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## Uber's Dilemma: How the ADA May End the On-Demand Economy

Bryan Casey

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## **Uber’s Dilemma: How the ADA May End the On-Demand Economy**

Bryan Casey

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### **ABSTRACT**

This article is the first to point out that a few relatively low-profile lawsuits involving Uber’s liability under the ADA could have an outcome-determinative effect on *O’Connor v. Uber Technologies, Inc.*, the blockbuster employment misclassification case brought against the startup by its own drivers. Because both types of lawsuits hinge on the role that drivers play within Uber’s business model, a ruling in favor of ADA liability which compelled Uber to exert additional control over its drivers would also, in turn, jeopardize the drivers’ legal status as independent contractors. Such an outcome would be catastrophic to Uber’s core business model, costing the company hundreds of millions—if not billions—of dollars. And because Uber is but one of hundreds of Silicon Valley startups to have adopted a similar business model, a misclassification ruling against the tech giant could set in motion a domino effect that impacts scores of companies throughout the “on-demand” economy. Hundreds of millions, if not billions, of dollars may hang in the balance of a few ADA cases. So, too, may the rights of some 57 million Americans with disabilities, for whom victory could come to represent a major civil rights milestone.

### **AUTHOR NOTE**

Bryan Casey is a J.D. candidate at Stanford Law School, class of 2018. The author particularly thanks Joan Petersilia, Adelbert H. Sweet Professor of Law at Stanford Law School and faculty co-director of the Stanford Criminal Justice Center, as well as Rabia Belt, Assistant Professor of Law at Stanford Law School for their generous support.

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## I. INTRODUCTION

Raindrops patter against the windowpane of Kristin Parisi's Boston office as the clouds of an April storm break open above.<sup>1</sup> Parisi is hardly conscious of it nowadays, but she tends to be acutely aware of the weather. To her, the sight of droplets trickling down a windowpane represents something far different than it might to the rest of us. Ever since a childhood car accident left her paralyzed from the waist down, rain has come to signify an obstacle that can prove as formidable to her as a flight of stairs lacking a handicap accessible alternative.

Relying on a wheelchair to get around means that, without the right combination of planning and anticipation, a sudden storm could leave her completely exposed to the elements—a state of affairs that adds fresh new ironies to the phrase: “Staying a step ahead of the weather.” After all, unlike most of her fellow Bostonians, Parisi cannot simply dart into a subway terminal to wait out a downpour until a cab arrives.

After more than twenty-five years in a wheelchair, Parisi's heightened concern for the weather has become almost second-nature to her. “It's one of those things I forget—that I'm disabled—until someone tells me I am,” she often says.<sup>2</sup> Yet on this April day in 2015, it is not the rain, but something else entirely, that reminds Parisi of her disability.

Only minutes before departing her office, Parisi had arranged for a ride home using a software application developed by a multibillion-dollar Silicon Valley startup named Uber. The thirty-year-old public relations executive had used her smartphone to request a ride and been paired—through the application—with a nearby vehicle-for-hire affiliated with the company. As the Uber driver pulled up to Parisi in a “good-sized Mercedes sedan,” however, something unexpected happened.<sup>3</sup>

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<sup>1</sup> This anecdote is adapted using quotations from two interviews of Kirstin Parisi featured on The Daily Beast and CNET. See Dara Kerr, *What Is Uber Doing To Train Its Drivers On Disability Rights?*, CNET (Aug. 3, 2015), <http://www.cnet.com/news/what-is-uber-doing-to-train-drivers-on-disability-rights/> [<https://perma.cc/YVW2-NJZQ>]; Nina Strohlic, *Uber: Disability Laws Don't Apply to Us*, THE DAILY BEAST (May 21, 2015), <http://www.thedailybeast.com/articles/2015/05/21/uber-disability-laws-don-t-apply-to-us.html> [<https://perma.cc/4F9Q-RL94>].

<sup>2</sup> Strohlic, *supra* note 1.

<sup>3</sup> Kerr, *supra* note 1.

“No, no, no,” the driver said as he gestured dismissively toward her wheelchair. “That’s never going to fit in my car.”<sup>4</sup>

“It will,” replied Parisi, before patiently explaining that her wheelchair—which weighs a grand total of 15 pounds and can be folded to a fraction of its normal size—can easily fit into the trunk of her own compact car.

Parisi continued to press, but the driver remained adamant. Their back-and-forth went on at length until, finally, Parisi felt no other choice than to concede defeat.

The rain fell unabated. Parisi watched from the curb as the Uber driver’s spacious Mercedes sped off and melded into the Boston traffic. On this occasion, as luck would have it, she managed to get a ride home from a generous passerby, who spotted the rain-soaked executive and offered to help.

Although the Uber driver’s refusal infuriated Parisi, she did not plan to report the incident. Like many others faced with the quotidian acts of discrimination that constitute just another day in the life of a person with a disability, Parisi thought it best to just let it go. That is, until shortly thereafter, when what she had dismissed as a single stroke of bad luck happened again.

“The first incident was, I thought, a fluke,” she later recalled.<sup>5</sup> But two weeks later, after requesting an Uber vehicle to get her to the airport, the driver again tried to deny her a ride—complaining that the wheelchair would “dirty the car.”<sup>6</sup>

This time, however, Parisi refused to take no for an answer. Against the driver’s protests, she dragged herself—and her wheelchair—into the back of the vehicle without any assistance.

Securing her place in the back seat, though, did not spell the end of Parisi’s troubles. The driver proceeded to berate her for the entire trip to the airport, proclaiming that “just like [she] wouldn’t drive a dog, she shouldn’t be expected to take a wheelchair.”<sup>7</sup> According to Parisi, the Uber driver also called her an “invalid.”<sup>8</sup>

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<sup>4</sup> Strohlic, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> Kerr, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> Strohlic, *supra* note 1.

Upon arriving at the airport, the driver had the nerve to ask whether Parisi would give her a bad review through the rating system built into Uber’s software application.

“It has nothing to do with a bad review,” Parisi responded.<sup>9</sup> “[I]t has to do with illegal practice. You have to understand what you’re doing is not only mean—it’s against the law.”<sup>10</sup>

These two incidents in quick succession spurred Parisi to lodge a complaint with Uber. “This was the worst transportation experience of my life,” she wrote in a report to the company.<sup>11</sup> She added, “I’m humiliated”—quite a statement considering the thick skin one tends to develop after living with a disability for almost twenty-five years.<sup>12</sup>

Uber responded by offering Parisi a refund for her ride, as well as a \$100 company gift card.<sup>13</sup> But she does not intend to use the card until Uber makes changes that would prevent the same kinds of refusals from occurring in the future.<sup>14</sup>

Parisi said that after receiving the gift card, she again contacted Uber, stating: “You need to do something about this and do it publicly. Say, ‘We see this as a problem and we’re not going to fight the public on this and do the right thing.’”<sup>15</sup> But according to Parisi, what Uber instead said was that, “[because it’s] a technology platform, not a public service[. . .] the ADA<sup>16</sup> does not apply to [Uber].”<sup>17</sup>

If Parisi’s description of Uber’s response has a familiar ring to it, there is good reason why. Her exchange with Uber is not the first time the multibillion-dollar company has invoked the defense that it is merely a “technology platform” after being accused of violating the law.<sup>18</sup> In fact, the response is strikingly similar to the legal defense Uber recently adopted in answer to the headline-grabbing class action

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Parisi’s use of the acronym ADA refers to a federal anti-discrimination statute known as the Americans with Disabilities Act, discussed in detail below. *See* Part IV *infra*.

<sup>17</sup> Kerr, *supra* note 1.

<sup>18</sup> *See infra* Part IV.

lawsuit brought by its own drivers, who allege Uber has misclassified them as independent contractors instead of as employees.<sup>19</sup> The case, *O'Connor v. Uber Technologies, Inc.*, has received widespread media attention thanks, in part, to the possibility that a ruling in favor of the drivers could spell hundreds of millions of dollars in additional costs for a company that many consider to be “the most successful Silicon Valley startup ever.”<sup>20</sup> Some commentators have even likened it to an employment misclassification suit brought against FedEx by its own drivers, which eventually settled for \$228 million.<sup>21</sup>

Far less attention, however, has been paid to a seemingly unrelated set of lawsuits also featuring Uber’s use of the “technology platform” defense.<sup>22</sup> Across the country—in states such as California, Arizona, and Texas—dozens of individuals with wheelchairs or guide dogs have filed suit against Uber, alleging that the company discriminated against them based on their disability.<sup>23</sup> Many of the documented incidents bear a disconcerting resemblance to those reported by Parisi. Customers with disabilities have allegedly been cursed at and yelled at by Uber drivers.<sup>24</sup> Others have allegedly been abandoned in extreme weather.<sup>25</sup> One passenger has even accused an Uber driver of stuffing her guide dog in the trunk of a vehicle without her consent.<sup>26</sup>

<sup>19</sup> *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

<sup>20</sup> Henry Ross, *Ridesharing's House of Cards: O'Connor V. Uber Tech., Inc. and the Viability of Uber's Labor Model in Washington*, 90 WASH. L. REV. 1431, 1431 (2015); see also Carmel DeAmicis, *Uber Could Have to Pay an Additional \$209 Million to Reclassify Its Drivers in California*, RE/CODE (July 14, 2015), <http://recode.net/2015/07/14/uber-could-have-to-pay-an-additional-209-million-to-reclassify-its-drivers-in-california/> [https://perma.cc/7ALT-7RYJ].

<sup>21</sup> DeAmicis, *supra* note 20; see also *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014).

<sup>22</sup> Martin De Caro, *Uber Does Not Serve Disabled People, Say D.C. Advocates*, WAMU 88.5 (Aug. 17, 2015), [http://wamu.org/news/15/08/17/uber\\_does\\_not\\_serve\\_disabled\\_people\\_say\\_dc\\_advocates](http://wamu.org/news/15/08/17/uber_does_not_serve_disabled_people_say_dc_advocates) [https://perma.cc/59Q2-TUJN].

<sup>23</sup> Strohlic, *supra* note 1; see also *Nat'l Fed'n of the Blind of Cal. v. Uber Techs., Inc.*, 103 F. Supp. 3d 1073 (N.D. Cal. 2015); *McPhail v. Lyft, Inc.*, No. A-14-CA-829-LY, 2015 WL 1143098 (W.D. Tex. Mar. 13, 2015); *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087 (W.D. Tex. Feb. 20, 2015).

<sup>24</sup> See *Complaint, Nat'l Fed'n of the Blind of Cal. v. Uber Tech., Inc.*, No. 3:14-CV-4086, 2014 WL 4628579 (N.D. Cal. Sept. 9, 2014).

<sup>25</sup> *Id.* at ¶ 3.

<sup>26</sup> *Id.* at ¶ 46.

With hundred-million-dollar figures looming in the background of Uber's employment misclassification case, a few suits featuring customers with wheelchairs or guide dogs may seem to be the least of the company's worries. But a closer examination of the overlapping issues involved in both types of lawsuits reveals that—though their subject matter is seemingly unconnected—their outcomes may in fact be inextricably linked. Indeed, Uber's lackluster response to its drivers' alleged misconduct might simply be a symptom of a far more systemic problem ailing the famous startup. It may not be that Uber lacks the will to do what Parisi describes as “the right thing” for its customers with disabilities.<sup>27</sup> Rather, it may be that doing the right thing, as Parisi and others envision it would imperil the company's entire way of doing business.

Uber's business model currently hinges on classifying its more than 160,000 U.S. drivers as independent contractors instead of as employees.<sup>28</sup> This distinction saves Uber from paying hundreds of millions of dollars in benefits to which its drivers would otherwise be entitled as W-2 employees under state and federal law.<sup>29</sup> These savings translate into a significant competitive advantage that has propelled Uber's meteoric rise from shoestring startup to multibillion-dollar transportation titan in the span of just a few short years.<sup>30</sup>

But because the pioneering company's business model is unlike any that have come before it, Uber is essentially operating in a legal grey area with respect to its workers' employment status. The validity of its independent contractor classification has never actually been affirmed by a court—in fact, the opposite has occurred. Just last year, a federal court expressed deep skepticism toward Uber's classification

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<sup>27</sup> Kerr, *supra* note 1.

<sup>28</sup> Emily Badger, *Now We Know How Many Drivers Uber Has — And Have A Better Idea Of What They're Making*, THE WASH. POST ONLINE (Jan. 22, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/01/22/now-we-know-many-drivers-uber-has-and-how-much-money-theyre-making%E2%80%8B/> [<https://perma.cc/7ALT-7RYJ>].

<sup>29</sup> DeAmicis, *supra* note 20; *see also* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015) (“Employees are generally entitled to, among other things, minimum wage and overtime pay, meal and rest breaks, reimbursement for work-related expenses, workers' compensation, and employer contributions to unemployment insurance.”).

<sup>30</sup> Lucas E. Buckley et al., *The Intersection of Innovation and the Law How Crowdfunding and the on-Demand Economy Are Changing the Legal Field*, WYO. LAW., 36, 38 (Aug. 2015).

of its drivers in a pretrial ruling issued in *O'Connor v. Uber Technologies, Inc.*<sup>31</sup> According to the court, the question of whether Uber's drivers should be classified as independent contractors, as opposed to employees, was simply too close to call at the pretrial stage.<sup>32</sup>

In California, where *O'Connor* is being litigated, the “principal test of an employment relationship is whether the [employer] has the right to control the manner and means” by which a worker accomplishes the employer's desired result.<sup>33</sup> The test is highly complex and involves a multifactor analysis, but essentially it boils down to this maxim: The more control an employer exerts over its workers' conduct, the more likely they are to be classified as employees.<sup>34</sup>

Viewed through this lens, the true impetus behind Uber's invocation of the “technology platform” defense in response to accusations of discrimination against its drivers is made readily apparent. With hundreds of millions of dollars turning on California's “control” test of an employment relationship, someone such as Kristin Parisi may say, “[D]o the right thing,” but all Uber can hear is the word “control.”<sup>35</sup> From Uber's standpoint, steadfastly insisting that it is merely a “technology platform” which bears no responsibility for controlling its drivers' conduct is its best means of guarding against an employment misclassification ruling that could dismantle its entire business model.<sup>36</sup> For all the startup knows, any changes to its policies and procedures—even something as minor as mandatory disability training for its drivers—may be the decisive factor that tips the scales in the direction of a potentially devastating ruling.

The result of this delicately-poised situation is a dilemma of staggering economic and moral significance. On the one hand, Uber's unwillingness to take additional responsibility for controlling its drivers' conduct all but ensures that individuals with disabilities will

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<sup>31</sup> *O'Connor*, 82 F. Supp. 3d at 1133.

<sup>32</sup> *Id.*

<sup>33</sup> *Alexander*, 765 F.3d at 988 (citing *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 350, (1989)).

<sup>34</sup> *Id.*

<sup>35</sup> Kerr, *supra* note 1.

<sup>36</sup> Roger Chapin, *Company Refuses to Follow Rules: Front Burner*, ORLANDO SENTINEL (July 3, 2014), [http://articles.orlandosentinel.com/2014-07-03/news/os-ed-front-burner-uber-con-20140702\\_1\\_uberx-taxi-regulations-orlando-interNat'l-airport](http://articles.orlandosentinel.com/2014-07-03/news/os-ed-front-burner-uber-con-20140702_1_uberx-taxi-regulations-orlando-interNat'l-airport) [https://perma.cc/9YFD-3S5Q].

continue to face discrimination.<sup>37</sup> But on the other hand, earnestly attempting to do what Parisi and others describe as “the right thing” could profoundly impact Uber’s employment relationship with its drivers—and, in so doing, jeopardize the very business model that has enabled the startup’s unprecedented success.<sup>38</sup>

As if those stakes alone were not high enough, the choice Uber ultimately makes in navigating this dilemma may not even be its own. A ruling in favor of the plaintiffs who have sued Uber for discriminating against customers with disabilities would force the company to take legal responsibility for controlling its drivers’ misbehavior—an outcome that would fundamentally alter its existing employment relationship.<sup>39</sup> And because Uber is but one of several hundred Silicon Valley startups now operating under a similar business model, the ruling could set in motion a domino effect—first toppling over Uber’s independent contractor classification, then sending others throughout Silicon Valley tumbling.<sup>40</sup> Indeed, the fate of not just Uber, but also scores of companies whose cumulative valuations number well into the billions of dollars, may rest on the outcomes of a few unlikely lawsuits involving disability rights.<sup>41</sup>

Part II of this piece discusses the transformative effect that software application-based companies, such as Uber, have had on the modern transportation industry in the last decade. It argues that the unprecedented success of Uber’s pioneering business model has led to a similarly unprecedented crisis of identity for the startup. With hundreds of millions of dollars hanging in the balance—and numerous lawsuits filed throughout the country—the stage is set for a judicial showdown of tremendous consequence.

Part III examines in detail some of the key legal ambiguities surrounding Uber’s independent contractor classifications. It argues that an employment misclassification ruling in *O’Connor v. Uber Technologies, Inc.* could be a defining moment in Silicon Valley that stands to impact hundreds of other similarly-situated startups.

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<sup>37</sup> Kerr, *supra* note 1.

<sup>38</sup> *Id.*

<sup>39</sup> See Complaint, Nat’l Fed’n of the Blind of Cal. v. Uber Tech., Inc., No. 3:14-CV-4086, 2014 WL 4628579 (N.D.Cal. Sept. 9, 2014).

<sup>40</sup> See *infra* Part III.

<sup>41</sup> See *infra* Part IV.

Part IV demonstrates that a few relatively low-profile discrimination lawsuits against Uber have inadvertently created a major dilemma for the startup. It argues that a ruling requiring Uber to accommodate customers with disabilities could also tip its drivers' delicately-balanced employment status in favor of a misclassification decision—potentially setting off a chain reaction of misclassification rulings throughout Silicon Valley.

This piece concludes by arguing that the dilemma facing Uber is a matter of not just economic, but also moral, significance. Its resolution will have lasting implications for the 57 million Americans with disabilities who—more than twenty-five years after the passage of the Americans with Disabilities Act—continue to experience troubling disparities in access to transportation across the U.S.<sup>42</sup>

## II. THE EMERGENCE OF TRANSPORTATION NETWORK COMPANIES

In the last decade, a number of companies have emerged that claim to offer a sleeker “alternative to what they view as the inefficiencies of traditional taxis services.”<sup>43</sup> Their premise is simple: the companies use smartphone-based software applications (“apps”) to connect people seeking rides with private drivers offering vehicles-for-hire.<sup>44</sup> In the span of just a few years, this new generation of startups has “wedged [its] way into a once airtight taxi market,” historically dominated by complex regulatory schemes and monopolistic behaviors that gave rise to high transaction costs and service quality problems.<sup>45</sup> Taking advantage of the natural efficiencies created by advances in smartphone computing power and global positioning systems (“GPS”), these companies have “brought new technology, new price structures, and consistently reliable service” into a private transportation market that had seen little in the way of innovation over the last half-century.<sup>46</sup> These app-based transportation companies are often referred

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<sup>42</sup> Humphrey Taylor et al., *The ADA, 20 Years Later*, 115, KESSLER FOUND. AND NAT'L ORG. ON DISABILITY (July 2010); see also *Transportation Equity: Ensure Access to All Modes of Transportation*, UNITED SPINAL ASS'N., [http://www.unitedspinal.org/pdf/transportation\\_equity.pdf](http://www.unitedspinal.org/pdf/transportation_equity.pdf). [<https://perma.cc/24RX-7HSF>].

<sup>43</sup> Ross, *supra* note 20, at 1431.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1434.

<sup>46</sup> *Id.* at 1433.

to as Transportation Networking Companies (“TNCs”), or more colloquially, as “ridesharing” services—though the business model resembles hailing a cab more than sharing a ride.<sup>47</sup>

Becoming a driver for one such company requires little more than owning a vehicle and a smartphone with an internet connection.<sup>48</sup> Drivers who wish to offer transportation-for-hire simply download the app of their preferred TNC, submit their personal vehicle for inspection, undertake an in-person interview, and undergo some form of background check.<sup>49</sup> The app provider hires qualifying applicants as independent contractors with no fixed hours or minimum wage.<sup>50</sup> Once hired, drivers elect when, where, and for how long they wish to offer their services on the app by indicating their availability to customers through their smartphones.<sup>51</sup> There is no minimum number of hours a driver must work, nor a minimum number of required rides a driver must provide.<sup>52</sup> Only after 180 days of consecutive inactivity does a driver’s eligibility to work for the app expire.<sup>53</sup>

Customers seeking a vehicle-for-hire can download the app, register an account with the company, and submit a request for a ride.<sup>54</sup> After the request has been submitted, the app uses the GPS of both parties’ smartphones to pair the customer with the nearest

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<sup>47</sup> Complaint, Nat’l Fed’n of the Blind of Cal. v. Uber Tech., Inc., No. 3:14-CV-4086, 2014 WL 4628579 (N.D.Cal. Sept. 9, 2014).

<sup>48</sup> Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 86-87 (2015).

<sup>49</sup> See *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at \*11 (W.D. Tex. Feb. 20, 2015) (“[A]nyone with a valid driver’s license, car insurance, a clean record and a four-door vehicle can log onto the App and connect with ride-seekers.”); see also *Cotter*, 60 F. Supp. 3d at 1070 (“To be a Lyft driver, a person must download the app, submit his car for inspection, undergo some form of background check, and submit to an in-person interview with a Lyft representative.”).

<sup>50</sup> *Cotter*, 60 F. Supp. 3d at 1069-70.

<sup>51</sup> *Id.* at 1069.

<sup>52</sup> *Id.*

<sup>53</sup> Drivers can reapply after their account expires for inactivity. Angela Moscaritolo, *California: Uber Driver an Employee, Not a Contractor*, PC MAGAZINE ONLINE (June 17, 2005), <http://www.pcmag.com/article2/0,2817,2486228,00.asp> [<https://perma.cc/F2VG-3ND7>].

<sup>54</sup> O’Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2014 WL 1760314, at \*1 (N.D. Cal. May 2, 2014).

available driver, and then plots the fastest route between pickup and drop-off locations.<sup>55</sup> Afterward, the app relays an estimate of the fare to the customer, as well as a best approximation of the driver's time of arrival—which is updated in real-time on the customer's phone as the driver approaches.<sup>56</sup> Once the customer arrives at the requested destination, drivers do not accept cash payments. Rather, a fee based on mileage, duration, and projected demand is automatically deducted from the customer's credit card, which the company stores on file.<sup>57</sup> Drivers receive a share of the fee, typically in the region of eighty percent.<sup>58</sup> The company providing the app keeps the rest.

The contrast between ordering a ride through a TNC and hailing a conventional cab goes a long way toward explaining the widespread adoption that these companies have enjoyed over the course of just a few short years. Although the initial process of registering with a TNC can take several minutes and requires the conveyance of sensitive credit card information, every subsequent request for a ride is highly streamlined. Customers merely log onto the app, punch in their intended destination, and submit a request for a ride. Having done so, customers in most cities can expect to be picked up within a matter of minutes, depending on the time of day and market demand.

TNCs market the experience as “transportation at the click of a button,” and unlike many overblown business slogans, this one often comes close to living up to its own rhetoric. By almost any measure, app-based transportation services offer the ordinary consumer a quicker, simpler, cheaper, and more reliable alternative to hailing a

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<sup>55</sup> *How to Request a Ride?*, UBER TECH., INC., <https://help.uber.com/h/082ab6d7-fc81-41f5-a17a-49e5e82bbebd> [<https://perma.cc/9YVF-RZLT>].

<sup>56</sup> *Id.*

<sup>57</sup> *How Does Uber Work?*, UBER TECH., INC., <https://help.uber.com/h/738d1ff7-5fe0-4383-b34c-4a2480efd71e> [<https://perma.cc/5UEU-GXY3>]; see also *Cotter*, 60 F. Supp. 3d at 1069-70. Some previous iterations of the model operated on a more discretionary “donation” system that more resembled traditional taxi payments. For simplicity, this essay does not dwell on the distinction.

<sup>58</sup> *O'Connor*, 82 F. Supp. 3d at 1142. This percentage has changed significantly in recent months, with the addition of new pricing structures, such as “surge pricing.” New drivers now typically receive less than 80% of the fare total. Older drivers remain grandfathered in to 80% rate. See Sage Lazzaro, *Uber Drivers Plan Boycott After Fare Cuts Slash Their Earnings to Below Minimum Wage*, THE OBSERVER ONLINE (Jan. 1 2016), <http://observer.com/2016/01/uber-drivers-plan-boycott-after-fare-cuts-slash-their-earnings-to-below-minimum-wage/> [<https://perma.cc/V3VN-NXRE>].

conventional cab. With TNCs, customers can tell whether a ride is available—and at what cost—with little more than a glance downward at their phone. There is no placing of calls to multiple dispatchers with hopes of tracking down an available cabby, no flailing of one’s arms on a street corner trying to catch a driver’s attention, no wondering whether an approaching cab might arbitrarily pass by, and no wandering onto the street uncertain of whether a taxi will even be in the area. Better still, there is no need to carry any cash, no need to calculate a tip, and no need to even reach for a wallet or purse. And if those differences were not enough to sway some consumers, TNCs also provide a rating system that allows customers to evaluate drivers based on the quality of their service, which companies can use to screen workers and monitor them for optimal performance.<sup>59</sup>

### **A. Transportation Network Companies’ Disruptive Effect on the Private Transportation Industry**

With great innovation, of course, comes great market disruption. Less than a decade since their inception, TNCs have come to represent an existential threat to conventional cab companies the world over.<sup>60</sup> A new generation of tech-savvy consumers has flocked to the ease and inexpense of this new breed of transportation provider, leaving bricks-and-mortar taxi services largely in the lurch. Public opinion surveys offer a glimpse into some of the consumer forces driving this rapid shift. In a study commissioned by the City of Seattle in September 2013—at a time when TNCs “were growing in the area”—more than ninety percent of TNC customers rated the response time for TNC vehicle-for-hire requests as “Good” or “Very Good.”<sup>61</sup> By contrast,

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<sup>59</sup> Ross, *supra* note 20, at 1440.

<sup>60</sup> See *infra* Part IV.

<sup>61</sup> *Id.* But see Lisa Rayle et al., *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco*, U.C. TRANSP. CTR. (Nov. 2014) [http://www.its.dot.gov/itspac/Dec2014/RidesourcingWhitePaper\\_Nov2014.pdf](http://www.its.dot.gov/itspac/Dec2014/RidesourcingWhitePaper_Nov2014.pdf) [<https://perma.cc/KVQ4-3RYK>] (“Bias and inaccuracy in respondent perception or recollection of wait time might partially account for the difference between modes. For instance, ridesourcing apps provide the user with an estimated wait time, but the actual wait time may be longer—without the user noticing or recalling the longer wait. In contrast, respondents may overestimate taxi wait times. For example, they may recall one negative experience more than several positive ones. Even so, ridesourcing’s short wait times and consistency across time and location—or at least perceptions of quick, consistent response—

just fifty percent of traditional taxi customers rated their vehicle's response time as "Good" or "Very Good."<sup>62</sup> The study also found that "[o]f 105 negative comments" received during the survey, "102 were related to taxis."<sup>63</sup> Further, "[o]f 16 positive comments, only 1 was related to taxis."<sup>64</sup> TNCs also received categorically higher customer ratings on six specific consumer metrics polled—"(1) willingness to accept credit cards, (2) courtesy of driver, (3) route knowledge of driver, (4) appearance of vehicle, (5) promptness of arrival, and (6) ease of booking/hailing a ride."<sup>65</sup>

Companies pioneering the app-based business model—with catchy names such as Lyft, Sidecar, and Bridj—have transformed, seemingly overnight, from unknown startups to household names, but none more so than Uber. Within a five-and-a-half-year period, the TNC went from a startup consisting of four people and two drivers to a global empire spanning six continents and operating in some 300 cities with over one million drivers.<sup>66</sup> Uber's latest valuation, triggered by a December 2015 venture capital investment round, put the company's worth at \$68 billion, on par with General Motors and Ford Motor Company.<sup>67</sup> Uber's meteoric rise "has led many to anoint [it] as the most successful Silicon Valley startup ever."<sup>68</sup> Like Google and a select few other tech behemoths, Uber has secured its place in the English lexicon as a verb unto itself, roughly synonymous with "to

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represent an important difference between ridesourcing and traditional taxis services from the user's perspective.").

<sup>62</sup> Ross, *supra* note 20, 1435-36.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (quotations omitted).

<sup>66</sup> Luz Lazo, *Uber Turns 5, Reaches 1 Million Drivers and 300 Cities Worldwide. Now What?*, THE WASH. POST ONLINE (June 4, 2015), <https://www.washingtonpost.com/news/dr-gridlock/wp/2015/06/04/uber-turns-5-reaches-1-million-drivers-and-300-cities-worldwide-now-what/> [<https://perma.cc/Y9WA-G2GZ>].

<sup>67</sup> Liyan Chan, *At \$68 Billion Valuation, Uber Will Be Bigger Than GM, Ford, And Honda*, FORBES ONLINE (Dec. 4 2015), <http://www.forbes.com/sites/liyanchen/2015/12/04/at-68-billion-valuation-uber-will-be-bigger-than-gm-ford-and-honda/> [<https://perma.cc/TG5J-VPZA>].

<sup>68</sup> Ross, *supra* note 20, at 1431.

taxi.”<sup>69</sup> And in the business world, “Uber may be becoming a verb meaning to ‘radically disrupt’ an entire industry.”<sup>70</sup>

### B. Uber’s Identity Crisis

Although many view Uber as tantamount to a taxi company, the transportation giant itself balks at the comparison. It insists it is not a fleet operator, but a “technology platform” that maintains a hands-off relationship with the drivers and passengers who use its app. Uber is quick to point out that it “owns no vehicles, and contends that it employs no drivers.”<sup>71</sup> By its own semantic framework, Uber functions as an “intermediary” that simply “generates leads for [drivers] through its software.”<sup>72</sup> Under Uber’s theory, it is the drivers who “perform services... for their riders, while [Uber] is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect, analogous perhaps to a company like eBay.”<sup>73</sup>

Uber’s business model—at least as it currently stands—hinges on its self-identification as a “technology platform.” For good reason, too. The structure allows the company to compensate drivers as independent contractors, not employees, while simultaneously allowing it to disclaim liability for a range of other state and federal laws that apply to traditional transportation services.<sup>74</sup> After all, employees and regulations are expensive. Among other costs, Uber’s legal assumption that it is a technology platform enables it to avoid remedial labor statutes that impose obligations such as minimum wage and overtime pay requirements, meal and rest breaks for drivers, reimbursement for work-related expenses, workers’ compensation, employer contributions to unemployment insurance, Medicare and

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<sup>69</sup> Evie Nagie, *Uber is a Verb*, FAST CO. (Sept. 9 2015), <http://www.fastcompany.com/3050660/most-creative-people/uber-is-a-verb> [<https://perma.cc/RDU8-FY6A>].

<sup>70</sup> Buckley, *supra* note 30, at 38.

<sup>71</sup> *O’Connor*, 82 F. Supp. 3d at 1137-38.

<sup>72</sup> *Id.* at 1141 (quotations omitted).

<sup>73</sup> *Cotter*, 60 F. Supp. 3d at 1078.

<sup>74</sup> *Id.* at 1072 (“[I]n the ‘Limitation of Liability’ section, the Agreement states that ‘LYFT HAS NO RESPONSIBILITY WHATSOEVER FOR THE ACTIONS OR CONDUCT OF DRIVERS OR RIDERS... LYFT HAS NO CONTROL OVER THE IDENTITY OR ACTIONS OF THE RIDERS AND DRIVERS.’”).

Social Security withholdings, and employee benefits.<sup>75</sup> And what is more, although Uber sets internal guidelines urging its drivers to follow state and federal laws mandating anti-discriminatory and safety standards, it ultimately disclaims any “responsibility or liability for any transportation services provided to [riders] by such third parties”—a luxury not afforded to traditional taxi companies.<sup>76</sup>

For a company of Uber’s size, the savings that result from this state of what some call “regulatory arbitrage” are staggering—by some estimates, in the hundreds of millions of dollars.<sup>77</sup> While it is by no means the only reason behind Uber’s explosive growth in recent years, it is an important factor contributing to its ability to outcompete its more conventional rivals.<sup>78</sup> The “technology platform” model—for better or for worse—simply eliminates many costs that bricks-and-mortar transportation companies face by virtue of their less ethereal status.<sup>79</sup>

One tiny detail, however, stands in the way of Uber’s self-styled assertion that it is a technology platform: it has not been tested in court<sup>80</sup> until recently.<sup>81</sup> Across the United States, an industry-defining battle has begun over the legality of Uber’s independent contractor-based business model.<sup>82</sup> As one commentator notes, while “attacking highly-regulated markets, acting without permission, and [upending longstanding trade practices] may be helpful strategies for creating a

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<sup>75</sup> DeAmicis, *supra* note 20; see also Cotter, 60 F. Supp. 3d at 1074.

<sup>76</sup> Chapin, *supra* note 36; see also Ramos, 2015 WL 758087; Cotter, 60 F. Supp. 3d at 1072.

<sup>77</sup> See Rogers, *supra* note 48.

<sup>78</sup> Rogers, *supra* note 48, at 86; see also Nia Hamm, *Disability Advocates: Require Uber to Serve People with Disabilities*, PUB. NEWS SERV. (Sept. 28, 2015), <http://www.publicnewsservice.org/2015-09-28/disabilities/disability-advocates-require-uber-to-serve-people-with-disabilities/a48292-2> [<https://perma.cc/6ALQ-9XDS>]; Strohlic, *supra* note 1 (quoting Marilyn Golden: “Uber’s arguments against [following the ADA] are the efforts of a private company to evade regulation, regulation which is there for the public good, regulation that other companies offering similar services for many years have always been required to comply with.”).

<sup>79</sup> Rayle et al., *supra* note 61.

<sup>80</sup> Jen Wieczner, *Why the Disabled Are Suing Uber and Lyft*, FORTUNE (May 22, 2015), <http://fortune.com/2015/05/22/uber-lyft-disabled/> [<https://perma.cc/QB6X-YHEU>].

<sup>81</sup> *Id.*

<sup>82</sup> See *infra* Part III.

competitive edge and revolutionizing an industry . . . [those] same factors are—not surprisingly—magnets for litigation.”<sup>83</sup>

Leading the charge in this battle are a number of highly publicized lawsuits that have put Uber’s legal status as both an employer and a transportation provider at center stage.<sup>84</sup> The cases have become part of a broader national debate—spanning news outlets, social media, and academic circles—that cuts to the core of the multibillion-dollar startup’s very identity.<sup>85</sup> In one camp are those who hold that Uber is simply a newer, sleeker version of an age-old paradigm: a taxi service.<sup>86</sup> They contend that a legal and regulatory framework which borrows from the traditional cab industry is needed in order to counteract the negative externalities created by the TNC business model.<sup>87</sup> In the other camp are those who hold that Uber and its rivals are ushering in a new era of private transportation—and the rules that have historically governed the industry do not, and should not, apply to these pioneering enterprises.<sup>88</sup>

### III. UBER, EMPLOYMENT MISCLASSIFICATION, AND THE ON-DEMAND ECONOMY

The loudest shot yet fired in the battle over Uber’s legal identity sounded on January 27, 2016. Lyft, a TNC and smaller rival to Uber, agreed to pay \$12.25 million to settle an employment misclassification suit brought against it in 2013.<sup>89</sup> Though the Lyft settlement did not attract the level of media attention usually garnered by its much larger competitor, the eyes of Silicon Valley’s business leaders were watching closely.

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<sup>83</sup> Buckley, *supra* note 30, at 38.

<sup>84</sup> See Rogers, *supra* note 48.

<sup>85</sup> See *infra* Parts III-IV.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*; Rayle et al., *supra* note 61.

<sup>88</sup> See Rogers, *supra* note 48.

<sup>89</sup> Heather Kelly, *Lyft Agrees To \$12.25 Million Driver Lawsuit Settlement*, CNN MONEY ONLINE (Jan. 27, 2016), <http://money.cnn.com/2016/01/27/technology/lyft-lawsuit-settlement/> [<https://perma.cc/6DYU-ZGK5>]. *But see* Davey Alba, *Judge Says Lyft’s \$12M Settlement Doesn’t Pay Drivers Enough*, WIRED (Apr. 7 2016), <http://www.wired.com/2016/04/judge-says-lyfts-12m-settlement-doesnt-pay-drivers-enough/> [<https://perma.cc/EU7S-QZK3>].

The reason for this watchfulness is that Lyft and its \$60 billion competitor, Uber, share a business model based on the classification of their drivers as “1099” independent contractors, a namesake owing to the 1099 Internal Revenue Service form associated with the status.<sup>90</sup> The structural similarities between the two companies means that although they are fierce competitors in the business world, in the legal world they oftentimes find themselves as unlikely allies.<sup>91</sup> As the contours of the new legal landscape created by the emergence of TNCs continue to be defined by litigation, any outcome that impacts one TNC is likely to have significant implications for the others.

The lead-up to the multimillion-dollar Lyft settlement began with a lawsuit, *Cotter v. Lyft, Inc.*, brought by the TNC’s own drivers, who contended that under California’s legal test for distinguishing the employment status of workers, their relationship with Lyft better approximated that of full-fledged employees than that of independent contractors.<sup>92</sup> In a pretrial denial of Lyft’s Motion for Summary Judgment, a California district court expressed sympathy for the drivers’ misclassification argument, observing that “Lyft drivers don’t seem much like independent contractors.”<sup>93</sup> The Court continued, “We generally understand an independent contractor to be someone with a special skill (and with the bargaining power to negotiate a rate for the use of that skill), who serves multiple clients, performing discrete tasks for limited periods, while exercising great discretion over the way the work is actually done.”<sup>94</sup> According to the court, independent contractors constituted the types of workers who might be “found in the Yellow Pages to perform a task that the principal or the principal’s own employees were unable to perform—often something tangential to the day-to-day operations of the principal’s business.”<sup>95</sup> Lyft drivers, by contrast, played a “central, not tangential [role in] Lyft’s business.”<sup>96</sup> Further, they performed “no special skill when [giving]

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<sup>90</sup> Tajha Chappellett-Lanier, *Lyft Drivers Still Aren’t Employees, but What About Uber Drivers?*, THE ATLANTIC ONLINE (Jan. 27 2016), <http://www.theatlantic.com/business/archive/2016/01/lyft-drivers-uber-sharing-economy-employees/431631/> [https://perma.cc/ZXM6-2GPZ].

<sup>91</sup> See *infra* Part IV.

<sup>92</sup> *Cotter*, 60 F. Supp. 3d at 1069.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

rides.”<sup>97</sup> The Court also noted that while “Lyft might not control when the drivers work,” it had “a great deal of power over how they actually do their work, including the power to fire them [when] they don’t meet Lyft’s specifications about how to give rides.”<sup>98</sup> Moreover, the Court observed, “some Lyft drivers no doubt treat their work as a full-time job . . . even while they lack any power to negotiate their rate of pay. Indeed, this type of Lyft driver—the driver who gives ‘Lyfts’ 50 hours a week and relies on the income to feed his family—looks very much like the kind of worker the California Legislature has always intended to protect as an ‘employee.’”<sup>99</sup>

Despite acknowledging the obvious merit to the drivers’ argument, the Court was also careful to emphasize that “Lyft drivers don’t seem like employees [either].”<sup>100</sup> It observed that employees are generally understood “to be someone who works under the direction of a supervisor, for an extended or indefinite period of time, with fairly regular hours, receiving most or all his [or her] income from that one employer (or perhaps two employers).”<sup>101</sup> Lyft drivers, conversely, could “work as little or as much as they want, and c[ould] schedule their driving around their other activities.”<sup>102</sup> Indeed, driving for Lyft, the Court remarked, could be done “as a side activity” for some workers, “to be fit into his [or her] schedule when time permits and when he [or she] needs a little extra income.”<sup>103</sup>

Eventually, after weighing both parties’ arguments at length, the court all but threw up its hands, stating, “As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes.”<sup>104</sup> Exasperated by what it described as a “20th Century [test] for classifying workers [that] isn’t very helpful in addressing this 21st Century problem,” the Court concluded: “Some factors point in one direction, some point in the other, and some are

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1069.

<sup>104</sup> *Id.* at 1081.

ambiguous. . . [a]nd because the test provides nothing remotely close to a clear answer, it will . . . be for [the jury] to decide.”<sup>105</sup>

Upon hearing the court’s vacillating analysis, both Lyft and its drivers elected to settle rather than put the matter before a jury. Apparently, the prospect of what the court described as a virtual roll of the dice was considered unacceptably risky by both parties to the dispute.

Had the drivers prevailed in court, Lyft would have been required to reclassify them as W-2 employees—an outcome that would have entitled them to both retroactive compensation for their prior misclassification and to the “many benefits and protections” afforded under California and federal law going forward.<sup>106</sup> Instead, the settlement preserved their independent contractor classification, but required that Lyft alter its terms of service.<sup>107</sup> Among other changes, Lyft will now need to provide a reason for terminating its drivers.<sup>108</sup> Drivers will also be able to contest termination decisions through an arbitration process available at the company’s expense.<sup>109</sup>

Though the settlement entails some costs for the company, a ruling in favor of W-2 employee status, by all accounts, would have been significantly more expensive for the TNC. Moreover, because the dispute never reached trial, the true legal status of the TNC’s on-demand workers remains an open question.

#### A. O’CONNOR V. UBER TECHNOLOGIES, INC.

Uber, meanwhile, is continuing its own fight against an almost identical suit brought in its hometown of San Francisco. But unlike Lyft, the ride-hailing giant apparently has no intention of settling.<sup>110</sup> The case is *O’Connor v. Uber Technologies, Inc.*<sup>111</sup> It has been billed

<sup>105</sup> *Id.* at 1081-82.

<sup>106</sup> *Id.* at 1074.

<sup>107</sup> *Id.* But see Wiczner, *supra* note 80.

<sup>108</sup> Tracy Lien, *Lyft Settles Worker Misclassification Lawsuit For \$12.25 Million*, L.A. TIMES ONLINE (Jan. 27 2016), <http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-20160126-story.html> [<https://perma.cc/CK4L-6RDS>].

<sup>109</sup> *Id.*

<sup>110</sup> See *id.* (quoting Shannon Liss-Riordan (“Uber, unlike Lyft, has made clear it wants to fight this battle for the long haul, whereas Lyft was willing to sit down with us and talk and try to figure out a way to resolve the matter.”)).

<sup>111</sup> *O’Connor*, 82 F. Supp. 3d at 1133.

as “[t]he lawsuit that could change Uber forever.”<sup>112</sup> The outcome—as was true of the Lyft suit before it settled—is far from certain.

What is certain, however, is that the stakes involved are massive. In 2015, FedEx settled an employment misclassification suit with its drivers for \$228 million in what is widely seen as a close analog to the dispute at issue in *O’Connor*.<sup>113</sup> The settlement covered “2300 [sic] individuals who were full-time delivery drivers for FedEx in California between 2000 and 2007.”<sup>114</sup> As in *O’Connor*, the drivers claimed their employer had misclassified them as 1099 independent contractors while treating them as W-2 employees. They “filed class action claims for a variety of alleged violations under federal and state law, including claims for reimbursement of business expenses, unpaid overtime, failure to provide meal and rest periods, reimbursement of deductions in pay, and non-payment of termination pay.”<sup>115</sup>

The eventual settlement followed in the wake of a Ninth Circuit ruling which declared, resoundingly, that FedEx’s drivers were “employees as a matter of law.”<sup>116</sup> Hearing those words uttered by California’s highest appellate court, undoubtedly, boded ominously for Uber. But even more concerning for the startup was the weight that the Ninth Circuit’s decision placed on aspects of FedEx’s business model that it shares in common with the TNC. Among other considerations, the ruling turned on the fact that driving for FedEx was “essential to FedEx’s core business,” did not require a high degree of skill,” was

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<sup>112</sup> Andrew J. Hawkins, *The Lawsuit That Could Change Uber Forever Has a Trial Date*, THE VERGE (Nov. 16, 2016), <http://www.theverge.com/2015/11/6/9681358/uber-class-action-lawsuit-driver-trial-date> [<https://perma.cc/AF6A-3RVL>].

<sup>113</sup> *FedEx Corps Adopts Mark-to-Market Pension Accounting*, FedEx NEWS RELEASE (June 12, 2015), <http://investors.fedex.com/news-and-events/investor-news/news-release-details/2015/FedEx-Corp-Adopts-Mark-to-Market-Pension-Accounting/default.aspx> [<https://perma.cc/G3HD-AM76>].

<sup>114</sup> *Alexander*, 765 F.3d at 984.

<sup>115</sup> *Id.*; Richard Reibstein, *\$228 Million: The Cost of Independent Contractor Misclassification for FedEx Ground in California*, IND. CONTRACTOR COMP. (June 13, 2015), <https://independentcontractorcompliance.com/2015/06/13/228-million-the-cost-of-independent-contractor-misclassification-for-fedex-ground-in-california/> [<https://perma.cc/TM4N-FMZV>].

<sup>116</sup> *Alexander*, 765 F.3d at 997.

often defined by lengthy tenures with the company, “and involved customers who were FedEx’s rather than the drivers’.”<sup>117</sup>

After reaching the settlement with FedEx, Beth Ross, the attorney representing the class of drivers, victoriously proclaimed, “The \$228 million settlement, one of the largest employment law settlements in recent memory, sends a powerful message to employers in California and elsewhere that the cost of independent contractor misclassification can be financially punishing, if not catastrophic, to a business.”<sup>118</sup>

Whether Ross’s words will prove prophetic for TNCs has yet to be seen. But the \$228 million figure nonetheless looms large in the background of Uber’s own employment classification worries. The class of drivers represented in *O’Connor* could comprise as many as 160,000 workers—all claiming violations similar to those alleged by the 2,300 who filed suit against FedEx.<sup>119</sup> If Uber loses in court, the damages owed to such a large number of misclassified workers could be immense. Yet even that sum might pale in comparison to the costs of Uber adopting an employee-based business model going forward.

Uber is not a publicly-traded company, so a lack of financial transparency makes calculating the true costs of a court-mandated reclassification of its workers speculative at best—but that has not stopped some observers from trying. Uber has publicly announced that it has roughly 45,000 active drivers in California, a number which is rapidly growing.<sup>120</sup> A recent commentator has estimated that classifying those California drivers as employees could cost the company as much as \$209 million annually in the Golden State alone.<sup>121</sup>

To put that figure into perspective, consider Uber’s current revenue. In August of 2015, a leaked investor presentation revealed that Uber’s drivers were projected to take in some \$10.84 billion in 2015, up from \$2.91 billion the year before.<sup>122</sup> The TNC itself keeps

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<sup>117</sup> *Cotter*, 60 F. Supp. 3d at 1071; *Alexander*, 765 F.3d at 985-96 (citing *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1 (2007)).

<sup>118</sup> Robert W. Wood, *FedEx Settles Independent Contractor Mislabeling Case For \$228 Million*, FORBES (June 16, 2015), <http://www.forbes.com/sites/robertwood/2015/06/16/fedex-settles-driver-mislabeling-case-for-228-million/#7a8cf49c5f5a> [<https://perma.cc/2XHF-54Z3>].

<sup>119</sup> Badger, *supra* note 28.

<sup>120</sup> DeAmicis, *supra* note 20.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

twenty percent of the revenue from fares—meaning that its own earnings were in the \$2 billion region that year.<sup>123</sup> Of course, until Uber publicly releases its books, such calculations are simply educated guesswork. But the numbers offer a useful point of comparison. They reveal that the added cost of reclassifying Uber’s drivers as employees could consume as much ten percent of the TNC’s current net revenue.<sup>124</sup> And that only accounts for Uber’s California drivers.

### **B. O’Connor’s Implications for the On-demand Economy**

Eye-popping numbers like the \$209 million figure have not escaped the attention of the rest of Silicon Valley.<sup>125</sup> Not merely out of concern for the TNC’s financial future, but also because Uber is widely viewed as the progenitor of a whole family of copy-cat companies whose business models also rely on workers nebulously classified as independent contractors.<sup>126</sup> Hundreds of Silicon Valley startups borrowing Uber’s model now operate in what is widely termed the “on-demand” economy—so-called because of its ability to deliver everything from cleaning services, to accommodations, to food deliveries at the click of a mouse or tap of a smartphone button.<sup>127</sup>

Multimillion-dollar startups such as DoorDash and GrubHub are routinely described as the “Uber of food delivery”; Taskrabbit, the “Uber of errands”; and Instacart, the “Uber of groceries.”<sup>128</sup> The “Uber of X” category goes on and on, and in theory is seemingly endless. According to one recent study, the labor force created by these companies “is expected to include an estimated 7.6 million [workers] by 2020.”<sup>129</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Kelly, *supra* note 89 (“The legal battle of whether or not on-demand workers are independent contractors is being closely watched in Silicon Valley.”).

<sup>126</sup> *Uber’s Long Road: Arbitration, Certification, and Independent Contractor Classification*, PRAC. L. (Dec. 15, 2015), [http://us.practicallaw.com/w-001-0714?q=&qp=&qo=&qe=\[https://perma.cc/9CXR-X6M8\]](http://us.practicallaw.com/w-001-0714?q=&qp=&qo=&qe=[https://perma.cc/9CXR-X6M8]) (“Hundreds of on-demand companies provide services such as grocery shopping, household cleaning, concierge services, and delivery of household items.”).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Heather Somerville, *On-Demand Workplace to Include 7.6 Million People by 2020, New Study Says*, SILICONBEAT (Aug. 13, 2015), <http://www.siliconbeat.com/2015/08/13/on-demand-workforce-to-include-7-6-million-people-by-2020-new-study-says/> [https://perma.cc/9V6C-452V].

When MyClean—a startup billed as the “Uber of housecleaning”—altered its business model from independent contractors to full-time employees in anticipation of misclassification suits, the company saw its labor costs soar by some forty percent.<sup>130</sup> MyClean’s switch, bear in mind, was done voluntarily.<sup>131</sup> A court ruling mandating such a shift stands poised to affect a category of companies whose cumulative valuations, depending on which venture capital firm one asks, number into the hundreds of billions of dollars.<sup>132</sup>

Perhaps even more foreboding for on-demand companies is the fact that *O’Connor* is not the first time Uber’s employment classification has been litigated in California—and on the earlier occasion, Uber ended up on the losing side.<sup>133</sup> In June of 2015, the California Labor Commission resolved an employment misclassification dispute brought by Barbara Ann Berwick, a former Uber driver who sued the TNC in San Francisco Superior Court.<sup>134</sup> Holding that Berwick was a company employee—not a contractor—the commission awarded her more than \$4,000 in reimbursable business expenses and accumulated interest, stating, “Without drivers such as [Berwick], [Uber’s] business would not exist.”<sup>135</sup> The Commission cited Uber’s exclusive control over the use of its app, the “integral” role that drivers play in its business model, and its “non-negotiable service fee” as the basis for the outcome.<sup>136</sup> The decision, however, is nonbinding and applies only to Berwick herself.<sup>137</sup> Better still from Uber’s perspective, the ruling could be overturned on

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<sup>130</sup> Kimberly Weisul, *After Uber, On-Demand Companies Should Brace for Lawsuits*, INC.COM (June 24, 2015), <http://www.inc.com/kimberly-weisul/not-just-uber-lawsuits-transform-ondemand-economy.html> [https://perma.cc/LSZ6-TMHW]; Kate Rogers, *What the Uber, Lyft Lawsuits Mean for the US Economy*, CNBC (Mar. 16, 2015), <http://www.cnbc.com/2015/03/16/what-the-uber-lyft-lawsuits-mean-for-the-us-economy.html> [https://perma.cc/ABM9-QCC8] [hereinafter K. Rogers].

<sup>131</sup> K. Rogers, *supra* note 130.

<sup>132</sup> *Uber’s Long Road*, *supra* note 126.

<sup>133</sup> *Berwick v. Uber Tech., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at \*1, (CA. Dept. Lab. June 3, 2015).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at \*6.

<sup>136</sup> *Id.* at \*5-6.

<sup>137</sup> *Id.*; Buckley, *supra* note 30, at 36, 38.

appeal.<sup>138</sup> The TNC can also take solace from the fact that the California Labor Commission's decision stands in opposition to numerous occasions in other states where Uber has "prevailed . . . in keeping its definition of drivers as independent contractors."<sup>139</sup>

Despite Uber's victories in other states, some on-demand companies apparently regarded the Labor Commission's decision as the proverbial writing on the wall for their workers' employment status. Both Instacart (an on-demand grocery delivery service) and Shyp (an on-demand shipping service) moved to preemptively reclassify some of their contractors as employees in the weeks following the California decision.<sup>140</sup> Others, already anticipating such an outcome, had reclassified their workers long ago, or purposely counted their workers as employees from the outset.<sup>141</sup> Such companies "include cleaners MyClean and Managed by Q; laundry service FlyCleaners; virtual assistants Zirtual; personal assistants Alfred; and delivery service Parcel."<sup>142</sup>

Many following the labor disputes believe that *O'Connor v. Uber Technologies, Inc.* is destined to provide the definitive word on the legal status of workers hired by on-demand companies.<sup>143</sup> But what fewer realize is that a less conspicuous set of cases may prove to be even more decisive. The suits involve dozens of plaintiffs with disabilities who have accused Uber and Lyft of violating a federal anti-discrimination statute known as the Americans with Disabilities Act.<sup>144</sup> The plaintiffs allege that the TNCs have fallen short of their statutory obligation to ensure that their drivers do not deny service to customers on the basis of a disability.<sup>145</sup> In response, Uber and Lyft have asserted that, as mere technology platforms, they bear no ultimate responsibility for their drivers' conduct.<sup>146</sup>

Although the two types of cases initially appear to be unrelated, their outcomes may, in fact, be inextricably linked. A court ruling

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<sup>138</sup> Buckley, *supra* note 30, at 36.

<sup>139</sup> *Id.* at 39.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Weisul, *supra* note 130.

<sup>143</sup> *Id.*; K. Rogers, *supra* note 130.

<sup>144</sup> *See infra* Part IV.

<sup>145</sup> *See infra* Part IV.

<sup>146</sup> *See infra* Part IV.

requiring Uber and Lyft to take legal responsibility for their drivers' misbehavior would fundamentally alter the employment relationship that currently exists between TNCs and their drivers. Such a radical shift could, in turn, have profound implications for their drivers' legal status as independent contractors. Indeed, it may be that *O'Conner*, which currently holds Silicon Valley in rapt attention, is actually a sideshow of sorts—and a few cases involving disability discrimination, which have received a far smaller share of the limelight, are the real blockbuster lawsuits that hold the fates of both Uber and the on-demand economy within their grasp.

#### IV. THE AMERICANS WITH DISABILITIES ACT AND THE “LAW OF MATHEMATICS”

*Jamey Gump is blind, uses a guide dog, and is a member of [the National Federation of the Blind] of California [ (“NFBC”) ]. On or about March 23, 2014, an UberX<sup>147</sup> driver refused to transport Mr. Gump in San Leandro, California from a work-related event to his home. On that occasion, Mr. Gump used the Uber mobile app to summon an UberX taxi. The UberX driver pulled the vehicle up to where Mr. Gump was standing on the curb and, after noticing that Mr. Gump had a dog, said “no pets allowed.” Mr. Gump tried to explain that his guide dog was a service animal and that the UberX driver had a legal obligation to allow the service animal into the vehicle. Mr. Gump attempted to show the UberX driver an official guide dog identification card issued by his guide dog’s training program. The driver adamantly refused to let Mr. Gump into the vehicle and drove away.*

*[O]n or about May 21, 2014, another UberX driver refused to transport Mr. Gump because of his service animal. . . . After the requested UberX vehicle had pulled up to the curb, Mr. Gump and his friend opened a passenger door. The UberX driver began shouting*

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<sup>147</sup> UberX is Uber’s most widely used—and lowest cost—transportation option. It allows a customer to request a sedan that can carry up to four passengers. See UBER TECH., INC., <https://www.uber.com/ride/uberx/> [<https://perma.cc/8X76-P8WJ>].

*“no dogs!” Mr. Gump tried to explain that his dog was a service animal for his disability and was legally allowed in the vehicle. The UberX driver began shouting and cursing at Mr. Gump and his friend in a language that Mr. Gump did not understand. Mr. Gump’s friend speaks the language and was offended by the profanity and insults. As Mr. Gump attempted to enter the vehicle, the UberX driver quickly accelerated the vehicle forward, nearly injuring Mr. Gump’s guide dog and causing an open passenger door to strike Mr. Gump’s friend. The UberX driver then sped away and cancelled the ride request. Mr. Gump and his friend immediately called the police to file a report and used alternative transportation to travel home approximately forty-five minutes later.*

*[O]n August 20, 2014, Mr. Gump requested an UberX ride to pick him up at 214 Van Ness Ave., San Francisco, California. Mr. Gump determined from the map in the Uber iPhone application that his requested vehicle was about to turn onto his street. Mr. Gump then went out to the curb with his guide dog in direct sight of the oncoming vehicle to intercept the UberX driver. Mr. Gump noticed a vehicle slow its speed to a near stop in front of him and then accelerate again as it passed him on the curb. A few seconds later, Mr. Gump received a notification on his phone that the UberX driver had cancelled the ride. Mr. Gump then requested a second UberX ride, but Uber assigned the exact same driver and vehicle to pick up Mr. Gump for a second time. Again, a few seconds after Mr. Gump received confirmation that this same driver was on the way, the driver cancelled on him for a second time.*

*[M]r. Gump wants to use the UberX taxi service because it is convenient and available near his home, an area with limited public transportation. However, he stopped using Uber after this most recent experience because he concluded that it is not a reliable transportation option for him. Notwithstanding Mr. Gump’s repeated complaints to Uber about his negative experiences over the last several months, his access to*

*Uber's services has not improved. Mr. Gump hopes that Uber will change its policies and practices to better prevent discrimination against passengers with service animals so that he can enjoy Uber with the same convenience and reliability enjoyed by others.*<sup>148</sup>

The above excerpt detailing Jamey Gump's experiences with Uber comes from a complaint filed against the TNC by the National Federation of the Blind of California in 2014, alleging that Uber discriminated against customers based on their disabilities. The complaint documents more than thirty instances "where drivers of UberX vehicles refused to transport blind individuals with service animals . . . after they initially agreed to transport the riders."<sup>149</sup> One such plaintiff—a blind woman with a guide dog—accused Uber of denying her service on no less than twelve separate occasions.<sup>150</sup> Others alleged they were "abandoned . . . in extreme weather" because of their guide dogs.<sup>151</sup>

Some plaintiffs who were not outright denied service by Uber drivers joined the complaint after experiencing "harass[ment]" and "serious[] mishandl[ing]" of their guide animals by Uber drivers.<sup>152</sup> One driver allegedly forced a plaintiff's guide dog into the trunk of a sedan without her knowledge.<sup>153</sup> When she realized "where the driver had placed her dog, she pleaded with the driver to pull over so that she could retrieve her dog from the trunk, but the driver refused her request."<sup>154</sup>

People with service animals are not the only individuals with disabilities allegedly discriminated against by TNC drivers. In Texas, several wheelchair-bound plaintiffs recently filed suit against both Uber and Lyft, alleging that the TNCs "allow their vehicles-for-hire to deny service to the disabled," "do not provide vehicles-for-hire services to mobility impaired consumers," "provide [no] manner for securing a wheelchair accessible vehicle," and "provide no training or

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<sup>148</sup> Complaint ¶¶ 35-38, Nat'l Fed'n of the Blind of Cal. v. Uber Tech., Inc., 103 F. Supp. 3d 1073 (No. 3:14-cv-4086) (N.D. Cal. 2015).

<sup>149</sup> *Id.* ¶ 3.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* ¶ 4.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

guidance to the vehicles-for-hire that use their service concerning lawfully meeting the needs of disabled customers.”<sup>155</sup> The plaintiffs reported multiple occasions where Uber or Lyft failed to dispatch wheelchair accessible vehicles or otherwise accommodate their transportation requests.<sup>156</sup>

Another woman—a grass-roots disability rights activist—filed suit against Lyft in Texas after one of its drivers allegedly left her on the curb because of her wheelchair.<sup>157</sup> In Arizona, too, a retired judge who was a wheelchair user filed suit after an Uber driver allegedly denied him service.<sup>158</sup>

Each of these lawsuits have claimed that the TNCs responsible for employing the drivers violated the Americans with Disabilities Act (“ADA”), a federal anti-discrimination statute designed to protect the civil rights of people with disabilities.<sup>159</sup> Title III of the ADA “prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations and . . . transportation services.”<sup>160</sup> Among other stipulations, entities that provide public accommodations, public transportation, or are private companies engaged primarily in providing transportation “may not impose eligibility criteria that tend to screen out disabled individuals”; must make “reasonable modifications in policies, practices, or procedures, when such modifications are necessary to provide disabled individuals full and equal enjoyment”; and “must remove architectural and structural barriers, or if barrier removal is not readily achievable, must ensure equal access for the disabled through alternative methods.”<sup>161</sup>

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<sup>155</sup> Ramos v. Uber Techs., Inc., No. SA-14-CA-502-XR, 2015 WL 758087, at \*1 (W.D. Tex. Feb. 20, 2015).

<sup>156</sup> *Id.* at \*2.

<sup>157</sup> McPhail v. Lyft, Inc., No. A-14-CA-829-LY, 2015 WL 1143098, at \*1 (W.D. Tex. Mar. 13, 2015).

<sup>158</sup> Mike Sunnucks, *Uber Faces Lawsuits Over Service Dogs, Blind, Disabled Riders in Arizona, California*, BIZJOURNALS (Apr. 24, 2015), <http://www.bizjournals.com/phoenix/news/2015/04/24/uber-faces-lawsuits-over-service-dogs-blind.html?page=all> [<https://perma.cc/9HGT-UNG5>].

<sup>159</sup> *Id.*

<sup>160</sup> Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 128-29 (2005) (citing 42 U.S.C. §§ 12182(a), 12184(a)).

<sup>161</sup> *Id.* at 129 (“These specific requirements, in turn, are subject to important exceptions and limitations. Eligibility criteria that screen out disabled individuals are permitted when ‘necessary for the provision’ of the services or facilities being offered. Policies, practices, and procedures need not be modified,

Taxi services, in particular, are forbidden from discriminating “against individuals with disabilities by actions including, but not limited to, refusing to provide service to individuals with disabilities who can use taxi vehicles, refusing to assist with the stowing of mobility devices, and charging higher fares or fees for carrying individuals with disabilities and their equipment than are charged to other persons.”<sup>162</sup>

What may come as a surprise to anyone familiar with the litany of misconduct alleged by the plaintiffs in the ADA suits is that both Uber and Lyft have longstanding policies of non-discrimination that, at least in theory, are ADA-compliant. According to Uber’s code of conduct, “[i]t is unacceptable to refuse to provide . . . services based on a person’s race, religion, national origin, *disability*, sexual orientation, sex, marital status, gender identity, age or any other characteristic protected under applicable federal or state law.”<sup>163</sup> Likewise, “[i]t is Lyft’s policy that passengers that use wheelchairs that can safely and securely fit in the trunk of the vehicle or backseat [sic] of the car without obstructing the view of the driver should be reasonably accommodated by drivers on the Lyft platform, and drivers should make every reasonable effort to transport the passenger and his or her wheelchair.”<sup>164</sup> Lyft’s policies also provide for the accommodation of service animals, but the TNC “recommends that passengers who need them call the driver in advance and let them know.”<sup>165</sup>

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and auxiliary aids need not be provided, if doing so would ‘fundamentally alter’ the services or accommodations being offered. Auxiliary aids are also unnecessary when they would ‘result in an undue burden.’ As we have noted, moreover, the barrier-removal and alternative access requirements do not apply when these requirements are not ‘readily achievable.’ Additionally, Title III does not impose nondiscrimination or accommodation requirements if, as a result, disabled individuals would pose ‘a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.’” (citations omitted).

<sup>162</sup> 49 C.F.R. § 37.29(c).

<sup>163</sup> Issie Lapowsky, *Uber’s Business Isn’t Built to Help Disabled People*, WIRED (Aug. 14, 2015), <http://www.wired.com/2015/08/uber-disability/> [<https://perma.cc/9C9H-9VVQ>] (emphasis added); see also *Introducing UberASSIST*, UBER TECH., INC. (Oct. 13, 2016), <https://www.uber.com/legal/community-guidelines/en/> [<https://perma.cc/7SXF-JLLW>].

<sup>164</sup> Wieczner, *supra* note 80.

<sup>165</sup> *Id.*

Uber was careful to emphasize its code of conduct in response to some of the negative publicity generated in the wake of the lawsuit filed by the NFBC. Spokeswoman Kristin Carvell issued the statement, “It is Uber’s policy that driver partners are expected to comply with local, state and federal laws regarding the transportation of service animals, and we have consistently communicated this policy to drivers nationwide.”<sup>166</sup> The company went on to “den[y] any responsibility by saying it doesn’t discriminate against the disabled and that it can transport blind and wheelchair-bound passengers.”<sup>167</sup> Later that same year, however, David Plouffe—who joined Uber in 2014 after serving as both White House adviser and campaign manager to President Barack Obama—admitted to a slightly more nuanced view of the issue: “We’ve got a lot of drivers, so unfortunately the law of mathematics is that occasionally we may have somebody who doesn’t understand for whatever reason. Sometimes we’ve seen instances where people say, ‘well I’ve got leather seats and I don’t want a dog on them.’ That’s just not okay.”<sup>168</sup>

Uber and Lyft reserve the right to discipline or “deactivate” (*i.e.* fire) drivers who breach their anti-discrimination policies.<sup>169</sup> But, crucially, both TNCs ultimately disclaim legal liability for riders harmed by their drivers’ conduct—each insisting it “only controls its smartphone App, and has no ability to require App users to modify their personal vehicles or control the conditions under which they operate.”<sup>170</sup> The result of this hands-off approach, says the U.S. Department of Justice, who joined NFBC in its suit, is that “Uber allegedly fails to respond, does not take steps to address the discrimination, and frequently denies responsibility for the discrimination” by its drivers.<sup>171</sup>

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<sup>166</sup> Bob Egelko, *Judge Rules That Blind Passengers Can Sue Uber for Discrimination*, SFGATE (Apr. 20, 2015), <http://www.sfgate.com/bayarea/article/Judge-rules-that-blind-passengers-can-sue-Uber-6212269.php> [https://perma.cc/LG5J-42C4].

<sup>167</sup> Wieczner, *supra* note 80.

<sup>168</sup> Kerr, *supra* note 1.

<sup>169</sup> *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at \*11 (W.D. Tex. Feb. 20, 2015).

<sup>170</sup> *Id.* at \*10.

<sup>171</sup> Statement of Interest of the United States of America, 1:16-18, *Nat’l Fed’n of the Blind of California v. Uber Tech., Inc.*, No. 3:14-cv-4086-NC, 2014 WL 4628579 (N.D. Cal. Dec. 22, 2014).

Meanwhile, riders with disabilities who request a ride through a TNC are left with few other options than to cross their fingers and wonder: Will I be lucky enough to get a driver who chooses to follow the code of conduct? Or will I be paired with one who turns me away? This state of uncertainty, according to the long list of plaintiffs who have filed suit under the ADA, means that individuals with disabilities “have been and continue to be denied access to [Uber’s] services on multiple occasions when they attempt to use Uber’s . . . transportation service.”<sup>172</sup> Moreover, the number of people affected extends far beyond those directly denied service. It includes people with disabilities who merely catch wind of the incidents and opt not to use the service for fear of unexpected delays, unfair cancellation fees, or humiliation at the hands of a driver.<sup>173</sup>

### A. The Dilemma of ADA Compliance

The challenge Uber faces in responding to the array of ADA lawsuits brought against it is that handing down a true mandate of compliance would require the company to exert more control over its drivers than merely drafting anti-discriminatory guidelines. And when a company is potentially facing hundreds of millions of dollars in costs over the classification of its California workers, that word “control” can be cause for serious consternation. In California, “[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to *control* the manner and means of accomplishing the result desired.”<sup>174</sup> The test is highly complex and involves a multifactor analysis (discussed briefly in Part III), but as a general rule, it can be understood as follows: The more control an employer exerts over its workers, the more likely those workers are to be classified as employees.

Seen through this lens, the ADA suits against both Uber and Lyft are, ultimately, cases about control. The plaintiffs insist that TNCs must do more to prevent discrimination than “consistently communicat[e]” anti-discriminatory policies to drivers.<sup>175</sup> They claim the best way to accomplish such a goal is to hold TNCs legally liable for controlling their drivers’ conduct. Uber and Lyft, meanwhile, are

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<sup>172</sup> *Id.* 1:19-20.

<sup>173</sup> *Id.*

<sup>174</sup> *Alexander*, 765 F.3d at 988 (citing *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 3d 341, 350, (1989)) (emphasis added).

<sup>175</sup> Egelko, *supra* note 166.

unsurprisingly resistant. They are well aware that if traditional cab companies offer any indication, the amount of additional control over their drivers that a finding of ADA liability would entail might be substantial.

The taxi company Limo Economy Cab of Eau Claire, Wisconsin offers an illustrative example. After being investigated by the Department of Justice based on allegations that “one of its drivers refused to help a customer place his wheelchair in the trunk,” the cab company instituted changes that have become standard industry practices.<sup>176</sup> In addition to mandating that its drivers undergo ADA compliance training, it also required them “to assist with the stowing of mobility devices, to transport service animals in the company of individuals with disabilities, to charge the same fares and fees to individuals with disabilities accompanied by service animals or equipment as is charged to others, to post disability rights and complaint notices in taxis, and to maintain a log of all such complaints and resolutions.”<sup>177</sup> Other cab companies have gone even further. Many Chicago taxi companies, for example, require that, in addition to general ADA compliance training, their drivers must specifically “take classes to learn about service dogs.”<sup>178</sup> Beyond training, other cab companies also operate under a mandate of maintaining a certain percentage of wheelchair accessible vehicles in their fleets—a stipulation that, if applied to TNCs, would run counter to their business model of requiring drivers to provide their own vehicles.<sup>179</sup>

Uber’s approach to accommodating passengers with disabilities, by contrast, has been decidedly more piecemeal. The TNC has responded to accusations of discrimination, in part, by increasing its output of training and information materials to drivers—including recently posting an “online video that drivers can choose to watch, which shows how to best assist people with disabilities.”<sup>180</sup> Uber has also

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<sup>176</sup> *Enforcing the ADA Part 3*, U.S. DEPT. CIV. RIGHTS DIV., [http://www.ada.gov/5yearadarpt/ii\\_enforcing\\_pt3.htm](http://www.ada.gov/5yearadarpt/ii_enforcing_pt3.htm) [https://perma.cc/HK4F-XZRH].

<sup>177</sup> *Id.*

<sup>178</sup> Kerr, *supra* note 1.

<sup>179</sup> Carol Tyson, *Ride-Hailing Services Present Major Gap in Access for People with Disabilities in the D.C. Area*, MOBILITY LAB (Oct. 5 2015), <http://mobilitylab.org/2015/10/05/ride-hailing-services-present-major-gap-in-access-for-people-with-disabilities-in-the-d-c-area/> [https://perma.cc/4FZD-TKYV].

<sup>180</sup> Kerr, *supra* note 1.

piloted a number of programs over the years that it touts as outreach to the disabled community—though few have caught on.<sup>181</sup> UberACCESS, a program which “allow[ed] those who need an extra hand or even a wheelchair accessible vehicle in Austin[, Texas] to request a ride . . . 24 hours a day . . . at the same rates of UberX” fizzled out entirely in less than a year for reasons that are unclear.<sup>182</sup> To this day, only two programs remain intact.<sup>183</sup> UberWAV—which partners with paratransit drivers to provide wheelchair accessible vehicles—claims to have “an average wait time of 7 minutes” in New York City.<sup>184</sup> But outside of New York City, the program remains extremely limited in scope. The most successful initiative, by far, has been UberASSIST, which is “designed to provide additional assistance to seniors and people with disabilities.”<sup>185</sup> UberASSIST allows customers to specifically request drivers who have volunteered to be “trained by [the] Open Doors Organization to assist riders into vehicles and [a]ccommodate folding wheelchairs, walkers, and scooters.”<sup>186</sup> The program has grown rapidly since its recent inception, but still has not received widespread adoption outside of major metropolitan areas. The program is also limited by the fact that it makes no provisions for customers who need specialized accessible vehicles.<sup>187</sup>

Uber is careful to couch its training materials and disability-related initiatives as “tips,” “suggestions,” or “voluntary” programs, so as not to imply it is actually exerting control over its drivers.<sup>188</sup> Yet because

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<sup>181</sup> De Caro, *supra* note 22.

<sup>182</sup> Shelley Adams, *UberACCESS: Wheelchair Accessible Vehicles Available at the Tap of a Button*, UBER NEWSROOM (July 29, 2015), <https://newsroom.uber.com/us-texas/uberaccess-wheelchair-accessible-vehicles-available-at-the-tap-of-a-button> [<https://perma.cc/G3UT-X567>].

<sup>183</sup> *UberACCESS: Expanding Transportation Options*, UBER TECH., INC. (Oct. 28, 2014), <https://newsroom.uber.com/us-california/uberaccess-sd/> [<https://perma.cc/6NYT-DB44>].

<sup>184</sup> Lapowsky, *supra* note 163; *Wheelchair Accessible Rides with UberWAV*, UBER TECH., INC. (Aug. 7, 2014), <https://newsroom.uber.com/us-new-york/wheelchair-accessible-rides-with-uberwav/> [<https://perma.cc/LG2G-A6LT>].

<sup>185</sup> *Introducing UberAssist*, UBER TECH., INC. (July 14, 2015), <https://newsroom.uber.com/us-california/introducing-uberassist-la/> [<https://perma.cc/N8TA-QA9C>].

<sup>186</sup> *Id.*

<sup>187</sup> *See id.*

<sup>188</sup> Kerr, *supra* note 1.

of this passive approach, the “law of mathematics” continues to ail the company.<sup>189</sup> Uber has all but admitted that, short of a more forceful intervention, incidents of discrimination are bound to continue.<sup>190</sup> And as Harry Campbell, a TNC driver who authors a popular blog with tips for Uber and Lyft drivers, points out: “Since Uber doesn’t provide much training in the first place, many drivers are left to figure it out and often feel like they’re thrown to the wolves, especially when first starting. There are a lot of things that Uber asks drivers to do and when there’s no central repository to get good information, this is what can happen.”<sup>191</sup>

Both Uber and Lyft recognize that court-mandated ADA compliance, alone, is not dispositive when it comes to California’s “control” test for employment classification. In fact, many orthodox cab drivers in California—all of whom are legally obliged to comply with the ADA—are uncontroversially classified as independent contractors. But because two federal courts have now ruled that the “control” Uber and Lyft currently exert over their drivers is already balanced in virtual equipoise between that of contractor and employee, both TNCs are highly sensitive to anything that might tilt the scales.

Therein lays the dilemma. On the one hand, even though both TNCs want their drivers to diligently follow anti-discrimination policies, truly compelling ADA compliance—through more interventionist measures such as mandatory disability training, standardized procedures, or wheelchair accessible vehicle quotas—would risk jeopardizing the drivers’ classification as independent contractors. On the other hand, merely setting guidelines that their drivers can, and allegedly do, disregard opens the companies up to a host of other lawsuits. As Jim Weisman, CEO of the United Spinal Association and one of the original framers of the ADA, said, “Uber’s quite sensitive to the disability issue, but it’s way more sensitive to its way of doing business and its bottom line. As soon as they give in, it’s a chink in the armor.”<sup>192</sup>

From Uber’s standpoint, it is caught between the legal equivalent of a rock and a hard place. A ruling in favor of ADA liability would unquestionably provide fodder for those who claim Uber’s drivers

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Lapowsky, *supra* note 163.

should be reclassified as employees. Indeed, for all Uber knows, court-mandated ADA compliance requiring the company to exert additional control over its drivers could prove to be the straw that broke the jury's back—resulting in hundreds of millions of dollars of additional costs for the company.

As if those stakes alone were not high enough, Uber is far from the only multibillion—much less multimillion—dollar company that stands to be affected by the *O'Connor* verdict. Some commentators believe that a ruling in favor of Uber's drivers could be a harbinger of more employment reclassification rulings to come for the on-demand economy.<sup>193</sup> One need only consider the swift reaction to the California Labor Commission's decision by companies such as Shyp and Instacart for confirmation of the disquiet felt by many on-demand businesses.

### **B. Forecasting ADA Liability for Transportation Network Companies**

Uber's and Lyft's strategy for navigating this dilemma of ADA compliance thus far has been to pull a page from their employment misclassification playbook. In answer to the lawsuits brought against them, both TNCs have asserted a defense reminiscent of those featured in *O'Connor v. Uber Technologies, Inc.* and *Cotter v. Lyft, Inc.*<sup>194</sup> They argue that "Title III [of the ADA] applies only to . . . place[s] of public accommodation," not "technology companies that provide platforms for peer-to-peer sharing"; therefore, as a matter of law, the plaintiffs failed to state a claim.<sup>195</sup> The TNCs assert that, far from being "public accommodations," they are not even "transportation compan[ies]" because "they do not provide specified public transportation services and are not engaged in the business of transporting people, but are simply mobile-based ridesharing platforms to connect drivers and riders."<sup>196</sup> Lyft—just as it had in *Cotter*—argues that "it does not own the vehicles drivers use or provide any transportation."<sup>197</sup> Uber, likewise, contends that it "merely provide[s] a

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<sup>193</sup> Weisul, *supra* note 130; Rogers, *supra* note 130..

<sup>194</sup> See generally *O'Connor*, 82 F. Supp. 3d at 1133; *Cotter*, 60 F. Supp. 3d at 1067.

<sup>195</sup> *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at \*11 (W.D. Tex. Feb. 20, 2015).

<sup>196</sup> *Id.* at \*10.

<sup>197</sup> *Id.*

platform for people with particular skills or assets to connect with other people looking to pay for those skills or assets.”<sup>198</sup>

The argument functions, essentially, as an affirmative defense. The two TNCs need not deny that the discrimination occurred. Rather, according to the theory they both advance, their ADA liability extends only as far as the legal reaches of their software; and “since Plaintiffs do not allege that they were unable to use the app, Defendants are not discriminating against them.”<sup>199</sup>

Mystifyingly, though, both TNCs appear to have overlooked a fundamental feature of the ADA that renders the first part of their argument essentially irrelevant. Namely, that the statute covers more than just public accommodations. It also applies to any “private entity that is primarily engaged in the business of transporting people whose operations affect commerce.”<sup>200</sup> Indeed, it is precisely this provision that subjects traditional taxi companies, which are not public accommodations, to the ADA—even private taxi companies whose drivers are classified as independent contractors.<sup>201</sup> As the U.S. Department of Justice noted in a brief it filed on behalf of the petitioners in the NFBC case, “The success of Plaintiffs’ ADA claim is not dependent on a finding that Defendants are a public accommodation, because . . . Title III of the ADA applies to private entities that are primarily engaged in providing transportation services regardless of whether the private entity is a public accommodation.”<sup>202</sup>

In a February 2015 dismissal of Uber’s and Lyft’s “Motions to Dismiss Plaintiff’s Complaint” in *Ramos v. Uber Technologies, Inc.*—an ADA suit brought against Uber in Texas—a federal court affirmed the Justice Department’s analysis, bluntly remarking that “Uber and Lyft misread Title III.”<sup>203</sup> The court continued, “Title III expressly

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> 42 U.S.C. § 12184(a).

<sup>201</sup> 49 C.F.R. 37; see also *Frequently Asked Questions*, FEDERAL TRANSIT ADMINISTRATION, (Mar. 10, 2016) <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/frequently-asked-questions> [<https://perma.cc/Y8UV-4PXT>].

<sup>202</sup> Statement of Interest of the United States of America, 3:14-17, *Nat’l Fed’n of the Blind of California v. Uber Tech., Inc.*, No. 3:14-cv-4086-NC, 2014 WL 4628579 (N.D. Cal. Dec. 22, 2014).

<sup>203</sup> *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at \*11 (W.D. Tex. Feb. 20, 2015).

applies to public accommodations *and* certain services operated by private entities.” Put simply, “[the TNCs’] restrictive reading of Title III as governing only public accommodations is contrary to its structure and its plain language.”<sup>204</sup> Accordingly, the court “reject[ed] Defendants’ arguments that Plaintiffs must allege and prove that Uber and Lyft operate places of public accommodation in order to state a claim.”<sup>205</sup>

The ruling was not, in and of itself, fatal to the TNCs’ overall defense. It simply changed the central legal question from whether TNCs are public transportation companies to whether they are transportation companies at all. With regard to this question, the court proved less willing to offer an opinion. But, here, some of the language from rulings in both *O’Connor* and *Cotter* may provide insight.

In a 2015 denial of Uber’s Motion for Summary Judgment in *O’Connor*, a San Francisco court stated that while “Uber passes itself off as merely a technological intermediary between potential riders and potential drivers . . . [t]his argument is fatally flawed in numerous respects.”<sup>206</sup> The court noted:

*[Although] Uber now disclaims that it is a “transportation company,” Uber has previously referred to itself as an “On-Demand Car Service,” and goes by the tagline “Everyone’s Private Driver.” Indeed, in commenting on Uber’s planned expansion into overseas markets, its CEO wrote on Uber’s official blog: “We are ‘Everyone’s Private Driver.’ We are Uber and we’re rolling out a transportation system in a city near you.” Other Uber documents state that “Uber provides the best transportation service in San Francisco[.]” Moreover, Uber does not sell its software in the manner of a typical distributor. Rather, Uber is deeply involved in marketing its transportation services, qualifying and selecting drivers, regulating and monitoring their performance, disciplining (or*

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at \*6.

<sup>206</sup> *O’Connor*, 82 F. Supp. 3d at 1141.

*terminating) those who fail to meet standards, and setting prices.*<sup>207</sup>

In a denial of Lyft's Motion for Summary Judgment in *Cotter*, a San Francisco court offered an almost identical analysis, stating:

*Lyft tepidly asserts there is no need to decide how to classify the drivers, because they don't perform services for Lyft in the first place. Under this theory, Lyft drivers perform services only for their riders, while Lyft is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect, analogous perhaps to a company like eBay. But that is obviously wrong. Lyft concerns itself with far more than simply connecting random users of its platform. It markets itself to customers as an on-demand ride service, and it actively seeks out those customers. It gives drivers detailed instructions about how to conduct themselves. Notably, Lyft's own drivers' guide and FAQs state that drivers are "driving for Lyft." Therefore, the argument that Lyft is merely a platform . . . is not a serious one.*<sup>208</sup>

The sense among some experts following Uber's ADA lawsuits has been that until a long, hard-fought legal battle "settle[s] whether Uber is a software company or transportation company, the disability community will just have to be patient."<sup>209</sup> But what these two federal court rulings suggest is that this question—which lies at the heart of the ADA lawsuits—might have already been answered. Uber's liability under the ADA may no longer be a matter of "if," but a matter of "when."

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<sup>207</sup> *Id.* at 1137 (citations omitted) (emphasis in original). Compare *Berwick v. Uber Tech., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at \*6 (CA. Dept. Lab. June 3, 2015) ("Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation. The reality, however, is that defendants are involved in every aspect of the operation.").

<sup>208</sup> *Cotter*, 60 F. Supp. 3d at 1078 (citations omitted) (emphasis added).

<sup>209</sup> Strohlic, *supra* note 1; see also Lapowsky, *supra* note 163.

## V. CONCLUSION

Uber's ADA dilemma stands as a synecdoche for an era increasingly defined by the judicial system's inability to keep pace with rapid technological innovation. A few relatively low-profile cases involving the ADA have inadvertently turned a seemingly trivial legal assumption made years ago by an obscure startup into a question of vast economic and moral significance. Hundreds of millions, if not billions, of dollars now hang in the balance. So, too, do the rights of some 57 million Americans with disabilities, for whom victory in Uber's ADA lawsuits could come to represent a major civil rights milestone.<sup>210</sup> Indeed, to borrow a provocative analogy from Christine Griffin, executive director of the Disability Law Center: "If these companies said 'We're not going to pick up women or African-Americans,' all the [customers] supporting them would be running away. No one wants to look at this as a civil rights issue, when in fact that's what it is."<sup>211</sup>

Though Griffin's analogy pulls no punches, the importance of her framing the issue as one involving civil rights cannot be overstated. More than a quarter of a century after the passage of the Americans with Disabilities Act, troubling disparities in access to transportation for people with disabilities persist in the U.S. Of the roughly 57 million Americans with disabilities, over a third—twice as many as those without disabilities—report having inadequate transportation options.<sup>212</sup> Unfortunately, these figures only increase with the severity of the disability. People "with very severe disabilities are twice as likely to think transportation is a major problem as . . . [those] with a somewhat severe disability . . . and three times as likely as those with a slight or moderate disability."<sup>213</sup>

<sup>210</sup> Taylor et al., *supra* note 42; *see also Transportation Equity, supra* note 42.

<sup>211</sup> Dan Adams, *Disabled Riders Seek Tougher Rules for Uber, Lyft*, BOS. GLOBE ONLINE (May 1, 2015), <https://www.bostonglobe.com/business/2015/04/30/massachusetts-disability-advocates-hit-uber-lyft-over-lack-accessibility/i17fMPe7omNmCIU32FVqI1/story.html> [<https://perma.cc/W2SV-FNU5>].

<sup>212</sup> Matthew W. Brault, *Americans with Disabilities: 2010, CURRENT POPULATIONS REPORT* (July 2012), <https://www.census.gov/prod/2012pubs/p70-131.pdf>, [<https://perma.cc/3WSW-HFNM>]; *see also* Taylor, *supra* note 42.

<sup>213</sup> Taylor, *supra* note 42; *see also Transportation Equity, supra* note 42.

For a new breed of companies whose staggering success has increasingly led them to market themselves as a viable alternative to car ownership, ADA liability presents a prospect for the disabled community that was almost unimaginable just a decade ago: true transportation equality. In the twenty-five years since the ADA's passage, this prospect has come to represent something of a holy grail for disability rights activists, who have long sought in vain for a solution to one of the federal statute's most glaring shortcomings. Namely, that the ADA is quite adept at ensuring that places are accessible, but not so adept at ensuring that disabled people can actually reach those places to begin with. After all, what good is a wheelchair accessible building if there is no way for someone in a wheelchair to get to it?

The potential of TNCs to bridge this heretofore unbridgeable gap is not lost on those who have filed suit against Uber and Lyft under the ADA. But whether this possibility becomes a reality will ultimately depend on the continued profitability and viability of the TNC business model as it weathers the storm of legal challenges waiting on the horizon.

Right now, all eyes in Silicon Valley are focused on *O'Connor v. Uber Technologies, Inc.* But what the unique confluence of circumstances presented in this piece suggests is that maybe, just maybe, those eyes should instead be focused on a less conspicuous set of cases that have the potential to shape not only the future of the on-demand economy, but also the future of the disabled community.