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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **CITY AND COUNTY OF SAN FRANCISCO**

13 PEOPLE OF THE STATE OF
14 CALIFORNIA,

15 Plaintiff,

16 v.

17 HANDY TECHNOLOGIES, INC., and
18 DOES 1 through 10, inclusive,

19 Defendants.

Case No. CGC-21-590442

UNLIMITED JURISDICTION

**APPLICATION OF CHAMBER OF
COMMERCE OF THE UNITED
STATES TO FILE AMICUS
CURIAE BRIEF; PROPOSED
AMICUS CURIAE BRIEF IN
SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

Date: September 16, 2021

Judge: Hon. Anne-Christine Massullo

Time: 11:00 a.m.

Dept: 304

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28 **APPLICATION TO FILE AMICUS CURIAE BRIEF;
AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

1 **Interest of Amicus Curiae**

2 The Chamber submits this brief in support of Defendant Handy Technologies,
3 Inc.’s (“Handy”) opposition to plaintiffs’ motion for a preliminary injunction. The
4 Chamber is the world’s largest business federation. It represents approximately
5 300,000 direct members and indirectly represents the interests of more than three
6 million companies and professional organizations of every size, in every industry
7 sector, and from every region of the country. An important function of the Chamber
8 is to represent the interests of its members in matters before Congress, the Executive
9 Branch, and the courts. To that end, the Chamber regularly files *amicus curiae*
10 briefs in cases, like this one, that raise issues of concern to the nation’s business
11 community.

12 The Chamber has a significant interest in ensuring the proper application of
13 AB5 to the thousands of businesses in California. A number of the Chamber’s
14 members work with independent contractors. Those members have an interest in
15 clarifying their legal obligations, as well as in developing a workforce conducive to
16 growth and prosperity for business and workers alike. As a result, the Chamber has
17 filed *amicus curiae* briefs on several prior occasions in cases involving the
18 interpretation of AB5. (See, e.g., Amicus Curiae Letter; *People v. Uber Techs.*, No.
19 S265881 (Jan. 12, 2021); Amici Curiae Brief of the Chamber of Commerce of the
20 United States *et al.*, *People v. Maplebear Inc. dba Instacart*, No. D077380 (Ct. App.
21 Dec. 1, 2020); Amicus Curiae Brief of the Chamber of Commerce of the United
22 States, *People v. Super. Ct.*, No. B304240 (Ct. App. Aug. 20, 2020); Brief of Amici
23 Curiae Chamber of Commerce of the United States *et al.*, *Olson v. State*, No. 20-
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1 55267 (9th Cir. May 14, 2020); Brief of Amici Curiae, *Olson v. State*, No. 2:19-cv-
2 10956 (C.D. Cal. Feb. 6, 2020).)

3 The Chamber has a strong interest in this case because it affects the scope of
4 an important provision in the statute that exempts referral agencies from the “ABC”
5 test announced in *Dynamex*. Section 2777 of the Labor Code sets forth the relevant
6 test for determining whether a company qualifies as a “referral agency,” and
7 provides that the *Borello* test (not the ABC test) determines whether an individual
8 contracting with such a company is an employee or independent contractor.

9 Plaintiffs contend that Handy is subject to the ABC test, but Handy plainly
10 qualifies as a referral agency under Section 2777. Indeed, if Handy does not satisfy
11 the statutory criteria, it is unclear who could. Granting a preliminary injunction here
12 would thus have a profound chilling effect and likely force many other referral
13 agencies to cease operations. That result would not just harm those businesses, it
14 would also harm the independent contractors (many of which are themselves small
15 businesses) and consumers who rely on them. Due to the significant impact this
16 Court’s decision will have on California’s (and the country’s) business community,
17 the Chamber believes that its perspective will assist the Court in resolving this
18 motion.

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15 Referral Fees*, 23 J. of Real Estate Fin. & Econ. 267–96 (2001)6

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17 Perspective*, 49 Md. L. Rev. 869–916 (1990)6

1 **PROPOSED BRIEF OF AMICUS CURIAE**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Plaintiffs in this case are attempting to dramatically narrow the referral services
4 exemption, which provides that the ABC test established in *Dynamex* does “not apply to
5 the relationship between a referral agency and a service provider.” (Labor Code § 2777.)
6 Instead, that relationship is governed by *Borello*. Contrary to Plaintiffs’ contention that
7 the Legislature intended the referral services exemption to be construed narrowly, the
8 Legislature *expanded* the exemption less than a year after it passed AB5, making the
9 exemption applicable to all but a few select industries, and allowing both individuals and
10 small businesses to provide services to customers through a referral agency. The
11 Legislature’s decision to liberate a greater variety of service providers from the strictures
12 of *Dynamex* is supported by the economic literature, which has long recognized the
13 welfare-enhancing features of referral services.

14 Plaintiffs assert that Handy should treat all Pros as employees because Handy
15 provides a customer service line, insurance, and other valuable services to Pros and
16 customers. But Section 2777 specifically authorizes a referral agency to provide such
17 “administrative services ancillary to the service provider’s business operation.” (Labor
18 Code § 2777(b)(3)(A).) Handy’s ability to suspend Pros for poor performance or other
19 misconduct is also consistent with the referral services exemption—indeed, such vetting
20 is what makes a referral service particularly valuable to the end customers. Plaintiffs also
21 target Handy’s advertising efforts, but access to a large number of customers is what
22 makes the platform valuable to service providers, most of whom cannot afford to
23 undertake such advertising efforts themselves. In short, Plaintiffs’ theory that Handy’s
24 customer support, quality control, and advertising render it an employer would
25 effectively require all referral agencies to cease providing the very services that make a
26 referral service valuable to both sides of the transaction.

1 The Court should be especially hesitant to grant the requested relief because a
2 preliminary injunction here would have a chilling effect on other lawful referral
3 agencies. If referral agencies can have their business models enjoined based on their
4 provision of ancillary services, they will be unlikely to devote the resources necessary
5 to develop useful platforms. Ultimately, Plaintiffs’ theory would force all referral
6 agencies to become little more than Craigslist-style online marketplaces. That model
7 may work for the sale of used goods, but when it comes to in-home services, most
8 customers want more than a list of unvetted service providers who may not be qualified,
9 may not show up, and may not treat their homes with care. Handy’s referral service
10 provides value to all parties involved, and the Court should not enjoin that business
11 model, especially not without further factual development and a hearing on the merits.

12 **II. ARGUMENT**

13 **A. The Legislature’s Decision To Expand The Referral Services**
14 **Exemption Confirms Its Intent To Protect Referral Agencies**
15 **From Overregulation.**

16 1. Plaintiffs’ motion asserts that, “[u]nder the simplified ABC test,” every Pro that
17 works with Handy “is presumed to be an employee[.]” (Mot. at 17.) But the ABC test
18 applies only if *Dynamex* provides the governing framework, and AB5 makes clear that
19 *Dynamex* is *not* universally applicable. On the contrary, the Legislature made clear that
20 “*any statutory exception* from employment status or any extension of employer status or
21 liability remains in effect,” and that all exempted cases are “governed by the test adopted
22 in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341
23 (*Borello*).” (AB5, Legislative Counsel’s Digest, <https://tinyurl.com/bs565a2v>, emphasis
24 added; see also AB5 § 2(a)(2); Labor Code § 2775(b)(2) [“any exceptions to the terms
25 ‘employee,’ ‘employer,’ ‘employ,’ or ‘independent contractor’ . . . that are *expressly*
26 *made by a provision of this code* . . . shall remain in effect for the purposes set forth
27 therein.”], emphasis added.) The first question the Court must answer is thus whether

1 *Dynamex* or *Borello* applies. But one would not know that from reading the Plaintiffs’
2 opening brief, which ignores the numerous exemptions from *Dynamex* included in AB5
3 and simply presumes that the ABC test applies.² That strategy is deeply unfair to
4 businesses, like Handy, that have a good faith belief that their business is subject to the
5 *Borello* test, not the *Dynamex* test. Confronted with a motion for a preliminary injunction,
6 such defendants are forced to address the main issue in dispute for the first time in their
7 opposition papers, without any insight into the plaintiffs’ position on that question.

8 That strategy is especially problematic when it comes to the broad referral services
9 exemption because referral services can take a variety of forms and involve many
10 different industries. Plaintiffs’ reply brief describes the referral services exemption as a
11 narrow carve-out, but the statutory text and history of Section 2777 confirm that the
12 exemption must be interpreted broadly. As originally enacted, AB5 narrowly defined a
13 “referral agency” as a “business that connects clients with service providers” in only a
14 few specific industries: “graphic design, photography, tutoring, event planning, minor
15 home repair, moving, home cleaning, errands, furniture assembly, animal services, dog
16 walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup.”
17 (AB5 § 2(g)(2)(C).) Referral agencies connecting clients with other types of service
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20 ² For example, AB5 carved out health care professionals, lawyers, architects, engineers, private
21 investigators, accountants, securities broker-dealers, direct sales salespeople, and commercial
22 fishermen. (AB5 § 2(b)(1)–(6); see also Labor Code § 2783.) The Legislature also made the
23 *Dynamex* test inapplicable to many contracts for “professional services”—such as marketing,
24 administrator of human resources, travel agent services, graphic design, grant writer, fine artist,
25 photographer, freelance writer, manicurist, barber, etc.—and to real estate licensees and
26 repossession agencies. (AB5 § 2(c)–(d); see also Labor Code § 2778.) The Legislature exempted
27 bona fide business-to-business contracting relationships and relationships between a contractor
and an individual performing work pursuant to a subcontract in the construction industry when
certain conditions are satisfied. (AB5 § 2(e)–(f); see also Labor Code §§ 2776, 2781.) And, as
relevant here, the Legislature exempted referral services from the *Dynamex* test. (AB5 §2(g);
see also Labor Code § 2777(a).)

1 providers were subject to the *Dynamex* test. The exemption was also limited to service
2 providers established as “business entities” and did “not apply to an individual worker
3 . . . who performs services for a client through a referral agency.” (*Id.* § 2(g)(3); see also
4 *id.* § 2(g)(1) [*Borello* test applies “[i]f a *business entity* formed as a sole proprietor,
5 partnership, limited liability company, limited liability partnership, or corporation
6 (‘service provider’) provides services to clients through a referral agency,” so long as the
7 referral agency could satisfy certain criteria], emphasis added; *id.* § 2(g)(1)(A)–(J)
8 [setting forth the criteria].)

9 In 2020, however, the Legislature passed AB2257, which substantially *broadened*
10 the exemption. Instead of being limited to specific industries, the referral services
11 exemption was expanded to encompass “all industries,” with only certain enumerated
12 exemptions. (AB2257, Senate Floor Analyses, <https://tinyurl.com/4kv8bys8>; see also
13 Labor Code § 2777(b)(2)(B) [“Under this paragraph, referrals for services shall include,
14 *but are not limited to*, graphic design . . .”], emphasis added; *id.* § 2777(b)(2)(C)
15 [excluding high hazard industries from the definition of referral services, along with
16 “businesses that provide janitorial, delivery, courier, transportation, trucking,
17 agricultural labor, retail, logging, in-home care, or construction services other than minor
18 home repair”].) And whereas AB5 provided that the referral agency exemption applied
19 only if “a business entity” provided service to clients through a referral agency (AB5
20 § 2(g)(1)), the amended exemption now applies when “*an individual* acting as a sole
21 proprietor, or a business entity” provides services to clients through a referral agency
22 (Labor Code § 2777(a), emphasis added). These amendments were designed to provide
23 “crucial, yet structured, pathways for [numerous] professionals to create a small business
24 and work with a third-party referral agency.” (AB2257, Hearing of Sen. Comm. on
25 Labor, Pub. Emp’t & Ret. (Aug. 5, 2020), <https://tinyurl.com/4kv8bys8>.)

26 The Legislature had good reason for exempting referral services from the *Dynamex*
27 test: referral agencies fill an extremely important need in the marketplace. Most small
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1 businesses and individuals that provide cleaning, minor home repair, landscaping, and
2 other similar services often lack the funds to advertise their services. Many cannot even
3 afford to develop and maintain a website. It is thus difficult for these entrepreneurs to
4 make potential customers aware of their services. Meanwhile, customers looking for a
5 handyman, house cleaner, or someone to repaint a bedroom have few options and
6 typically must resort to asking friends and families for referrals. That is a very haphazard
7 way of finding someone qualified to provide the needed service. Referral agencies like
8 Handy solve this problem by (1) making customers aware of the referral agency; (2)
9 referring customers to experienced and qualified service providers, (3) giving Pros the
10 opportunity to bid on projects submitted by customers; and (4) providing valuable
11 ancillary services to Pros that allow them to focus on their core business.

12 It is well-established in the economic literature that third parties, including referral
13 agencies, can improve market efficiency and supplier and consumer welfare by reducing
14 the transaction costs that inhibit individual suppliers and consumers from finding and
15 evaluating each other.³ For any individual supplier or consumer, it may be prohibitely
16 expensive to search for a “match” that meets the other’s needs in terms of price and
17 quality, but by aggregating information about numerous suppliers and consumers,
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20 ³ See, e.g., Abdullah Yavas, *Middlemen in Bilateral Search Markets*, 12 J. Lab. Econ. 406–29
21 (1994) [describing how “middlemen in bilateral search markets” such as “employment
22 agencies” and “real estate brokers” “improve[] welfare if search is very costly and inefficient,”
23 including by reducing the needs of buyers and sellers to search for each other]; Francis Bloch &
24 Harl Ryder, *Two-Sided Searches, Marriages, and Matchmakers*, 41 Int’l Econ. Rev. 93–115
25 (2000) [describing how across “many markets,” “intermediaries play a major role by facilitating
26 (and sometimes organizing) meetings between potential partners”]. See also *Stop Missing Out
27 on the Referral Economy*, TradeGecko (Sept. 18, 2019), <https://tinyurl.com/y8theaxn> [“When
28 two [parties] enter into a referral economy partnership it benefits all [] parties involved. . . . It’s
a situation offering advantages and benefits to everyone, *all by doing what they’re already
doing.*”], emphasis added; Steven Rosenbaum, *The Birth of the Referral Economy*, Forbes (Aug.
5, 2014), <https://tinyurl.com/nuvf8s79> [describing superiority of referrals for exchanging
services, and noting that the “Referral Economy” is “increasingly important”].

1 referral agencies enable both parties to efficiently separate the wheat from the chaff. By
2 facilitating matches that would not otherwise occur, referral agencies increase total
3 economic welfare. Here, this means that homeowners receive services and Pros receive
4 projects that they otherwise would not. These information-sharing and match-facilitating
5 aspects of referral services provide benefits across numerous economic sectors. For
6 example, referrals are crucial to the efficient operation of the real estate market,⁴ and the
7 market for specialized legal services.⁵ The state of California even contracts with private
8 referral agencies to provide childcare and find employment for ex-prisoners.⁶
9 Companies like Handy bring these same welfare-enhancing features to countless other
10 markets. Yet in their zeal to apply the ABC test to Handy, Plaintiffs overlook or
11 downplay the important market functions that referral agencies provide.

12 Given the breadth of the referral services exemption and the significant benefits
13 offered by referral agencies, it makes little sense to preliminarily enjoin companies that
14 arguably satisfy the statutory criteria. The Court should instead allow the parties to
15 develop the record and present their arguments at a merits hearing.
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21 ⁴ Peter F. Colwell & Charles M. Kahn, *The Economic Functions of Referrals and Referral Fees*,
22 23 J. of Real Estate Fin. & Econ. 267–96 (2001) [noting that “middlemen” that “take on
23 informational roles including marketing, screening, and matching” are “central” to the “efficient
operation” of “complex” “real estate market[s]”].

24 ⁵ Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 Md.
25 L. Rev. 869–916 (1990) [noting how referrals for specialized legal services may help clients
who could not otherwise evaluate the quality of individual lawyers].

26 ⁶ See, e.g., Cal. Dep’t of Educ., Resource and Referral County Listing,
27 <https://tinyurl.com/568vd59m>; Cal. Dep’t of Corrs., Adult Reentry Grant Programs,
<https://tinyurl.com/u5apcezh>

1 service provider’s business operation.” (Labor Code § 2777(b)(3)(A).) Handy’s
2 customer service agents provide quintessential administrative services allowed under the
3 statute.

4 Even more outrageous is Plaintiffs’ contention that Pros are employees because
5 “Handy’s financial success relies on selling cleanings and handyman work.” (Mot. at
6 20.) No matter how a referral agency structures its business, its financial success will
7 depend on clients purchasing services from “service providers” through the referral
8 agency’s platform. Even if Handy simply charged Pros a fixed annual fee for the right
9 to use the platform, Handy’s business would succeed only if customers hired Pros
10 through the Platform in high enough numbers to justify Pros paying the fee.

11 And to the extent Plaintiffs suggest that it is somehow improper for Handy to
12 charge a fee for each project, Section 2777 provides that a “referral agency’s contract
13 may include a fee or fees to be paid *by the client* for utilizing the referral agency.” (Labor
14 Code § 2777(b)(3)(B), emphasis added.) Nothing in the statute forecloses a referral
15 agency from charging a fee on a per-project basis and thus achieving financial results
16 based on the projects filled by service providers. The free market settles on economically
17 rational fee structures, not courts.

18 Plaintiffs’ reply brief contends that Handy cannot satisfy Section 2777(a)(10)
19 because it proposes an amount for each project that the Pros are free to take or leave
20 rather than allowing the Pros to propose the amount they are willing to charge on each
21 project. (Reply Br. at 7.) Under Plaintiffs’ reading of the statute, Handy would be
22 required to post projects from customers on its platform, allow Pros to bid on those
23 projects, wait for the customer to choose between competing bids, and then facilitate the
24 contract at the agreed-upon amount. That pricing method is certainly *allowable* under
25 Section 2777, but there is little practical difference between that method and the
26 streamlined process utilized here allowing Pros to decide whether to take particular
27 projects at certain prices. In either scenario, Pros decide how much they are willing to

1 accept for a project and thus functionally “set[] their own rates.” (Labor Code
2 § 2777(a)(10).) What Section 2777(a)(10) prohibits is requiring a service provider to
3 accept a project *without knowing*—and thus without approving—the fee they will be
4 paid for the project. Handy is not alleged to have done that.

5 Plaintiffs’ contention that Handy should be treated as an employer because it does
6 “not sell software to customers,” also lacks any footing in the statute. (Mot. at 21.)
7 Section 2777 provides a referral exemption, not a software exemption. And Plaintiffs’
8 assertion that “Pros perform the cleaning or handyman services that Handy sells” (*Id.* at
9 22), is simply *ipse dixit*. Handy does not “sell” cleaning services—it connects customers
10 who need that service to Pros who provide it. No referral agency could long exist without
11 third-party service providers performing the “exact services” offered through the referral
12 agency. (*Id.*) Yet the Legislature has clearly indicated that such referral services are
13 valuable and should not be subject to the *Dynamex* test.

14 Nor is Handy ineligible for the referral services exemption because it uses a “rating
15 system” that allows customers to provide feedback to Pros. (*Id.* at 24.) A referral agency
16 is valuable to customers precisely because it allows them to locate and contract with
17 *reliable* service providers. Customers turn to Handy and other referral agencies because
18 it is extremely difficult for individuals to tell the difference between quality service
19 providers with a record of satisfied customers, and inexperienced, fly-by-night service
20 providers with little interest in developing a long-term business. Nearly every online
21 marketplace includes rating systems so that purchasers of goods and services can choose
22 among different sellers. A rating system fits squarely within the “administrative services
23 ancillary to the service provider’s business operation,” as a service provider cannot
24 meaningfully rate either itself or its competitors. (Labor Code § 2777(b)(3)(A).)

25 Plaintiffs suggest that Handy should be subject to *Dynamex* because it retains the
26 power to suspend or deactivate Pros for bad performance. (Mot. at 24.) But nothing in
27 Section 2777 prohibits a referral agency from screening the service providers it refers to

1 clients. A referral agency that refers a house cleaner who routinely damages furniture
2 would be worthless to the customer. The whole point of a referral service is to relieve
3 customers of the burden of finding and vetting a service provider. Referral agencies
4 therefore must be allowed to exercise some discretion over which providers they are
5 willing to refer. Indeed, the statute *requires* referral agencies to keep every service
6 provider’s business license or business tax registration on file. (Labor Code
7 § 2777(a)(2).) The Legislature clearly did not want referral agencies sending unqualified
8 or unlicensed individuals to clients’ homes. Handy’s discretion to remove from its
9 platform service providers who consistently fail to show up to projects or who damage
10 customers’ property is thus perfectly consistent with the statutory scheme.

11 In the end, Plaintiffs’ evidence shows only that Handy runs an effective,
12 economically rational, and high-quality referral service that is attractive to service
13 providers and clients alike. The referral services exemption was designed to protect
14 precisely such referral agencies from overzealous enforcement.

15 **C. A Preliminary Injunction on This Record Would Have a Chilling**
16 **Effect on Other Lawful Businesses.**

17 At a minimum, Handy should be afforded the opportunity to present its case to the
18 factfinder before it is required to make fundamental changes to its business operations.
19 That course of action would be especially prudent here, given the diversity of services
20 Pros provide and the various ways in which Pros have organized their businesses. The
21 record in this case is likely to be extensive, and Handy should not be required to prove
22 its entitlement to the exemption in a preliminary injunction proceeding.

23 Plaintiffs note that the referral agency has the burden of proving that the exemption
24 applies (Reply Br. at 6; Labor Code §2777(a)), but it is deeply unfair to require a referral
25 agency to carry that burden in this procedural posture, where Plaintiffs bear the burden
26 of proving likelihood of success and did not even attempt to address the central issue
27 until their reply brief. Granting a preliminary injunction here would sanction Plaintiffs’
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1 strategy of ambushing lawful referral agencies with unexpected complaints and
2 preliminary injunction motions and improperly shifting the burden to those agencies to
3 disprove likelihood of success on the merits when defending against those motions—
4 thereby ensuring more such actions in the future.

5 A proliferation of such actions would greatly diminish the value of referral
6 agencies and cause many to fail. After all, if other referral agencies know that their
7 business models can be enjoined before they can properly defend themselves on the
8 merits, they may reasonably decide not to invest in their platforms. It is one thing to
9 know that your business model may be enjoined after discovery and a full trial. It is quite
10 another to know that a court may preliminarily enjoin your business at the behest of an
11 aggressive government entity based on the mere *assertion* that the ABC test applies—
12 unless you can prove your entitlement to the referral services exemption in your
13 opposition brief. A preliminary injunction here would thus have a profound chilling
14 effect on other lawful businesses that believe themselves protected by the referral
15 services exemption.

16 **III. CONCLUSION**

17 For the foregoing reasons, this Court should deny Plaintiffs’ motion for a
18 preliminary injunction.

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20 Dated: September 10, 2021

Respectfully submitted,

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22
23 /s/ Robert E. Dunn

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