camera: Passenger Punches, Spits At Lyft Driver After Being Asked To Wear Face Covering*, CBS LOS ANGELES (Jul. 10, 2020), <https://losangeles.cbslocal.com/2020/07/10/passenger-punches-spits-at-lyft-driver-after-being-asked-to-wear-face-covering/>; Marc Santia, *Lyft Driver Says He Was Attacked, Then Arrested After Refusing Rider Without Mask*, NBC NEW YORK (Jul. 23, 2020), <https://www.nbcnewyork.com/news/local/lyft-driver-says-he-was-attacked-after-refusing-rider-without-mask-then-he-was-arrested/2529101/>.

Lyft also failed to provide all drivers with vehicle partitions, or funding for partitions, for months after the CDC recommended using partitions to protect against COVID-19 transmission. On July 17, 2020, Lyft announced it would provide only 60,000 of its drivers with partitions, “with the goal of providing 50% ride coverage”

in a few major cities, including Boston.⁹ Sara Ashley O’Brien, *Lyft is providing some drivers with vehicle partitions for free, while others will have to pay*, CNN BUSINESS (Jul. 17, 2020), <https://www.cnn.com/2020/07/17/tech/lyft-vehicle-partitions/index.html>. Lyft claimed it would sell the partitions to hundreds of thousands of other drivers, including all Massachusetts drivers based outside Boston, in the coming months. *See Lyft Expands its Health Safety Program, Strengthening Commitment to Driver Safety*, LYFT BLOG (Jul. 17, 2020), <https://www.lyft.com/blog/posts/lyft-expands-health-safety-program>.

In the meantime, drivers are still forced to rely on their own makeshift solutions, much as they were back in March, even as virus infections have sharply risen in recent weeks. *See* Smith, *supra* (describing how one driver crafted a partition that “doesn’t cover 100 percent” but “helps a lot”). Lyft’s failure to install in-vehicle partitions is notable given that many grocery stores—which feature better air circulation than cars—installed such barriers within the first month of the pandemic. *See* Lisa Baertlein, *U.S. grocers add plexiglass sneeze guards to protect cashiers from coronavirus*, REUTERS (Mar. 30, 2020), <https://www.reuters.com/article/us->

⁹ It is not clear whether the Lyft-produced partitions will effectively reduce virus transmission. An installation demonstration video shows that, when installed, there will be a gap of “2 inches or bigger” on either side of the partition. *See* Lyft, *How to install your vehicle partition*, YOUTUBE, at 1:26 (Jun. 24, 2020), <https://youtu.be/uwJNZXrnWIk>.

health-coronavirus-kroger/u-s-grocers-add-plexiglass-sneeze-guards-to-protect-cashiers-from-coronavirus-idUSKBN21H3G1.

As of July, Lyft still did not provide adequate face coverings, protective gear, or cleaning supplies to its drivers. *See* Chauncey Alcorn, *Lyft drivers accuse company of not providing enough protective gear*, CNN BUSINESS (Jul. 23, 2020), <https://www.cnn.com/2020/07/23/business/lyft-drivers-ppe-gig-app/index.html>.

Instead, Lyft sells its drivers such supplies. *See id.*; LYFT STORE (accessed Nov. 11, 2020), <https://www.lyft-store.com>. Nothing appears to have changed in recent months, even as virus infections have surged to new heights. *See Disinfect to Protect*, LYFT (accessed Nov. 11, 2020), <https://www.lyft.com/driver/clean> (Lyft now recommends cleaning products and process to drivers, but only offers those cleaning products for sale, and one-time free vehicle disinfecting service in select cities).

The CDC has also recommended that rideshare drivers avoid using recirculated air and lower vehicle windows. *See* CDC Rideshare Guidance, *supra* note 8. But Lyft has only encouraged drivers and passengers to open their windows to ensure greater airflow “when possible,” and to avoid recirculated air “when possible.” *See Lyft launching personal health certification, will require face masks as part of new Health Safety Program*, LYFT BLOG (May 7, 2020), <https://www.lyft.com/blog/posts/lyft-launching-health-safety-program>.

Opening windows, to be sure, is cost-free and can mitigate—though not eliminate—the risk of transmission. *See* Joseph Allen et al., *Is there coronavirus in your car? Here's how you can protect yourself.*, USA TODAY (Apr. 22, 2020), <https://www.usatoday.com/story/opinion/2020/04/22/coronavirus-car-protect-yourself-column/5166146002/>. But making it optional means passengers can ignore this recommendation. Opening windows will also generally not be an option for drivers during rain, snow, or other inclement weather, when rideshare drivers typically see significant spikes in usage. *See* Abel Brodeur & Kerry Nield, *An empirical analysis of taxi, Lyft and Uber rides: Evidence from weather shocks in New York City*, 152 J. ECON. BEHAVIOR & ORG. 1–16 (Aug. 2018) (number of Lyft rides per hour is 19% higher when raining). Similarly, if passengers ask for windows to be closed, or for the driver to close the windows to keep the vehicle warm during the winter, drivers have little option but to comply—or risk getting a low rating.¹⁰ *See generally* Carolyn Said, *Uber, Lyft drivers fear getting booted from work*, S.F. CHRONICLE (Oct. 14, 2018), <https://www.sfchronicle.com/business/article/Uber-Lyft-drivers-fear-getting-booted-from-work-13304052.php>.

¹⁰ While Lyft's Health Safety Program claims to allow drivers to cancel rides without penalty "if the health safety commitment isn't being followed," it is not clear how disputes about whether a rider complied with these types of optional recommendations would be resolved. *See Helping Lyft's driver community*, LYFT (accessed Jul. 29, 2020), <https://www.lyft.com/safety/coronavirus/driver>.

III. Lyft’s Misclassification of Drivers Denies Them Access to Paid Sick Days, Endangering Workers’ Health and the Public’s Health.

Since the start of the pandemic, the CDC has emphasized that employers should “actively encourage sick employees to stay home” to reduce the spread of the virus, including by offering paid sick leave.¹¹ The CDC specifically urged rideshare companies to do the same in its mid-April rideshare guidance.¹² But because Lyft insists on calling its drivers non-employees, it does not provide paid sick leave.

The CDC’s advice is supported by numerous studies that have shown that workers without paid sick days are more likely to go to work with a contagious disease than workers with access to paid sick days.¹³ Research has also identified a clear correlation between lack of paid sick leave and the spread of the flu; one study

¹¹ See CDC, *Interim Guidance for Businesses & Employers*, *supra* note 3 (first updated Mar. 6, 2020).

¹² See CDC Rideshare Guidance, *supra* note 8.

¹³ See, e.g., TOM W. SMITH & JIBUM KIM, PUBLIC WELFARE FOUNDATION, *PAID SICK DAYS ATTITUDES AND EXPERIENCES* (Jun. 2010), <http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-attitudes-and-experiences.pdf>; LeaAnne DeRigne et al., *Workers Without Paid Sick Leave Less Likely to Take Time Off For Illness or Injury Compared to Those with Paid Sick Leave*, 35:3 HEALTH AFFAIRS 520–25 (Mar. 2016), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2015.0965>.

estimates that providing all U.S. workers with paid sick leave can reduce the spread of flu by 6 percent.¹⁴

But Lyft never implemented a paid sick leave policy that enabled its drivers to stop working if they were sick with COVID-19. Lyft did offer some sick pay to its drivers, but only if they tested positive for the disease or if their doctor ordered them to self-quarantine. *See A Note for the Lyft Driver Community*, LYFT HUB (Mar. 19, 2020), <https://www.lyft.com/hub/posts/a-note-for-the-lyft-driver-community>. Because Lyft drivers faced the same testing obstacles as other Americans, and lack employer-based health insurance that would enable them to easily see a doctor and obtain an order of quarantine, few were able to access this sick pay benefit.

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

¹⁴ Supriya Kumar et al., *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent Based Model*, 103:8 AM. J. PUBLIC HEALTH 1406–11 (2013); *see also* Stefan Pichler and Nicolas R. Ziebarth, DIW Berlin, *The Pros and Cons of Sick Pay Schemes* (2015), https://www.diw.de/documents/publikationen/73/diw_01.c.514633.de/dp1509.pdf; ROBERT DRAGO & KENNETH MILLER, INSTITUTE FOR WOMEN'S POLICY RESEARCH, *SICK AT WORK: INFECTED EMPLOYEES IN THE WORKPLACE DURING THE H1N1 PANDEMIC* (Jan. 2010), <http://www.iwpr.org/publications/pubs/sick-at-work-infected-employees-in-the-workplace-during-the-h1n1-pandemic>.

platform.” 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/>.

If Lyft properly classified its workers as employees, it would be required to provide its drivers with up to 40 hours of state-mandated sick leave. MASS. GEN. LAWS ch.149, § 148C. Because employees may use paid sick leave in increments (i.e., need not take 8 hours in a single day), *id.* § 148C(c)(7), this leave could effectively extend for eight to ten days, if taken in four- to five-hour increments. This modest amount of leave would enable tens of thousands of Lyft drivers across Massachusetts to stay home when they are sick with COVID-19—or when they fear they were exposed and infected, and seek preventive care/diagnosis¹⁵—thus helping limit the spread of the virus and save lives.

But Lyft has been flouting the law, denying its drivers the right to paid sick days. Lyft drivers are thus unable to afford to stay home when they are sick, and instead many continue to drive—putting themselves at risk of a longer, more severe bout of COVID-19, and putting riders and the public as a whole at risk of infection.¹⁶

¹⁵ MASS. GEN. LAWS ch.149 § 148C(c)(2) (sick leave may be used for employee’s preventative medical care).

¹⁶ Lyft has also expanded its business model into “essential deliveries” of goods to high-risk populations—meaning infected drivers also risk exposing such individuals. See *Essential Deliveries: A New Way for Drivers to Earn and Support*

See CDC, Duration of Isolation and Precautions for Adults with COVID-19 (updated Oct. 19, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html>.

IV. Lyft’s Misclassification of Drivers Harms Law-Abiding Employers and the Public, Depriving Public Coffers of Millions of Dollars in Payroll Taxes, Including Unemployment Insurance Payments.

National data demonstrates that Lyft’s misclassification of drivers also harms law-abiding employers and public coffers.

When companies like Lyft evade their obligations as employers by misclassifying their workers as independent contractors, law-abiding employers suffer. Independent contractor misclassification, as the United States Treasury Inspector General found, “plac[es] honest employers and businesses at a competitive disadvantage.”¹⁷ This is especially a problem in labor-intensive low-wage sectors, where employers can gain competitive advantage by driving down payroll costs.

App-based ride-hail drivers work in a highly price-competitive sector. When companies escape their employer obligations to unlawfully boost profits, they

Our Community, LYFT BLOG (Apr. 15, 2020), <https://www.lyft.com/blog/posts/essential-deliveries>.

¹⁷ TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, ADDITIONAL ACTIONS ARE NEEDED TO MAKE THE WORKER MISCLASSIFICATION INITIATIVE WITH THE DEPARTMENT OF LABOR A SUCCESS 1 (Feb. 20, 2018), <https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf>.

pressure other businesses in the ride-hail sector to shed labor costs. Rampant misclassification creates a “race to the bottom” where firms can remain competitive only by copying these illegal business models.¹⁸ Over time, working conditions like subminimum wages and the lack of paid sick days become the industry norm that workers are forced to accept.¹⁹

Law-abiding employers also suffer from inflated unemployment insurance and workers’ compensation costs, as free-riding employers that misclassify employees as independent contractors pass off costs to employers that play by the rules. A 2010 study estimated that misclassifying employers shift \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers’ compensation premiums to law-abiding businesses annually.²⁰

¹⁸ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 139–41 (2017).

¹⁹ See NAT’L EMP’T L. PROJECT, *INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES* 5 (Oct. 2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf> (misclassified workers earn thousands less in pay than properly classified employees doing the same work).

²⁰ MICHAEL P. KELSAY, DEP’T OF ECON., UNIV. OF MO., KAN. CITY, *COST SHIFTING OF UNEMPLOYMENT INSURANCE PREMIUMS AND WORKERS’ COMPENSATION PREMIUMS* 5–6 (Sept. 12, 2010).

Federal, state, and local governments suffer hefty losses of revenue due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.²¹ According to a 2009 report by the Treasury Inspector General for Tax Administration, misclassification contributed to a \$54 billion underreporting of employment tax, and losses of \$15 billion in unpaid FICA taxes and UI taxes.²² A recently-published 2020 review of findings from thirty-two state studies of independent contractor misclassification demonstrates the staggering scope of these abuses.²³

Lyft has never paid the Massachusetts Unemployment Insurance tax for its drivers. While there is no currently available data about the impact of this on the state's UI fund, the state of New Jersey recently determined that Lyft and its chief competitor Uber owed tens of millions of dollars in back unemployment taxes.²⁴ And

²¹ Wage and Hour Division, U.S. Dep't of Labor, *Misclassification of Employees as Independent Contractors*, <https://www.dol.gov/whd/workers/Misclassification/>.

²² TREASURY INSPECTOR GENERAL, *supra* note 17, at 2.

²³ NAT'L EMP'T L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION, *supra* note 19.

²⁴ See Erin Mulvaney, *New Jersey Pursues Lyft on Taxes, Keeping Pressure on Gig Model*, BLOOMBERG LAW (Nov. 5, 2020), <https://news.bloomberglaw.com/daily-labor-report/new-jersey-pursues-lyft-on-taxes-keeping-pressure-on-gig-model>; Chris Opfer, *Uber Hit With \$650 Million Employment Tax Bill in New Jersey*,

a recent study found that Lyft and Uber collectively owed \$413 million to California's UI fund between 2014 and 2019.²⁵

In April, amidst an unprecedented economic crisis, the Massachusetts UI fund was forced to seek a \$1.2 billion loan from the federal government to provide UI benefits.²⁶ In June, the Massachusetts Executive Office of Labor and Workforce Development projected the state's UI trust fund would have a deficit of nearly \$3.2 billion by the end of 2020, and almost \$6.2 billion by the end of 2021.²⁷

Lyft alone did not create the Massachusetts UI insolvency. But the company's blatant and unlawful misclassification of hundreds of thousands of drivers has directly contributed to the state's current fiscal crisis. Had Lyft properly paid into

BLOOMBERG LAW (Nov. 14, 2019), <https://news.bloomberglaw.com/daily-labor-report/uber-hit-with-650-million-employment-tax-bill-in-new-jersey>.

²⁵ KEN JACOBS & MICHAEL REICH, U.C. BERKELEY LABOR CTR., WHAT WOULD UBER AND LYFT OWE TO THE STATE UNEMPLOYMENT INSURANCE FUND (May 7, 2020), <http://laborcenter.berkeley.edu/what-would-uber-and-lyft-owe-to-the-state-unemployment-insurance-fund/>.

²⁶ Chris Lisinski, *Gov. Charlie Baker seeks \$1.2 billion loan to cover Massachusetts unemployment benefits during coronavirus pandemic*, MASSLIVE (Apr. 23, 2020), <https://www.masslive.com/coronavirus/2020/04/gov-charlie-baker-seeks-12-billion-loan-to-cover-massachusetts-unemployment-benefits-during-coronavirus-pandemic.html>.

²⁷ Greg Ryan, *State projects \$6B hole in unemployment fund by end of 2021*, BOS. BUS. J. (Jun. 8, 2020), <https://www.bizjournals.com/boston/news/2020/06/08/state-projects-6-billion-hole-in-unemployment-fun.html>.

the UI fund for its employee drivers, Massachusetts would be better positioned to assist unemployed workers—including Lyft drivers—during this recession.

V. *Waithaka* Provides a Clear, Easily Applied Standard For Determining Whether Workers are Engaged in Interstate Commerce, Creating Certainty as to Section 1’s Scope.

This Court’s recent *Waithaka* decision has provided a clear and easily applied standard for courts in this Circuit: workers who transport goods or people within the flow of interstate commerce are engaged in interstate commerce and exempt from the FAA. *Waithaka*, 966 F.3d at 26 (Amazon last-mile drivers, “by virtue of their work transporting goods or people ‘within the flow of interstate commerce,’ are ‘a class of workers engaged in interstate commerce.’”) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001)). *Waithaka*’s straightforward standard has thus provided much needed clarity, aiding district courts that were previously divided over how to interpret Section 1 and helping ensure greater uniformity across the judiciary.

This Court should affirm the sound reasoning of *Waithaka* here, as there is no reason or basis for discarding it and re-injecting uncertainty as to Section 1’s scope. *See Arecibo Cmty. Health v. Commonwealth of Puerto Rico*, 270 F.3d 17, 22 (1st Cir. 2001) (“The principle that a ruling of law by a panel of this court is binding upon subsequent panels is ‘an integral component of our jurisprudence.’”) (quoting *Stewart v. Dutra Constr. Co.*, 230 F.3d 461, 467 (1st Cir. 2000)).

VI. Lyft’s Corporate Behavior Shows That Airport Transportation is Central to its Business Model and the Work of Lyft Drivers.

Despite the claims of Lyft and supporting Amicus Chamber of Commerce that Lyft drivers engage in only “occasional local trips” to Logan Airport and other airports, Br. of Amicus Curiae Chamber of Commerce at 13, Lyft’s corporate behavior shows that airport transportation plays an integral role in Lyft’s business, and in the regular work of Lyft drivers in Massachusetts.

Lyft and its chief competitor, Uber, invested considerable lobbying resources to win permission from the Massachusetts Port Authority to fully operate at Logan International Airport. *See Cabbies say the end is near as Uber, Lyft come to Logan*, BOS. GLOBE (Jan. 31, 2017), <https://www.bostonglobe.com/business/2017/01/31/cabbies-say-end-near-uber-lyft-come-logan/ZvsYuFKjQnQILIBzbB4RAK/story.html>. Airport rides are such a major part of Lyft’s business that it has also devoted significant lobbying resources to reduce recently proposed rideshare fee increases, in order to prevent taxis and limos—which were not subject to the surcharges—from cutting into its business. *See Uber, Lyft push back against Logan Airport changes proposed by Massport*, WCVB (Apr. 9, 2019), <https://www.wcvb.com/article/uber-lyft-push-back-against-logan-international-airport-changes-proposed-by-massport/27091179> (Lyft describes non-application of fees to taxis and limos as its “biggest issue” with Massport proposal).

Lyft’s relationships with airports are so important to the company’s business and growth that it employs a team of ten people dedicated exclusively to airport operations. *Lyft’s Aviation Journey & Future of Ridesharing at Airports*, RUNWAY.VC, at 6:20–6:30 (Nov. 20, 2016), <https://www.runway.vc/podcasts/category/Runway.VC+Podcast> (interview with Lyft Senior Director of Business Operations & Airport Policy Manager Baraki Brock). Among other issues, Lyft negotiates the location of passenger pick-up areas with airports, and shares data with airports about traffic congestion. *See id.* at 31:59–33:04; *see also* Harriet Baskas, *As LAX Ends Curbside Pickup, Here’s How Other Airports Are Handling Uber, Lyft Congestion*, USA TODAY (Oct. 9, 2019), <https://www.usatoday.com/story/travel/news/2019/10/09/lyft-uber-airport-rides-how-lax-other-airports-address-pickups/3912890002/>.

Lyft’s own data reflects how significant airport rides are for the company’s business. In Massachusetts, Lyft reports that 82% of its riders statewide use Lyft to get to the airport,²⁸ as do 82% of Boston riders.²⁹

Far from the “casual and incidental relationship to interstate transit” of local cab companies, *see United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947),

²⁸ *See 2020 Economic Impact Report: Massachusetts*, LYFT (accessed Nov. 8, 2020), <https://www.lyftimpact.com/stats/states/massachusetts>.

²⁹ *2020 Economic Impact Report: Boston*, *supra* note 7.

Lyft's relationship to airport transportation is central to its business model in Massachusetts, and beyond.

VII. Under Massachusetts Law, Lyft's Forced Arbitration Requirements are Unenforceable.

Because Lyft's arbitration requirements are not subject to the FAA, their enforceability is a question of state law. As the district court correctly held, the arbitration requirements' class and collective action waivers run afoul of state law, rendering the requirements unenforceable in their entirety.

In Massachusetts, class action waivers that are not governed by the FAA are unenforceable under Massachusetts Supreme Judicial Court precedent. *See Feeney v. Dell Inc. (Feeney I)*, 454 Mass. 192, 199–200 (2009) (class action prohibition violates fundamental public policy of Massachusetts favoring consumer class actions under state law), *abrogated in cases governed by the FAA, Feeney v. Dell Inc. (Feeney II)*, 465 Mass. 470, 472 (2013); *see also Machado v. System4 LLC*, 465 Mass. 508, 514–15 (2013) (recognizing that Massachusetts's Wage Act provides a substantive right to bring a class proceeding, and that class waivers must be enforced when the FAA applies). “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.” *Waithaka*, 966 F.3d at 33 (citation omitted).

Because Plaintiffs seek to bring class claims, and because Lyft's forced arbitration requirement explicitly forbids class arbitrations, the class action waiver cannot be severed without fundamentally rewriting the contract. Accordingly, the district court correctly found that Plaintiffs' claims should be permitted to proceed in court, not arbitration.

CONCLUSION

It is not too late for this Court to act to save lives. The Court should reverse the denial of preliminary injunctive relief and direct the district court to enter a preliminary injunction reclassifying Lyft drivers and granting them access to paid sick days and other applicable protections. At the same time, this Court should affirm the district court's decision finding that Lyft drivers are not subject to the FAA and thus not required to arbitrate their claims under the FAA or Massachusetts law.

Respectfully submitted,

Dated: November 12, 2020
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because it contains 6,456 words, excluding the items exempted under Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: November 12, 2020
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CERTIFICATE OF SERVICE

I, Hugh Baran, certify that on November 12, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 12, 2020
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