
In The
Supreme Court of Virginia

RECORD NO.: 230865

AMAZON LOGISTICS, INC.,
Appellant,

v.

VIRGINIA EMPLOYMENT COMMISSION,
Appellee.

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

**BRIEF OF CHAMBER OF PROGRESS AND NETCHOICE AS
AMICI CURIAE IN SUPPORT OF APPELLANT**

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INTEREST OF AMICUS

Chamber of Progress is a tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. It is an industry organization that backs public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps. Chamber of Progress' work is supported by corporate partners, many with interests in promoting innovative, technology-driven labor-market solutions.

NetChoice is an association dedicated to promoting an Internet safe for free enterprise and expression. It focuses on promoting those values through consumer choice, limited government, and open competition. Its members include companies that operate digital work platforms offering new and innovative ways to find and expand consumer choice and work opportunities.

Amici and their members have a significant interest in this case. In this amicus brief, Amici offer their perspective on the legal, economic, and policy implications of classifying workers as a group in a single unemployment proceeding. The brief also provides insight into how such a decision could affect the unemployment system in Virginia

and unemployment in the broader economy. The brief aims to help the Court explore these issues and provide a broader context for the arguments presented by the parties.

SUMMARY OF ARGUMENT

This case asks whether a single claims examiner should be able to reclassify an entire community of app-based workers in a proceeding involving only one unemployment claim. The answer is no. That result would not only conflict with Virginia law, but would also create a regulatory mismatch, and it could even destabilize the unemployment system itself.

The unemployment system was designed to protect workers from unexpected job losses in the traditional employment market. *See Unemployment Comp. Comm'n v. Tomko*, 65 S.E.2d 524, 527 (Va. 1951). So it uses concepts designed for that market, including “unemployment,” “partial unemployment,” and “suitable” work. *See, e.g.*, Va. Code §§ 60.2-612, 60.2-226(a); 16 Va. Admin. Code § 5-10-10. While those concepts may be easy to understand in the traditional market, they do not translate to app-based workers. As a class, app-based workers offer their services when, where, and as often as they want. They need not accept any particular request for service; they can accept or reject as many requests as they like. *See, e.g.*, Uber Platform Access Agreement (P2P) ¶ 1.2 (Jan. 2022) (stipulating driver-partner’s

choice over service requests)¹; Lyft Terms of Service ¶ 1 (2024)² (same); *How to Set Your Schedule*, Shipt (2024) (“As a shopper with Shipt, you have the flexibility to create your own schedule and select the areas, days, and times you'd like to be available to receive order offers.”). See also Seth Harris & Alan Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: the “Independent Worker,”* Hamilton Proj. Discussion Paper No. 2015-10 (Dec. 2015)³ (describing common features of app-based work); Tammy McCutchen & Alexander T. MacDonald, *Ready, Fire, Aim: How State Regulators Are Threatening the Gig Economy and Millions of Workers and Consumers*, U.S. Chamber of Commerce 12–13 (Jan. 9, 2020)⁴ (same). Their ability to access work depends not on the work offered by any single employer, but on the aggregate demand for services in their local markets. See,

¹ Available online: <https://tb-static.uber.com/prod/reddog/country/United States/licensed/f5f1f4a9-4e6d-4810-8aa3-21b663290294.pdf>.

² Available online: <https://www.lyft.com/terms>.

³ Available online: https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

⁴ Available online: <https://www.uschamber.com/employment-law/ready-fire-aim-how-state-regulators-are-threatening-the-gig-economy-and-millions-of-workers>.

e.g., Gad Allon et al., *The Impact of Behavioral and Economic Drivers on Gig Economy Workers*, Univ. of Penn. Mack Inst. 1–2 (2020)⁵ (describing how digital platforms balance supply of providers with demand for services). They may find less work when demand falls, but they are not “laid off” or “separated” from any particular job. They can continue to use their platforms of choice, search for service requests, and accept whatever requests are available. In short, they never become “unemployed” as that term is used in the existing unemployment system. *See, e.g., Benefits Eligibility*, Va. Emp. Comm’n (2024)⁶ (describing requirements of benefits eligibility, including “separation” from employment and an adequate search for work) [hereinafter VEC Benefits Eligibility Guidance]; Va. Code § 60.2-226(a) (defining unemployment as a period in which the person performs *no* services). *See also* Harris & Krueger, *supra*, at 20 (concluding that “because independent workers control when and whether they will work, the

⁵ Available online: https://mackinstitute.wharton.upenn.edu/wp-content/uploads/2020/11/FP0438_WP_2019Oct.pdf.

⁶ Available online: <https://www.vec.virginia.gov/unemployed/benefits-information/benefits-eligibility>.

fundamental principles of the federal-state employment insurance system do not apply”).

This mismatch is more than just semantics. It goes to the very heart of the employment system. If the system were stretched to cover app-based work, the effects could be severe and counterintuitive. For one, app-based drivers have lower than average job attachment, and so would be more costly to insure. Average costs could rise across the system. *See* Seth Harris, *Protections, and Benefits in the U.S. Gig Economy*, *Global Law Review* 35 (Sept. 2018); Benjamin Della Rocca, *Unemployment Insurance for the Gig Economy*, *Yale L.J. Forum* (Jan. 26, 2022)⁷ (predicting that “gig-worker UI will put significant strain on states’ unemployment-claims processing systems”). For another, those costs would be borne first by the platform operators, who may be forced to raise prices, reduce services, or shut down altogether. *See* Harris, *supra*, at 35 (“Risks would rise that many existing companies would lose growth prospects, or potentially face bankruptcy or retrenchment.

⁷ Available online: <https://www.yalelawjournal.org/forum/unemployment-insurance-for-the-gig-economy>.

The risk that some start-up companies no longer would be economically feasible would also increase.”).

That result could actually increase unemployment overall because many workers use app-based platforms as a temporary bridge between jobs. See, e.g., Vyacheslav Fos, et al., *Gig Labor: Trading Safety Nets for Steering Wheels*, 191 *Cato Research Br.* 1, 1–2 (2019);⁸ Dylan Walsh, *How the Gig Economy Can Reduce Unemployment and Debt*, MIT Mgmt. (Sept. 29, 2020).⁹ The platforms help workers cover their short-term bills and stay off the unemployment rolls. See Toby Kass, *The Value of Contingent Work*, Univ. of Minn. Working Paper 4—5 (April 14, 2022).¹⁰ If the platforms had to shut down, these workers would flood back into the system, raising unemployment rates overall. Kass, *supra*, at 4–5.

But that result is not inevitable. It may be possible to design a system that both accounts for app-based work’s unique features and

⁸ Available online: https://www.cato.org/sites/cato.org/files/2019-11/RB191_final.pdf.

⁹ Available online: <https://mitsloan.mit.edu/ideas-made-to-matter/how-gig-economy-can-reduce-unemployment-and-debt>.

¹⁰ Available online: https://tlkass.github.io/TobeyKass_JMP_2022_UMN.pdf.

protects app-based workers from unexpected losses. *See Harris & Krueger, supra*, at 20 (proposing other potential models, including private risk-pooling and collective bargaining). But such a system cannot be designed in the confines of a single unemployment claim. No single claims examiner, agency, or even court can force-fit a decades-old system to a novel form of work. What is needed is a new system—one developed, in the first instance, by legislatures. *See Harris, supra*, at 31 (calling for new laws to address risks while mitigating systemic damages); Della Rocca, *supra* (describing legislative adjustments necessary to make unemployment system function in app-based economy); Alexandra J. Ravenel, *Unemployment Insurance Needs an Update for the Gig-Economy*, Hill (Nov. 8, 2023)¹¹ (calling for legislative reform at state and federal levels).

This Court should not allow a single agency to short circuit the legislative process. Nor should the Court take that policymaking burden on itself. It should hold that the Commission has no power to reclassify

¹¹ Available online: <https://thehill.com/opinion/finance/4297752-unemployment-insurance-needs-an-update-for-the-gig-economy/#:~:text=Gig%20workers%20and%20freelancers%20are,jobs%20C%20can%20also%20be%20disqualifying>.

an entire class of workers in an emerging field under the guise of adjudicating a single claim. It should reverse.

ARGUMENT

1. **App-based platforms create a new arrangement between workers, consumers, and the platforms themselves.**

App-based work goes by many names. It is sometimes called the gig economy, sometimes the sharing economy, sometimes the on-demand economy. But whatever the label, it refers to work mediated through web- or app-based digital platforms. *See* Deepa Das Acevedo, *Who Are Gig Economy Workers?*, Reg. Rev. (April 9, 2019).¹² Broadly speaking, these platforms are multi-sided marketplaces. *Id.* *See also* Harris & Krueger, *supra*, at 9. They match people looking for a service (consumers) with people looking to provide a service (workers). Harris & Krueger, *supra*, at 9. The platforms register both sides, match their requests, and process their transactions. *Id.* They also offer certain safety and security features designed to make people more comfortable transacting with strangers. These features include ratings systems, background checks, and even profile pictures. The features are sometimes called “digital trust cues”: they help people find reliable partners and smooth commerce through the digital marketplace. *See*

¹² Available online: <https://www.theregreview.org/2019/04/09/das-acevedo-who-are-gig-economy-workers/>.

Mareike Möhlmann & Andrea Geissinger, *Trust in the Sharing Economy*, in *Cambridge Handbook of the Law of the Sharing Economy* 29, 33 (2018) (explaining that “digital trust cues” such as ratings systems and profile pictures “enable trust between multiple parties” interacting with one another through digital marketplaces). *Cf. also* Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States*, Working Paper No. 22843 (Nat’l Bureau of Econ. Research Jan. 22, 2015)¹³ (explaining that ratings systems may encourage high-quality service and attract better performing service providers).

So described, app-based platforms are nothing new. Physical and analog matching services have existed for years. Long before the internet, people used the want ads or Craigslist to find specialized services. And before smartphones, they called dispatchers to find rides. Like app-based platforms, these tools were all intermediaries: they matched people who needed services with people who provided them. *See generally* Sean Silverthorne, *New Research Explores Multi-Sided*

¹³ Available online: <https://www.nber.org/papers/w22843>.

Marketplaces, Harv. Bus. Sch. (March 12, 2006)¹⁴ (interviewing Prof. Andrei Haigu, who explains that multi-sided marketplaces are as diverse as dating clubs, credit cards, and video games); Mikko Hänninen et al., *Multi-Sided Marketplaces and the Transformation of Retail: A Service Systems Perspective*, 48 *J. of Retailing & Consumer Servs.* 380, 382–83 (2019) (describing rise of multi-sided platforms in retail industry). *See also* McCutchen & MacDonald, *supra*, at 12 – 13.

What makes app-based platforms unique is their efficiency. Because of advances in communications technology, platforms can match consumers with workers more quickly and with better accuracy. Harris & Krueger, *supra*, at 5. Travelers no longer have to schedule rides to the airport days in advance. Shoppers no longer have to order from a catalog and hope the right item shows up. They can order their goods in seconds and receive them in hours—sometimes minutes. *Id.* (describing how technological advances have allowed more efficient matching between consumers and individual service providers). *See also* Orly Lobel, *Coase in the Platform Economy*, in *Cambridge Handbook of*

¹⁴ Available online: <https://hbswk.hbs.edu/item/new-research-explores-multi-sided-markets>.

the Law of the Sharing Economy 67, 74 (2018) (explaining that platforms can render services more efficiently in part because of their scale, facilitated by the near-zero marginal cost of adding new users).

This tech-driven efficiency has created new opportunities for workers. Twenty years ago, a worker could not realistically start her own rideshare or delivery business. She had no way to find, much less negotiate with, enough potential customers to keep a steady stream of revenue. *See* Kellen Zale, *Scale in the Sharing Economy*, in Cambridge Handbook of the Law of the Sharing Economy 38, 39 (2018). But today, she can do so with the touch of a button. By downloading an app on her phone, she can connect with hundreds if not thousands of potential consumers. *See id.* And she can instantly contract with one of these consumers using automated contracting terms. *Id.* She no longer has to deal with the friction of finding and securing business: her “transaction costs” have fallen through the floor. *See* Lobel, *supra*, at 67. She can focus on providing a service and leave the matching to someone else. *See id.* (“Most basically, the platform lowers costs associated with matching transaction partners and the costs of the actual transaction.”). *See also* Zale, *supra*, at 39 (“Previously expensive, inconvenient, or risky

exchanges have become instantaneous, thanks to technology such as GPS location services, smartphones, and app software.”).

Low transaction costs do more than generate business; they also allow people to work at times and places convenient for them. Platforms typically allow workers to choose jobs ad hoc: the worker selects one job, completes the job, and has no obligation to do another. *See, e.g.,* Uber Platform Access Agreement, *supra*, ¶ 1.2; Instacart Independent Contractor Agreement ¶ 2.3 (2024)¹⁵ (stating that there is no maximum or minimum amount of service required to use platform). *See also* Harris & Krueger, *supra*, at 10 (observing that platform workers do not depend on platform operator because they control the volume of their own work). The worker therefore controls her own schedule. She can use a platform to find work without rearranging her life or quitting her day job. She can pick up work when, where, and however often she wants. *See* Hall & Krueger, *supra*, at 2 (“Whether to access the app on any given day, and when, are entirely up to the drivers’ discretion.”).

Perhaps because of that flexibility, platform work often attracts people looking for something other than a full-time job. About seven in

¹⁵ Available online: <https://shoppers.instacart.com/contracts>.

ten platform workers say that they consider their platform work a “side job.” Monica Anderson et al., *The State of Gig Work in 2021*, Pew Research Ctr. (Dec. 8, 2021) [hereinafter Pew Survey].¹⁶ About 40% say they use platforms for 10 or fewer hours per week. *Id.* By contrast, only about 8% say they use a platform 35 or more hours per week. *Id.* In fact, it is more common for workers to go whole weeks between using a platform: a full quarter of platform workers say they do not use any platform most weeks. *Id.* In short, they use platform work as an occasional, supplemental source of income. *Id.* See also Diana Farrell & Fiona Grieg, *Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility*, J.P. Morgan Inst. (2017)¹⁷ (studying account-deposit data and concluding that most people used platform work to smooth out fluctuations in their traditional income); Safety Vyacheslav Fos et al., *Gig Labor: Trading Safety Net for Steering Wheels* 4 (July 3, 2019)¹⁸ [hereinafter *Safety Net for Steering Wheels*]

¹⁶ Available online: <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>.

¹⁷ Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911293.

¹⁸ Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3414041.

(describing how platforms have offered workers a “pool of easily accessible short-term jobs”).

That flexibility helps explain platform work’s popularity. While exact numbers are hard to come by, observers agree that platform work is growing at a rapid clip. By some estimates, almost a third of American adults have done some kind of platform-mediated work in the past year. Pew Survey, *supra*. Other estimates put the figure lower—closer to ten percent. See *Contingent and Alternative Employment Arrangements Summary*, U.S. Bureau of Labor Statistics (June 7, 2018).¹⁹ But whatever the absolute number, it is still growing. See Pew Survey, *supra*. And the workers who use it report widespread satisfaction: more than six in ten say the pay they receive is fair, and more than seven in ten say that the platforms themselves are fair. *Id.* That sentiment is also shared by the public at large: more than nine in ten people say that platform work is a “good way to make extra money.” *Id.* Cf. *Safety Net for Steering, supra, at 3* (describing the advent of platform work as a “structural shift in labor markets likely to benefit a broad group of laid-off workers”); Bruno Frey & Matthias Benz, *Being*

¹⁹ Available online: <https://www.bls.gov/news.release/conemp.nr0.htm>.

Independent is a Great Thing: Subjective Evaluations of Self-Employment and Hierarchy 1 (June 2003)²⁰ (concluding that app-based workers enjoy high “procedural utility” from their independence) (“Individuals derive utility from being self-employed because it gives them a higher measure of self-determination and freedom.”). And those earnings opportunities are especially important for people of color, immigrants, and women, all of whom make up a greater percentage of app-based workers than they do of the general workforce. *See* Pew Survey, *supra*,

2. App-based platforms fit poorly with the existing unemployment system.

For all of platform work’s virtues, it does not map on well to systems built for traditional employment, including unemployment insurance. As we know it today, the unemployment-insurance system came out of the Social Security Act of 1935, Pub. L. 74-271, 49 Stat. 620. The Act established a national program administered jointly by federal and state officials. *See* U.S. Dep’t of Labor, Unemployment Compensation: Federal–State Partnership 1 (2024) [hereinafter

²⁰ Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=359822.

Federal–State Partnership].²¹ The program was informed by the Great Depression, which at its peak saw unemployment levels hit 24.9%. *See Great Depression*, U.S. Bureau of Labor Statistics (June 19, 2024).²² As more workers lost their jobs, their purchasing power evaporated. *See* Irving Bernstein, *Americans in Depression and War*, U.S. Dep’t of Labor, ch. 5.²³ Aggregate demand collapsed, leading to even more job losses. *See* Daniel N. Price, *Unemployment Insurance, Then and Now, 1935–85*, 48 Soc. Sec. Bulletin 22 (1985).²⁴ The result was a downward spiral that ended only decades later. *See id.* *See also* ABRAHAM L. GITLOW, *LABOR ECONOMICS & INDUSTRIAL RELATIONS* 538, 582–83 (Literary Licensing, LLC 2012) (1957) (describing downward spiral of joblessness and higher unemployment rates during Great Depression),

The Act aimed to prevent similar collapses by smoothing out household incomes during downturns. *See* Federal–State Partnership,

²¹ Available online: <https://oui.doleta.gov/unemploy/pdf/partnership.pdf>.

²² Available online: https://data.bls.gov/timeseries/LFU21000100&series_id=LFU22000100&from_year=1929&to_year=1939&periods_option=specific_periods&periods=Annual+Data.

²³ Available online: <https://www.dol.gov/general/aboutdol/history/chapter5>.

²⁴ Available online: <https://www.ssa.gov/policy/docs/ssb/v48n10/v48n10p22.pdf>.

at 1. It also sought to alleviate the personal hardship experienced by those who temporarily lost their jobs through no fault of their own. *Id.* See also *Tomko*, 65 S.E.2d at 528 (“The primary purpose of the Act is to provide temporary financial assistance to workmen who become unemployed through no fault of their own.”).

Those purposes explain how the system works today. The system is designed mainly to help people who lose their jobs in the traditional employment market. See *Tomko*, 65 S.E.2d at 528. And for those people, the system’s design makes sense. It helps them pay their bills when they’re laid off, furloughed, or lose their jobs in a downward business cycle. But the system makes little sense when applied to app-based platforms.

For example, consider the very concept of unemployment. In a normal case, a worker is “unemployed” when he or she is separated from a job. See VEC Benefits Eligibility Guidance, *supra*; *Tomko*, 65 S.E.2d at 528. Separation is easy to understand in traditional employment: a person is separated when she is laid off, and she remains separated until she is recalled. See Va. Code §§ 60.2-612 (establishing eligibility criteria, including continued search for work),

60.2-226 (defining unemployment as week in which person performed no work for wages). But in the app-based economy, the concept is not so simple. App-based workers are not separated in the same sense as employees. They hold no formal positions on a platform, and they are not “laid off” when demand on the platform falls. Rather, they continue to have the same access to the platform they had when demand was high. The only difference is they find fewer requests for services. There is no point at which they are “separated”; their opportunities simply decline in step with consumer demand. *See, e.g.*, Harris & Krueger, *supra*, at 20 (noting the mismatch between unemployment systems and app-based work); Della Rocca, *supra* (observing that new standards for unemployment would be needed to include app-based workers in unemployment system). *Cf. Tomko*, 65 S.E.2d at 528 (“The involuntary unemployment for which the Act is designed to provide, presupposes a lack of available work. Where work is available there can be no involuntary unemployment within the meaning of the Act.”).

For a dramatic illustration, consider the experience of rideshare drivers during the COVID-19 pandemic. As people sheltered and self-quarantined, demand for rideshare services plummeted. *See Demand*

Coronavirus Relief for Platform Workers, Rideshare Drivers United²⁵ (reporting declines as severe as 80% from pre-pandemic levels) [hereinafter Rideshare Drivers United]. *See also* Erika Beras, *Big Jump in Unemployment Claims from Gig Workers*, Marketplace (Jan. 21, 2021)²⁶ (describing rise in unemployment claims by gig workers during pandemic under temporary federal Pandemic Unemployment Assistance fund). Drivers who could once find ample demand for rides suddenly found very little. *See* Rideshare Drivers United, *supra*. The drivers could still access the platform in the same way as before; they could still open their apps and search for ride requests. *See id.* But the requests themselves had dried up. *See id.* *See also* Benn Penn, *Uber, Lyft Drivers Eligible for Jobless Aid Under New Law*, Bloomberg Law (April 6, 2020).²⁷ Danielle Burr, *Who We Fought for in the Coronavirus*

²⁵ Available online: <https://www.drivers-united.org/demand-coronavirus-relief-for-platform-workers>.

²⁶ Available online: <https://www.marketplace.org/2021/01/21/big-jump-unemployment-benefit-claims-gig-workers/>.

²⁷ Available online: <https://news.bloomberglaw.com/daily-labor-report/uber-lyft-drivers-now-eligible-for-jobless-aid-under-new-law>.

Relief Package, Uber (March 31, 2020)²⁸ (noting the challenges that drivers experienced finding work during the pandemic).

Dried up, however, does not mean disappeared. Consumers, albeit fewer, continued to use the platforms, and some work opportunities were still available. *See* Preetika Rama, *U.S. Spending on Ride-Hailing with Uber, Lyft Falls as Coronavirus Spreads*, Wall St. J. (March 18, 2020)²⁹ (reporting decline of 21% in ride requests on Uber platform and 19% of Lyft Platform). So even in the pandemic, there was never a time when drivers truly lost all access to work. *See id.*

More to the point, app-based workers do not experience anything so drastic under normal circumstances. In most cases, demand for services moves alongside demand in general. *See* Krueger, *supra*, at 13 (noting that supply of drivers tends to rise during times of peak demand for services); Möhlmann & Gessinger, *supra*, at 34 (explaining how platforms help match supply of providers with demand for services or facilities). Demand for restaurant deliveries may rise at dinner time;

²⁸ Available online: <https://www.uber.com/newsroom/coronavirus-relief-package/>.

²⁹ Available online: <https://www.wsj.com/articles/u-s-spending-on-ride-hailing-with-uber-lyft-falls-as-coronavirus-spreads-11584525600>.

demand for dog-walking services may spike during vacation season. At those times, workers may find abundant work. And when demand falls back to normal (or even subnormal) levels, they simply see fewer requests. *Cf.* Krueger, *supra*, at 13 (observing relationship between supply and demand on Uber platform). *Cf. also* Niamh Dunne, *Competition Law and Its Limits in the Sharing Economy*, in Cambridge Handbook of the Law of the Sharing Economy 91, 95 (2018) (explaining how demand for services affects price and supply on digital work platforms).

In short, app-based workers are not “separated” or “laid off” in the traditional sense. They can continue to work, even if at reduced levels. So it is hard, if not impossible, to determine at what point they become “unemployed.” *See Tomko*, 65 S.E.2d at 528 (“The involuntary unemployment for which the Act is designed to provide, presupposes a lack of available work. Where work is available there can be no involuntary unemployment within the meaning of the Act.”).

Nor can a better analogy be found in partial unemployment. Like many states, Virginia offers reduced benefits to partially unemployed workers. *See* Va. Code §§ 60.2-614, 60.2-618(1). A worker is considered

partially unemployed when her hours are cut below her “customary full-time” schedule. *See* 16 Va. Admin. Code § 5-10-10 (defining “partially unemployed individual”). But that concept fits poorly with app-based work because app-based workers have no “customary” schedules: each worker determines her own schedule on the fly. One week, she might work two hours on Sunday night, three on Tuesday morning, and four on Friday afternoon. The next week, she might work no hours at all. *See* Pew Survey, *supra* (reporting that most “gig” workers use the platforms irregularly and that a full quarter do not use them even once every week). That flexibility is why most workers choose app-based work, and it explains why so few work fixed or full-time schedules. *See* Krueger, *supra*, at 2 (explaining that workers are attracted to platform work because of its scheduling flexibility). In fact, it is what many see as platform work’s main advantage over employment. *See* Pew Survey, *supra* (reporting that roughly half of gig workers say scheduling flexibility is essential). But it also makes it impossible to establish a “customary” baseline to determine when a worker is partially unemployed. *See* Krueger & Harris, *supra*, at 20 (concluding that it is “impossible” to apply time-based employment standards like

unemployment insurance to gig workers because the workers control their own schedules).

But even if the system could determine when an app-based worker became unemployed, it would still struggle to determine how long she stayed eligible for benefits. Virginia's unemployment system imposes many eligibility requirements, such as an adequate search for work. To continue receiving benefits, a worker must continue to search for "suitable" replacement work. *See* Va. Code § 60.2-612(A)(7). That means the worker must make at least two job contacts per week. *See* VEC Eligibility Guidance, *supra*. And if the worker receives a suitable job offer, she must either accept it or show that she had good reasons for refusing it. *See id.* (explaining that a worker may lose benefits for declining suitable work); *Tomko*, 65 S.E.2d at 528; *Johnson v. Va. Emp. Comm'n*, 382 S.E.2d 476, 481 (Va. App. 1989) ("The employee must establish by a preponderance of the evidence that he had justifiable reasons to refuse the offer in light of the particular circumstances.").

While that requirement is easy to understand in the employment market, it makes little sense for app-based workers. App-based workers are constantly presented with multiple, discrete service requests. When

they log into a platform, they may see dozens if not hundreds of requests in a single day. *See, e.g.*, Lauren Wingo, *What Is a Gig Worker?* CP (March 16, 2021) (describing typical experience of app-based independent workers); *The Pros and Cons of the Gig Economy*, WGU (Aug. 31, 2018) (same). Under current law, they have no duty to accept any of those requests; they can decline as many as they like. *See, e.g.*, Uber Platform Access Agreement, *supra*, ¶ 1.2; Instacart Independent Contractor Agreement ¶ 2.3. *See also Razak v. Uber Techs., Inc.*, No. 2:16-cv-00573, slip op. at 27–28 (E.D. Pa. June 4, 2024) (citing “significant testimony and documentary evidence” showing that drivers had the “freedom to decide whether, when, and how to use” the Uber app). But if unemployment rules applied, each request might be a “suitable” job offer. It would involve the same kind of work the worker had accepted before; it would be offered in the same forum; and would present similar compensation. So could the worker still decline each request? Or would she now be required to accept every request or risk losing her benefits? *Cf. Sage v. Mouldings, Inc.*, 16 Va. Cir. 1, 1988 WL 619140, at *1–2 (1988) (finding that offer of work was “suitable” when offered by former employer at former place of employment, even when

the offer included only one day of work). *Cf. also Azimi v. Va. Emp. Comm'n*, 57 Va. Cir. 1, 2001 WL 876247, at *2 (2001) (finding employee unavailable for work, and so ineligible for benefits, when she made herself available only from 3 p.m. to 9 p.m. because of childcare responsibilities).

That result would be perverse. The ability to decline service requests is a defining feature of platform work. *See Hall & Krueger, supra*, at 3 (noting that many workers use Uber's platform mainly because of its scheduling flexibility). In fact, it is so important to platform workers that some jurisdictions have protected it by law. *See Seattle Mun. Code § 8.37.080(A)* (“An app-based worker has the right to decide when to make themselves available to work and which offers to accept or reject.”). It is one of the main reasons people choose app-based work in the first place. *See Pew Survey, supra. See also Understanding the Shopper Community: A Report*, Instacart (June 8, 2023)³⁰ (reporting that 80% of app-based shoppers cited “independence” and 75% cited “flexibility” as the reasons they used Instacart's platform to find work).

³⁰ Available online: <https://www.instacart.com/company/shopper-community/understanding-the-shopper-community-a-report/>.

So if unemployment rules applied, the work would have to fundamentally change. It would no longer be a low-friction, flexible option, but something like a traditional job. There would be no way to preserve its core features within a system designed for something else entirely. *See Harris, supra*, at 35 (observing that to apply the unemployment system to independent workers, policymakers would have to deal with “a host of new factual scenarios”).

Conceptual mismatches, however, are only the beginning. More concerning are the potential economic and social effects—which could include higher unemployment rates. Multiple studies have shown that app-based platforms help reduce unemployment. Platforms offer low-friction earnings opportunities to anyone with the necessary skills and equipment (e.g., a phone and a car). *See Walsh, supra* (“The fact that you can show up and get paid, that anyone who wants to work has the unlimited ability to do so—at least during normal times—it’s really hard to create jobs like that.” (quoting MIT economist David Autor)). That feature allows them to provide workers with a short-term bridge between jobs. *See Safety Net for Steering Wheels, supra*, at 3–5. When a worker is laid off from her normal job, she can offer rides or deliver

packages until she finds her next one. And meanwhile, she can keep earning money, which keeps her from accumulating unnecessary debt. *Id. at 1*. She is less likely to need assistance and so less likely to apply for benefits. *Id. See also* Kass, *supra*, at 4–5 (concluding that availability of app-based work is associated with lower rates of unemployment). She can also spend more time looking for her next job and find a better fit. *See Safety Net for Steering Wheels, supra, at 4, 5*. Job matching improves, unemployment declines, and social welfare rises. *See id.* (explaining that prior research has shown that app-based platforms serve “as a flexible second job, allowing a worker to buffer a negative shock to primary job income, likely due to a reduction in hours worked”). *See also* Hall & Krueger, *supra*, at 3 (noting that even as unemployment has fallen, the number of people driving on Uber’s platform has continued to rise); Harris, *supra*, at 31 (observing that research has shown that “income from online platform work helped workers smooth both temporary declines in income lost due to spells of unemployment”).

Those benefits could evaporate if platform work were shoe-horned into the unemployment system. Consider first the raw costs of insuring

app-based workers. Overall, platform workers have lower-than-average “job attachment” than the average worker. Jonas Kolsrud & Joannes Spinnewijn, *Does Providing Gig Workers with Unemployment Insurance Create a Moral Hazard?*, LSE (Feb. 29, 2024).³¹ They are less likely to stay in a job over time and so more likely to drop out of the workforce. *See id.* And workers who are likely to drop out are naturally more expensive to insure. *Id.* They stay unemployed for longer and therefore draw more benefits on average. *Id.* So if app-based workers were imported into the system en masse, they could increase average costs and force the Commonwealth to raise taxes. *See id.* (noting that coverage for app-based workers could also raise costs through informational gaps, adverse selection effects, and moral hazard concerns).

Those taxes, of course, would have to be paid by someone. And that someone would likely be the platforms. The operators would face new tax burdens and systemically higher costs. *See Harris, supra*, at 35. They might offset those costs by increasing their commissions—i.e., the

³¹ Available online: <https://blogs.lse.ac.uk/businessreview/2024/02/29/does-providing-gig-workers-with-unemployment-insurance-create-a-moral-hazard/>.

percentage they take from transactions on their platforms. *See Harris & Krueger, supra*, at 11 (describing common commission structures). That strategy could reduce worker earnings across the board—effectively forcing current app-based workers to subsidize former ones. Kass, *supra*, at 5. Worse, the platforms might not be able to offset the costs at all. Instead of adjusting their business models, they might go out of business. *See Harris, supra*, at 35 (predicting that extension of unemployment system to app-based workers could be “challenging and expensive”).

While that result would hurt everyone, it would fall hardest on the most vulnerable populations. On average, app-based workers are more likely to be immigrants and members of racial minorities. Pew Survey, *supra*. They are also more likely to hail from low-income households. *Id.* They often use platforms to supplement their earnings or to overcome barriers in the traditional labor market, such as limited work histories or language skills. *See id.* *See also* See Risa Gells-Watnick & Monica Anderson, *Racial and Ethnic Differences Stand Out in the U.S. Gig*

Workforce, Pew Research Ctr. (Dec. 15, 2021).³² Without platform work, they would be deprived of a vital income stream. *See Harris, supra*, at 31 (warning that “[n]ew laws and regulations that would stifle or significantly restrict these innovations, and risk squelching future innovations that have not been brought to market, may damage workers along with the entrepreneurs and investors who create them”).

3. Any solution must come from legislators—not administrators and courts.

Different policies are of course possible. One could imagine a system that both accommodates flexible work and protects workers from unexpected losses. *See Harris & Krueger, supra*, at 20 (proposing alternative policies, such as risk pooling); Della Rocca, *supra* (suggesting that new methods of work-time tracking could be found). Yet such a system cannot be designed on the fly. For decades, policymakers have debated how or whether to regulate app-based platforms. That debate is nuanced, complicated, and fraught with tradeoffs. It cannot be resolved by a single claims examiner, a single

³² Available online: [https://www.pewresearch.org/short-reads/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/#:~:text=Hispanic%20adults%20are%20more%20likely,of%20White%20adults%20\(12%25\)](https://www.pewresearch.org/short-reads/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/#:~:text=Hispanic%20adults%20are%20more%20likely,of%20White%20adults%20(12%25).).

agency, or even a single court. *See Razak*, No. 2:16-cv-00573, slip op. at 12 (concluding that despite “various proposals and empirical insights,” the court was “not free to invent a third category of worker, or to adopt the type of ‘hybrid’ legal frameworks advocated [elsewhere]”). If a solution is to come, it must come from legislatures. *See Harris & Krueger, supra*, at 5 (calling on “Congress and, where appropriate, state legislatures” to adopt legislation addressing app-based work).

CONCLUSION

This case asks whether the unemployment system should be applied to a group of platform workers based on the record developed in one claim. It should not. That kind of decision is fraught with legal, social, and policy weight. It should not be made by one agency claims examiner, one agency, or one court. It should be made by the Commonwealth's and nation's lawmakers in their respective legislative chambers. The court of appeals thought otherwise; but it failed to appreciate the gravity of that choice. This Court should reverse.

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The foregoing complies, excluding the cover page, table of contents, table of authorities, and certificate, the word limit and contains 5,690 words.

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