



## FIGHT FOR THE RIGHT TO VOTE

The National Lawyers Guild's Labor and Employment Committee hosted a webinar on August 14, 2020, featuring Greg Palast, Terry Ao Minnis, and Jeanne Mirer, to mobilize to defend voting rights. Here is a list of ways to join the fight:

### **Vote** ([www.nass.org/can-I-vote/](http://www.nass.org/can-I-vote/))

- Register to vote.
- Verify that you are registered to vote, have not been purged, and that your information/address is correct.
- Register to be an absentee voter before your state's deadline.
- Vote early.

### **Work/Observe at the Polls**

([WorkElections.com](http://WorkElections.com); [PowerThePolls.org](http://PowerThePolls.org))

- Apply and urge others to be a Poll Worker/Observer.

### **Educate & Assist**

([WorkingAmerica.org](http://WorkingAmerica.org); [866ourvote.org/volunteer](http://866ourvote.org/volunteer))

- Urge others to get-out-the-vote.
- Educate others on the issues.
- Volunteer to work on a voter protection hotline.
- Apply for a canvassing position.

### **Submit an Op-Ed Letter to a Newspaper**

- NLG L&EC provides a template; contact Nina Macapinlac <[nlglabor@gmail.com](mailto:nlglabor@gmail.com)>.

### **Restore Purged Voter Lists**

NLG L&EC provides a sample unpurge request letter that follows the National Voter Registration Act; contact Jeanne Mirer <[jmirer@mmsjlaw.com](mailto:jmirer@mmsjlaw.com)>

### **Write an Amicus Brief**

Research voting rights litigation in your state and write an amicus brief.



### **Resources**

#### Voter Hotlines Resources

- English: 866-OUR-VOTE (866-687-8683)
- Spanish: 888-VE-Y-VOTA (888-839-8682)
- Several Asian languages (Chinese, Korean, Vietnamese, Tagalog, Hindi, Urdu, and Bengali): 888-API-VOTE (888-274-8683)
- Arabic: 844-YALLA-US (844-925-5287)
- America Votes, [americavotes.org](http://americavotes.org)
- NAACP, [naacp.org](http://naacp.org)
- Protect Democracy, [protectdemocracy.org](http://protectdemocracy.org)
- Lawyers Committee for Civil Rights Under Law, [lawyerscommittee.org](http://lawyerscommittee.org)
- Campaign Legal Center, [campaignlegal.org](http://campaignlegal.org)
- Poor People's Campaign, [poorpeoplescampaign.org](http://poorpeoplescampaign.org)

### **If you'd like to get involved,**

we are hosting a follow-up meeting for participants who are interested in taking action on Friday, September 11, 2020 at 12pm Eastern/11am Central/9am Pacific. Register for the call by going to [https://us02web.zoom.us/join/register/tZYsc-qrzopH9yb0acj\\_T3oJYW44MQ7cJDT](https://us02web.zoom.us/join/register/tZYsc-qrzopH9yb0acj_T3oJYW44MQ7cJDT).

For more information, please email the National Labor & Employment Committee at [nlglabor@gmail.com](mailto:nlglabor@gmail.com).

# Police Unions: What Is To Be Done?

**Workshop: September 23, 1-4pm EST.**

**A**mid calls for defunding police and expelling police unions from the labor movement, the NLG Labor & Employment Committee, with co-sponsors the NLG National Police Accountability Project and the NLG Military Law Task Force, presents a half-day webinar exploring police unions in their historical context, the relationship between law enforcement locals and other unions, the politics of expelling police unions from labor federations, an understanding of police union-management collective bargaining, including responsibility for and impact of harmful police union contract provisions, strategies to challenge police brutality while maintaining a pro-labor stance, and a discussion of the role of labor lawyers in this moment.

This workshop aims to give participants an understanding of both the history and current state of police unions as a lens through which to see the work of dismantling state violence while protecting the rights and livelihoods of workers as a whole.

## **Part I: Historical and Political Context**

In this opening section, panelists will situate police unions in their historical and political contexts, by giving an overview of the professionalization of policing and growth of police unions over the past century, as well as the challenges they pose for contemporary social justice movements and politics. This will ground the audience with a basic understanding of police and their unions' role in labor history, how these unions evolved to their current state, and why they are a target for those pushing to reform and/or abolish policing.

## **Part II: Relationship within Federations and Broader Labor Movement**

In Part II, panelists will explain the relationship between law enforcement locals, other locals, and labor federations; the internal governance processes that would enable or block expulsion of certain locals; as well as how potential expulsion would affect other workers who are members of those federations. We will also engage in a discussion of police unions' relationship to other public unions, including whether both rhetoric and proposed changes to police

unions and contracts could have collateral impact on other public sector unions and will explore whether strategies developed in other public sector unions, such as bargaining for the common good, could be used to produce fairer and more transparent police contracts.

In addition, panelists will touch on what is encompassed when the labor movement talks about law enforcement unions: are ICE and CBP officers included; correctional facility guards, etc? What does our definition of who is included in this category mean for a call to demilitarize and defund police?

## **Part III: Challenging Police Union Misconduct**

In Part III, panelists will explore the nuts and bolts of police union contracts, hear from attorneys who have litigated police misconduct cases, and explore how labor law and union membership may be able to protect individuals who act as whistleblowers within their departments or who want to resist racist or violent orders by superiors.

We will look at examples of provisions of police collective bargaining agreements that protect officers who have been disciplined, had civilian complaints filed against them, and



committed acts of racist brutality and other crimes and discuss these provisions, what their effect on police work is, and what can be done about them. (ex: including if these provisions can be eliminated from future contracts, either through bargaining or superseding state or federal statutes, and what kind of legal challenges that would pose, such as potential constitutional or labor law claims by police union members.)

We will also consider the success of failures of combating police brutality through legal means, including what systems we have to hold police accountable, including civilian review boards, litigation, and other means.

# Holding Uber and Lyft Accountable

By STACEY LEYTON

**F**or years, gig transportation companies like Uber Technologies and Lyft have profited from a business model that relies on the misclassification of their drivers. Touting the flexibility and independence they purport to offer their drivers, Uber and Lyft have avoided the obligations imposed by California's employment and labor protections by misclassifying their drivers as independent contractors rather than employees. This misclassification has allowed Uber and Lyft to forego paying their drivers minimum wage, reimbursing drivers for their expenses, and complying with social insurance obligations like paying into unemployment insurance.

Over two years ago, in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, the California Supreme Court took a major step toward ending such abuses and addressing the prevalent misclassification in the gig economy and other economic sectors, by adopting the ABC test for determining whether workers are employees or independent contractors. The ABC test, which replaced the more complicated, multi-factor test adopted in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, mandates a presumption that workers are employees, and allows hiring entities to rebut that presumption only by showing that they satisfy all three of the following conditions:

- (A) The worker must be free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) The worker must perform work that is outside the usual course of the hiring entity's business; and
- (C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The year after *Dynamex* was decided, the California Legislature overwhelmingly adopted Assembly Bill ("AB") 5, which codified the ABC test and made explicit that the test applied not only to California's wage orders but to all provisions of the California Labor and Unemployment Insurance Codes.

In the face of these judicial and legislative measures, however, Uber and Lyft have persisted in unlawfully treating their drivers as independent contractors, depriving them of the basic protections of California law. Although the California

Legislature had rejected their heavy lobbying for an exemption from AB 5, even before AB 5 took effect, Uber and Lyft announced that they would continue to treat their drivers as independent contractors, openly flouting AB 5's mandates. And they announced that they (along with DoorDash, a delivery network company) would each invest \$30 million to support a ballot measure, Proposition 22, which would designate their drivers as independent contractors exempt from AB 5's mandates. (The ballot measure, which will go to the voters on November 3, 2020, also purports to adopt measures allowing drivers to retain flexibility and independence without sacrificing economic security, but an analysis by the UC Berkeley Labor Center estimated that the measure would guarantee drivers an hourly wage of only \$5.64 after expenses and unpaid payroll taxes and benefits were taken into account.)

Despite private attorneys' efforts to enforce Uber and Lyft's obligations under AB 5, the companies continued to avoid the mandates of California law by requiring their drivers to sign compulsory arbitration agreements that prohibit class and collective actions. The California Supreme Court and Ninth Circuit have held that claims under the Private Attorney General Act ("PAGA") are not subject to compulsory arbitration, so that workers have been able to bring PAGA claims in court. However, PAGA does not

authorize injunctive relief, so that misclassified employees can obtain penalties for themselves and the state, but not injunctive relief requiring reclassification as employees. Given these gaps in private enforcement, gig worker organizations, labor unions, and others have urged public officials to file enforcement actions against Uber and Lyft under an enforcement provision of AB 5 and their existing authority under California's Unfair Competition Law. Unlike drivers, public officials can avoid compulsory arbitration agreements and obtain injunctive relief. Thus, on May 5, 2020, the California Attorney General and the City Attorneys of San Francisco, Los Angeles, and San Diego filed an action in San Francisco Superior Court challenging Uber and Lyft's misclassification of drivers (*People v. Uber Technologies*, Case No. CGC-20-584402), followed by a June 25 motion for a preliminary injunction. Uber and Lyft opposed the preliminary injunction and moved to dismiss, to stay, and to compel arbitration of the case. Uber's demurrer argued that joinder of the two

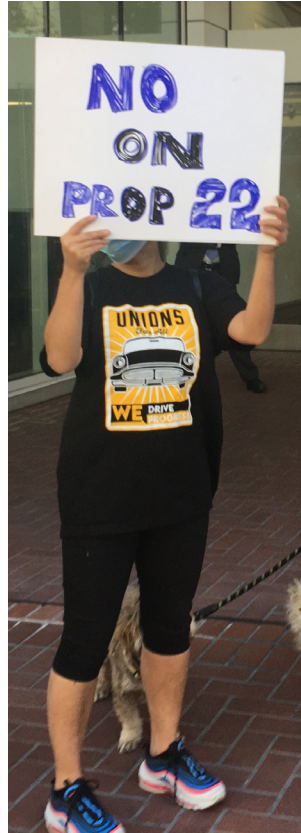




## Holding Uber and Lyft Accountable (continued)

companies in the same lawsuit was improper, that the public officials had failed to state legal claims, and that their failure to plead claims with specificity violated due process. The companies also asked that the case be stayed pending the outcome of (i) Proposition 22, (ii) Uber's constitutional challenge to AB 5 (*Olson v. California*, Ninth Circuit Case No. 20-55267, appeal from preliminary injunction denial pending), (iii) PAGA cases filed by other parties in other courts, or (iv) thousands of arbitrations pending in the state. And they moved to compel arbitration of the restitution claims asserted by the public officials.

**O**n August 6, 2020, Judge Ethan Schulman held an hours-long hearing on the parties' motions, joined by hundreds of online listeners (which required Judge Schulman to have the court expand the limit on participants). A few days after the hearing, Judge Schulman issued a 33-page decision granting a preliminary injunction that enjoined Uber and Lyft from continuing to classify their drivers as independent contractors in violation of AB 5 and California's Labor Code, Unemployment Insurance Code, and wage orders. To find an "overwhelming likelihood" that the People would prevail on the merits, the court needed go no further than analyzing prong B of the ABC test, noting, "It's this simple: Defendants' drivers do not perform work that is 'outside the usual course' of their businesses.... Defendants' entire business is that of transporting passengers for compensation." Rejecting the companies' arguments that they were technology (not transportation) companies, or "multi-sided platforms" that merely matched drivers with customers, Judge Schulman wrote that this argument was "flatly inconsistent with the statutory provisions that govern their business as transportation network companies," "flies in the face of economic reality and common sense," and was "irreconcilable with the Supreme Court's directive in *Dynamex* that California's employee classification standard should be interpreted and applied broadly." The court further concluded that "substantial public harm w[ould] result" absent an injunction, including "real harms to real working people," and that the costs the companies complained they would have to incur in order to comply with an injunction should have been incurred over two years earlier, after the *Dynamex* decision. The court expressed frustration with "Defendants' prolonged and brazen refusal to comply with California law," and warned that they "are not entitled to an indefinite postponement of their day of reckoning." Judge



Schulman also denied Uber's demurrer and the companies' stay motions, and deferred any ruling on the motions to compel arbitration.

To allow the parties to seek appellate review, Judge Schulman stayed the preliminary injunction for ten days. During those ten days, Uber and Lyft filed *ex parte* applications asking Judge Schulman to extend his stay of the injunction's effective date, arguing that the injunction was mandatory rather than prohibitory and so automatically stayed pending appeal, and alternatively that the court should exercise its discretion to grant a longer stay. In the course of deciding the applicable legal standard, however, Judge Schulman had concluded that the preliminary injunction sought was "prohibitory in nature" in that it would "restrain[] a defendant's continued violation of state law." After hearing argument, Judge Schulman denied the companies' *ex parte* applications orally, without written order.

Uber and Lyft both filed petitions for writ of supersedeas and requests for stay in the First District Court of Appeal (*People v. Uber Technologies*, Case No. A160701), renewing their arguments that the injunction was mandatory rather than prohibitory so automatically stayed on appeal and, alternatively, that it should be stayed as a matter of discretion. They publicly announced (raising concerns about potential unlawful coordination in violation of anti-trust laws) that if the Court of Appeal did not issue a stay before the injunction took effect at the end of the day on August 20, rather than converting their drivers to employee status, they would cease providing transportation in California. Riders and drivers received alerts that the companies would shut down at midnight.

The companies never had to carry out their threat. That afternoon, the Court of Appeal granted a writ of supersedeas, putting the preliminary injunction on hold pending resolution of the companies' appeal of the preliminary injunction. The Court of Appeal adopted an expedited briefing schedule and set argument for October 13, 2020. An the court required that, "[o]n or before September 4, 2020, each defendant shall submit a sworn statement from its chief executive officer confirming that it has developed implementation plans under which, if this court affirms the preliminary injunction and Proposition 22 on the November 2020 ballot fails to pass, the company will be prepared to comply with the preliminary injunction within no more than 30 days after issuance of the remittitur in the appeal." Accordingly, the companies will need to promise compliance, but the court made clear that the injunction will not take effect until well after the voters decide whether to exempt Uber and Lyft from AB 5.

Thus, whether Uber and Lyft drivers are ever able to vindicate their hard fought right to be properly classified as employees with the rights guaranteed to them under California's laws will depend on the outcome of Proposition 22. Uber and Lyft

## Holding Uber and Lyft Accountable *(continued)*

suffered a significant setback in their effort to convince the voters to grant them an exemption from California's employment mandates, when the courts rejected their challenge to the Attorney General's summary of the effect of the ballot measure. After the Attorney General issued a title describing Proposition 22 as "exempt[ing] app-based transportation and delivery companies from providing employee benefits to certain drivers," initiative proponent David White filed a petition for writ of mandate in Sacramento Superior Court (*White v. Padilla*, Case No. 34-2020-80003438) on July 29, 2020. The petition argued that the title, summary, and ballot label were false and misleading and, instead of being objective, were written in a manner to support the Attorney General's lawsuit against Uber and Lyft. Sacramento Superior Court Judge Laurie M. Earl denied the petition on August 6, and the petitioner immediately appealed to the Third District Court of Appeal (*White v. The Superior Court of Sacramento County*, Case No. C092398). The Court of Appeal denied the petition on August 10, defeating the companies' efforts to obtain a more favorable description of the ballot measure.

Uber, Lyft, and other gig economy companies face other legal battles as they head into the November election. The San Diego Superior Court's preliminary injunction requiring Instacart to cease misclassifying its shoppers and drivers in a case filed by the San Diego City Attorney is presently on appeal in the Fourth District Court of Appeal (*State of California v. Maplebear, Inc.*, Case No. D077380). The San Francisco District Attorney has filed suit seeking statewide relief against DoorDash in San Francisco Superior Court, and a preliminary injunction hearing is set for October 15, 2020 (*People v. DoorDash*, Case No. CGC20584789). And on August 5, 2020, the California Labor Commissioner filed complaints for injunctive relief, damages, and penalties for Uber and Lyft's Labor Code violations in Alameda Superior Court (*Garcia-Brower v. Uber Technologies*, Case No. RG20070281, and *Garcia-Brower v. Lyft*, Case No. RG20070283).

If the voters see through Uber and Lyft's well-funded ballot measure campaign, which rests on warnings that AB 5 will "eliminat[e] hundreds of thousands of jobs and threaten[] the availability of rideshare and food delivery services," and purports to protect the independence of app-based drivers and "provid[e them] with new benefits and protections," then the end of Uber and Lyft's misclassification scheme appears to be imminent. State and federal courts across the country, as well as the California Public Utilities Commission (which regulates

transportation providers) have repeatedly rejected the argument that these companies are "multi-sided platforms," "apps," technology companies, or anything other than what they are in reality: companies in the business of moving riders from one destination to another. There should thus be little risk that the Court of Appeal will reject Judge Schulman's determination that the People have shown likely success on the merits and that the equities weigh in favor of finally ending the companies' worker misclassification scheme. Whether Uber and Lyft will actually carry out their threat to leave California (which contains two of their largest markets internationally, Los Angeles and San Francisco), or will adjust their business plan to account for fair and lawful treatment of their drivers, remains to be seen.



Stacey Leyton is an attorney in San Francisco. She filed an amicus brief in *People v. Uber Technologies* on behalf of the International Brotherhood of Teamsters (IBT), Service Employees International Union California State Council (SEIU California), State Building and Construction Trades Council of California, Transport Workers Union, United Food and Commercial Workers Union Western States Council, UNITE HERE, and the California Labor Federation, and an amicus brief in *Olson v. California* on behalf of SEIU California and the IBT.



## The L&EC'S Student Committee is Ready for Action

The Student Committee is proud to report that we are ready for the 2020-21 academic year! We have been taking applications for new student representatives for this year and will be relying on our new representatives to keep up the Committee's work in these difficult times. .

The Student Committee is also planning on hosting its yearly summer job conference calls. The first one will hopefully include three major labor employers: the AFL-CIO, the Peggy Browning Fund, and SEIU. The second one will include other types of organizations that need interns interested in labor and employment law, including NELP and various worker centers across the country.

Lastly, the Student Committee plans to take advantage of the virtual semester by hosting an inter-school event. This event will focus on police unions and the labor movement and will explore how the police unions influence the labor movement and whether police unions should continue to be a part of the labor movement.



# DOJ Pushes White Supremacist Policy on Campus

By M.S.M.R.

On August 13, 2020, the United States Department of Justice declared that Yale University discriminates against Asian American and White undergraduate applicants and demanded a change to the university's admissions policies to comply with Title VI of the Civil Rights Act of 1964. The Department of Justice's demand not only hurts applicants of color in the admissions process, but it also uses Asian Americans as a "wedge"<sup>1</sup> to promote White supremacist efforts against affirmative action, a tactic implemented by Edward Blum and the Project on Fair Representation.

Four years ago, in *Fisher v. University of Texas at Austin*, the United States Supreme Court held for a White woman plaintiff who was denied admission into the university. Fisher's lawsuit was funded by the Project on Fair Representation, which is directed by Edward Blum.<sup>2</sup> Last year, the student group Students for Fair Admissions, coincidentally also led by Edward Blum, lost in its case when a federal judge found that Harvard University's admissions policies did not discriminate against Asian Americans. In November 2020, the Students for Fair Admissions will begin trial against the University of North Carolina at Chapel Hill, as they allege discrimination of Asian American and White applicants. With the Project on Fair Representation's support for plaintiffs like Fisher and Students for Fair Admissions, the organization seemingly advocates for the civil rights of Asian Americans; yet as a result, this work encourages the erasure of the narratives of Black, Native American, and Latino applicants who have historically been forgotten. Additionally, Edward Blum's projects misleadingly elevate the Asian American experience to be comparable to that of the White community. Legal

groups like Asian Americans Advancing Justice | AAJC,<sup>3</sup> the Lawyers' Committee for Civil Rights Under Law,<sup>4</sup> and the National Asian Pacific American Bar Association<sup>5</sup> fiercely contend the lawsuits funded by this group.

The United States Department of Justice's stance against Yale University's admissions policies aligns with Edward Blum's mission to eradicate race as a factor in college admissions. With such parallel initiatives, both promote the use of Asian Americans as a wedge to benefit White applicants. Accordingly, the Department of Justice's directive magnifies the current presidential administration's racist policies against communities of color.



## NOTES

1. See Kat Chow, 'Model Minority' Myth Again Used as a Racial Wedge Between Asians and Blacks, National Public Radio (Apr. 19, 2017), <https://www.npr.org/sections/codeswitch/2017/04/19/524571669/model-minority-myth-again-used-as-a-racial-wedge-between-asians-and-blacks>; see also Not Your Wedge, Asian Americans Advancing Justice Los Angeles, <https://www.advancingjustice-la.org/what-we-do/policy-and-research/educational-opportunity-and-empowerment/affirmative-action/not-your-wedge>.
2. On the organization's website, the Project on Fair Representation is a "not-for-profit legal defense foundation" that funds plaintiffs that "wish to challenge government distinctions and preferences made on the basis of race and ethnicity." Notably, the organization champions the result of *Shelby County v. Holder*, the decision that led to the eradication of decades-long civil rights work to protect voters of color.
3. See Asian Americans Advancing Justice Files Brief in Support of Race-Conscious Admissions at Harvard, Asian Americans Advancing Justice | AAJC (Jul. 30, 2018), <https://advancingjustice-aajc.org/press-release/asian-americans-advancing-justice-files-brief-support-race-conscious-admissions>.
4. See Don Owens, Civil Rights Groups who Supported Harvard Students in Affirmative Action Case Decry DOJ's Yale University Discrimination Claims (Aug. 14, 2020), <https://lawyerscommittee.org/civil-rights-groups-who-supported-harvard-students-in-affirmative-action-case-decry-doj-yale-university-discrimination-claims/>.
5. See National Asian Pacific American Bar Association, Statement in Support of Affirmative Action (2015), [https://cdn.ymaws.com/www.napaba.org/resource/resmgr/7\\_advocacy\\_&\\_research/policy\\_resolutions/2015/2015affirmativeaction.pdf](https://cdn.ymaws.com/www.napaba.org/resource/resmgr/7_advocacy_&_research/policy_resolutions/2015/2015affirmativeaction.pdf).

M.S.M.R. is the NLG L&EC's Liaison to the Student Committee. In 2017, she spearheaded an event involving D.C., Maryland, Virginia, and Pennsylvania law students, honoring Fred Korematsu's tenacity against racism towards Japanese-Americans in the 1940s, featuring his daughter Karen Korematsu.



**Labor and  
Employment  
Committee**

c/o

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## SEE YOU (REMOTELY) AT THE CONVENTION

- **NLG CLE - Police Unions: What is to be Done?**  
Wednesday, September 23 at 10am to 2pm PT/1pm to 4pm ET
- **LEC Membership Meeting**  
Thursday, September 24 at 9am - 10am PT/12pm - 1pm ET
- **International Committee Major Panel—Global Capital & the Disposability of Workers & the Poor in the COVID Era**  
October 3 at 9 am to 10:30 am PT/12pm - 1:30 pm ET