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LABOR AND EMPLOYMENT: THE BATTLE FOR THE GIG ECONOMY

The following is a transcript of a 2016 Federalist Society panel entitled Labor & Employment Law: The Battle for the Gig Economy. The panel originally occurred on November 17, 2016 during the National Lawyers Convention in Washington, D.C. The panelists were: Mark Brnovich, Attorney General, Arizona; Mr. Mark Floyd, Senior Director and Global Relations Lead, Uber Technologies Inc.; Mr. Randel K. Johnson, Senior Vice President, Labor, Immigration and Employee Benefits, U.S. Chamber of Commerce; and Mr. Bill Samuel, Director of Government Affairs, AFL-CIO. The moderator was the Honorable Judge Thomas M. Hardiman of the U.S. Court of Appeals, Third Circuit.

[RECORDING BEGINS]

Hon. Judge Thomas Hardiman: My name is Tom Hardiman. I'm a judge on the Court of Appeals for the Third Circuit in Pittsburgh, and it's my pleasure to moderate this debate.¹ You might not agree with me, but I find it highly ironic that a sinecured, life-tenured judge would be selected to moderate a panel on the gig economy. We don't do a lot of gigging in the federal judiciary, but I'm going to try to channel my inner newspaper delivery boy, lawn mowing, and taxi driving experiences to see if I can be of service here to the panel.

But regardless of my inadequacies, we do have a very distinguished group of panelists here today, and we're going to do opening statements of ten minutes or less. We're going to begin to introduce all the panelists briefly, and then they can come up seriatim to give their opening remarks. Then I will ask questions to the panelists, and we will, of course, welcome questions, not speeches, but questions from the floor.

So, our panelists are Randel Johnson, who is Senior Vice President of Labor Immigration and Employee Benefits at the U.S. Chamber of Commerce; Mr. Bill Samuel, who is the Director of Governmental Affairs for the AFL-CIO; Mr. Mark Floyd, who is the Senior Director in Global Labor Relations, lead of Uber Technologies; and we have the Attorney General of Arizona, the Honorable Mark Brnovich. So, without further ado, I invite Randel to start us off.

¹ Thomas Michael Hardiman, *History of the Federal Judiciary, Judges*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/hardiman-thomas-michael> (last visited Sept, 2017).

Randel Johnson: Thought you'd read a little bit of my bio there. I was a little unprepared. I have to make a little joke about it, of course. The AFL-CIO is sitting to my right here, but I'm looking forward to Bill's comments. Bill and I worked together for many, many years over labor issues, and, Judge, I've got to say one reason I did this is because so many of these labor issues in our town and—I know Al and you know this—they repeat themselves. So, right now given the results of the last election, we're in the midst of trying to change the overtime regulation and trying to repeal the persuader regulation of the LMRDA.² We're repealing the Obama blacklisting executive order³, which kind of mirrored what Clinton did back in 1994, which I was very involved in. So, I told my staff never throw away any files, because these labor issues keep coming back at you, and it sure is true. Of course, they all keep it on the computer now.

So, I think this issue, the gig economy and all, is sort of an exciting new issue on the horizon. And judge, I know I'm sort of supposed to set the stage here, but I'm not going to go through a lot of statistics and all that, because you can find what you want in this area. How many workers are in the so-called gig economy? What exactly is the gig economy? There's many definitions on that. How many hours does a worker typically work in this area? Is it 40? Is it 30? Is it 20? It's actually a remarkably few number of hours typically, but are they mostly full-time or part-time? How does that fact engage on the policy level? Does the flexibility that's offered to many of these workers who are working off of Internet platforms, offset some of the perhaps downsides of being a more traditional employee? What is really driving the mini lawsuits out there? Is it, in fact, dissatisfaction on the part of the workers with their relationship with their Internet provider platform, or is it, in fact, plaintiff's lawyers trolling to generate lawsuits? I've got my own view on that. I might touch on that.

But there's a lot of stories written out there on the gig economy over the last two or three years, you can just Google it, and there's probably forty things that will jump out at you. I am pleased to note that the Bureau of Labor Standards Statistics has announced that they are finally going to revise their 2005 data on the contingent alternative workforce survey, so that the last data we really have will be the last. I think the Department of Labor is a very credible organization regardless of who's there.⁴ So, we should be getting

² LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. 401 (2012)); Office of Labor-Management Standards, *Agencies, Office of Labor Management Standards, Labor-Management Reporting and Disclosure Act (LMRDA)*, U.S. DEP'T OF LABOR, https://www.dol.gov/olms/regs/compliance/ecn_finalrule.htm (last visited Sept. 9, 2017).

³ President Barack Obama, *Fair Play and Safe Workplaces*, OBAMA WHITE HOUSE (Jul. 31, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>.

⁴ Erica Groshen, *Measuring "Gig" Work*, U.S. DEP'T OF LABOR BLOG (Mar. 5, 2016), <https://blog.dol.gov/2016/03/05/measuring-gig-work>.

some good, hard data out of that area. So, I'm not going to go through all those anecdotal stories again, but look, you can find the Lyft driver who's extremely happy with the situation they're in, you can find someone who's working for TaskRabbit who's unhappy, and each side on this debate has their own anecdotal stories. I can line them up and go through them all, but I'm not going to. They're out there, again. You can Google them. People are testifying on The Hill depending on what side you're on.

I see this as being in three camps, and this issue sort of developed now over the last couple years. I think one camp recognizes this as a new type of work that's being driven by, obviously, a different sort of connection called the Internet platform. But America has always had new kinds of work. It's gone from the agrarian era to the industrial era. When it went from industrial, it went from hands-on manual labor to robotics.

It's a new kind of work, but the traditional analysis of independent contractor versus employee has always handled those things, and some say that's a good enough analysis framework to go with it as we go down this new frontier. And so, let's just litigate the hell out of these cases and go after bad employees, and let the dust settle where it may. You know, I think we can all agree that that's a straw man, because anybody who has looked at this area of the law, I'm sure most of you have, would acknowledge that this area is uncertain.

There are all sorts of different criteria with regard to who is, in fact, an independent contractor. It's the same criteria. It's very vague. It depends whether it's under the internal revenue code, the FLSA, NLRB, and, of course, state laws all have their own deal. I would say a dead lawyer could win a misclassification case with the right jury on it. I'm surprised that that actually took the plaintiffs' bar as long as it took to sort of wake up to all the litigation potential under the Fair Labor Standards Act. But there's that camp, and I'm not sure if Bill's in it or not, but certainly I think the plaintiff's lawyers are, where "Let's just litigate these cases and push these entities into an employee relationship, because we're just going to keep hammering them and that's what they're going to have to do."

And then there's the second camp, which the U.S. Chamber is in, which is 'Look, this is a new area. We need to take a thoughtful look at it – a very thoughtful and careful look at it– and maybe we should change the law to recognize a new classification of worker called "independent workers" and develop a new sort of criteria for these workers.' Should they be qualified for certain kind of benefits or certain kind of protections or whatever, in exchange for preemption of state laws and certain kinds of safe harbor from litigation?

I was very surprised to find out, when I had a very large meeting at the Chamber, that we had a tremendous turnout on this issue from both the new economy companies and, say, more traditional types of companies, and

their message to me as a staffer was, ‘Keep working on this, keep looking at it. We’ve got to get the Hill to look at this, so we’ve got to position the Chamber to be players in this area.’ Now, when you’re talking about changing independent contractor laws, etcetera, it’s a very, very difficult area fraught with many pitfalls, and we are all aware of that. I will say that given the results of the election in the House, Senate, and the White House, it’s more interesting going down this road than it was a week ago, because I think we can control the process better.

And there’s the third camp, which basically says, ‘Wait, look, we’ve got 155 million workers in this area. Let’s just let this work its way out. We’ll see what happens two or three years from now, and we’ll come back to it if it’s a problem.’ And in fact, recent data has come out that shows there’s actually a bit of a slowdown in the growth of the so-called gig economy.

I just want to close by mentioning, Judge, that there are examples of where the law in fact has been changed to create certain kinds of new classifications of workers. When I was on the Hill –actually, on The Hill as a Republican Council– we raised the minimum wage, but there are a few sentences in that bill that actually created a new kind of worker in the newspaper industry, and it said for the purposes of the newspaper industry, “If a worker meets this criteria, they shall not be considered an employee under the internal revenue code.” Now, that didn’t cover Title VII of Civil Rights Act⁵ or FLSA⁶ or anything else, but FLSA does have a similar provision. My point is, this was in response to heavy litigation by State IRS offices and the Federal IRS going after the newspaper industry for alleged misclassifications, and Congress was able to sort through these things and come up with a formula to create sort of a safe harbor of types.⁷

So, I’m going to close by that, because I know we’ve got a lot to go through. Again, there’s a lot out there in terms of should there be a benefit structure created for these kinds of workers that employers pay independently. There are all sorts of administrative issues with how you would set that up: how much would you pay, who would hold the money, and how would the criteria be calculated? None of which the various treaties go into. And on the workplace protections, there are various sorts of articles out there that sort of carve up Title VII, minimum wage, NLRA, etc., and figure out how these laws could be divvied up. It’s an interesting, fascinating area, and I think we’re going to have a great panel.

⁵ TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S. Code § 2000e–2 (2012).

⁶ FAIR LABOR STANDARDS ACT OF 1938, 29 U.S.C. ch. 8. (2012).

⁷ *Misclassification of Employees as Independent Contractors: Fact Sheet 2016*, DEP’T FOR PROFESSIONAL EMPLOYEES, <http://dpcalicio.org/programs-publications/issue-fact-sheets/misclassification-of-employees-as-independent-contractors/> (last visited Sept. 19, 2017).

Bill Samuel: OK, I'm going to stay here because I think I'll be a smaller target if I don't stand up behind the podium. Thanks for inviting me. It's always fun to be in the belly of the beast, something I can tell my grandkids about later.

Randy described this as sort of these new issues, new economy. I know you're reading a lot about these magazine covers, you know it's new and old. We've had hiring halls for a century or more, and if you're a longshore worker you were called out for work, you went to a different company on different days, but would still be considered an employee.

Randy was speculating what camp I'm in. I'm in the camp that's going to work best for individual workers and for the economy, so that's kind of how we look at this. As Randy also said, there's probably been too much emphasis on the newness of all this. Obviously, the online platforms are new, the technology for calling out workers is new. Uber's invention is only a few years old, but, as I said, the structure of the work, the way it unfolds, how the worker gets to work, and how autonomous they are, are issues we've been grappling with for a long time.

Many of you may have seen there was a J.P. Morgan report issued just this week. The online platform economy's growth has peaked, and, in fact, they've found the rate of growth peaked probably in 2014.⁸ Monthly earnings have actually fallen since June 2014, coinciding with wage cuts by some of these platforms. Turnover is very high, more than half of the participants exit after 12 months.⁹ I think that says something about the kind of work, the kind of people who are attracted to it and where they are at in their lives. Other studies have demonstrated that the size of the labor in the platform work force is pretty small, maybe half a percent of all adults. We add to that a little less than a half-percent of people involved are getting income from capital platforms rather than services. And that's sort of Airbnb's model. We may be talking about 2 million workers out of what, 150 million workers in the country?

Now, it is true, if we get behind the platform work, then a much larger share of the work force does consist of people doing other kinds of insecure work. We look at this as sort of insecure or precarious work: temporary workers, ("temps"), supplied by a temp agency, temps hired directly by employers, on-call workers, part-time workers who want to work full time, workers who work for agencies that contract out their services, and workers misclassified as independent contractors, which is a huge issue that this labor department, that's about to exit, has done a lot of good work on.

⁸ See generally *J.P. Morgan Chase & Co.: Annual Report 2016, Investor Relations, 2016 Complete Annual Report*, JP MORGAN CHASE, <https://www.jpmorganchase.com/corporate/investor-relations/document/2016-annualreport.pdf> (last visited Sept. 9, 2017).

⁹ *Id.*

I mean, according to their numbers, these other sort of insecure workers are definitely growing as pressure continues to increase on businesses to shed their direct employment costs. I would say that much of this growth is not necessarily voluntary on the part of workers. My wife, when we had our first baby, she was a freelance editor. That's what she wanted to do, but I'm not sure when you look at the list that I just gave you of other kinds of precarious workers, that they're all doing this voluntarily. It may be what they're forced to do because they can't get a full-time job.

Anyway, the result of all this "downsourcing" (downsizing, outsourcing and just-in-time employment) is that a lot of the risks that are involved in investing and running a business have been shifted to employees. Taking on that risk has meant that millions of workers have given up the guarantee of a minimum wage, overtime pay, unemployment compensation, workers' compensation, family leave, and protections against discrimination. Often, the workers don't even know who their boss is, and with that, they lose their act to bargain. They can't organize. They don't have a voice at work over the terms and conditions of their own employment.

So where has all this left us? It's left us with an economy that, you know, for maybe two decades, has seen flat wages, an enormous and growing wealth gap, and millions of insecure families. If election day taught us anything, it's that the average working men and women feel increasingly powerless in today's economy and exploited by forces that are well beyond their control.

Now, I want to be clear about one thing. The Labor Movement doesn't oppose technological innovation; we don't oppose entrepreneurship. We do have a problem when all the gains are captured almost entirely by the top 10%. You've obviously heard us say that. And I would say that the best example of technological change that works for both workers and the economy comes from my old union. I was at the United Mine Workers for 10 years in the 1980s. When coal operators introduced mechanization into the mines in the 1940's, John L. Lewis made them a deal. After a series of crippling strikes, Lewis offered them a compromise. He said, "We'll go along with productivity increases and some reductions in employment in exchange for higher paying benefits, guaranteed healthcare, pension security, and a greater say over health and safety." That was a win-win situation, that worked for both parties.

And the final point I would make is that treating platform workers as employees doesn't necessarily put digital platforms companies out of business. We have companies that do both. For example: Managed by Q, which is an office management company; Instacart, grocery delivery service; and Hello Alfred, which provides workers to handle everyday chores like shopping, picking up dry cleaning, and house cleaning. These companies

treat their workers as employees and they're all doing fine. Really, what these are are choices. Choices made by executives. UPS chose one model, FedEx another. TaskRabbit went one way, Hello Alfred went another. So, I'll go back to what I said in the beginning, the questions for policy makers are: which one works better for our economy in the long run and which works better for workers? I suspect many people in this room will have a different answer from me, but I'd be interested in the conversation that we're about to have.

Hon. Judge Thomas Hardiman: Thank you, Bill.

Mark Floyd: Good afternoon, thank you so much for inviting me to participate in this panel. It's a prestigious panel and I feel honored and humbled. As working for a fairly new startup company, it's good to know that people take notice of you from time to time.

Uber started with a pretty simple idea. It started with two guys, 6 years ago, standing on a curb, in the snow, having trouble finding a taxi. And they said, "wouldn't it be nice if you just pushed a button and you could get a cab?" Well, it turns out a lot of people wanted to push a button and get a ride, or food, or a package. Today, Uber is in more than 400 cities, 70 countries, and in 6 continents around the world. 75% of the US population lives in a county where they have access to Uber technology.

In December of 2015, just over 5 years from Uber's day one, the platform connected a rider and a driver for the billionth time.¹⁰ That's pretty amazing. What's even more amazing is 6 months later, we did it for the two-billionth time. For the driver, Uber represents the opportunity to push a button and get work. In the past year alone, more than 500,000 Americans have been drivers on the Uber platform, and they've taken home hundreds of millions of dollars from connecting with riders through the use of Uber. Globally, there are over 1.5 million active drivers using the platform and hundreds of thousands of new independent drivers signing up every month.

Even with those numbers, I would agree with Bill and Randel. I would caution against this idea that there's a pervasive shift toward a world where people cobble together jobs to make a living. That said, there is a new economy that is starting to take shape, and it's being driven by an advancement of technology that allows individuals to engage with commercial activities in a more direct way than we could have imagined—or some of us could have imagined—even 7 years ago.

¹⁰ Robert Mclean, *Uber Hits 1 Billion Rides*, CNN (Dec. 31, 2015, 5:00 A.M.), <http://money.cnn.com/2015/12/31/technology/uber-billion-rides/index.html>.

The fact they're independent workers isn't new. As Bill and Randel indicated, we have independent workers and independent contractors throughout the United States in a wide variety of industries. 80% of the real estate agents are independent, 64% of registered financial advisors are independent, for example, and yes, even 90% of taxi drivers are estimated to be independent contractors.

What I'd also caution against is broad-brushing the gig economy, because there are a lot of players in this area, there are a lot of different types of work, and there are a lot of different types of structures on how that work is carried out. I can only speak about the way Uber does it. I did find the 2016 McKinsey Global Institute study fairly instructive and interesting, and there they estimated that 20% to 30% of the working population in the United States and Europe, or about 162 million individuals engage in some type of independent work, maybe not as a main source of income, maybe as a supplemental income, and maybe only on a part-time or a short duration.¹¹

But interestingly, 72% of the workers in that study that came from the United States viewed this type of work as by-choice versus essential-to-live work.¹² For the digital platforms, workers that engage with companies like Uber, it was a much higher number. For example, the study found that 87% of those participating in a digital platform do it by choice and not by necessity.¹³ When you talk about Uber—and again, that's the only company I can speak with any kind of significance about—there's no typical driver. Drivers that partner with Uber come from all walks of life. Some people use the app to drive toward a goal, like a vacation for their family. My driver last night was a school cafeteria woman who is working and used the platform because her daughter is going to be a senior next year. She wanted to be able to buy a senior ring, pay for senior prom, and let her enjoy, as she said, her senior year. After that, she may never drive again. Some people drive once a week, some people drive a few hours a week, some people drive just weekends. We have a large number of drivers that utilize our platform that are teachers that drive during the summer. We have a growing number of drivers that use our platform that are stay-at-home parents and drive while their children are in school. This gives them the flexibility and freedom to earn money and still be a parent to their child.

Most are not making a decision to do this for a lifetime, or even for a long time, and that's one of the beauties about this type of work. No driver has to make a long-term commitment to participate. Drivers on the Uber platform in the U.S. are overwhelmingly part-time. In fact, for most people

¹¹ JAMES MANYIKA, ET AL., *INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY*, Full Report 1-3, MCKINSEY GLOBAL INSTITUTE (Oct. 2016) available at <http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>.

¹² *Id.* at 8.

¹³ *Id.* at 59.

driving it is not even a part-time job; it's driving just an hour or two a day. In the United States, 60% of the drivers use the app less than 10 hours a week. 69% have other full or part-time work.

What is common among the workers that use the Uber platform is that they value their independence and they value their control over what they do. Drivers decide when to drive, where to drive, how to drive, what to drive, and decide which app to use. Many of the drivers that use the Uber app have two other apps running alongside the Uber app in their car to take drives from Lyft or other competitors. That freedom does not make that driver a victim, nor renders that driver vulnerable. It certainly doesn't make them insecure or powerless. To the contrary, unlike most workers, these drivers can simply turn us off. They can go to a competitor, or they can go to a different line of work should at any time they become dissatisfied or have a change in needs or goals. From our perspective, we need to make sure that they don't become a victim and make sure they don't become powerless through regulating away that freedom. Again, I look forward to the discussion and appreciate being invited.

Mark Brnovich: Thank you all for being here today, and thank you, Judge. I will say that one of the great things about speaking on the federal side of the event is I get the opportunity, as a former federal prosecutor, to ask the Judge, "What the hell happened to the Pittsburgh Steelers last week when they lost to the Cowboys?" I'm sorry. If Leonard Leo is here, I apologize for using the word "hell." Hopefully, he's not watching somewhere.

Hon. Judge Thomas Hardiman: I'll give you what the standard answer is: we ask the questions; we don't answer them.

Mark Brnovich: Spoken like a true appellate judge. I thank you all for being here today, but I must admit, I do feel a little bit like Larry Fortensky, at this point, on his wedding night. Some of you may be too young or may not remember that Larry Fortensky was Elizabeth Taylor's seventh and final husband, so at this point, I'm not sure how much I can do or say that'll be new and innovative compared to what's already been said, but I will try my best.

I also come at this from a perspective that Ronald Reagan used to talk about regarding the government. There are many folks in Washington, D.C., and in the states that have an approach when it comes to the economy, and that is, "If it moves, tax it. If it keeps moving, regulate it. And when it stops

moving, subsidize it.”¹⁴ And I would submit to you, as you’ve heard from Mr. Johnson from the Chamber of Commerce talk today a little bit about the three camps, that there’s a fourth camp.

And the fourth camp that I want to talk about is regulatory overreach, and just a basic fundamental question and the fundamental principle of what types of regulations we need. Do we need these regulations? We talk about employee versus independent contractor, aren’t these old, outdated notions that really don’t apply to the new economy? So, when we frame this debate, I think that very often people that are proponents of regulations talk about it in terms of how the government can or can’t regulate a new industry, how they should or shouldn’t treat individuals within those industries. Very often we see folks that are engaged in occupational licensing. They try to frame licensing issues as an “and/or” proposition, but what they are dealing with is either the safety and health of the individuals or society’s lack of safety. But, I would submit that this really fails to address the real terms of this debate. Throughout all of this discussion about disruptions, market and creative disruptions about new economies, what is being lost is that what we are seeing in today’s economy is a shift—a shift in our economy—and the backbone of this new economy is defined by the individual’s rights and their rights not only in themselves, but in their property and their freedom to make a livelihood.

I believe that the voluntary transactions between individuals that support this new economy lead to nearly universal benefit. I would submit that it bolsters our social progress, innovation, and it also bolsters the economic development of this country. To paraphrase Milton Friedman, an essential part of our liberty and our free market is an individual’s freedom to choose his or her pursuits as long as they do not interfere with the freedoms of others.¹⁵ But, as Friedman warned decades ago, this freedom is threatened by “men of good intentions and good will who wish to reform us.”¹⁶ And so, therefore, we end up seeing regulatory schemes or debates or discussions about how we do or do not define individuals exercising their freedom to work.

So I believe, from this perspective, it is very clear that we are experiencing, actually, an extensive regulatory overreach that has burdened, or is burdening, individuals’ rights in their own person and their own property. And second, I believe that there’s also been a clear and recent string of efforts by regulators, politically established entities, to exclude competitors for their own benefits. And so, that’s why you see statistics like, for example, in the

¹⁴ *Remarks to State Chairpersons of the National White House Conference on Small Business*, RONALD REAGAN PRESIDENTIAL LIBRARY AND MUSEUM, (Aug. 15, 1986), <https://www.reaganlibrary.archives.gov/archives/speeches/1986/081586e.htm>.

¹⁵ MILTON FRIEDMAN AND ROSE D. FRIEDMAN, *CAPITALISM AND FREEDOM* 201 (Nov. 15, 2002).

¹⁶ *Id.*

1950's, only about 5% of our workforce here in America required some sort of license, by the year 2000 it was 20%, and now, as of today, roughly a quarter of all occupations require licensing of some sort. More than a thousand occupations today in the United States of America require licensing.¹⁷

I mean, do you appreciate and realize that it takes an EMT an average of 33 days to get trained to be certified, and yet, the average cosmetologist has to spend 372 days in training? I would ask you, is training cosmetologists or other occupations more important than our EMTs and police officers? Why is the state and why is the government imposing those types of regulatory burdens? My good friend Adam Laxalt said—I got to talk to Adam about this—if you want to become an interior designer in Nevada, you have to have approximately 2200 days of experience in order to obtain the necessary training to be licensed. In places like California, tree trimmers and landscapers have to spend years in order to be licensed.

These costs to our society are great, and that's why when people start talking about traditional regulatory schemes or how we are going to define employees versus independent contractors, I would submit that they are missing the bigger picture. Today the gig, the new economy, is estimated to be about \$15 billion, but in the next decade, it is going to grow to \$335 billion. This creative destruction, where workers can work remotely, derive income from several sources, and seek economic opportunities in new and innovative ways, is what made this country great.

And when it comes to individual examples, for example, with Uber, we know the Uber passengers know who's picking them up. We know that these drivers are licensed. But what we have seen, whether it's Uber, Airbnb, Lyft, or other innovative technologies, we've seen local governments and state governments coming in to try to regulate and not only protect those vested interests, but stifle entrepreneurship, the type of entrepreneurship that is not a privilege, but is a right. And as an aside, I would point out people like former Attorney General Eric Holder, who opposed public proposals in Chicago and New Jersey to require fingerprint background checks of drivers, pointing out that it has had a discriminatory impact on people of color.¹⁸

So, ultimately, what we are left with today, is a call for more and more regulations that not only trample on our fundamental liberties, and that entrepreneurial spirit that made this country great, but have a disproportionate impact on the people that can least afford to pay those costs: people like young

¹⁷ DAVID BODDY AND MELISSA KEARNEY, *Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices*, Brookings (January 27, 2015), <https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices/>.

¹⁸ DEBRA SAUNDERS, *Eric Holder: Fingerprinting rules are racist*, SFGate (June 11, 2016), <http://www.sfgate.com/opinion/saunders/article/Holder-Fingerprinting-rules-are-racist-7974544.php>.

entrepreneurs, like my mom that immigrated from a communist country, that just want a chance at the American dream. And what we've seen is vested big interests trying to stifle out those that just want to make a little something for themselves. And, to the industries that promote more regulations, or more licensing requirements, I would remind you what Lyndon B. Johnson once said: "If you let a bully in your front yard, the next day he's on your porch, and then the next day after that, he's shacking up with your wife."¹⁹ Now, Lyndon B. Johnson used another term, but I'm not going to use that today.

So, I thank you all very, very much for being here, and, once again, I think the most basic fundamental questions we have to ask are: Are we trampling on individual liberty and does this regulation really promote the public's health and safety? Thank you very much.

Hon. Judge Thomas Hardiman: Well, Mr. Attorney General, I guess the folks at Uber are happy to be in Arizona these days. But let me start with you, Mark Brnovich, what about your colleagues? Is this a subject that has come up at the meetings of the attorneys general? And are we going to see wide disparities among the states? Have you seen that in your discussion? Have you had the discussion, and if so, what has been the nature of them?

Mark Brnovich: Well, Judge, I think that this is one of those situations where, once again, people do come at it from different perspectives. So, what we see in some municipalities like Austin, Texas, you have an attempt to essentially regulate entrepreneurs or folks, companies like Uber or Lyft, out of business. We've seen in places like New York, the Attorney General's Office going after advertising and going after companies and going after people that are trying to share maybe an extra room on Airbnb. I think that it depends on where you come at these issues philosophically, but it is something that's on the radar, I think, of every attorney general. But ultimately, as AGs, I remind folks all the time that I am not a policymaker. You know, we have to "dance with who brung us" and so, as the state's chief law enforcement officer, you have an obligation to enforce the law as it is, not as you want it to be. But, I do think that there are fundamental questions that need to be asked, and what I worry about is how some state AGs' offices use the power of their office to go after market disruptors or those engaged in creative destruction. They use consumer protection laws or false advertising laws in order to punish those that may not have the political power to fight back against the power of the state.

¹⁹ IZQuotes, *Lyndon B. Johnson Quote*, <http://izquotes.com/quote/95694>.

Hon. Judge Thomas Hardiman: Mark Floyd, are you comfortable with the states regulating your company and your fellow gig companies, or do you want one-size-fits-all from Washington? I mean, historically, the taxi industry where I grew up, my taxi license was issued not by the state but by the local police chief and the city I grew up in, so I assume you don't want townships and cities regulating what your drivers do. Is that fair?

Mark Floyd: Well, we're a very city-oriented company, you know. Our whole structure is based upon the city; we work with cities all over the world to develop access to the platform, to develop opportunities for their communities not only in terms of riders but also in terms of access to transportation. A long-term Harvard study indicated that the number one mechanism to get out of poverty is access to transportation, so when we go into a city where traditional taxis may have a limited supply and a limited scope, access to this transportation both as a rider and as a driver creates opportunities for transportation and the opportunity for jobs. And we work on a city basis.

Now, I do think that there's certain aspects of the regulations that could be national in scope. The definition of independent contractor is applied sporadically and differently, not only based upon states or cities, but within agencies of those states. But we work with cities and states primarily. I don't know that there's a need for federal TNC regulations on who can drive, how they can drive, when they can drive, etcetera.

Hon. Judge Thomas Hardiman: Going back to that distinction that obviously the law has made, there is a critical distinction between independent contractors and employees. Randel or Bill, do you think that binary system, that definitional decision up front, is going to change over time and will it have other gradations? Or do you expect that the litigation will continue to revolve around whether somebody satisfies the tests for being an employee?

Randel Johnson: First of all, I think that the focus on regulations is one thing. I think it fails to take into account that a lot of these lawsuits are driven by private causes of action in the plaintiffs' bar, which will continue to roll on and on, I mean, regardless, unless there's a regulatory fix of some sort, and certainly when it comes to big money lawsuits, it's often not from the government, but it's from the plaintiffs' bar. So, regulations are almost an aside from that.

Look, there's going to be litigation over independent contracting and who's an independent contractor and who's an employee, long after we're

dead and buried, because the nature of the legal standards in this area are inherently unclear. My members suffer from those lawsuits all the time. So, will it change? Will the court sort of morph it to respond to our new developments in the social agenda? It's probably going to depend on which circuit you're in, as you well know. I suspect they will. I do think that, again, either we go with the status quo and let it all just work itself out in the courts, or we take a shot at trying to come up with a legislative fix? And again, my members have asked me to take a look at that. I think, again, it's fraught with a long road to hoe, and so we may or may not go down that road, but without that, we're just going to continue to face the litigation.

Bill Samuel: Yeah, I disagree. Obviously, I don't have a crystal ball. People who come out on the short end of a decision in a litigation are going to try to change the rules so that the next time they'll be happier with the decision. I don't see Congress doing that, although we do have this crazy patchwork of rules that's been addressed by the panel before. Different laws, and in various geographical locations are applied differently, and that's not helpful, I don't think, to anybody.

Hon. Judge Thomas Hardiman: Do you think there might be something legislatively done? I mean, the IRS tests for employee/independent contractor. Do you expect any regulation at the federal level or the state level in that regard?

Bill Samuel: I've given up predicting what Congress or the executive branch is going to do after last Tuesday.

Mark Floyd: You know the challenges. The test doesn't vary that much. It's the application of the test; it's the weighing of the factors that vary. I mean, the tests from the state are pretty standard and not only in the United States, just about anywhere in the world. But when you get in front of an agency or a court, you just don't know which factors are going to predominate. You don't know at what point is the tipping point over to one side or the other? It's very fact-driven, so you can take a hiring hall example. Surely they're on call and their discharge is to a job, but once they get to the job, you know, they're supervised, they're directed, they're patrolled, they're told when to go, and they're told what to do. So, there's aspects of independence, but in the grand scheme of things, depending upon that particular workplace and that job, the factors may tilt it the other way. So you know, the test is pretty out there. I mean, it's fairly established. It's just the

application of the test that is the challenge in a particular fact-based situation.

Hon. Judge Thomas Hardiman: But isn't that because there's a lot of subjectivity and wiggle room in the test, in the numerosity of the factors? Is that inevitable that you're going to get different results in different agencies and courts?

Randel Johnson: Yeah, I think there's two parts, for us the goal of the – the brass ring, right – the standard is preemption of state and local laws, so even if you had a standard that had those kind of vagaries that Mark mentioned, if there was one standard and it was somewhat tightened up in preemptive state and local laws, I mean, that's a huge win.

Hon. Judge Thomas Hardiman: Even if that standard said everyone who works more than five hours a week shall be employee?

Randel Johnson: Well no, the standard has to be a reasonable one. But that's the whole thing, everybody likes one-size-fits-all but they only like the one size that they like. Bill likes one-size-fits-all; we just have a different view on what that would be. And, the other part is trying to develop some kind of safe harbor that, I think, if you could meet some fairly subjective criteria, you would have a safe harbor of some sort of a presumption. Or we keep leaving this up to the courts, and attorneys get rich. So, this kind of stuff we're going to try and look at.

Bill Samuel: I will say that we are not in a hurry to change the law. I mean, I think these decisions will work their way through the judicial system, and, in some cases, whether it's Uber or some other online platform, the decision will eventually come down to whether they are employees or whether they're not. Now, we would argue that those tests are pretty clear, and we would come down on one side of that debate, but I don't think we need to change the law to accommodate a new form of hiring hall.

Mark Floyd: Yeah, you know, there's a school of thought out there that I think is pretty good, and that is you can get all tied up into the classification, and maybe what we should really focus on are things like portability and benefits and other things that actually benefit the participant in this type of economy. So I mean, you know, at that level, I think maybe

deregulation or freeing up—because if as a company I provide a certain benefit or task that Bill would applaud, at the same time, by doing so, I’m doing it at the risk of losing independent contractor status. And so, what you do then is, you force companies that hire independent contractors to stay within a very tight guardrail out of fear, and then you have the argument that the workers’ powers benefit, you know, have no benefits, etcetera. I think that one area of regulatory reform may have nothing to do with the classification of the worker, but the benefits that are available to the worker including the portability and the benefits. There are a lot of smart people thinking of those things up here in D.C., so that may be more of a federal focus as opposed to classification.

Randel Johnson: Wait, let me just jump to Mark. One of the ideas is if an employer, if business entities provided that kind of a benefit structure contributed to it, what is the incentive to do that? One could be a presumption in favor against employee status when you went to litigation. So, I mean, there’s a structure there, but how do you provide entities an incentive to follow that path that Mark was talking about? I just want your ideas on the table.

Mark Brnovich: Let me just add something, Judge, very kind of general and keeping with my theme here. We know that in June of 2015, the California Labor Commission in a non-binding rule held that an Uber driver was indeed an employee, not an independent contractor.²⁰ Following up on this, we had the New York Department of Labor issuing a similar result for a couple of Uber drivers.²¹ Do you know who cheered those decisions? The taxi drivers and people that want to create barriers to allowing folks, often recent immigrants or people in lower income groups, from competing against them. Very similarly, what did we see when Airbnb lost or was being challenged in New York City with new regulations, making it harder for folks to use their property as they deem necessary or how they want to use it even when they aren’t harming someone? It was the big hotel chains that were cheering that decision.

And so, that’s why I think it’s important to remember that very often, sometimes in business, folks have this mentality that they want to feed the alligator in hopes that it eats you last. But as I said when I made my remarks,

²⁰ See *Berwick v. Uber Technologies, Inc.*, No. CGC-15-546378 (Super. Ct. San Francisco County, June 16, 2015), available at <https://cdn.arstechnica.net/wp-content/uploads/2015/06/04954780-Page0-20.pdf>.

²¹ Noam Scheiber, *Uber Drivers Ruled Eligible for Jobless Payments in New York State*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/business/state-rules-2-former-uber-drivers-eligible-for-jobless-payments.html?mcubz=0>.

is that once we open the door and we accept this notion that the government can control us and has this extraordinary ability to control how we make our livelihoods, I think you're opening the door to all sorts of unintended consequences. So, not only are there detrimental economic impacts to us as a society, there's also detrimental impacts to us as freedom-loving people here in the United States. And so, very often I hear politicians complain about "Oh, the nanny state" and, "Oh, the mayor of New York City is regulating diet soda," and yet these same folks have no problem with saying, "Oh yeah, I want these groups to come in here and regulate how we treat these entrepreneurs who are trying to better themselves."

And I think ultimately, that's why, in the structure we're in, we do want some sort of certainty, but the folks that are out there that are doing this in the sharing economy are really independent contractors, and I will give you just one quick anecdote about this. The other day at my office I had a meeting, and there were some folks leaving, and they had called an Uber to come pick them up to take them to the airport. We were standing out front of our building and a car pulled up that had one of the Uber stickers, and they started to get into the car, and it was actually one of the legal assistants in our office. She wasn't picking up people during work hours, but she was an Uber driver in her spare time. It was because she was trying to make some money to save for her kid's college, and I think that is that entrepreneurial spirit that made America great. And you know, ultimately, at the end of the day, if you want to take a traditional taxi, take a traditional taxi, but I don't think it's the government's role to come in and try to deny people the opportunity to better themselves, or to provide a good or a service at a lower cost to us.

Hon. Judge Thomas Hardiman: Alright, I have to jump in, because this side continues to beat up on the taxi industries. Someone has to come to the rescue. Mark Floyd, you're right. I mean, cab drivers historically have been independent contractors. So you know, point well made, but isn't it true to the two Marks that, you know, there's a reliance interest here. Some immigrants comes over to the country, start driving a cab in Philadelphia, save up money for 10 years and spend, you know, \$400,000 on a medallion in reliance on the fact that this is a heavily regulated industry. Isn't there a fairness aspect that if the customers are so happy with the gigging and the service that is provided, should there not be some response from the regulator, state, or city to compensate or to facilitate an orderly transition for that person that spent all that money on, and maybe even in some cases mortgage their homes, to buy that medallion?

Mark Floyd: What did they do for the Blockbuster store when Netflix came out? Yeah, I don't know the answer to that question. You know, we focus on our business.

Hon. Judge Thomas Hardiman: I mean, we do that with the –There is a precedent, right? Electricity, regulation of electricity, I mean, stranded costs –this isn't a perfect analog but–

Mark Floyd: Yeah, I don't, you know, I don't want to get–

Hon. Judge Thomas Hardiman: I don't want to get you in trouble with the CEO. Maybe Brnovich should answer.

Mark Floyd: Yeah, but I don't anticipate the taxi being out of business. I mean, you know, I think that–

Hon. Judge Thomas Hardiman: But the price of medallions has plummeted radically in New York, in Philadelphia, probably all over the country, right? Isn't that true?

Mark Brnovich: Yes.

Mark Floyd: Well, I don't know the answer to that.

Mark Brnovich: I would think that that might be true. I would accept the basic premise, Judge, but I would just say that, first, it's important to note that a government occupational licensing, putting aside what I mentioned earlier, remember, it's just permission; it's not a right. The government doesn't give you a right to earn a living, and so, just as a matter of law, I would submit that there are not any 5th Amendment or property interests.²² I know that recently the 7th Circuit actually dealt with this very issue, and Judge Posner authored an opinion regarding this and the taxicab monopolies, and he said that property does not include a right to be free from competition.²³ A license to operate a coffee shop doesn't authorize the licensee to adjoin a teashop from opening. When property consists of a license to operate in a market a particular way, it does not carry with it the right to be free from competition. And so, ultimately, echoing on what I was saying and what Judge Posner was saying, we have seen in the past when there was deregulation in the 70's, it created disruption within the airline

²² U.S. CONST. amend. V.

²³ Ill. Transp. Trade Ass'n v. City of Chi., 839 F.3d 594, 599 (7th Cir. 2016).

industry. But ultimately now, who benefits?

Maybe people like my mom, who couldn't afford to travel to Europe 30 years ago when there was regulation. Now the prices have gone down, and she can go visit my sister in Nashville. It's cheaper now than it was even 30 years ago, and so, I think that although a permit gives you the right maybe to do something, it is not a right to exclude others from competing with you. And then to me that is what part of my concern always is, is that people, and especially the vested interest folks in the industry, use these licensing schemes in order to hinder competition. And what happens when you have hindrance in competition is ultimately, as consumers, we all pay more and we get less innovation. I am absolutely certain that when the automobile industry was in its infant stages, that folks such as blacksmiths, folks that were in the buggy whip business, were very, very concerned about their future and their livelihood. And, I think that is something we should be concerned about as a society. But, ultimately, the question is what do we have an obligation to do? And to me, that's to create a fair, consistent, and balanced playing field when it comes to competition.

Hon. Judge Thomas Hardiman: OK, Bill?

Bill Samuel: Yeah, I want to go back to something Mark said earlier, because I think it was a little unfair and maybe an overgeneralization. You said that when the California or New York decision came down, the ones that were happiest were the taxicab owners. In fact, from where we sit, we are hearing from cab drivers, Uber drivers, and more traditional cab drivers working as independent contractors all over the country and the thousands who want a voice at work. They want to organize, they want to bargain, and they want to have more control over what their compensation is. So, the idea that it's only one side that's looking for this, these decisions to come down in favor of employment status, there are actually lots of drivers in different industries that think the same thing.

There are a lot of drivers who become Uber drivers for whatever reason, you know, with the promise that they're going to make a whole lot of money, and then when it turns out that once they pay for gas and repairs and insurance, you know, they're lucky to be making a minimum wage. We've had a lot of testimony like that, so the idea that they don't want to be employees with health insurance, the possibility of retirement, and a voice at work –I think it's really not– I don't think there's any evidence that's not what people driving actually want.

Mark Brnovich: Although I will say, Bill, that my father was a member of the union, so I understand the benefits.

Bill Samuel: Probably paid for your education, right?

Mark Brnovich: We can talk about that later.

Bill Samuel: I don't want to get personal; I don't know what your relationship is.

Mark Brnovich: Once again, there's too much government intervention in not only the health care industry, but also the education market. That's a conversation for a different day. I would just say, that I think the short answer to that, Bill, is that if you don't think you're making enough money as an Uber driver, no one's forcing you to do it. You don't have to do it.

Bill Samuel: So, we don't need labor standards at all, and maybe that's where the Federalist Society comes down. I mean, minimum wage, overtime—

Mark Brnovich: Well, yes. Just so we're absolutely clear—I think this is being taped—I'm not saying that, and I understand that there are times when we are talking about public health and safety standards, let's say, food and restaurant standards. When I walk into a restaurant, I don't know how the chicken has been prepared, or if there's a public health risk there, that if something goes wrong—and so I think there are instances—that's an instance where maybe a government health and safety standard is absolutely necessary. But I would just submit in the case of an Uber driver, some young, not necessarily young, entrepreneur or someone that's trying to better themselves, if they don't like that, they don't have to do it.

Bill Samuel: Of course not.

Hon. Judge Thomas Hardiman: Bill, what about the —Do you have an opinion on the reliance interest or things that government can or should do to—

Bill Samuel: To compensate?

Hon. Judge Thomas Hardiman: Yeah, to take care of the incumbents who have the disruption come in sort of suddenly?

Bill Samuel: I don't.

Hon. Judge Thomas Hardiman: No? Randel?

Randel Johnson: So help me out, Judge, again, on the question. I mean disruption, helping out?

Hon. Judge Thomas Hardiman: I think that the question is, you know I've never owned a medallion personally, but if I did, I think my point would be, for 60 years, the city of Philadelphia has run their taxis this way, and I spent a lot of money on this medallion in reliance on that, and now you're just allowing this technology to come in that is essentially a direct competitor and –

Randel Johnson: Right. Well, look, let's face it, the vagaries of economy hit us all in different ways, and I admit, for those of us sitting up here in our nice suits, it's easy for us to talk about it in those terms. But that is the way life is and certainly that's a part of the whole trade argument. I'm not going to say open trade, but with trade agreements, the argument is made, certainly by the left, that people are displaced and adversely affected, and the other argument is as a whole, all people benefit.

But what do we do? In fact, we do have extensive job training programs at the Department of Labor to help people who are sort of displaced because of economic factors that are not under their control. This strikes me as a sort of similar situation where, yeah, there need to be some kinds of programs to remediate the worst effects of capitalism. But, there is a role like that, and the Department of Labor does play that role.

Mark Brnovich: I was surprised. Bill should have said that one of the ways to do that is to be collective and organized and be unified. So, you should have made a pitch for more unionization.

Bill Samuel: Well, exactly. We're not choosing between Uber and the more traditional cab companies. We're simply saying that an employee is an employee and they ought to have the right to negotiate over the terms and conditions of their employment, and that's how they ensure themselves a better life, that's all. Whether they're working for a traditional cab company or Uber, I mean, this idea that we're talking about overregulation or slavery – that's not what we're debating here. We're debating whether, in the contexts of these online platforms, if there is somehow a new relationship between the worker and what we would consider to be the employer. We're saying, in most cases, probably not.

Mark Brnovich: And I would just add that I think part of it, part of our challenge is that I think we need to change people's attitudes and expectations of what government is or shouldn't be doing. I think one of the things that we are seeing is people have this natural expectation that the "nanny state" is going to come in and regulate. And instead, I think we should stop supporting policies that bear these new regulatory costs, and when we make assumptions, we should side on, when it comes to employees versus independent contractors, we should treat them as independent contractors, because they have property and they have rights, and their own person and their own–

Bill Samuel: Can they grow a business? Can an Uber driver grow his or her own business?

Mark Floyd: Yeah, a lot of them do.

Bill Samuel: Can they hire people?

Mark Floyd: A lot of them have three – a lot of them have three/four different –

Bill Samuel: No, no – as a driver. When I think of an independent contractor, I think of someone who's starting his or her own business. Is an Uber driver running his or her own business? Can he set the terms of what he's paid? He can control his own hours. That's obvious.

Mark Floyd: Yeah, they control 65% of the drivers in the United States change their number of hours—

Bill Samuel: No, I know the hours—

Mark Floyd: – they work by more than 25%. They can choose whether to accept a ride or not, they can turn the app on or off.

Bill Samuel: How about what they charge?

Mark Floyd: They can charge lower than what our standard fare is. They can't go higher. But yeah, they have great freedom. And again, you know, you can focus on one element and pound that element, but the reality is there's some eleven elements. Contrary to what you might have suggested, Bill, there's extensive research out there, as well as anecdotal research, that clearly supports the fact that these folks love the freedom and flexibility that comes with driving on Uber or any other similar platform, and they don't want to sacrifice that.

And you know, I think that when we talk about the vulnerability of workers, I don't think the first answer should always be, "well, they should be able to be in a union that protects them." I mean, you know, 94% of America works in a traditional employment setting without that right. So the answer is yes, they can grow their own business. We have several drivers that have different platforms or fleets that use Uber. We have taxi companies that use the Uber platform to fill and dispatch. So, it's a great tool for either the individual who's just looking to pay a bill to or a person who wants to run a full-time business.

Bill Samuel: I mean I would acknowledge that they, in opinion research, love their jobs, they love their flexibility. But how about if you ask them, "Would you like a contribution into a 401k? Would you like to be eligible for workers' comp if you're robbed and injured? Would you like, any of the industries have of being an employee?" What do you think the answers would be? I think, again, this is sort of the straw man that they love what they're doing, which I acknowledge; it doesn't mean they don't want to have some of the protections and labor standards that apply to employees.

Mark Floyd: Well, I mean, let's take minimum wage. How in the

world would you apply a minimum wage law to what they do because, of course, you can't compare an hourly job to driving on Uber's platform, since there's no typical driver. Some of the drivers are very entrepreneurial, some use their skills to maximize their earnings, others are very casual and only drive when they want to. They're free to do a number of things not related to Uber while their platform is on. They're free to have two-three different platforms on at the same time. You know, again, the majority of the drivers that use the Uber platform have full-time jobs and have many of those benefits you just allocated or identified through other employment opportunities. Some, like anybody else that opens up a business, creates other opportunities for them through insurance and otherwise.

You know, again it gets back, Bill, to the earlier point, and that is that I think that we can get hung up on the classification, as opposed to looking at some of the things that we can work on to improve upon or create opportunities for the independent driver or the independent contractor that are "regulatorily prohibited" to companies that have or utilize an independent workforce.

Hon. Judge Thomas Hardiman: When you say there are ways to look at the benefit side, are you alluding to making it easier for people to purchase health care and other benefits without having to do it through the tax advantage of being an employee of a corporation? Or is that sort of—

Mark Floyd: Yeah, I mean, again, getting back to the portability and benefits, there are a lot of smart people, and both sides are looking at that issue, and I think that's a specific area where we should be looking.

Hon. Judge Thomas Hardiman: Do you think that'll change, Bill? I mean, I'm not an expert on tax law, but I believe it's still a fact that it's a tax advantage to get health care through the employer, is it not? Do you see that changing? Is that something that you're afraid of?

Bill Samuel: Yeah. I mean, we are worried about that, sure.

Hon. Judge Thomas Hardiman: You're worried about that?

Bill Samuel: Sure.

Hon. Judge Thomas Hardiman: But could that result in more opportunity to get benefits for people who aren't employees? Who knows what the future holds, but speculation is out there that nearly half of all workers by 2020 will be independent contractors.²⁴ Even if that's off, even if its 30% of the workforce, that's still many millions of people, so are we comfortable with the notion that we would have to procure our benefits through our employers?

Bill Samuel: Well, there's something called the Affordable Care Act as of quarter-to-three.

Mark Brnovich: Not for long, Bill.

Bill Samuel: That's my point. It may not be, so I'm not sure where we're going to find these benefits. You know, there is a model here of gig workers having these portable benefits. It's a multi-employer trust that has been around the building trades context for a hundred years. What makes that work, though, is the fact that there's a union on one side as forming the trustee function, and the employer on the other making sure that those contributions are made, the benefits are paid on time, and that the trust is run properly. There are ways to establish portable benefit pools, but without workers having some organized voice and representatives, it's not at all reliable.

Mark Brnovich: Even this discussion on employees versus independent contractors, I think part of the problem is that we are using definitions that were created back in the 1930's when the economy was much different and, you had the mass production and oppressive working conditions, so people collectively organized in order to make sure that they got benefits and maybe it was health care or, you know, retirement benefits and plans – that social safety net. But, times have changed, and I think with it, these definitions need to change. Although I do think –and correct me if I'm wrong, Bill– recently, within the last few months, didn't Uber and one of the unions, maybe the international–

Bill Samuel: Machinison?

²⁴ Brian Rashid, *The Rise of the Freelancer Economy*, FORBES (Jan. 6, 2016), <https://www.forbes.com/sites/brianrashid/2016/01/26/the-rise-of-the-freelancer-economy/#2a0c07ca3bdf>.

Mark Brnovich: Yes.

Bill Samuel: Well there are—

Mark Brnovich: Didn't they sign? So I mean, so the market, I would submit, is working.

Hon. Judge Thomas Hardiman: Let's talk about what's gone on. What's the status of unionizing gig workers, as far as you know?

Mark Brnovich: I'm not the labor guy so don't look at me.

Randel Johnson: The NLRB General Counsel has a memorandum out saying basically misclassification is an unfair labor practice, so that puts²⁵ —

Bill Samuel: Now, if you're considered an employee, which is the first test, you can organize. There are lots of gig employees and gig workers, who have been determined to be employees, who are organizing. I love this kind of story that 'maybe in the old days when we had the unions, mass production, unsafe coal mines and child labor'. Well, there are a lot of people in 2016 who still believe that, and they're still trying to organize, whether that's graduate teaching assistants, nurses, EMTs, or taxi drivers. We have the taxi drivers' alliance in New York City, and thousands of other people — cab drivers— have joined it, because they want a collective voice. They don't feel they have enough power on their side of the table to have any say over what they're getting paid, how they're treated, etcetera.

Hon. Judge Thomas Hardiman: Let me go to a different subject: Public school teachers represent a large group of unionized workers. Do you expect the gig economy to increase in that space with the advent of online-learning and tutoring? A lot of people make money tutoring students. You think of Khan Academy and other online platforms, and colleges seem to be increasingly— not just colleges but legal, continuing legal education— done remotely online.

²⁵ Memorandum from Barry Kearney to Oliva Garcia, Nat'l Labor Relations Board (Dec. 18, 2015) (on file at http://hr.cch.com/ELD/AdvicememoPac921_CA_150875_12_08_15_.pdf).

Bill Samuel: Well, I mean, if you're working for a company—whether or not you're providing the tutoring online or sitting across the kitchen table—the question is “Do you have an employer, in that case, or are you just an individual, tutoring after school?” If you're working for one of these big companies, and you're tutoring maybe over a computer, as opposed in person, that doesn't really change the employer relationship between you and the person who's paying you.

Hon. Judge Thomas Hardiman: Any other thoughts on that?

Randel Johnson: It's certainly hard to be organized when people are offsite in that manner.

Bill Samuel: That's true.

Randel Johnson: Even if they are employed.

Mark Brnovich: I think I would . . . I'm not an economist, but I think I would predict that you will see more teachers trying to do freelance work. I think that virtual schools and online school are growing, and so I think you're going to see more teachers, more educators, trying to get more involved in that field. So I think you're going to see more of this. I think that education is certainly an area where a one-size-fits-all solution is probably not necessary. One of the things that's happened with education—I know this is not an education forum—we once again have seen a centralization where every problem requires a Washington, D.C., solution. I'm an old school federalist: I believe that the federal government didn't create the states, but the states created the federal government. As Justice Brandeis talked about the fifty laboratories of democracy²⁶, I would like to see the power, especially when it comes to education issues, returned back to the states—that local control versus a Washington, D.C., solution. If you accept that model, there will be more and more opportunities for teachers at a state level to be involved in freelancing—whether it's online or virtual teaching or even tutoring. There will be those opportunities for teachers in the future.

Hon. Judge Thomas Hardiman: Let me invite our audience to start lining up at the microphones for questions. I think that we can start right in.

²⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

Please just give your name, and let's hear your question.

Audience Question: I'm actually Chair of the Labor Employment Practice group here. I want to go back to whether this industry is growing or not? Mark, you said it's not, and the other Mark, has your growth stopped? Is this much ado about nothing? Is this a growing part of the economy, or not?

Mark Floyd: In our sector? No, we're growing. We've boarded a stadium full of drivers in Jakarta a couple weeks ago. You know, the nice thing about what Uber is doing in partnership with cities is creating a kind of support system for mass transit access to transportation, like in New York. We service the outer boroughs much more than internal cab companies do because of their supply. So, our growth partnership in progressive cities is very good. I don't know about the rest of the economy; I just focus on my own little company.

Audience Question: Some cities will be very open to the gig economy, some won't. Will we be able to see what happens to the gig economy all over the country?

Hon. Judge Thomas Hardiman: Could you hear the question over there? So, the question is, "Are we going to see different approaches from various cities across the country—hostility to friendliness—toward the gig economy?"

Audience Question: And would we be able to measure what works and what doesn't?

Hon. Judge Thomas Hardiman: Can we measure the laboratories of democracy? Can we measure what's working well and what isn't based upon disparate treatment among those cities?

Audience Question: And then after the uniform ADA proposals on various subjects... Something of that nature?

Hon. Judge Thomas Hardiman: Thoughts?

Randel Johnson: Well, there were some. Was it Austin? Some cities where they banned Uber or Lyft and, in fact, local citizens demanded that that be repealed. There's been push-back on cities that have tried to ban some of these platforms. So, beyond that, there are plenty of surveys that show customers like this kind of availability, and they don't want government pushing it out of existence. That's a long way of saying maybe regulation is maybe appropriate. I don't know. But to simply ban them because of unfair competition is not a dog that's going to hunt in a lot of cities because customers want this kind of service.

Mark Floyd: And beyond experimentation and pilot with city operations we've got a lot of different pilot ideas going on at one point of time, and it's not just in dealing with cities. We've worked with the AFL-CIO to pilot an idea in New York City, where we have a very unique setting, because 90% plus of the drivers in New York City are black-car delivery drivers. And so, we've worked with the AFL-CIO and the machinists to come up with kind of a guild-type of approach, where there wasn't collective bargaining, but there is representation through deactivation. There's contribution to benefit funds. They have a black-car fund up there, which allows for portability of benefits for certain types of drivers.

And I think that the challenge. There are two challenges. One, and I think David Rolf of the SAU put this pretty bluntly in a publication this week, is that the biggest obstacle to that is the continued insistence by some in the labor that the only way that you can work is through a collective bargaining, a traditional collective bargaining, and in some instances, that's putting a square peg through a round hole.²⁷ But here, we sat down and worked through it, and we immediately got a charge from another union saying this was a company-sponsored union.

I think there is an opportunity for dialogue. I think there's opportunity for continuing to find a way in our industry. I mean, there are a lot of different ways to look at this in different industries. There clearly are some situations where independent contractors are misclassified, and other times when they truly are independent contractors. The danger here is that for either political reasons or policy reasons, all these people are being painted with a broad brush. And so, I think that you've got to pull away the curtain and look at each situation, but you find a willingness to try new things and to figure out safe harbors in which some things can work again.

Again, getting back to what my original point was, some of the focus

²⁷ See generally David Rolf, *Toward a 21st Century Labor Movement*, THE AMERICAN PROSPECT (Apr. 18, 2016), <http://prospect.org/article/toward-21st-century-labor-movement> (last visited Sept. 25, 2017).

needs to be on removing those barriers. Right now, you're trying sometimes trying to thread a needle any different way to try to achieve a result that easily could have been achieved if certain barriers were removed.

Mark Brnovich: Well I think the one constant that a lot of folks have is if it moves, tax it, if it keeps moving, regulate it. And so, what I think we've seen is you get successful industries or people disrupting market forces or traditional forces, and then people clamoring for the government to do something, and very often that stifles innovation. Actually, as I was sitting here, I was thinking to myself that we spoke earlier to education and health care. Think about this for a second. About 10 to 15 years ago, one of my good friends had a surgery, what do they call that where they fix your eyes?

Hon. Judge Thomas Hardiman: LASIK.

Mark Brnovich: LASIK, LASIK. It was thousands of dollars per eye. This was an industry the government stayed out of. They hadn't really regulated, even though eye doctors have to get a license, but they didn't micromanage it. Insurance didn't cover it. What do we see now? 10 to 15 years later? The price, of LASIK surgery for example, has dramatically been reduced. I see commercials, "Hey, buy one eye for \$300, get the next one free." But, as a consumer, I wouldn't go to that person. But what I do know as a consumer is that very often these disruptive forces can self-regulate; they can create their own standards for what is acceptable and what's not.

And I know, just in my own personal life, my wife and I—Hi, Susan!—we have a date night once a month and we go out to eat. She goes on Yelp, and if it doesn't have four stars on Yelp, we're not going there. So Yelp has become our arbiter now of where we go out to dinner once a month. I think that this innovation and technology is radically changing our lives, and instead of stifling it with more regulations or getting into arguments about whether these people are employees or not, we need to foster it and allow the thousand flowers to bloom.

Audience Question: With regards to the employee versus independent contractor debate, I'm concerned with the effect this might have on the drivers, considering most of them are part-time workers for whom flexibility is the main draw. How would the reclassification of Uber drivers as employees affect that flexibility which drew them to the job in the first place?

Bill Samuel: My only answer would be there are lots of part-time employees who are working 15 to 20 hours a week. I mean, obviously there's lots of variability with what their eligibility for various benefits and what their pay structures are, but you can be an employee and work less than 40 hours a week.

Mark Floyd: You know, as soon as you become an employee, you start being subject to being scheduled, being told where to be, when to be there, what to drive, where to drive. The argument becomes "I've got seniority so I should get this shift versus anybody else's shift." Frankly, as I said earlier, most drivers who use this platform is like the young man who had just got married and he was my driver the other night. His wife had this horrible medical bill, medical crisis. He didn't anticipate driving past the point of having that bill paid, and if all the sudden he's being told how to drive, when to drive, what to drive, where to drive; this is no longer an alternative for him.

J.P. Morgan did a great three-year study and it was published earlier this year. I found a couple of things that I thought were really important, one pointing to ridesharing directly. They said the flexibility and opportunity of the ridesharing programs for men and women who represent the vast majority of people who use those platforms have kept them out of debt. The alternative in the past would be to borrow money, run up your credit cards, or go bankrupt. We had a matter up in Seattle recently where a woman stood up in tears and said, "But for this, I would have been homeless after I lost my job." It gave her the flexibility to work, care for her kids, and still look for a job.

The other thing that the study pointed out was there's not a dependency on this beyond the bill, beyond the vacation, or beyond the computer. Like I said earlier, the vast majority of people who do this platform have other jobs. I rode in a car the other day with a man who has his own business, but he doesn't open his doors until nine, so he's got to drive into San Francisco at six to beat the traffic, so he might as well pick up a few extra bucks while he's doing it. But you're exactly right. If you listen to some of the advocates, it's the cake and eat it too scenario, but that cake is not going to have icing on it. It's going to be my mom's cake, and you're not going to want to eat it. I'll just tell you that right now.

Mark Brnovich: Hopefully your mom's not listening. If you're listening, Mom, I love you. I would just say this goes back to the point I was trying to make earlier that we get into these debates, employee versus independent contractor and at some point we need to shift or to create new definitions.

Hon. Judge Thomas Hardiman: That's what I asked at the beginning and everyone said, "No, we're just going to have two categories."

Mark Brnovich: No, no, I don't think I said that, Judge.

Hon. Judge Thomas Hardiman: I think it's fair to say that there's some support for what you say about the dynamism and the pace of change and all that. If that's true, how can it be that the age-old binary distinction between independent contractor and employee should remain the paradigm? I guess that's the question.

Mark Brnovich: And I would say that it should not be the paradigm anymore.

Hon. Judge Thomas Hardiman: Then what's going to replace it?

Mark Brnovich: I'm not sure, because I'm not a policy maker, and I wouldn't presume to have the wisdom to know exactly, but I think there needs to be a new notion that to say whether someone's an employee or an independent contractor. I think it's best when the government lets individuals make those decisions. And so, I think, theoretically, you would have a situation where if people who are independent contractors want to collectively bargain or come up with something, they should be allowed to do so. They should be allowed to as individuals, as free individuals, to come up with their own way, through free association, of coming up with that.

That being said, we are stuck with these definitions, for now. If we're stuck with them, we need to work with the policy makers and the legislative branch to come up with new categories because what we've seen is that a lot of new folks don't fit neatly into this employee category or this independent contractor category. What we're going to see is more and more people not being able to fit into those categories. I know when I was growing up, there were a lot of folks who had maybe one job or two jobs, their entire lives. I know recently at our office we were hiring some folks, and someone who had been around for a long time said, "Oh, this person has had four jobs in the last 12 years, there must be something wrong with them." I remember thinking, "No, that's just the way things are nowadays." If you don't like what you're doing, or maybe you're not making as much as you should, or you feel like you're disrespected, you go maybe into another occupation or another field, or you find another job.

Our role as government, as AGs, is to create an environment that fosters the rule of law, where people have some sort of certainty; they know what the rules are; they know they're going to be applied equally and fairly. That's when the economy can grow, and there will be opportunities for folks. Whether you call them employees or independent contractors, the point is the economy grows, and everyone is better off.

Bill Samuel: I think I heard you say that it would be fine with you if independent contractors could get together collectively and bargain. I will take that deal, but we'll have to do something about the anti-trust laws.

Mark Brnovich: Now I'm going to get in trouble, but I really do believe that.

Mark Floyd: The challenge is if you go into a factory and you've got a conveyor belt, you've got people standing around who are workers and people who are independent contractors. There's some commonality of interests. There's some community of interests: they're working shifts; they're getting paid; they have access to the same supervisors; they're told when to come; they're told when not to come.

You take the typical city in which Uber operates, and we have people using the platform; what's the collective voice? The only thing that drivers typically have in common is the desire to do this when they want, where they want, how they want—to turn it on or off, to have that freedom of flexibility. Those of you who follow the news know the city of Seattle passed an ordinance a year ago allowing independent-contractor-for-hire drivers to organize. For the last year, they've been trying to recreate the National Labor Relations Act in the City of Seattle to put that in place. What you heard from the teamster representative in Seattle was “Well, who's going to get to vote on whether or not they actually want to be represented?” If you apply the National Labor Relations Act, it says that if you're in the bargaining unit, you should have the voice to say whether you want to be in the union or not. Under the statute, the bargaining unit is defined as every for-hire driver operating within the City of Seattle.

When they come to the realization that everybody is going to get a voice, the position now will be only full-time. People who do this for a real job and who use their language and don't do this for fun, should have a voice, even though we're going to represent everybody, and there's mandatory membership. The reality then becomes, in that scenario, less than 1% of our driver pool in Seattle do this 40 hours a week, 50 weeks a year; so is that

really the protection that those drivers are wanting or needing when only 1%, under that scenario, would be voting on behalf of an entire population of drivers, who then could argue under a collective bargaining agreement that they didn't vote for because there's interest arbitration. That collective bargaining agreement, then, under the statute, would allow them to negotiate an interest arbitrator to require and mandate provisions of when they drive, how they drive, minimum hours of driving, etc.

So what do you have? You've got taxi. Well, there's a reason Uber is popular in Seattle: because it's not taxi. So what is the answer? I think the challenge is not trying to put that square peg through that round hole and say, "You've got to have collective bargaining." The challenge is what are we trying to create? What are we trying to serve? There are other ways to have collective voices; there are other ways to have input. As David Rolf was saying yesterday, one of the fallacies of organized labor they've got to come to grips with is that there's not going to be a return to 1935 collective bargaining. We've got to be creative; we've got to be innovative.²⁸

What I'm suggesting is that, right now, there are barriers to that innovation because everybody thinks that independent contractors are independent contractors, and you're treating them all the same. And now, we've been successful with both AFL-CIO and some associations outside the United States to sit back and say, "OK, look, what are we really trying to achieve?" Those dialogues are always going to be available to us when you can look at it dispassionately, and when you can look at it as to what you're trying to solve.

Bill Samuel: I think what David Rolf recited a couple times, what he was driving at, was some kind of European system of secretarial bargaining.²⁹ He thinks enterprise bargaining is probably consigned to the ashes of history, but he does think the cab industry should bargain as an industry. Every cab driver in Seattle, or beyond Seattle and Washington State, should go before a government agency, and there be some kind of tri-partite agreement like they do in France and other countries. He's not saying do away with bargaining, or collective bargaining, or unions; he's saying the current model may not work anymore, but he's for a broader, more inclusive model.

Hon. Judge Thomas Hardiman: Very quickly, let's get to these last few questions. Questions will be answered fast, answers in 30 seconds or

²⁸ *Id.*

²⁹ *Id.*

less. Go ahead.

Audience Question: How would your analysis apply to high-paying salaries? So Uber drivers, taxi drivers, TaskRabbit are low paying. A lawyer who works for one law firm all year as a private practitioner but only does cases for one company, or say a hospital, where your anesthesiologist is an independent contractor; does your analysis change if you're talking about a high-salary positions?

Hon. Judge Thomas Hardiman: Right, yes or no?

Mark Brnovich: No, but working at a large firm is equivalent to indentured servitude. And second, I do want to make clear that when I talked about the bargaining units, I was talking about changing the definitions. My whole premise is that you've got to change the definitions, the way you look at these things, and then you can come up with voluntary associations, however you wanted to do it.

Hon. Judge Thomas Hardiman: Alright—

Mark Brnovich: I just wanted to clarify that.

Hon. Judge Thomas Hardiman: I see my future clerk here. Go ahead.

Audience Question: I'm just curious what, in terms of this definitional debate, are the influences of civil rights groups who have a vested interest in shifting the definition to change the scope of liability and the implications of discrimination laws? It seems like even though they don't directly implicate labor and employment, they are an important voice in this debate.

Hon. Judge Thomas Hardiman: Thoughts on that? Do you expect litigation about the impact of civil rights law on gigging and the regulation of gigging?

Randel Johnson: One of the issues when we talk about the new

independent worker classifications and civil rights laws applied to those is this new classification criteria. But I haven't seen a leadership conference in the typical civil rights groups weigh in that much on this issue.

Mark Floyd: We have great partners with the Urban League, NAACP. As pointed out from both sides of the aisle, with regard to empowering women's groups as well as minorities, getting on our platform is pretty blind. Seattle said that prior to Uber coming to Seattle, seeing a female cab driver was the equivalent of seeing a unicorn run down main street. And so, the civil rights groups have partnered with us to help foster that opportunity.

Hon. Judge Thomas Hardiman: So you see more cooperation than conflict there.

Mark Floyd: Oh, yeah.

Hon. Judge Thomas Hardiman: OK, last question.

Audience Question: So, the primary distinction here between employees and independent contractors seems to be distinguishing between employees as exclusive unions and independent contractors as maybe no union at all. What you were talking about there at the end seemed to be the more non-exclusive union. I know the unions may not like non-exclusive unions going forward, but would that be something that might work well for the gig economy?

Mark Brnovich: I am not a policy maker, but as a matter of philosophy, yes. I think if individuals in a particular trade want to associate with each other, they should be allowed to do so. But, I don't think anyone should be forced to join that guild, so to speak.

Bill Samuel: You're saying something short of exclusive representation, like a worker center or something that where workers come together?

Audience Question: So, under exclusive unions, I'm saying if you

vote and you have 51%, then that union is the exclusive union that represents all the employees, regardless of what the minorities or employees might want. A non-exclusive union would only represent those employees that asked to join that union and choose to join that union.

Bill Samuel: Right. There are some unions looking at that as a possible way forward. I don't think there's a consensus in the labor movement.

Hon. Judge Thomas Hardiman: And you don't expect that to grow?

Bill Samuel: I don't think. Not in the short term, no.

Hon. Judge Thomas Hardiman: OK. Please join me in thanking our distinguished panel.

[RECORDING ENDS]