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THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL RETAIL FEDERATION, and HR POLICY ASSOCIATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., A Delaware Corporation; LYFT, INC., A Delaware Corporation; and Does 1-50, Inclusive,

Defendants.

Case No. CGC-20-584402

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL RETAIL FEDERATION, AND HR POLICY ASSOCIATION IN SUPPORT OF OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Assigned to Hon. Ethan P. Schulman, Dept. 302

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AMICI CURIAE BRIEF

I. Introduction

Dynamex Operations W., Inc. v. Superior Court (2018) 4 Cal.5th 903, 955-956 & fn. 23 (*Dynamex*), adopted the Massachusetts version of the so-called "ABC" test to govern whether workers can be classified as independent contractors. The Legislature recently codified this same version of the test. (Lab. Code, § 2750.3, subd. (a)(1)(A)-(C); Stats. 2019, ch. 296, § 1(d).)

The State of California's lawsuit here claims that, under this test, defendants Uber Technologies, Inc., and Lyft, Inc., have misclassified drivers as independent contractors. This Court must determine how to apply the test to the gig economy, where individual entrepreneurs use software platforms to accept "gigs" from customers if and when they please, rather than having their hours, wages, and work dictated by a traditional employer. Millions of entrepreneurs take advantage of the gig economy to work for themselves on their own time schedules rather than being tied down to a traditional nine to five job. The State's misguided theory here would strip many of those workers of the flexibility they want and need.

This amici brief focuses primarily on prong B of the ABC test, which is among the more ambiguous and contentious of the test's components. (See *Labor and Employment Law – Worker Status – California Adopts the ABC Test to Distinguish Between Employees and Independent Contractors – Assemb. B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at Cal. Lab. Code §§ 2750.3, 3351 and Cal. Unemp. Ins. Code §§ 606.6, 621)* (2020) 133 Harv. L.Rev. 2435, 2439 & fn. 45; see also *Carpet Remnant Warehouse, Inc. v. New Jersey Dept. of Labor* (N.J. 1991) 593 A.2d 1177, 1186 [the meaning of prong B is "elusive"].) Under prong B, workers are not employees if they "perform[ ] work that is outside the usual course of the hiring entity's business." (*Dynamex, supra*, 4 Cal.5th at p. 964.) This necessarily requires the Court to determine what the "hiring business" is and how it operates. In deciding this issue, this Court should apply a rule focusing on how a business defines itself and structures its operations. A standard grounded in these features is important for all parties to have certainty and fair notice of how workers will be classified under prong B. Such a rule is particularly important in the context of injunctions because any violation may subject the defendant to contempt. That is one of the reasons why "a court may not

issue a broad injunction to simply obey the law." (*City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 416 & fn. 40, citing *N.L.R.B. v. Express Pub. Co.* (1941) 312 U.S. 426, 435–437 [61 S.Ct. 693, 85 L.Ed. 930].)

The State insists this Court should grant its motion for a mandatory preliminary injunction and reclassify drivers because they are employees under prong B. According to the State, this is so because Uber's and Lyft's "usual course" of business under prong B "is providing rides to Passengers. Simply put, Defendants sell rides." (The People's Memorandum of Points and Authorities in Support of Mot. for Preliminary Injunction (State's P&A's) 21:24-25.) But the State mischaracterizes the essential nature of Uber's and Lyft's operations and its motion should be denied. That Uber and Lyft make profits from software platforms that allow people seeking rides to connect with and purchase rides from drivers does not mean Uber and Lyft sell rides. Airbnb is not transformed into a landlord merely because it earns revenue from home rentals that its technology helps facilitate. eBay is not in the business of selling baseball cards because some people use eBay's internet platform to do that.

As explained below, California and Massachusetts courts have rejected the State's mistaken view of prong B. Instead, courts analyze how the business describes itself and how it operates, not simply whether it makes a profit from other individuals' eventual sale of their goods or provision of their services to their customers. Here, Uber and Lyft offer a software platform that brokers between the drivers who provide their own non-software services (i.e., rides) to individuals looking to purchase the drivers' services. Indeed, this technology helps facilitie a myriad of non-software services, such as food delivery, public transportation, renting of bicycles, etc. That Uber and Lyft make a profit off these transactions does not convert them from technology companies into transportation companies that sell rides.

In any event, even if the State's characterization of prong B were correct, this Court should nonetheless deny the preliminary injunction motion based on public policy concerns because (among other reasons): (a) the quickly approaching November election may squarely settle whether or not the independent contractor status of drivers in the gig economy should be evaluated under the ABC test; (b) granting the State's request for a mandatory injunction to change the status quo will

cause drivers to lose benefits available under federal law; and (c) the impact of such an injunction will remove the flexibility in work hours created by an independent contractor relationship and harm the workers in the gig economy who thrive under that relationship.

II. Prong B requires a standard based on how the business defines itself and structures its operations, as opposed to public perception.

Prong B of the ABC test asks whether a worker "performs work that is outside the usual course of the hiring entity's business." (*Dynamex*, *supra*, 4 Cal.5th at pp. 955-956; Lab. Code, § 2750.3, subd. (a)(1)(B).) While *Dynamex* stated generally that this calls for an inquiry into whether the individuals are "*reasonably* viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor" (*Dynamex*, at p. 959, emphasis added), *Dynamex* did not specify how this general standard should work in practice, let alone in the gig economy. In the absence of clear guidelines from *Dynamex*, this Court should follow post-*Dynamex* California case law, as well as Massachusetts case law addressing Massachusetts' ABC test, to conclude that the prong B inquiry turns on how a business defines itself and structures its operations.

To begin with, *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289 (*Curry*) is instructive. *Curry* was a class action brought against a defendant for wage-and-hour violations. (*Id.* at pp. 292-293.) Prior to May 2003, the defendant (Shell) owned approximately 365 gas stations in California. (*Id.* at p. 293.) But Shell then changed its business model and no longer operated the gas stations, instead offering leases to entities that sought to run the stations. (*Ibid.*) Those entities had a lease interest in the stations' convenience stores and carwash facilities. (*Ibid.*) One of those entities, ARS, operated the service station where the plaintiff worked. (*Id.* at pp. 294-295.) Shell, however, continued to own the gasoline sold to customers, received all of the revenue from fuel sales, and set prices. (*Id.* at p. 293.) The trial court granted Shell's motion for summary judgment, holding that the plaintiff was not Shell's employee. (*Id.* at p. 299.)

The Court of Appeal affirmed. (*Curry*, *supra*, 23 Cal.App.5th at p. 316.) Applying the ABC test, the court held that while the plaintiff was the manager of an ARS fueling station, Shell was "not in the business of operating fueling stations—it was in the business of owning real estate and

fuel." (*Id.* at p. 315.) Thus, as a matter of law Shell satisfied prong B "because managing a fuel station was not the type of business in which Shell was engaged." (*Ibid.*)

In short, *Curry* analyzed the substance of the defendant's business operations and differentiated between the selling of gas and the operation of a gas station. That Shell controlled the price of the gasoline and retained all of the revenue from the sale of gasoline there (*Curry, supra,* 23 Cal.App.5th at p. 293) had no bearing on the court's prong B analysis (see *id.* at p. 315). Therefore, the fact that Uber and Lyft generate revenue from drivers providing rides (State's P&A's 22:26-23:7) or control pricing (State's P&A's 14:1-9) is likewise of no moment here.

Massachusetts case law is also instructive. This is so because *Dynamex* expressly adopted Massachusetts' version of the ABC test (*Dynamex, supra,* 4 Cal.5th at pp. 955-956 & fn. 23) and the Legislature adopted *Dynamex* (Lab. Code, § 2750.3, subd. (a)(1)(A)-(C); Stats. 2019, ch. 296, § 1(d)) and thereby equally adopted the Massachusetts version of the test. Massachusetts case law is especially helpful because it sets out detailed standards governing the prong B inquiry. In particular, the Massachusetts Supreme Judicial Court's decision in *Sebago v. Boston Cab Dispatch, Inc.* (Mass. 2015) 28 N.E.3d 1139 (*Sebago*) is persuasive authority regarding prong B.[1]

In *Sebago*, licensed taxicab drivers leased taxicabs and taxicab medallions from the medallion owners and received radio dispatch services. (*Sebago, supra,* 28 N.E.3d at p. 1145.) They sued the entities from whom they leased the taxicabs and received the dispatch services, alleging that the defendants improperly misclassified them as independent contractors. (*Ibid.*) Applying Massachusetts' ABC test, Massachusetts' highest court concluded the drivers were not defendants' employees. (*Id.* at pp. 1149-1156.)

Sebago emphasized that, under prong B, "a purported employer's own definition of its

[1] Despite *Dynamex*'s declaration that the ABC test it adopted "tracks the Massachusetts version" (*Dynamex, supra,* 4 Cal.5th at p. 956, fn. 23), *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558 did not follow *Sebago* with respect to prong C. (*Id.* at p. 574 ["The Massachusetts test is simply not the formulation of part C articulated in Dynamex"].) *Garcia,* however, addressed only prong C and specifically noted that prong B under *Dynamex was* based on Massachusetts law. (*Ibid.* [*Dynamex* "explained that it followed Massachusetts in omitting certain language from part *B* of the ABC test given 'contemporary work practices[ ] in which many employees telecommute' "].) Thus, *Sebago* remains persuasive authority with respect to prong B.

business is indicative of the usual course of that business," and courts also look to " 'whether the service the individual is performing is necessary to the business of the employing unit or merely incidental.' " (*Sebago, supra,* 28 N.E.3d at p. 1150.) Applying this test, *Sebago* held that the defendants had "satisfied t[his] second prong of the independent contractor test." (*Id.* at p. 1152.)

As to the medallion owners who leased taxicabs to drivers, *Sebago* explained that the defendants had not held themselves out as providing transportation services to passengers, and instead "lease[d] taxicabs, manag[ed] the leasing of taxicabs, provid[ed] taxicab dispatch services, . . . provid[ed] limousine services," and serviced taxicabs. (*Sebago, supra*, 38 N.E.3d at p. 1152.) Consequently, the drivers "*did not provide services in the ordinary course of the medallion owners' business, i.e., the leasing of taxicabs and medallions*." (*Ibid.*, emphasis added.) And as to the radio associations that provided dispatch services, while they had "advertise[d] themselves as providing taxicab services" and "arrang[ed] for the transportation of passengers," *Sebago* held that this did "not override the realities of the radio associations' actual business operations," whose "raison d'etre . . . [was] to provide dispatch services to medallion owners—a service that is funded by medallion owners and only incidentally dependent on drivers." (*Id.* at p. 1152.)

Ruggiero v. American United Life Insurance Company (D.Mass. 2015) 137 F.Supp.3d 104 (*Ruggiero*) adopted the same prong B standards. *Ruggiero* involved an insurance agent who sued a life insurance company and its parent entity, alleging that the defendants misclassified him as an independent contractor. (*Id.* at p. 107.) In applying Massachusetts' ABC test, under prong B and *Sebago*, the court must consider the defendants' own definition of their business and that their website did "not present itself as actually selling the insurance and financial products that it offers." (*Id.* at p. 118.) Instead, the website "educate[d] consumers about [defendants'] products and indicate[d] that it 'provides local service through a national network of experienced financial professionals.' " (*Ibid.*) That is, the defendants were not "in the business of *selling* insurance products directly; [they were] in the business of determining which products to make available." (*Ibid.*) The court "agree[d] with the defendants that providing information about and fashioning a product one manufactures is not the same as being in the business of directly selling it." (*Ibid.*)

The court stated that this manufacturing-versus-sales dichotomy "may seem formalistic, but

it is grounded practically in business arrangements where the manufacturer does not engage in direct sales but instead empowers individuals to engage in their own, separate businesses that involve—but do not [necessarily] consist exclusively of—the sale of the manufacturer's products." (*Ruggiero, supra,* 137 F.Supp.3d at p. 119.)[2] Thus, such a business arrangement does *not* qualify as services provided by workers within the usual course of the hiring entity's business under prong B. (*Id.* at pp. 118-122.) "[W]here a business has legitimately defined the boundaries of its operations, and outsourced functions it considers to be beyond those boundaries to 'separately defined' businesses or third parties [citation] the independent contractor [law] cannot be used to expand those boundaries." (*Id.* at p. 119, citing *Sebago, supra,* 28 N.E.3d at pp. 1153, 1155.) The court concluded that "the manufacture of a product is not necessarily the same course of business as selling or using that product to make a profit." (*Id.* at p. 120.)

Other Massachusetts state and federal cases are in accord. (See *Beck v. Massachusetts Bay Technologies, Inc.* (D.Mass., Sept. 6, 2017, No. 16-10759-MBB) 2017 WL 4898322, at p. *8 [nonpub. opn.] [under prong B, "[a]lthough a service may be essential to a business' survival, the service provided must be sufficiently related to the primary purpose of the business to be considered part of the usual course of the business," citing *Ruggiero, supra,* 137 F.Supp.3d at pp. 118-119 and *Sebago, supra,* 28 N.E.3d at pp. 1152]; *Kubinec v. Top Cab Dispatch, Inc.* (Mass.Super.Ct., June 25, 2014, No. SUCV201203082BLS1) 2014 WL 3817016, at p. *11 [nonpub. opn.] [taxi dispatch service was not employer of taxi driver under prong B]; *Sagar v. Fiorenza* (Mass.Super.Ct., Jan. 18, 2014, No. MICV201204081F) 2014 WL 794966, at p. *6 [nonpub. opn.] [explaining that an employer fails to satisfy prong B where "it contracted directly with customers to provide services, which it then relied on its workers to furnish to customers," but holding that hiring entity did not fall afoul of this standard and instead satisfied prong B where plaintiff taxi driver's work was only incidental to its dispatch business].)

Cases from other jurisdictions addressing ABC tests agree with Massachusetts' approach to

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[2] Indeed, many workers frequently use multiple apps at the same time (so-called " 'multi-app[ing]' "), or at different times, in order to maximize their profits. (See Opn. Letter Fair Labor Standards Act (FLSA) (Apr. 29, 2019) 2019 WL 1977301, at pp. *2, *7 (hereafter Opn. Letter).)

prong B, likewise focusing on the hiring entity's description of its business and the realities of the entity's operations. (See, e.g., *State Dept. of Employment, Training and Rehabilitation, Employment Sec. Div. v. Reliable Health Care Services of Southern Nevada, Inc.* (Nev. 1999) 983 P.2d 414, 418 ["Despite the fact that a temporary agency profits solely from referring temporary health care workers, we cannot ignore the simple fact that providing patient care and brokering workers are two distinct businesses"]; *Trauma Nurses, Inc. v. Board of Review, New Jersey Dept. of Labor* (N.J.Super.Ct.App.Div. 1990) 576 A.2d 285, 291 (*Trauma Nurses*) ["With respect to the subsection B criterion, the Attorney General argues that TNI is in the business of providing health care, rather than brokering nursing personnel to hospitals. We reject this strained contention. The record does not substantiate the naked claim that a broker in the business of matching a nurse with the personnel needs of a hospital is undertaking the provision of health care services. The service of supplying health care personnel does not translate into the business of caring for patients"]; *Great Northern Construction, Inc. v. Department of Labor* (Vt. 2016) 161 A.3d 1207, 1216 (*Great Northern*) ["Factors relevant to part B include whether the worker's business is a 'key component' of the putative employer's business, how the purported employer defines its own business, *which of the parties supplies equipment and materials*, and whether the service the worker provides is necessary to the business of the putative employer or is merely incidental" (emphasis added), citing, among other authorities, *Sebago*, *supra*, 28 N.E.3d at p. 1150].)

All of these cases demonstrate that courts applying prong B in California, Massachusetts, and elsewhere engage in a careful analysis of the hiring entity's description of its business and an assessment of the entity's operations and how they are actually structured in order to decide whether a worker is an independent contractor under prong B.

These cases also show that the State's request for a mandatory injunction should be denied. Drivers use the Uber and Lyft apps to connect with and render delivery services *to passengers*, not to Uber or Lyft. Uber and Lyft have merely created technology platforms that allow drivers to connect with passengers. Uber's and Lyft's characterization of their own businesses must be afforded deference. (See *Sebago, supra*, 28 N.E.3d at p. 1150 ["a purported employer's own definition of its business is indicative of the usual course of that business"].) Consistent with the

dichotomy between manufacturing a good and selling that good, providing a software application allowing a driver selling rides to connect via that technology platform with a passenger looking to purchase the driver's services, does not mean that Uber and Lyft are themselves in the business of selling rides to those passengers. (See *Ruggiero, supra*, 137 F.Supp.3d at p. 119 [where a business that "does not engage in direct sales but instead empowers individuals to engage in their own, separate businesses that involve—but do not [necessarily] consist exclusively of—the sale of the manufacturer's products," the workers at issue do not provide services within the usual course of the hiring entity's business under prong B].)

Rather, Uber and Lyft provide technology platforms that broker between those looking to sell a myriad of non-software services to those looking to purchase those services—for example, drivers and those looking to purchase rides from them or looking to hire them for food deliveries, or those looking to rent out bikes or scooters to people looking to rent these items from them. The drivers are therefore not employees under prong B because the work they perform (i.e., driving) is outside the usual course of the distinct brokerage services (i.e., offering a technology platform that allows drivers to connect to individuals looking for rides).[3] (See Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante*? (2020) 11 William & Mary Bus. L.Rev. 733, 756-757 ["workers' services fall outside [the hiring entity's] usual course of business" where the entity is "a broker of services"—for example, the Indiana Supreme Court held drivers were not a business's employees where that company "connected drivers with customers who needed too-large-to-tow vehicles driven to them," citing *Q.D.-A., Inc. v. Indiana Department of Workforce Development* (Ind. 2019) 114 N.E.3d 840, 848]; see also *id.* at p. 765 & fn. 136 [explaining that Vermont's Department of Labor concluded that drivers for transportation network companies (like Uber and Lyft) are not employees under prong B because

[3] The Department of Labor characterized other gig economy companies operating " 'on-demand' " or " 'sharing' " services in the same fashion, explaining: "Your client provides a referral service. As such, it does not receive services from service providers, but empowers service providers to provide services to end-market consumers. *The service providers are not working for your client's virtual marketplace; they are working for consumers through the virtual marketplace. They do not work directly for your client to the consumer's benefit; they work directly for the consumer to your client's benefit*." (Opn. Letter, *supra*, 2019 WL 1977301, at pp. *1, *6, emphasis added.)

such companies "are not in the business of owning or operating a fleet of vehicles for purposes of providing transportation for hire to the general public"]; accord, e.g., *Trauma Nurses*, *supra*, 576 A.2d at p. 291 [rejecting premise that "a broker in the business of matching a nurse with the personnel needs of a hospital is undertaking the provision of health care services" under prong B].) Thus, that Uber and Lyft purportedly control pricing and retain a portion of revenue generated (see State's P&A's 14:2-109, 22:26-27) is irrelevant to the prong B analysis. (See *Curry*, *supra*, 23 Cal.App.5th at pp. 293, 315.) And the fact that drivers select their own vehicle and pay for it is also strongly indicative that they are independent contractors under prong B. (See *Great Northern*, *supra*, 161 A.3d at p. 1216 ["Factors relevant to part B include . . . *which of the parties supplies equipment and materials*" (emphasis added), citing, among other authorities, *Sebago*, *supra*, 28 N.E.3d at p. 1150]; cf. *United States v. Silk* (1947) 331 U.S. 704, 706-707, 718-719 [67 S.Ct. 1463, 91 L.Ed. 1757] [truck drivers who delivered coal for a coal company were independent contractors under the federal Social Security Act, as the drivers were "small businessmen who own[ed] their own trucks," "hire[d] their own helpers," and "[i]n one instance haul for a single business, [while] in the other for any customer"], abrogated on another ground as recognized by *Nationwide Mutual Ins. Co. v. Darden* (1992) 503 U.S. 318, 324-325 [112 S.Ct. 1344, 117 L.Ed.2d 581].)

Moreover, prong B must be interpreted by courts in a meaningful manner in order to give businesses predictability and fair notice of what is expected from them. Companies, gig-based or otherwise, should be permitted to develop new and innovative business models knowing what the rules are before they set up their operations. This is particularly true in the context of mandatory injunctive relief where the penalty for claimed noncompliance is contempt. Applying the standards for prong B embraced by *Curry*, Massachusetts courts and courts from other jurisdictions that embrace a similar approach to prong B, will accomplish those goals.

III. Public policy considerations counsel in favor of denying the preliminary injunction.

A. The upcoming election and federal COVID-19 unemployment benefits militate against granting injunctive relief.

"It is well established that when injunctive relief is sought, consideration of public policy is not only permissible but mandatory." (*Teamsters Agricultural Workers Union v. International*

Brotherhood of Teamsters (1983) 140 Cal.App.3d 547, 555 (*Teamsters*), citing *Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 588.) Here, even assuming the State could demonstrate a likelihood of success on the merits under the ABC test (it cannot), numerous public policy concerns counsel in favor of nonetheless denying the State's motion for injunctive relief.

First, the quickly approaching November 2020 election may vitiate any effort here to reclassify the drivers as employees under the ABC test. According to the Secretary of State, Proposition 22 has qualified for the November ballot. (*Qualified Statewide Ballot Measures*, Cal. Sect. of State <https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures/> [as of July 16, 2020].) If passed, Proposition 22 will "[e]stablish[ ] different criteria for determining whether app-based transportation (rideshare) and delivery drivers are 'employees' or 'independent contractors.' " (*Ibid.*) The ballot summary also explains: "companies with independent-contractor drivers will be required to provide specified alternative benefits, including: minimum compensation and healthcare subsidies based on engaged driving time, vehicle insurance, safety training, and sexual harassment policies." (*Ibid.*) If this Court grants the mandatory injunction requested by the State, that injunction will be automatically stayed by the filing of a notice of appeal. (Code Civ. Proc., § 916; *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 226, fn. 9.) Thus, it is unlikely that any injunction issued by this Court would go into effect before the election, and if Proposition 22 passes, the request for injunctive relief under the ABC test would be moot. Thus, the Court should deny injunctive relief at this stage and allow the democratic process to play out in a few short months via the November election.

Second, in the middle of this public health crisis, granting the State's requested injunctive relief will likely *harm*, rather than aid, the legions of Uber and Lyft drivers the State is claiming to protect. "The COVID-19 pandemic has shaken this nation to its core. The virus has taken the lives of thousands of Americans and permanently altered the lives of many more. COVID-19 has unquestionably had—and continues to have—a devastating impact on our nation's economy. As doctors, nurses, first responders, and other heroes fight this scourge on the front lines, the federal government sprang into action to provide an economic stimulus for our nation's businesses and citizens." (*American Association of Political Consultants v. United States Small Business*

Administration (D.D.C. 2020) ___ F.Supp.3d ___ [2020 WL 1935525, at p. *1].) For example, the "Families First Coronavirus Response Act offers substantial sick pay to independent contractors sidelined by coronavirus." (*Rogers v. Lyft, Inc.* (N.D.Cal. 2020) ___ F.Supp.3d ___ [2020 WL 1684151, at p. *2], app. pending, citing Pub. L. No. 116-127, § 7002 (Mar. 18, 2020) 134 Stat. 178, 212.) This law "makes independent contractors eligible for up to ten days of paid sick leave in the form of refundable tax credits worth up to the lesser of $511 per day or their average daily income last year." (*Ibid*, citing Pub. L. No. 116-127, § 7002(c)(1)(B) (Mar. 18, 2020) 134 Stat. 178, 212.) By contrast, "the small amounts of paid sick leave that would be available" to only a "handful" of drivers under California law "pale in comparison to the assistance workers will be able to get from th[is] emergency legislation." (*Id.* at pp. *1-*2.) If drivers were reclassified as employees now, resulting in Lyft and Uber workforces consisting of thousands of employees, the drivers "might not qualify for these benefits" because this law "funds sick pay for employees too, but it excludes people who work for companies with 500 or more employees." (*Ibid.*, citing Pub. L. No. 116-127, §§ 5102, 5110(2)(B)(i)(I)(aa) (Mar. 18, 2020) 134 Stat. 178, 195-196, 199.) Furthermore, the Coronavirus Aid, Relief and Economic Security Act (CARES Act) allowed independent contractors to "apply for a forgivable small business loan through the Paycheck Protection Program to cover up to 250 percent of their monthly income as a measure of 'payroll costs.' " (*Id.* at p. *2, citing Pub. L. No. 116-136, § 1102(a)(2) (Mar. 27, 2020) 134 Stat. 281, 286–293.) If people were "immediately switched from independent contractor to employee status" at this time, "they could lose their entitlement to this relief" and may therefore need to pay back these loans right away in the event of immediate reclassification. (*Ibid*.) Such adverse consequences weigh against injunctive relief that would immediately reclassify the drivers here. (See *id.* at pp. *1-*3.)

B. ABC tests should be construed narrowly so as not to destroy the gig economy.

An analysis performed by amicus the Chamber of Commerce of the United States of America (the Chamber) earlier this year explains the harmful effects of ABC tests on the gig economy if those tests are construed too broadly. That report summarizes that adverse impact:

> **Undermining the gig model**. In survey after survey, gig workers report that the primary benefit of gig work is flexibility. They gravitate to gig work because it allows them to make their own schedules and choose their own projects. They like

> feeling like their own boss. And for many of them, this is not simply a preference: they may be students, parents or workers with other full-time jobs.
>
> Proponents of reclassification assume that gig work would retain these features even after workers become employees. The evidence, however, suggests the opposite.
>
> Logically, platform holders would have to make some changes to their models. If gig workers become employees, they will be subject to state wage-and-hour laws. Platform holders would become responsible for providing an hourly minimum wage and overtime. So to ensure they can continue making a profit, platform holders will have to take more control over when and where gig employees work. They will have to limit the time gig workers can spend working and schedule the workers at places and times where the opportunities for revenue are the greatest. Gig employees will therefore no longer control their own schedules or projects or where they work; they will become more like shift workers.
>
> Gig companies may also more strictly control access to their platforms. Today, one of the gig economy's primary benefits is its low barrier to entry. Platform holders have an incentive to open their platforms to as many workers as possible; doing so improves utility and convenience for consumers by increasing their options. But once platform holders have to guarantee wages and other benefits, they will behave more like traditional employers and be more selective about whom they partner with. They will have to ensure that every new service provider can generate enough revenue to justify his or her wage and benefits, and that will make them more careful about offering work opportunities.[ ]
>
> We should not be surprised by this result. The traditional trade-off in employment relationships has always been security for control. If states force platform holders to provide the security associated with employment, they should expect platform holders to exercise the corresponding control.
>
> And those controls will necessarily change the nature of gig work—often to the detriment of gig workers. Military spouses, transitioning service members, ex-offenders, students, parents, and moonlighters may no longer have access to the gig economy. Legislators will have closed an avenue for millions of Americans to supplement their incomes or sustain themselves when they are in between jobs. In that sense, they may actually be raising costs for the state, which may need to provide social services to people who no longer have alternate work opportunities. And they will, perhaps, have smothered a nascent industry in the cradle.

(*Ready, Fire, Aim*: *How State Regulators Are Threatening the Gig Economy and Millions of Workers and Consumers* (Jan. 2020) U.S. Chamber of Commerce Employment Policy Div., pp. 36-37 <https://www.uschamber.com/sites/default/files/ready_fire_aim_report_on_the_gig_economy.pdf> [as of July 16, 2020], fns. omitted.)

The U.S. Chamber's report and conclusions are supported by economic data. Traditional employer-employee relationships typically involve a schedule determined by the employer, whereas

many independent contracting relationships allow the worker to set his or her own schedule. (See Donovan et al., *What Does the Gig Economy Mean for Workers?* (Feb. 5, 2016) Cong. Research Service, pp. 1-2 <https://bit.ly/2SM8CMR> [as of July 16, 2020].) And many other workers prefer—or even require—the flexibility of an independent contractor relationship. Indeed, a 2017 federal government survey found that 79 percent of independent contractors prefer their work arrangement to traditional, less-flexible jobs. (*Contingent and Alternative Employment Arrangements News Release* (June 7, 2018) U.S. Bureau of Labor Statistics <https://www.bls.gov/news.release/conemp.htm> [as of July 16, 2020].)

This preference has been confirmed again and again. A 2019 survey, for example, found that 51 percent of freelancers say there is no amount of money that would cause them to definitely take a traditional job, and 46 percent say that freelancing gives needed flexibility because they are unable to work for a traditional employer due to personal circumstances. (Upwork, *Freelancing in America: 2019* (Sept. 23, 2019) LinkedIn: SlideShare <https://bit.ly/2WqwmZ8> [as of July 16, 2020].) Likewise, a 2016 study found that for every primary independent worker who would prefer a traditional job, more than two traditional workers hope to shift in the opposite direction. (Manvika et al., *Independent Work: Choice, Necessity, and the Gig Economy* (Oct. 2016) McKinsey Global Inst., p. 7 <https://mck.co/3bdqOFx> [as of July 16, 2020].)

Still other workers prefer a mix of traditional and flexible work. A 2018 study found that 53 percent of gig economy workers consider the gig economy a secondary source of income used to supplement their earnings as employees. (*The Gig Economy* (Dec. 2018) Edison Research & Marketplace, p. 5 <https://bit.ly/2Wr6Rag> [as of July 16, 2020].)

If this Court broadly interprets the ABC test—and particularly prong B—it will make it more difficult to structure work opportunities as independent contractor relationships instead of employer-employee relationships. The consequence is that the number of flexible-schedule work opportunities is likely to decrease substantially.

It is not economical for employers to maintain the flexible nature of the independent contractor work they provide if the work must instead be performed by traditional employees. (See Radia, *California Ride Share Contracting Legislation Is a Solution in Search of a Problem* (Dec.

17, 2019) Competitive Enterprise Inst., pp. 1-2 <https://bit.ly/2WFE1lv> [as of July 16, 2020] ["[Transportation Network Companies] will . . . face a strong incentive under A.B. 5 to decrease the level of flexibility they currently afford their drivers in terms of which cars they may use, how they maintain their cars, how many hours they may work, and when and where they work"].)

This reduced flexibility can manifest in many ways. For example:

• California may require that employers consider time spent waiting for active work to be compensable. (See *Augustus v. ABM Security Servs., Inc.* (2016) 2 Cal.5th 257, 272.) An employer therefore has an incentive to schedule shifts for when and where the employer believes the shift will be the most productive and to require a minimum level of productivity, rather than letting the worker decide when, where, or how much he or she will work.

• California provides that during the term of employment, "an employer is entitled to its employees' 'undivided loyalty,' " (*Techno Lite, Inc. v. Emcod, LLC* (2020) 44 Cal.App.5th 462, 471), so an employer has an incentive not to permit its employees to work simultaneously for other competing employers. The incentive to demand undivided loyalty is particularly strong because permitting an employee to work for a competitor may lead to disputes about which employer is required to pay for time spent waiting for active work. (See Harris & Krueger, *Hamilton Project, A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The Independent Worker* (Dec. 2015) The Hamilton Project, p. 13 <https://bit.ly/3be628Y> [as of July 16, 2020].) In the gig economy context, this means "multi-apping" (using two or more apps at the same time—like Uber and Lyft—to reduce wait times between gigs), and the worker flexibility that comes with that common practice, may become a thing of the past. (See Bryan & Gans, *A Theory of Multihoming in Rideshare Competition* (Aug. 3, 2018) Journal of Economics and Management Strategy, p. 13 <https://bit.ly/2Lvq6Jf> [as of July 16, 2020] ["[I]t is possible that restricting driver [multi-apping] can reduce total surplus, by affecting both equilibrium price and wait time"].) Disincentivizing multi-apping would hurt rather than aid gig economy workers, who often gain much from the flexibility afforded by this arrangement. (See, e.g., Kristoff, *How to manage side hustles like a boss* (July 20, 2020) L.A. Times, p. A10 [explaining how gig economy workers make significant money by strategically multi-apping].)

- California requires that if an employee works a split shift (a work schedule interrupted by a nonpaid nonworking period), the employer may have to pay an extra hour of wages (see Cal. Code Regs. tit. 8, § 11090(4)(C)), so an employer has an incentive not to allow employees to come and go as they wish.

Economic studies confirm that reduction of flexible work opportunities thus harms the vast majority of independent workers. By diminishing employers' incentives to provide flexible working arrangements, broadly construed ABC tests impose enormous harm on independent workers—who, by and large, prefer or require flexible work arrangements. The preferences of workers who are in employment relationships say nothing about the preferences of workers who are independent contractors. A relatively free market in labor helps ensure that those who value an inflexible work schedule can choose to be employees, as most workers do, while those who value flexibility can choose to be independent contractors.

Accordingly, the Court should consider these public policy issues in deciding whether to deny the State's request for injunctive relief. (See *Teamsters*, *supra*, 140 Cal.App.3d at p. 555.) These public policy considerations, which favor allowing drivers to remain independent contractors—especially for the few short months that remain until the November 2020 election addresses the independent contractor status of gig economy drivers—weigh in favor of denying a mandatory injunction that would upend the status quo.

IV. CONCLUSION

For the foregoing reasons, this Court should deny injunctive relief.

July 24, 2020

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