
In The
Supreme Court of Virginia

RECORD NO.: 230865

AMAZON LOGISTICS, INC.,
Appellant,

v.

VIRGINIA EMPLOYMENT COMMISSION,
Appellee.

**ON APPEAL FROM THE COURT OF APPEALS OF VIRGINIA
RECORD No. 0310-22-2**

**BRIEF OF LEGAL AID JUSTICE CENTER, LEGAL AID WORKS,
NATIONAL EMPLOYMENT LAW PROJECT AND
VIRGINIA POVERTY LAW CENTER AS *AMICI CURIAE*
IN SUPPORT OF APPELLEE**

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TABLE OF CONTENTS

	Page:
TABLE OF AUTHORITIES.....	iii
INTERESTS OF AMICI.....	1
STATEMENT OF THE CASE AND FACTS.....	4
ASSIGNMENT OF ERROR	4
STANDARD OF REVIEW	4
ARGUMENT	5
I. The lower court’s determination should be affirmed because Mr. Diggs’s experience as a Flex driver is representative and illustrative of Amazon’s systemized and pervasive control, both exercised and retained, over all Flex drivers’ working conditions	5
A. Amazon’s “terms of service” take-it-or-leave-it contract dictates most aspects of drivers’ work	5
B. Amazon uses technological surveillance and algorithmic management to exercise near total control of drivers’ working conditions.....	8
C. Amazon’s far-reaching surveillance and control is not outweighed by the limited scheduling flexibility it offers.....	10
II. The Virginia Unemployment Insurance Compensation Act is liberally construed because it is designed to alleviate economic crisis—particularly for low-income workers like Flex drivers—and stabilize the economy	13

A.	Like other digital labor platform workers, Flex drivers earn low wages and have no employer-provided benefits, making their access to social insurance programs like unemployment insurance vitally important	13
B.	Unemployment insurance maintains purchasing power and stabilizes the economy during economic downturns	17
C.	Unemployment insurance provides enormous benefits to unemployed workers	18
III.	Misclassification undermines the purpose of unemployment insurance and harms workers, competitor businesses, and the economy as a whole.	20
A.	Misclassification degrades job quality and harms workers	20
B.	Misclassification puts law-abiding businesses at a competitive disadvantage.....	23
C.	Misclassification harms government coffers and weakens the solvency of Virginia’s unemployment insurance fund.....	25
IV.	Amazon received the due process to which it was entitled for a tax liability determination, and Amazon’s argument for multiple tax liability determinations would be unduly burdensome to VEC and Flex drivers	26
A.	VEC aptly used the tax determination process to evaluate Amazon’s tax liability for Flex drivers	27
B.	Amazon received ample notice and opportunity to be heard.....	30
C.	Amazon’s demand for separate tax liability determinations is unduly burdensome	36
CONCLUSION		39
CERTIFICATE		40

TABLE OF AUTHORITIES

Page(s):

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INTERESTS OF AMICI

Amici are three Virginia-based organizations and one national organization that advocate for the labor and employment rights of low-wage and unemployed workers, include broad access to unemployment benefits.

The **Legal Aid Justice Center** (“LAJC”) is a non-profit organization located in Virginia committed to battling poverty and injustice through partnership with people and communities directly impacted by a range of issues – including unemployment – using a variety of advocacy tools (including public education, media work, administrative advocacy, and litigation). LAJC provides legal advice and direct legal representation to low-income individuals who cannot afford private counsel in civil practice areas such as consumer protection, landlord-tenant, employment, public benefits, education, immigration, and civil rights. LAJC’s interest in this case flows from LAJC’s longstanding advocacy with and for people navigating Virginia’s unemployment insurance system, both through individual cases and systemic work.

Legal Aid Works (“LAW”), founded in 1973, is a nonprofit law firm representing indigent persons in civil legal matters, including family, housing, consumer, and public benefits. LAW serves a seventeen-county region of mostly rural communities with offices in Fredericksburg, Culpeper, and Tappahannock.

LAW is extremely interested in this case because it has represented clients who seek illegally denied unemployment benefits.

The **National Employment Law Project** (“NELP”) is a non-profit organization with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP has studied and written about misclassification of employees as independent contractors and its detrimental impact on workers, competition and government revenue, as well as ways employers use technology—such as digital labor platforms—to obscure their control over working conditions and enable misclassification. NELP has litigated and participated as amicus curiae in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws, including on behalf of truck and delivery drivers.

The **Virginia Poverty Law Center** (“VPLC”) uses advocacy, education, and litigation to break down systemic barriers that keep low-income Virginians in the cycle of poverty. VPLC has extensive experience with Virginia’s Unemployment Insurance system, through legislative advocacy on a range of bills designed to insure broad access to unemployment benefits and to prevent and limit unemployment overpayments. During the Covid-19 pandemic, VPLC, along with LAJC and LAW, filed a class action case against the Virginia Employment Commission (VEC) resulting in breaking the backlog of applications for

unemployment benefits when benefits were sorely needed by Virginians who lost their jobs because of the pandemic.

Amazon Logistics (“Amazon”) is a logistics corporation that, through its Amazon Flex program, hires individuals as independent contractors to deliver packages to its customers. By classifying these workers as independent contractors instead of employees, Amazon excludes them from critical rights and protections—including minimum wage and overtime pay, unemployment insurance (“UI”), and workers’ compensation—that employees are entitled to. The independent contractor business model also enables Amazon to pass substantial risks and expenses onto its drivers, including vehicle maintenance, fuel costs, and fluctuations in demand.

Ronald Diggs (“Mr. Diggs”), a former Amazon Flex driver (“Flex driver” or “driver”), filed a claim for UI compensation. While administering his claim, the Virginia Employment Commission (“VEC”) realized that Mr. Diggs had been classified as an independent contractor, not an employee. This prompted VEC to open a tax liability investigation to determine whether the services performed by all Flex drivers were employment and whether Amazon owed taxes for all Flex drivers in the Commonwealth.

The resulting investigation by a VEC tax representative found that the services provided by all Flex drivers constituted employment and that Amazon

owed taxes for all Flex drivers. After conducting a hearing that Amazon requested, the VEC, by written decision of a VEC special examiner, affirmed the tax representative's findings. *Amici* write in support of VEC's determination that Mr. Diggs and all other Flex drivers are employees under the Virginia Unemployment Compensation Act ("VUCA").

STATEMENT OF THE CASE AND FACTS

Amici accept Appellee's Statement, including the Statement's discussion of the statutory and regulatory background and factual and procedural background as set forth in the Brief of Appellee ("Appellee's Brief"). *Amici* also state that on September 11, 2024, *Amici* filed a motion for leave to submit this brief pursuant to Va. Sup. Ct. R. 5:30(c).

ASSIGNMENT OF ERROR

Amazon's assignment of error states:

- I. The Court of Appeals erred in holding that the administrative record, developed in response to an individual claim based on a statute that requires an individualized analysis, supported a determination that all individuals providing delivery services via the Amazon Flex program are employees and not independent contractors.

STANDARD OF REVIEW

Amici accept Appellee's Standard of Review as set forth in Appellee's Brief.

ARGUMENT

- I. The lower court's determination should be affirmed because Mr. Diggs's experience as a Flex driver is representative and illustrative of Amazon's systemized and pervasive control, both exercised and retained, over all Flex drivers' working conditions.

As VEC found, through the unilaterally-imposed contract Amazon requires all Flex drivers to sign, Amazon maintains the right to control most aspects of the working relationship and the drivers' performance of their work. Amazon uses algorithmic management and technological surveillance to effectuate the pervasive and systemized control reserved to it in its contracts. Amazon's pervasive retained and exercised control over drivers' working conditions means drivers are not truly in business for themselves like legitimate independent contractors are. The lower court's determination should be affirmed because Mr. Diggs's experience as a Flex driver is representative and illustrative of Amazon's relationship with all Flex drivers, and Amazon's arguments to the contrary are meritless. Amazon Opening Brief, at 37-39.

- A. Amazon's "terms of service" take-it-or-leave-it contract dictates most aspects of drivers' work.

Amazon dictates most of the material terms of its relationship with Flex drivers through its "Independent Contractors Terms of Service" ("Terms of Service"), a take-it-or-leave-it contract each driver must sign before they can start work. JA 81V1, 187-88V1. The Terms of Service state that drivers are independent

contractors and not Amazon’s employees. JA 1V1, ¶ 2. By classifying drivers as independent contractors instead of employees, Amazon excludes them from critical rights and protections—including minimum wage and overtime pay, unemployment insurance,¹ and workers’ compensation—that employees enjoy. Classifying drivers as independent contractors also allows Amazon to shift substantial risks and costs of its business onto its drivers, including vehicle maintenance and fluctuations in demand. *See* Maya Pinto, Rebecca Smith & Irene Tung, *Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It*, NAT’L EMP. L. PROJECT, Mar. 25, 2019, at 1, <https://www.nelp.org/app/uploads/2022/03/Rights-at-Risk-4-2019.pdf> (“Gig companies are simply using newfangled methods of labor mediation to extract rents from workers, and shift risks and costs onto workers, consumers, and the general public.”).

Despite disclaiming Amazon’s responsibility as an employer, the Terms of Service authorize Amazon to control most aspects of Flex delivery work.

- Amazon has the right to set drivers’ pay for each shift, which are called “Delivery Blocks.” The Terms of Service state that “Amazon will pay you fees in the amounts indicated in the Amazon Flex app at the time of

¹ Virginia law expressly prohibits employers from requiring employees to sign away rights to unemployment insurance and makes efforts to do so void. *See* Va. Code § 60.2-107.

acceptance, or as otherwise agreed between you and Amazon from time to time . . .” JA 2V1, ¶ 3.

- The Terms of Service state that Amazon has “exclusive possession, control and use” of both the driver’s vehicle and the driver’s transportation and delivery services during the driver’s active performance of services. JA 3V1, ¶ 5(b).²
- Amazon has the right to collect drivers’ data, such as “geolocation and related tracking data, including your location, movements, speed at which you are traveling, and other personally identifiable information,” and to use and share this data with third parties. JA 11V1, § VI, ¶A.
- Amazon requires drivers to adhere to its “service standards” regarding how to perform the work, which include delivering packages to customers during the specified delivery window and following particular delivery instructions in the app, such as using an insulated bag for restaurant orders, not leaving frozen items unattended, and checking recipients’ identification when delivering alcohol. JA 8-9V1, § III, ¶A.

² A driver’s active performance of services is defined in the Terms of Service as the time a driver spends “actively delivering Deliverables, waiting to receive more Deliverables, or on [their] way back to the delivery station with undelivered or damaged Deliverables.” JA 3V1, ¶ 5(b).

- Finally, Amazon has the right to terminate drivers who fail to adhere to any of its “service standards” or who otherwise materially violate Amazon Flex policies. JA 3V1, ¶6(c).

Taken together, these contract terms give Amazon the ability to control drivers’ performance of their duties, and these terms apply equally to all drivers, rendering Mr. Diggs’s experience typical of all drivers. Accordingly, the lower court’s ruling that the drivers are employees, itself based on a VEC decision holding the same and on the agency’s findings of fact, should be affirmed. *See, Virginia Employment Comm’n v. A.I.M. Corp.*, 225 Va. 338, 350 (1983) (holding that delivery persons were employees because their contract “require[d] obedience to the business methods prescribed” by their distributor and they were not free from direction or control in the performance of their work).

- B. Amazon uses technological surveillance and algorithmic management to exercise near total control of drivers’ working conditions.

Amazon uses algorithmic management—a combination of data collection, worker surveillance and automated decision making—to effectuate the surveillance and control reserved to it in its Terms of Service with drivers. Through its digital labor platform (otherwise known as its “app”), Amazon matches drivers to available shifts, determines pay rates and delivery loads and locations, suggests

delivery routes,³ and tracks drivers' performance of each shift. Aiha Nguyen & Eve Zelickson, *At the Digital Doorstep*, DATA & SOCIETY, Oct. 12, 2020, at 9-10, <https://datasociety.net/library/at-the-digital-doorstep/>.

As described in a qualitative study of Amazon Flex, the app directs drivers through the delivery process. “The routes for Flex drivers are provided by an app the driver downloads to her phone. Once the driver approaches the address for a delivery, the app makes available the option to scan the package and photograph the package delivered to the appropriate destination. Only then will the app allow the driver to move on to the next package along the route, as the driver must deliver packages in the order in which the app has the deliveries organized.” Grace C. Willis, *Auto-Exploited: Narrative Explorations of the Commodification of Time*, MISSOURI STATE UNIV., Graduate Thesis. Fall 2023, at 20, <https://bearworks.missouristate.edu/cgi/viewcontent.cgi?article=4983&context=theses>.

Amazon's continuous real-time surveillance of drivers allows the corporation to supervise drivers at all times and to enact discipline and rewards. This surveillance includes monitoring drivers' acceleration, reversing, braking, seat

³ Although the app suggests a delivery sequencing and route, Amazon states in its Terms of Service that drivers “are free to map out [their] own route [and] sequence [their] deliveries . . .” JA 10V1, § III, ¶B. However, given that Amazon has the technology to map out the most efficient delivery sequencing and route, and that drivers face pressure to make deliveries within the specified time frame, this “freedom” is likely illusory.

belt wearing, responses to customer requests, and even how much they touch their screen while in motion. Tiran Bajgiran, *When Algorithms Fire Humans*, ON LABOR, Jan. 5, 2022, <https://onlabor.org/when-algorithms-fire-humans/>. Amazon uses the data to rate drivers' performance after each shift—what Amazon calls a driver's "standing"⁴— as well as determine which drivers get more shifts and which are terminated. Spencer Soper, *Fired by Bot at Amazon: 'It's You Against the Machine'*, BLOOMBERG, June 28, 2021. As one driver explained, "the app is our supervisor and boss." Nguyen & Zelickson, *supra* at 9. This algorithmic management obscures Amazon's control and enables its misclassification of Flex drivers.

- C. Amazon's far-reaching surveillance and control is not outweighed by the limited scheduling flexibility it offers.

Amazon's argument that drivers are properly classified as independent contractors hinges on its assignment system, which purports to allow drivers to choose from available shifts on the app.⁵ But this limited scheduling flexibility

⁴ Amazon's "standing" feature on its app allows drivers to see how they are rated and the reasons for the rating. Amazon gives drivers one of four ratings: Fantastic, Great, Fair, and At Risk. AMAZON FLEX, HOW TO SUCCEED AS A DELIVERY PARTNER, <https://flex.amazon.com/blog/2022/how-to-succeed-as-a-delivery-partner#:~:text=The%20Standings%20feature%20in%20the,re%20providing%20excellent%20customer%20service> (last visited Sept. 4, 2024).

⁵ Amazon describes the Flex program as a "flexible opportunity to earn extra money" because "Delivery Partners select blocks of time at will. They can cancel up to 45 minutes before a block with no penalty. And they may work for other companies." Amazon Opening Brief, at 1.

must be weighed against the other types of control that Amazon is implementing. *See Yard Bird, Inc. v. Virginia Employment Comm'n*, 28 Va. App. 215, 223-24 (1988) (holding that dancers were employees of the club where they performed despite the fact that the dancers could choose from available shifts and did not have to work a minimum number of hours per week because the club had the power to control job performance).

The ultimate question is whether a worker is in business for themselves, and as courts have recognized, scheduling flexibility is just one factor among many. In fact, “multiple courts of appeals have determined that workers were employees, rather than independent contractors, even when they had the flexibility to choose their work schedule” because the employer had the power to control significant aspects of the work relationship such that the worker was not truly in business for themselves. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1648, 1695 (Jan. 10, 2024). Amazon’s far-reaching supervision and control of drivers during the performance of their duties weighs strongly in favor of employment here. *See Uber Technologies, Inc. v. Comm’r of Labor*, 189 A.D.3d 1863, 1865-66 (N.Y. Sup. Ct 2020) (holding that Uber is an employer of drivers for unemployment insurance contributions purposes because it maintained sufficient control over drivers, including controlling drivers’ access to

customers, calculating and collecting fares, setting drivers' compensation, and tracking and rating drivers' performance).

Furthermore, the scheduling flexibility Amazon touts is limited. Although Flex drivers can choose from available "delivery blocks," Amazon acknowledges that "available delivery blocks may fluctuate week to week and are not guaranteed." AMAZON FLEX, FREQUENTLY ASKED QUESTIONS, SCHEDULING DELIVERY BLOCKS, <https://flex.amazon.com/faq> (last visited Sept. 4, 2024).

Amazon even uses tiers of scheduling flexibility to reward drivers who have strong performance records; these drivers get "preferred scheduling", whereby they receive more delivery opportunities at their preferred stations, days of week, and times of day. *Id.* (explaining that drivers must "unlock at least Level 2 Rewards" to get preferred scheduling).

Even worse, choosing a delivery block means a driver chooses a shift start time but not its end time. Flex drivers are responsible for delivering all packages in their possession or returning them to a delivery station if delivery is not possible. If package delivery exceeds the estimated shift time because of traffic or other circumstances out of a driver's control, a driver must work until package deliveries

are completed or face negative consequences, including possible termination. JA 9V1, § III(A)(3)(iii).⁶

II. The Virginia Unemployment Insurance Compensation Act is liberally construed because it is designed to alleviate economic crisis—particularly for low-income workers like Flex drivers—and stabilize the economy.

The Virginia Unemployment Insurance Compensation Act is liberally construed because it is intended to “to assure a measure of security against the hazard of unemployment in our economic life.” *Unemployment Compensation Comm’n v. Collins*, 182 Va. 426, 438 (1944). That “security” is critically important to workers in low-wage and precarious jobs, such as Flex drivers.

A. Like other digital labor platform workers, Flex drivers earn low wages and have no employer-provided benefits, making their access to social insurance programs like unemployment insurance vitally important.

As of 2017, the Bureau of Labor Statistics estimated that electronically mediated workers—workers like Flex drivers who obtain work through digital labor platforms or apps—constituted one percent of the United States workforce.

U.S. Bureau of Labor Statistics, *Electronically Mediated Employment*,

<https://www.bls.gov/cps/electronically-mediated-employment.htm>. More recently,

⁶ “Amazon expects that you will deliver all the packages you picked up as part of your Delivery Block. In an instance where delivery is not possible, you are required to return all packages to the Amazon delivery station, unless otherwise directed by Amazon. If you repeatedly do not attempt to delivery all the packages you picked up during a Delivery Block or you do not return the undeliverable packages to a location specified by Amazon, you will no longer be eligible to participate in the Program.”

a Pew Research study found that 16 percent of Americans currently or recently obtained work through an online platform, and online platform work was the primary job for one third of these workers. Monica Anderson et al., PEW RESEARCH CTR., *The State of Gig Work in 2021*, Dec. 8, 2021. The same study found that Black, Hispanic and Asian workers represent a larger percentage of digital labor platform workers than white workers. *Id.*⁷

Recent studies suggest that many digital labor platform workers earn poverty level wages.⁸ A national study of digital labor platform workers found that 1 in 7 earned less than the federal hourly minimum wage, and 30 percent of digital platform workers received a Supplemental Nutrition Assistance Program benefit, compared to 15 percent of employees in comparable service-sector jobs. Ben Zipperer, et al, *National Survey of Gig Workers Paints a Picture of Poor Working*

⁷ Sixteen percent of all surveyed adults said they had engaged in online platform work, but the percentage was higher for Black (20%), Hispanic (30%) and Asian (19%) workers. Twelve percent of white workers said they had engaged in online platform work. *See also* 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-newquestions-in-the-contingent-worker-supplement.htm> (finding that Black and Latino workers make up almost 42 percent of workers for Uber, Lyft, and other “electronically mediated work” companies, although they comprise less than 29 percent of the overall U.S. workforce).

⁸ In part because these workers are generally classified as independent contractors and not employees, there is a dearth of high-quality data on the wages and working conditions of digital labor platform workers.

Conditions, Low Pay, ECON. POL'Y INST., Jun. 2022, <https://www.epi.org/publication/gig-worker-survey/>. Studies from 2018 to 2021 of ridehail and food delivery workers in New York City and Seattle who obtained work through platforms like Uber, Lyft and DoorDash similarly found that these workers made at or below the minimum wage for the localities in which they lived, after accounting for work expenses like gas and vehicle wear-and-tear. *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs*, NAT'L EMP. L. PROJECT, Oct. 2021, at 4, <https://s27147.pcdn.co/wp-content/uploads/App-Based-Workers-Speak-Oct-2021-1.pdf> (summarizing studies of app-based workers' pay). The lack of employer-provided benefits, such as paid sick and family leave, retirement benefits, and health insurance, undoubtedly compounds the precarity these workers face.

Given the overrepresentation of Black, Hispanic, and Asian workers in online platform work, the low wages and lack of benefits in this work are exacerbating racial inequities. And it is creating a racialized sub-worker class, whereby a workforce of predominantly people of color is denied the employment rights and benefits that other workers enjoy. See Veena Dubal, *The New Racial Wage Code*, 15 HARVARD L. & POL'Y REV. 511, 535 (2021).

The record in this case suggests that Flex drivers' wages are in line with the wages of digital labor platform workers described in the studies above. Drivers in

Mr. Diggs's area are paid approximately \$20 per hour. JA 278V1.⁹ This hourly wage does not account for the substantial work expenses and other costs drivers assume, including vehicle maintenance, gas, and the employer portion of the Social Security tax. Thus drivers' net earnings are substantially less and likely below Virginia's \$12 minimum wage.¹⁰ Their earnings are also a fraction of what UPS and USPS drivers make, and UPS and USPS drivers also receive benefits like health insurance and pensions or 401(k) plans. Mary Martin, Note, *When Flexibility Sacrifices Security: An Analysis of Amazon's Flex Program*, 54 NEW ENG. L. REV. 131, 143 (2019).

Flex drivers' low earnings—coupled with the lack of employer-provided benefits—suggests that their livelihoods are incredibly precarious. They are the types of workers who most need and benefit from the stabilizing impact of unemployment insurance.

⁹ Drivers are paid per delivery block, not per hour. "A two-hour block was valued at \$40, a three-hour block at \$60, and a four-hour block at \$80. Drivers are not paid extra for overtime or for having to work beyond the block's timeframe." JA 278V1.

¹⁰ One analysis from 2018 estimated that Amazon Flex drivers actually earn between \$5 and \$11 per hour after accounting for expenses. Olivia Zaleski, *Drivers for Amazon Flex Can Wind Up Earning Less than They Realize*, SEATTLE TIMES, Nov. 10, 2018, <https://www.seattletimes.com/business/amazon/drivers-for-amazon-flex-can-wind-up-earning-less-than-they-realize/>.

- B. Unemployment insurance maintains purchasing power and stabilizes the economy during economic downturns.

Amazon’s attempt to exclude drivers from unemployment benefits has resulted in a loss of purchasing power for their families and economic stimulus for the economy as a whole. According to one study, “individual consumption for those receiving UI benefits falls only one-third as much as it would have in the absence of the program.” Michael Greenstone & Adama Looney, *The Importance of Unemployment Insurance for American Families and the Economy*, BROOKINGS, Dec. 4, 2012. And, according to the Congressional Budget Office, “each dollar of UI benefits raises aggregate economic activity by \$1.10, and each million dollars of UI benefits increases employment by six jobs.” *Id.*

Experts estimate that unemployment insurance during the 2007-2008 Great Recession had a 1.7 multiplier effect, meaning that a \$100 increase in unemployment insurance leads to \$70 additional GDP in the private sector. Ioana Marinescu, *Moving from Federal Pandemic Unemployment Compensation to a Job Losers’ Stimulus Program Amid the Coronavirus Recession*, WASHINGTON CEN. FOR EQUITABLE GROWTH, June 5, 2020, <https://equitablegrowth.org/moving-from-federal-pandemic-unemployment-compensation-to-a-job-losers-stimulus-program-amid-the-coronavirus-recession/>. This means that Virginia’s average weekly benefit amount—\$345.56 in the first quarter of 2024—results in \$587.45 per unemployed worker per week in economic stimulus for Virginia. Flex drivers’

exclusion from unemployment insurance is likely costing Virginia hundreds of thousands of dollars in lost economic stimulus per week.

This loss of economic stimulus can increase the length and severity of the next recession. Since the UI system was enacted, recoveries from recessions have become lengthier, meaning that unemployment remains high long after economic growth resumes. Rachel West et al., *Strengthening Unemployment Protections in America*, CTR. FOR AMER. PROGRESS, June 2016, at 1, https://cdn.americanprogress.org/wp-content/uploads/2016/05/31134245/UI_JSAreport.pdf. Amazon's attempt to exclude its drivers from UI, coupled with increasingly lengthy recessions, undermines the UI system's capacity to serve as a macroeconomic stabilizer during recessions.

C. Unemployment insurance provides enormous benefits to unemployed workers.

Unemployment insurance provides enormous financial and social benefits to recipients and their families—benefits that Flex drivers lose out on because Amazon misclassifies them as independent contractors. UI has a hugely positive impact on recipients and their families. In 2009, it kept more than 5 million Americans out of poverty and saved more than 2 million jobs by boosting the economy. *Id.* And, between 2008 and 2012, it prevented an estimated 1.4 million foreclosures. *Id.* Similarly, during the height of the COVID-19 pandemic, UI benefits kept 5.6 million people out of poverty in 2020 and 2.3 million people out

of poverty in 2021. Danilo Trisi, *Government's Pandemic Response Turned a Would-Be Poverty Surge Into a Record Poverty Decline*, CTR. ON BUDGET & POL'Y PRIORITIES, Aug. 29, 2023, <https://www.cbpp.org/research/poverty-and-inequality/governments-pandemic-response-turned-a-would-be-poverty-surge-into>.

Pandemic UI was associated with a 30% reduction in food insecurity for families with incomes of \$75,000 or less. Julian Raifman et al., *Unemployment Insurance and Food Insecurity Among People Who Lost Employment in the Wake of COVID-19*, NAT'L INST. OF HEALTH, July 2020, at 11, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7402065/pdf/nihpp-2020.07.28.20163618.pdf>.

Unemployment insurance also helps recipients find the right job. Research shows that workers who are afforded the opportunity to search for jobs for longer periods find jobs that are better matches and stay employed for longer periods subsequently. Ammar Farooq, et al., *Do Unemployment Insurance Benefits Improve Match Quality? Evidence from Recent U.S. Recessions* 4-5, 21, NAT'L BUREAU OF ECON. RSCH., Working Paper No. 27574, July 2020. Unemployment insurance helps individuals absorb the cost of a longer and more exhaustive work search period.

Receipt of UI compensation also has social benefits for recipients. It keeps recipients connected to the labor market through workforce development opportunities, as well as job search requirements that ensure recipients continually

seek out new opportunities. The unemployment insurance system connects recipients with local employers and job openings, screens recipients to assess their skills and needs, and provides work-search tools, counseling, and training opportunities. Rachel West et al., *Strengthening Unemployment Protections in America*, CTR. FOR AMER. PROGRESS, June 2016, at 12-14, https://cdn.americanprogress.org/wp-content/uploads/2016/05/31134245/UI_JSAreport.pdf. Flex drivers lose out on these critical resources as well.

III. Misclassification undermines the purpose of unemployment insurance and harms workers, competitor businesses, and the economy as a whole.

Corporations like Amazon that use digital labor platforms to assign work and supervise workers must not be allowed to maintain their competitive advantage by misclassifying workers as independent contractors at the expense of low wage workers, law abiding businesses, and the solvency of Virginia's unemployment insurance fund. Given these widespread harms, VEC should prioritize worker misclassification investigations and tax liability assessments, as it did in this case.

A. Misclassification degrades job quality and harms workers.

In 2012, the Joint Legislative Audit and Review Commission ("JLARC") issued a report to the Governor on employment misclassification in Virginia, entitled "Review of Misclassification in Virginia." Joint Legislative Audit and Review Commission, Report to the Governor and the General Assembly of Virginia, Review of Employee Misclassification in Virginia, June 2012,

<https://jlarc.virginia.gov/pdfs/reports/Rpt427.pdf> (“JLARC Report”). JLARC found that up to a quarter of audited Virginia employers misclassified one or more employees, and that the Commonwealth could have up to 40,000 misclassifying employers and 214,000 misclassified workers. JLARC Report, at v. Moreover, JLARC noted that in 2010, VEC auditors found that audited employers misclassified 5,639 employees, and that 34% of audited employers in the transportation and warehousing industry misclassified their workers. JLARC Report, at 25.

Misclassification is rampant across the country, not just in Virginia. “Federal studies and state-level agency audits, along with unemployment insurance and workers’ compensation data, indicate that between 10 and 30 percent of employers wrongly label at least one employee as an independent contractor, meaning that several million workers nationally may be misclassified.” Rebecca Smith, *Public Task Forces Take on Employee Misclassification: Best Practices*, NAT’L EMP. L. PROJECT, Aug. 2020, at 3, <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification-Updated-August-2020.pdf>.

Misclassification unlawfully excludes workers from bedrock labor rights and protections, such as the right to minimum wage and overtime, the right to collectively bargain, and the right to a harassment and discrimination-free

workplace. JLARC Report, at iii. Corporations that misclassify their workers as independent contractors shirk their responsibilities to contribute as employers to social insurance funds, so their workers are excluded from critical state social insurance programs like UI and are obligated to pay both the employer and employee shares of payroll taxes that fund Social Security and Medicare. JLARC Report, at 14, 18, Appendix C.

Because misclassified workers are excluded from baseline labor rights and protections, they tend to earn less money than properly classified employees in the same occupations. A 2022 study by the New School analyzed the incomes of independent contractors in 11 low-paying misclassification-prone industries in New York and found that these independent contractors are paid half to two-thirds of what employees receive in the same industries. Lina Moe and James A. Parrott, *For One in 10 New York Workers, 'Independent Contractor' Means Underpaid and Unprotected*, NEW SCHOOL CTR. FOR NYC AFFAIRS, June 2022, at 2, <http://www.centernyc.org/urban-matters-2/the-low-wages-of-misclassification-what-one-in-10-new-york-workers-face>.

Similarly, an Economic Policy Institute study of 11 commonly misclassified jobs—including landscapers, truck drivers, home health aides and janitors—found that workers classified as independent contractors lose out on thousands of dollars per year in income and job benefits relative to their employee counterparts. John

Schmitt et al., *The Economic Costs of Misclassification*, ECON. POL'Y INST., Jan. 25, 2023, <https://www.epi.org/publication/cost-of-misclassification/>. One of the 11 occupations studied—light truck delivery driving—is similar to Amazon Flex driving work. The study estimates that the full value of the typical light truck delivery driver job for a worker classified as an employee is \$30,883. The full value includes average compensation and employer-provided benefits like unemployment insurance, workers' compensation, and health insurance. The same light truck delivery driver job is valued at between \$21,803 and \$24,999 for an independent contractor. *Id.* This study further indicates that misclassification is depressing earnings and reducing benefits in many occupations that are already low-wage.

For many misclassified workers, their poverty-level incomes—coupled with their exclusion from employment-related social insurance programs like UI and employment-related benefits like health insurance, retirement benefits, workers' compensation, and paid leave—mean that their lives are incredibly precarious. They live paycheck to paycheck, one accident or illness away from financial disaster, and without the means to ever survive a job loss or retire.

- B. Misclassification puts law-abiding businesses at a competitive disadvantage.

Misclassification of employees as independent contractors causes negative ripple effects in the community, making it more difficult for law-abiding

businesses to compete. Businesses that misclassify their employees pocket between 20 to 40 percent of payroll costs they would otherwise incur for UI, workers compensation premiums, the employer share of Social Security, and health insurance premiums. Françoise Carré, *(In)Dependent Contractor*, ECON. POL'Y INST., Jun. 8, 2015, at 5, <https://files.epi.org/pdf/87595.pdf>. *Accord*, JLARC Report, at 13. Consequently, corporations with business models reliant on misclassifying workers as independent contractors pressure their competitors who properly classify their workers as employees to shed labor costs, creating a “race to the bottom” where firms try to remain competitive by following suit. *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).

A 2010 study estimated that misclassifying employers shift \$831.4 million in UI taxes and \$2.54 billion in workers’ compensation premiums to law-abiding businesses annually. Douglas McCarron, *Worker Misclassification in the Construction Industry*, 57 BNA CONSTRUCTION LABOR REPORT 114, Apr. 7, 2011.¹¹ The practice, as the United States Treasury Inspector General found, “plac[es] honest employers and businesses at a competitive disadvantage.” Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make*

¹¹ *See also* Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers’ Compensation Premiums*, DEP'T OF ECON., UNIV. OF MO., KAN. CITY, Sept. 12, 2010, at 5-6.

the Worker Misclassification Initiative with the Department of Labor a Success, Feb. 20, 2018, at 1, <https://www.tigta.gov/sites/default/files/reports/2022-02/2018IER002fr.pdf>.

- C. Misclassification harms government coffers and weakens the solvency of Virginia’s unemployment insurance fund.

Employers also starve government of revenue when they misclassify their employees as independent contractors. Conservative estimates suggest that federal and state governments lose billions of dollars per year in unreported payroll taxes and UI contributions. *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT. EMP. L. PROJECT, Oct. 2020, <https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>. A 2009 Government Accountability Office report estimates that independent contractor misclassification costs federal revenues \$2.72 billion in 2006. U.S. Gov’t Accountability Off., *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (Aug. 2009), <http://www.gao.gov/new.items/d09717.pdf> (noting \$1.6 billion lost in 1984 dollars). Additionally, the Treasury Inspector General for Tax Administration estimates that misclassification contributed to a \$54 billion underreporting of employment tax and losses of \$15 billion in unpaid FICA taxes and UI taxes. Treasury Inspector General for Tax Administration, *While Actions*

Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed, Feb. 4, 2009.

State-level task forces, commissions, and research teams have also used agency audits along with UI and workers' compensation data to document the huge impact of independent contractor misclassification. The JLARC Report estimated that misclassification lowered Virginia's income tax collections by as much as \$28 million per year. JLARC Report, at 31. This lost revenue harms the solvency of Virginia's general fund and will weaken Virginia's resiliency during future recessions.

IV. Amazon received the due process to which it was entitled for a tax liability determination, and Amazon's argument for multiple tax liability determinations would be unduly burdensome to VEC and Flex drivers.

State unemployment insurance taxes ("SUTA") are the bread and butter of the federal-state UI compensation program. Under the program first codified in the Social Security Act of 1935, each state compensates qualified unemployed workers using SUTA revenue. 42 U.S.C. § 503(a)(5). Each state is responsible for designing and implementing SUTA plans to ensure both compliance with federal law and adequate revenue to make UI compensation payments to unemployed workers when due. *See* 42 U.S.C. § 503; 26 U.S.C. § 3304.

Virginia's SUTA plan is codified in the VUCA. Va. Code § 60.2, *et seq.* Under VUCA, VEC determines its own organization and methods of procedure,

and is responsible for SUTA administration. Va. Code § 60.2-111(A). SUTA Administration includes determining the SUTA liability of employing units operating in the Commonwealth such as Amazon. Va. Code § 60.2-500.

Determining SUTA liability is routine work for VEC; in the past five years, VEC performed between 4,428 to 9,978 tax liability determinations *each quarter*. U.S. Dep't of Labor, 581 Report, <https://oui.doleta.gov/unemploy/DataDownloads.asp> (total of new and successor employer tax liability determinations per quarter between 2019 to 2023). Yet, Amazon would have the Court believe that in *its* case, VEC confused taxes with benefits and in doing so failed to provide Amazon with due process.

Amazon's account is wrong: first, VEC appropriately determined Amazon's tax liability under the procedures set forth in VUCA's Taxation section by evaluating Flex drivers' employment status. Second, VEC provided Amazon with due process throughout the tax determination process. Third, and finally, to hold otherwise would place an undue burden on VEC and workers.

- A. VEC aptly used the tax determination process to evaluate Amazon's tax liability for Flex drivers.

Amazon contests VEC's authority to evaluate the employment status of multiple workers where a tax liability decision was triggered by a single claim for benefits. As detailed below, VEC followed the process set forth in VUCA.

Amazon's argument is without merit.

Under Virginia Code § 60.2-500, VEC is responsible for determining the tax liability of employing units operating within the Commonwealth. Tax liability determinations commonly consider the employment status of one or more workers under Virginia Code § 60.2-212(C). According to VEC, “[t]he most frequent type of liability issue that comes before the Commission involves whether or not services performed by **certain designated individuals** constitutes employment within the meaning of Section 60.2-212 of the Code of Virginia.” JA 59V1 (emphasis added). VEC is required to make a unit-wide determination in some cases. “Whenever an employing unit contracts with any person for any service which is a part of such employing unit’s usual trade, occupation, profession or business, that employing unit shall be deemed to employ **all individuals** employed by such person for such service.” Va. Code § 60.2-211(B) (emphasis added). The sole exception to this rule is when workers hold out their services to the public as an independent business, they are excluded from the unit-wide determination. *Id.* Here, VEC correctly found that the services provided by Mr. Diggs were the same services as those provided by all Flex drivers and that there was no evidence that Flex drivers held out their services to the public independent of Amazon.

Aside from where an employing unit requests an advisory opinion, Va. Code § 60.2-212.2, VEC tax liability determinations are generally triggered by one of three events. JA 58V1. First, VEC investigates the liability of new employers. *Id.*

Second, under federal guidance, VEC is required to conduct regular audits of employers. Dep't of Labor, Unemployment Insurance Program Letter 03-11, *Implementation of the Effective Audit Measure* (Dec. 30, 2010). Third, when a worker files for UI benefits and learns that their putative employer did not report their wages to VEC, VEC may investigate the tax liability of the worker's putative employer. JA 58V1. This third event was the triggering event for VEC's determination of Amazon's tax liability here, as Mr. Diggs's application for UI led a VEC tax representative to investigate.

Amazon argues that a tax liability determination triggered by a single UI claim cannot consider an employer's liability for multiple workers. Amazon Opening Brief, at 23-4. There is no legal basis for this argument. As noted above, VUCA expressly prescribes unit-wide findings of employment regardless of whether a tax determination is triggered by a single claim for benefits.

Moreover, VEC's decision requiring Amazon to pay SUTA for all Flex drivers based on a determination triggered by a single benefits claim is supported by case law. In *Yard Bird v. VEC*, one worker filed a UI claim, and "[w]hile processing [the worker's] claim, VEC discovered that Yard Bird had not been paying unemployment taxes on [the worker] or any of its other dancers." *Yard Bird*, 28 Va. App. at 219. This led VEC to undergo an investigation, and a VEC tax representative issued a letter opinion finding that the dancers were Yard Bird's

employees, just as VEC did here with Flex drivers. Yard Bird appealed this determination to the Commission, as did Amazon. A VEC special examiner conducted a hearing on the matter and issued a decision affirming the earlier letter opinion, as occurred here. *Id.* The *Yard Bird* court affirmed VEC's decision, ruling that the single claimant and the other dancers were under the control and direction of Yard Bird, that they were not engaged in independently established businesses, and that VEC correctly determined they were employees. *Id.* at 227. The same result should be sustained here.

In sum, Amazon fails to point to any state or federal law that would restrict VEC's tax liability determination inquiry to a single worker. Instead, Virginia law requires VEC to make a fulsome investigation of a putative employer's liability with respect to all workers performing the same services. VEC did so here.

B. Amazon received ample notice and opportunity to be heard.

Generally, the Due Process Clause of the Fourteenth Amendment requires both notice and an opportunity to be heard before a person can be deprived of a property interest. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Virginia Code § 60.2-500 provides putative employers such as Amazon with the constitutionally required Due Process.

In conducting the tax liability determination and hearing, VEC provided Amazon with both notice and an opportunity to be heard – the essential elements

of due process. Regardless of the triggering event for a tax determination, the process generally begins with a VEC tax representative making an initial determination of the putative employer's SUTA liability. Where the tax representative determines that the putative employer is liable for SUTA, VEC has, by "its own motion", triggered the hearing process set forth in Virginia Code 60.2-500. *Yard Bird*, 28 Va. App. at 219. Then VEC must provide the putative employer with at least thirty days' notice of a tax liability hearing if the putative employer requests a hearing to contest the tax representative's determination. Va. Code § 60.2-500(A). At the hearing, conducted by a VEC Special Examiner, both VEC, as represented by the Office of the Attorney General, and the putative employer may submit evidence, call witnesses, conduct cross examinations, and make opening and closing statements. *See* Va. Code § 60.2-500(B); JA 59V1. In rare cases, parties will be afforded the opportunity to submit post-hearing briefs. JA 59V1. The resulting decision of the Special Examiner conducting the hearing is VEC's final determination of the putative employer's SUTA liability. Va. Code § 60.2-500(B). Putative employers may request judicial review of VEC's decision, but "the Commission's findings of facts, if supported by the evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." Va. Code § 60.2-500(C).

Contrary to Amazon’s protestations that VEC failed to follow its own process, thus depriving it of due process, Amazon Opening Brief, at 23, VEC actions adhered to all the requirements set forth in Virginia Code § 60.2-500, thus providing Amazon with constitutionally mandated due process. First, Amazon was fully notified of the tax liability determination. On August 26, 2019, VEC tax representative Hiuber Letona sent Amazon a nine-page tax liability determination letter detailing the scope, law, and factual basis for the Commission’s tax liability determination. JA 15V1. The scope of VEC’s inquiry is described on the first page. The letter expressly states that the issue under consideration was not merely Amazon’ tax liability for services Mr. Diggs performed, but for services performed by “subsequent individuals working for Amazon Logistics.” *Id.* Likewise, the letter clearly communicates that VEC’s holding extends to liability for all Flex drivers. As Mr. Letona writes, “the evidence leads the Commission to conclude that Flex drivers who receive remuneration are employees of Amazon Logistics Inc. and their remuneration is to be reported to the Virginia Employment Commission as wages.” JA 22V1. Mr. Letona’s letter also details the relevant law by reciting both the relevant portions of the Virginia Code and each of the IRS 20 factors. JA 16-22V1. The factual basis for VEC’s legal conclusion is set forth in both the text of the letter and the attached Agreement and Tax Liability Determination Questionnaire. Finally, Mr. Letona’s letter notifies Amazon that it may request a

hearing, and of the method and time limit for making such a request. JA 22-23V1. Thus, Amazon was fully notified of the scope, relevant law, and factual basis of VEC's tax liability determination, as well as how to appeal.

Amazon's understanding of its right to appeal is evidenced by its request for review. On September 24, 2019, 29 days after the date of Mr. Letona's determination letter, Amazon sent VEC an appeal letter by USPS Priority Mail. JA 29V1. Thus, Amazon understood the 30-day appeal window. However, the text of Amazon's appeal contests solely VEC's tax liability determination with respect to Mr. Diggs, not with respect to all Flex drivers. *Id.* Whereas other sections of VUCA provide for an extension of the appeal window and other statutory deadlines for good cause shown, *see* Va. Code § 60.2-619(D), Virginia Code § 60.2-500 is devoid of any such extension. To borrow a quote from the Court referenced by Amazon, "If the General Assembly had intended to grant the Commission the right" to accept late appeals, "it would have included words to that effect in Code" Section 60.2-550. Amazon Opening Brief, at 25. Thus, by failing to timely request a hearing on Amazon's tax liability for all Flex drivers, Amazon waived its right to contest VEC's determination as to workers other than Mr. Diggs.

VEC informed Amazon of the relevant law authorizing and setting forth the procedure for the hearing. In advance of the hearing that occurred on May 14,

2020, VEC sent Amazon two separate letters, dated March 30, 2020, which plainly identified Va. Code § 60.2-500 as the section at issue in the May 14, 2020 hearing, and extensively spelled out procedural rights to the parties. JA 45-47V1. The letters invited the parties to raise any questions that they had about the process or procedures.

Amazon was granted a fulsome hearing on its tax liability for both Mr. Diggs and all Flex drivers, yet now the company misrepresents that procedural history. At the Tax Liability hearing on May 14, 2020, the evidence Amazon presented focused squarely on its tax liability for all Flex drivers and not on its sole point of appeal – tax liability for Mr. Diggs. Amazon’s opening argument is illustrative of the company’s intent to achieve a category-wide determination that all Flex drivers are independent contractors. In its opening argument, Amazon referenced “delivery providers” twenty-three times. JA 116V1-20V1. The company referenced Mr. Diggs only once. JA 116V1. Amazon concluded its opening argument with, “In summary, the evidence you’ll hear today shows that the delivery partners operate as independent contractors and not employees under Virginia law.” JA 120V1.

Amazon’s only witness at the hearing, Mr. Hallingstad, testified extensively about the Flex program but had no direct knowledge of Mr. Diggs. JA 176V1. Hallingstad testified that there were four separate categories of Flex drivers to differentiate the services Mr. Diggs provided from other Flex drivers. JA 183-

86V1. Then, Mr. Hallingstad testified that all Flex drivers had to sign the same agreement that governed Mr. Diggs's services to Amazon. JA 187V1. After hearing the evidence, the VEC, through the special examiner, affirmed the tax representative's decision, finding that the agreement Mr. Diggs signed provided Amazon with the requisite control, that Mr. Diggs's services constituted employment, and that all Flex drivers signed the same agreement. Therefore, Amazon was liable for SUTA for all Flex drivers. JA 295-96V1.

Thus, Amazon was afforded ample opportunity to contest its tax liability with respect to Mr. Diggs and all Flex drivers, despite having waived its right to contest the latter determination. Amazon had the chance to ask factual and evidentiary questions to Mr. Letona, Mr. Diggs, and Mr. Hallingstad. It could have called additional witnesses, though it chose not to. It could have submitted documents other than the Terms of Service; it failed to submit any. Moreover, Amazon had a full and fair opportunity to enter evidence. Amazon even had the rare (and non-requisite) opportunity to submit a post-hearing brief. In these briefs, Amazon argued for a determination that all Flex drivers are independent contractors, and argued in the alternative that the decision should apply only to Mr. Diggs. JA 263-74V1. In short, VEC gave Amazon both notice and an opportunity to be heard, notwithstanding Amazon's belated and implausible arguments to the contrary.

C. Amazon's demand for separate tax liability determinations is unduly burdensome.

Amazon argues that VEC cannot consider the employment status of other workers where VEC's investigation of the putative employer's tax liability is prompted by a single worker's benefits claim. If Amazon's argument is accepted by the Court, that outcome will have catastrophic effects on the federal-state UI system in Virginia.

Federal oversight is prolific in state UI tax collection. While SUTA are assessed and collected by states, generated revenues are poured directly into UI trust fund accounts that the U.S. Treasury maintains. 42 U.S.C. § 1104. Moreover, the U.S. Department of Labor tracks state compliance with federal standards for timely and accurate tax collection, regular auditing of employers, and identification of misclassified workers. Dep't of Labor, Unemployment Insurance Program Letter 03-11, *Implementation of the Effective Audit Measure 3* (Dec. 30, 2010) [hereinafter "UIPL 03-11"]; Quality Control in the Federal-State Unemployment Insurance System, 20 C.F.R. § 602 (1987). While it is VEC's job to administer SUTA, the U.S. Department of Labor is regularly checking VEC's work.

SUTA administration is a massive job. To meet federal standards, VEC is required to conduct annual tax liability audits of at least one percent of employer accounts and at least one percent of the state's total wages. *Id.* VEC also must target audits to identify at least one misclassified worker per audit and to increase

taxable wages by two percent. *See* UIPL 03-11. In 2023, VEC conducted an average of 8,533 tax liability determinations per quarter. U.S. Dep’t of Labor, 581 Report, <https://oui.doleta.gov/unemploy/DataDownloads.asp>. The agency performed 452 to 679 audits of existing employers in each quarter of 2023. *Id.* Those audits identified an average of 2,645 misclassified workers per quarter. *Id.* In *each* quarter of 2023, through audits, VEC identified an average of nearly \$19 million in unreported wages, including nearly \$7 million in taxable wages. *Id.* In this context, Amazon’s argument that VEC needed to conduct *two separate* liability determinations here – one with respect to the employment status of Mr. Diggs and one with respect to the employment status of all Flex drivers – is not simply contrary to the law; it is wholly impracticable.

Amazon’s interpretation of the law would also place an unconscionable burden on unemployed workers. In support of his claim for UI and because his employer had misclassified him as an independent contractor, Mr. Diggs had to produce 1099s and other documentation, submit to interviews with the tax representative, and testify at the Tax Liability hearing. In practice, other Flex drivers could be subjected to these same burdens. Amazon’s interpretation of the law would force VEC to conduct *separate* tax liability determinations as each Flex driver applied for UI, unless or until VEC conducted a *separate* determination with respect to all Flex drivers.

States are supposed to pay workers at “the earliest stage of unemployment that such payments [are] administratively feasible,” *California Dep't of Hum. Res. Dev. v. Java*, 402 U.S. 121, 131 (1971), not to condition payments to misclassified workers on surviving a war of attrition. Amazon’s arguments would compromise VEC’s ability to comply with *Java’s* directive, as VEC would delay benefit decisions while it conducts the multiple tax liability determinations Amazon insists upon.

When federal standards are not met, the federal government’s enforcement mechanisms are financial. Failure to substantially comply with federal standards can result in loss of federal administration funding for the state, 42 U.S.C. § 503(b)(2), or loss of credits against the Federal Unemployment Tax for employers operating in the state, 26 U.S.C. § 3302. Likewise, the availability of interest-free federal loans to top off state UI trust funds in extreme economic downturns is contingent on states meeting trust fund solvency and tax rate requirements. 20 C.F.R. § 606.32(b)(1)(ii) (2010). Amazon’s interpretation would hinder VEC’s ability to perform its essential tasks and would threaten its continued federal funding.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals.

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CERTIFICATE

I do hereby certify that the foregoing Brief *Amici Curiae* of the Legal Aid Justice Center et al. complies with Va. Sup. Ct. R. 5A:19 and contains 8,305 words.

I further certify that on September 11, 2024, I electronically filed the foregoing Brief *Amici Curiae* with the Supreme Court of Virginia by using the VACES system, and an electronic copy has been emailed to counsel listed below:

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