CASE NO. 18-15386

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAEF LAWSON, individually and on behalf of all other similarly situated individuals, and in his capacity as Private Attorney General Representative,
Plaintiff-Appellant

v.

GRUBHUB HOLDINGS INC. and GRUBHUB INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:15-cv-05128-JSC
The Honorable Jacqueline Scott Corley

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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/s/ Adam G. Unikowsky

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

No party opposes the filing of this amicus brief.

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving labor and employment matters.

Amicus has a strong interest in this proceeding. *Amicus*'s members use independent contractors extensively and rely on the flexibility of independent contractor relationships, which has promoted innovation and growth for *amicus*'s members and contractors alike. Classifying drivers who use the Grubhub app as

[1] Pursuant to Federal Rule of Appellate Procedure 29, *amicus* certifies that all parties have consented to the filing of this brief. *Amicus* further certifies that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

"employees" would substantially impair the ability of *amicus*'s members to enter into such economic relationships. *Amicus* therefore encourages this Court to hold that such drivers are not "employees" for purposes of California wage orders.

SUMMARY OF ARGUMENT

This case concerns the "gig" economy—that is, the economic activity that arises when entrepreneurs seeking to accept "gigs" can find customers via the Internet. Such entrepreneurs differ from employees of ordinary companies because they can accept "gigs" if and when they please, rather than being having their wages and hours dictated by an employer. The "gig" economy is nothing new—independent contractors have always been a critical part of the economy. But the Internet has opened the door for millions of entrepreneurs to strike out on their own without being tied down to a traditional job. Today, a person who wants to rent out their house, design software, be a personal trainer, or undertake innumerable other activities can use an Internet product to find customers. Or—relevant here—a person who wants to earn extra money making deliveries can find customers by taking advantage of Grubhub. Such independent workers benefit greatly from the flexibility of products like the Grubhub app. They can earn a living while working where and when they want, while using other apps if they so choose to find other customers.

Classifying such independent contractors as "employees" would be harmful to Internet businesses, independent contractors, and consumers. Internet businesses would be subject to unexpected liability and cumbersome regulatory requirements. Their contractors would suffer as well because such businesses might be forced to micromanage those contractors to prevent labor costs from ballooning. For instance, if the Court classified Grubhub as the employer of drivers who use the Grubhub app, then Grubhub might be forced to ban those drivers from working for more than 40 hours a week, ban drivers from keeping the app open if they are not actively seeking customers, or force them to drive in high-volume areas—thus eliminating the flexibility that is the very reason drivers take advantage of Grubhub in the first place.

The law does not require that result. Grubhub has advanced numerous arguments for affirmance that do not depend on the classification of Grubhub drivers under the California Supreme Court's "ABC test." If the Court reaches that question, however, it should hold that Grubhub drivers are independent contractors under that test. The "ABC test" was designed to sweep in traditional employers who relax control over their employees as a mechanism to avoid wage-and-hour laws. It was not designed for platforms like Grubhub, which are based on the fundamentally different business model of matching restaurants, drivers, and consumers. Thus, under all three prongs of the "ABC test," Grubhub is not an employer. First, it exercises virtually no control over drivers' activities. Second, it is not in the driving

business; it is in the technology business. Third, Plaintiff and similarly situated drivers use Grubhub and other apps as a platform to promote their own driving businesses. Classifying drivers as independent contractors would also be consistent with the practical justifications for the "ABC test." The test was designed to prevent employers from manipulating the work conditions of economically dependent employees to avoid wage-and-hour laws. But Grubhub does not manipulate the work conditions of drivers, and drivers—who have the unrestricted right to use multiple apps simultaneously—are not economically dependent on Grubhub.

ARGUMENT

The Chamber agrees fully with all of Grubhub's arguments for affirmance. In particular, the Chamber agrees that the "ABC test" from *Dynamex Operations, West Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), should not apply to this case. *Amicus* further agrees that under *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), drivers who use the Grubhub app are independent contractors, not employees. Finally, the Chamber agrees that even under the "ABC test," Plaintiff did not prove the essential elements of his claim. Therefore, it is unnecessary to decide whether Plaintiff is an "employee" under that test.

But if the Court reaches the question of whether Plaintiff is an employee under the "ABC test," it should answer that question in the negative. The "ABC test" was designed to prevent employers from avoiding their labor-law obligations by ceding

control over their employees' day-to-day activities. The test's definition of an "employee," though broad, does not sweep in contractors who use apps in order to find customers. Thus, although the Court should not reach the question of whether Plaintiff is an "employee" under the "ABC test," it should affirm even if it does reach that question.

I. The Gig Economy Has Created Millions Of Economic Opportunities For Independent Contractors.

This case requires the Court to determine the legal status of participants in the so-called "gig economy"—that is, the economy that allows entrepreneurs to accept "gigs" if and when they please, rather than being tied down to particular jobs requiring them to work a set number of hours per day at their employer's direction. The gig economy is nothing new—independent contractors pursued gigs long before the Internet was invented. But by facilitating the matching of entrepreneurs and their customers, the Internet has dramatically expanded the gig economy, to the benefit of both the gig economy's suppliers and its customers.

"Independent contractor arrangements are commonplace throughout the U.S. economy, from computer software engineers and emergency room physicians to home health care providers and timber harvesters." Jeffrey A. Eisenach, Navigant Economics, *The Role of Independent Contractors in the U.S. Economy*, at i (2010). "Independent contracting is especially prevalent in such broad industry categories as agriculture, construction and professional services, and in a diverse set of specific

occupations, including cab drivers, construction workers, emergency room physicians, financial advisors, mystery shoppers, and truck drivers." *Id.*

As of 2017 there were more than 40 million independent workers in the United States—people "of all ages, skill, and income levels—consultants, freelancers, contractors, temporary or on-call workers—who work independently to build businesses, develop their careers, pursue passions and/or to supplement their incomes." MBO Partners, *The State of Independence In America: Rising Confidence Amid A Maturing Market* 2 (2017) ("*State of Independence*"). That segment of the workforce is "multi-faceted, economically powerful—and increasingly confident." *Id.* It is growing rapidly, too, at a rate three times faster than the overall economy. Freelancers Union & Upwork, *Freelancing In America: 2017* at 3 (2017) ("*Freelancing In America*"). If that growth rate holds, independent workers may be the majority of the U.S. workforce by 2027. *Id.*

Online products that facilitate the process of matching providers with customers have spurred the dramatic growth of the gig economy. These products are remarkably diverse. Some focus on specific areas, such as Gigster (software engineering), Airbnb (short term accommodations), and Postmates (local courier services). Others encompass a wider range of services, such as Thumbtack (home, business, wellness, creative design), Uber and Lyft (ride sharing, food delivery), and Upwork (accounting, copy editing, personal fitness). Still others are involved in

commercial real estate, healthcare, handyman services, pet care, legal services, finance, fundraising, customer services, logistics, and management consulting.

Thanks to the innovations of these companies and others, "millions of Americans [w]ork in jobs that didn't even exist 10 or 20 years ago." President Barack Obama, Remarks by the President in State of the Union Address (Jan. 20, 2015). The ranks of those workers continues to swell. In 2017, the number of people working for an Internet-based company at least once per month "soared 23 percent to 12.9 million, up from 10.5 million in 2016." *State of Independence* 3.

The rise of the gig economy has created new job opportunities for workers of all stripes, especially those who want or need flexible arrangements. By working independently—when, where, how, and for whom they wish—workers who are constrained from taking traditional 9-to-5 jobs can nevertheless boost their income. A parent can work around school functions; a retiree can supplement savings; an artist can work in between shows; a person with a long commute can make extra money by driving someone else home. Independent work allows workers to take control of their earning potential and decide how to spend their time in a way they deem best. Many in the independent workforce take advantage of this flexibility. Roughly half of independent contractors use that job to supplement traditional employment. *State of Independence* 7.

Meanwhile, many gig-economy workers choose to contract with multiple companies simultaneously to ensure the greatest volume of work. Independent contractors may take full advantage of the flexible working relationship by "toggling back and forth between different … companies and personal clients, and by deciding how best to obtain business" such that profits are "increased through their initiative, judgment, or foresight—all attributes of the typical independent contractor." *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 144 (2d Cir. 2017) (internal quotation marks and alterations omitted). A driver, for example, could take a job for a traditional black-car company for one trip, find a passenger using Uber's app for the next trip, take a personal client to the airport after that, and then finally deliver a dinner using Grubhub's app.

This independent-contractor arrangement offers real benefits to workers. Because independent contractors own the necessary tools and equipment for the job, they have the flexibility and freedom to deploy those resources however they see fit. That provides them with "more control over their economic destiny" because they are empowered "to choose [their] own hours, clients and manner in which the work is completed." Steven Cohen & William B. Eimicke, Colum. Sch. of Int'l Affairs, *Independent Contracting Policy and Management Analysis* 16 (Aug. 2013) ("*Independent Contracting*"). In turn, that independence and autonomy leads the overwhelming majority of independent workers to report being satisfied in the

independent contractor relationship. *See, e.g.*, Eisenach, *supra* at 33-34; *Freelancing In America* 4; Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 71 ILR Rev. 705 (2018); Morning Consult & Chamber Technology Engagement Center, *New Economy Report: Polling Presentation* 26, 27 (Feb. 22, 2018) ("*New Economy Report*") (finding 79% of independent workers describe working in the new economy positively and 72% have seen their financial situation improve since working in the gig economy). Independent workers also report feeling added security from having the power to choose diverse clients, rather than a single employer, and to control their own costs and benefits. *Freelancing In America* at 4; *New Economy Report* 22.

The rise of the gig economy has also benefited the public. The Federal Trade Commission has noted that ridesharing companies like Uber and Lyft are "providing customers with new ways to more easily locate, arrange, and pay for passenger motor vehicle transportation services," allocating transportation resources more efficiently, helping to "meet unmet demand for passenger motor vehicle transportation services," and "improv[ing] service in traditionally underserved areas." Federal Trade Commission, Comments on Chicago Proposed Ordinance 02014-1367, at 3 (Apr. 15, 2014). The public agrees, as "users are in near-universal agreement that ride-hailing saves them time and stress, and that these services offer good jobs for

people who prioritize flexible working hours." Aaron Smith, Pew Research Center, *Shared, Collaborative, and On Demand: The New Digital Economy* 5 (2016); *see also New Economy Report* 21 (reporting that most adults recognize the gig economy's positive impact on workers in need of a flexible environment).

II. Deeming Gig Economy Workers Employees Would Have Major Negative Impacts On Businesses, Labor, And The Economy.

Classifying gig-economy businesses as "employers" and their independent contractors as "employees" would have negative consequences for businesses, contractors, and consumers.

From the business perspective, deeming drivers to be employees would drive up costs and stifle innovation. Technology products like the Grubhub app are successful precisely because they do *not* create traditional employer-employee relationships, but instead allow independent workers and independent consumers to find each other. For instance, eBay transformed the retail industry by creating a new business model in which it does not employ sellers in retail stores, but instead allows independent buyers and sellers to find each other. This business model allowed willing buyers to find willing sellers and enter into mutually agreeable transactions that could never have occurred in a world of big-box retail stores. Grubhub, likewise, has adopted a business model which, among other things, allows restaurants who wish to sell food, drivers who wish to deliver food, and consumers who want to eat food to find each other. Such a business model is more attractive to

both drivers and consumers than the traditional business model of top-down food delivery companies in which employers tell employees what to do.

Yet Plaintiff now asks the Court to declare drivers who use the Grubhub app to be Grubhub's "employees"—and presumably also the employees of every other app that those drivers use to make extra money. Given that many gig economy workers (including Plaintiff) use multiple apps, often simultaneously, the result would be that every worker has numerous employers—and every app has enormous numbers of employees. Such a ruling would prevent technology companies from pursuing the business models that have transformed modern commerce—business models in which the technology companies sell an app and are not merely Internet versions of retail stores, taxicab companies, or food delivery companies.

Independent contractors in the gig economy, too, would be worse off if they were declared to be employees. This is because if app designers are deemed to be employers of independent drivers, they will be forced to act like employers—to their "employees'" detriment. The high cost of compliance with labor laws and regulations will cause companies to sharply limit the number of people who work on their product. *See* Nat'l Retail Fed'n & Oxford Econs., *Rethinking Overtime: How Increasing Overtime Exemption Thresholds Will Affect The Retail And Restaurant Industries* 20 (2014) ("*Rethinking Overtime*"); *see also, e.g.*, Nat'l Ass'n of Realtors, *Independent Contractor Status in Real Estate - 2015 White Paper* 10

(updated July 14, 2016) ("*NAR White Paper*") ("A resulting shift away from the independent contractor model may result in a significant reduction in the number of real estate agents, as brokers struggle with the increased costs of employing agents."). The employees that remain would lose the flexibility they enjoy as independent contractors. *See Freelancing In America* 4; Hall & Krueger, 71 ILR Rev. at 713; *New Economy Report* 26, 27; *Independent Contracting* 16. Employers would no longer allow workers to set their own schedules and work without advance notice whenever, wherever, and for however long they wish, lest the company's labor costs balloon unpredictably. *See Rethinking Overtime* at 4, 20; *see also, e.g.*, *NAR White Paper* 10-11 ("brokers would have to assume heightened control over real estate salespeople, resulting in significant decrease in the freedom and flexibility that real estate agents currently enjoy in an independent contractor relationship.").

In particular, if drivers using the Grubhub app were classified as employees eligible for overtime pay, Grubhub might be forced to limit them to 40 hours per week. If they are eligible for minimum wage and declare all of their time with the app activated to be compensable work time, Grubhub might be forced to micromanage when the app is turned on or off. For instance, Grubhub might prevent the app from being turned on if the drivers are in an area unlikely to get delivery offers, or force drivers to be in high-yield areas at particular times of day. This

would eliminate one of Grubhub's fundamental selling points for drivers—they can turn the app on when they want, where they want.

Consumers would also be hurt if gig economy participants were considered employees. If Grubhub is forced to cut the number of drivers working for it, or prevent drivers from working more than 40 hours per week, consumers may become unable to obtain the late-night dinner that Grubhub previously facilitated. Further, classifying gig economy participants as employees would make it more logistically challenging to launch new Internet matching apps, to the detriment of the economy as a whole. Studies have shown that the "economic benefits of independent contracting … are substantial" and that making "it more difficult for workers and firms to enter into such arrangements would thus result in slower economic growth, lower levels of employment and job creation, and lower consumer welfare overall." Eisenach, *supra* at ii; *see also Independent Contracting* 85.

In short, requiring companies to classify independent contractors as employees creates a lose-lose-lose situation that is bad for businesses, workers, and consumers. This Court should avoid that result by holding that drivers who use the Grubhub app are independent contractors and not employees.

III. Drivers Who Use The Grubhub App Are Not Employees For Purposes Of California Wage Orders.

Classifying drivers who use the Grubhub app as independent contractors is not only good policy, it is consistent with the "ABC test" adopted in *Dynamex*. For

the reasons explained by Grubhub, the Court need not reach the classification of Grubhub's drivers under *Dynamex*. But if the Court reaches that question, then for conceptual, doctrinal, and practical reasons, the Court should hold that Grubhub's drivers are independent contractors under California law.

A. The "ABC test" was not designed for gig economy apps.

The basic reason that the "ABC test" does not sweep in drivers who use Grubhub is that the "ABC test" is aimed at solving a fundamentally different problem. The "ABC test" is designed to cover workers for companies that have the same basic business model as other companies subject to employee-protection labor laws, but seek to avoid application of those laws by ceding a degree of control over their employees' activities. For instance, a "clothing manufacturing company" that "hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company," may be an employer under the "ABC test." *Dynamex*, 4 Cal. 5th at 959-60. Likewise, "when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes," *id.* at 960, it may be an employer in California. In both cases, the fundamental character of the business does not change—a clothing manufacturer or bakery that exercises looser control over its employees is still a clothing manufacturer or bakery. The "ABC test" is designed to ensure that this relinquishment of control over employees, standing alone, is insufficient to avoid application of state wage-and-hour laws.

Gig economy platforms like Grubhub and Uber do not fit that model. Grubhub is not a traditional food-delivery service that set up an app and decided to micromanage its employees a little bit less. Grubhub is, from the ground up, an Internet platform. Its purpose is to create a convenient mechanism for restaurants, drivers, and customers to find each other. Just as one would not say that eBay "employs" the people who use it to sell their antiques, or that Airbnb "employs" the people who use it to find renters, Grubhub does not "employ" the restaurants, drivers, or customers who use it to find each other. While the "ABC test" undoubtedly expands the definition of an "employee" beyond its common-law roots, it was not designed to characterize Grubhub's users as "employees."

Indeed, Grubhub's business model is strikingly different from the business model of Dynamex itself.[2] The California Supreme Court characterized Dynamex as a "package and document delivery company." 4 Cal. 5th at 914. As the court explained, "[p]rior to 2004, Dynamex classified as employees drivers who allegedly performed similar pickup and delivery work as the current drivers perform." *Id.* "In 2004, however, Dynamex adopted a new policy and contractual arrangement under

[2] In *Dynamex*, the California Supreme Court did not decide whether Dynamex was an employer under the "ABC test"—it decided only that a class should be certified to answer that question. 4 Cal. 5th at 966-67. The Chamber does not contend that Dynamex is an "employer." The Chamber merely observes that even if the California courts do ultimately deem Dynamex an employer, that would not affect the classification of Grubhub.

which all drivers are considered independent contractors rather than employees." *Id.* Dynamex's new "policy and contractual arrangement," *id.*, did not alter that core model, but gave employees more freedom to choose their own schedule and required them, among other things, to buy their own cars. *See id.* at 918.

Grubhub is not, and never was, a "delivery company." It simply provides technology to help people who want to sell their labor find people who want to buy it. As Grubhub's brief recounts, drivers can declare themselves "available" whenever they want; accept or reject delivery orders at will; and take as much time as they want to complete the delivery. Grubhub Br. 6-7. They can even make stops during the delivery to find customers using other apps. *Id.* Drivers are not employees of Grubhub; they are *users* of Grubhub, taking advantage of it to find customers. Of course, drivers do not pay for use of the app, but neither do the customers who eat the food. This does not change the fact that Grubhub offers a service to both the drivers and the customers.

B. Doctrinally, Plaintiff is not an employee under the "ABC test."

An analysis of the three prongs of the "ABC test" confirms that drivers who use Grubhub are not employees under California law.

"A" prong. First, drivers who use Grubhub are "free from the control and direction of the hirer in connection with the performance of the work." *Dynamex*, 4 Cal. 5th at 916-17. As the District Court explained in detail, the degree of control

that Grubhub exercises over drivers is remarkably lax. Grubhub "did not control how he made the deliveries—whether by car, motorcycle, scooter or bicycle." ER-0020. "Nor did it control the condition of the mode of transportation Mr. Lawson chose. Grubhub never inspected or even saw a photograph of Mr. Lawson's vehicle." *Id.* "Grubhub also did not control Mr. Lawson's appearance while he was making Grubhub deliveries." *Id.* "Grubhub did not require Mr. Lawson to undergo any particular training or orientation. … indeed, no Grubhub employee ever met Mr. Lawson in person before this lawsuit." *Id.* "Grubhub had no control over whom, if anyone, Mr. Lawson wanted to accompany him on his deliveries." ER-0021. "Mr. Lawson had complete control of his work schedule: Grubhub could not make him work and could not count on him to work." ER-0022. "Grubhub also did not control how and when Mr. Lawson delivered the restaurant orders he chose to accept." *Id.* "Mr. Lawson picked his own route; indeed, he could make as many stops as he desired and even make a delivery for another company while delivering for Grubhub, and on many occasions he made deliveries for Grubhub's restaurant delivery competitors while working a Grubhub scheduled block." *Id.* "Grubhub also did not prepare performance evaluations of Mr. Lawson." ER-0023. "No one at Grubhub was Mr. Lawson's boss or supervisor." *Id.*

Against all this, Plaintiff argues that he is an employee for two reasons: "GrubHub retained the right to terminate its drivers in its discretion," and "GrubHub

unilaterally determines the amount the drivers are paid, which is generally on an hourly basis." Plaintiff Br. 22-23. Neither factor establishes, or even suggests, that Plaintiff is Grubhub's employee. Companies routinely retain the authority to terminate their independent contractors. A company can dismiss its plumber or its outside counsel at will, but that does not transform them into the company's employees. Likewise, dictating wages—even unilaterally—does not make someone an employer. A large company might announce publicly that it will pay only a particular hourly rate for its plumber or its outside counsel, yet the plumber or outside counsel that works under those conditions is not an employee. Conversely, small businesses routinely haggle with new employees over salaries, yet these negotiations do not transform those employees into independent contractors. The critical point is that neither termination, nor wage negotiations, have anything to do with "control and direction of the hirer *in connection with the performance of the work*." *Dynamex*, 4 Cal. 5th at 916-17 (emphasis added). Wage negotiations occur before the work is done; termination may cause the work to stop; yet neither is evidence of control of the performance of the work itself. Thus, Plaintiff points to *no* evidence even suggesting that he is an employee under the "A" prong of the "ABC test."

"B" prong. Drivers who use Grubhub perform "work that is outside the usual course of the hiring entity's business." *Dynamex*, 4 Cal. 5th at 917. To analyze this

factor, the court must determine what the "hiring entity's business" *is.* And as previously explained, Grubhub's business is the creation of an app that, among other things, allows restaurants, drivers, and customers to find each other. Thus, a software designer responsible for building and maintaining the Grubhub app may be a Grubhub "employee," because his work advances Grubhub's core app business. Conversely, a driver who takes advantage of Grubhub's app does not work in the "hiring entity's business." A driver is no more Grubhub's employee than a restaurant proprietor who uses Grubhub to find both drivers and customers.

Plaintiff insists that Grubhub is in the "business" of "food delivery," relying heavily on the District Court's conclusion that "food delivery" is a "regular part of [Grubhub's] business in Los Angeles." ER-0030. But as Grubhub explains, the District Court analyzed this issue under the *Borello* test and never had any occasion to consider the distinct "B" prong of the "ABC test." Not only did the District Court apply a different legal standard, but the evidentiary record and the parties' arguments would undoubtedly have been different if the parties had been aware that the California Supreme Court would change the law. If the Court does not affirm, then rather than hold that the District Court accidentally resolved the classification question based on a subsequent state-court decision that the District Court could not have foreseen, the Court should at most remand to give the District Court a fair opportunity to resolve the question under the correct standard.

In any event, the District Court is wrong: food delivery is not Grubhub's business. The District Court did not address—indeed, it appeared wholly unaware of—Grubhub's core theory that it is a technology business, as opposed to a food delivery business. Instead, the District Court appeared to hold that Grubhub was in the food delivery business merely because it profits from food delivery. But this reasoning stretches far too broadly. This reasoning would establish that eBay is in the retail business—and employs all the people who sell items using the eBay platform—merely because it profits from those sales. Likewise, it would establish that Airbnb is in the hotel business—and employs all the people who rent out their rooms—merely because it profits from such rentals. But this cannot be right. eBay and Airbnb are services that bring people together, rather than services that employ the persons on one side of the transaction. Grubhub is no different.

The line between a "matching" service and an employer may in some cases be blurry, but it is a line that must be drawn to avoid absurd outcomes such as deeming eBay and Airbnb employers of the sellers who use those services. But neither the District Court nor Plaintiff offer any indication of where that line should be drawn or why Grubhub falls on the "employer" side. They merely assert that because Grubhub profits from food delivery, it is in the food delivery business. It is critically important that this Court not make the same error, lest district courts in this circuit be overwhelmed by class actions characterizing anyone who has ever profited

from using an Internet matching service as an employee. The Court should clearly delineate the distinction between a matching service and an employer and hold that Grubhub is a matching service—or, at a minimum, remand for the parties to develop more facts to resolve this inquiry.

"C" prong. Finally, Plaintiff and similarly situated drivers are "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *Dynamex*, 4 Cal. 5th at 917. Plaintiff's independent occupation is to be a driver, and he finds customers using many services—one of which is Grubhub.

Plaintiff argues that the District Court has already rejected this contention, pointing to the District Court's statement that Plaintiff "did not run a delivery business of which Grubhub was simply one client," but instead "worked multiple low-wage jobs in addition to his nascent acting career." Plaintiff Br. 17 (quoting ER0027). Again, however, the District Court did not analyze the *Dynamex* test, and the parties did not create an evidentiary record on the question of whether Plaintiff, or other class members, have an "independently established trade, occupation, or business." *Dynamex*, 4 Cal. 5th at 917. At a minimum, a remand is necessary for the parties to create a record under the correct legal standard.

In any event, the record is sufficient to show that Plaintiff has an "independently established trade, occupation, or business." Plaintiff Br. 6. The

record establishes that "[p]rior to performing Grubhub food deliveries, Mr. Lawson worked for other so-called 'gig economy' companies, including Lyft, Uber, Postmates, and Caviar." ER-0005. Further, Plaintiff "also worked as a delivery driver for Postmates and Caviar, two of Grubhub's food delivery competitors, during the same period he worked for Grubhub. He often accessed the Postmates and Caviar apps during his Grubhub blocks and sometimes made deliveries for Postmates and Caviar while working a scheduled Grubhub block." ER-0013. Because Plaintiff customarily drove using *numerous* apps—not just Grubhub—he is not an employee of any of those apps. Just as a plumber customarily fixes the pipes of numerous buildings without being the "employee" of all of those buildings' proprietors, or an outside counsel customarily handles the legal work of multiple companies without being those companies' "employees," Plaintiff uses numerous apps to find customers but is not employed by any of those apps.

In arguing to the contrary, Plaintiff points to language in *Dynamex* that an independent contractor "generally takes the usual steps to establish and promote his or her independent business – for example, through incorporation, licensure advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers and the like." Plaintiff Br. 18 (quoting *Dynamex*, 4 Cal. 5th at 962). According to Plaintiff, the fact that he does

not advertise or promote his business, but instead takes advantage of apps to find customers, demonstrates that he is an employee of those apps.

Such reasoning may have been persuasive in the past, but it is not persuasive today. At the time the "ABC test" was developed, there were only two ways to find work: through the active promotion of one's *own* business, or through affiliation with an employer. Thus, at that time, if a worker was not actively promoting one's work through advertising, promotions, and the like, then it was fair to infer that he must not be in business for himself, and instead dependent on an employer.

But that is not true anymore. The beauty of services like eBay, Airbnb, and Grubhub is that a person can go into business for himself without making business cards or airing advertisements—he can merely sign up for a matching platform and the business will come. A person who wants to rent out his apartment does not need to put an ad in the Yellow Pages—he can sign up for Airbnb and find renters. Likewise, a person who wants to start a delivery business does not need to advertise and search for customers—he can find them using an app. But the fact that an app makes it easier to start a business does not make the business owner an employee of the app.

C. Practical considerations warrant classifying Grubhub's drivers as independent contractors.

The practical justifications for the "ABC test" support classifying drivers as independent contractors.

"Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions." *Dynamex*, 4 Cal. 5th at 952. This divergence in "bargaining power" is the core reason for wage-and-hour statutes. Employees need to put food on the table every week. In many areas of the country, few employers exist, and it is difficult to move. An employee who wants to keep her family where it is has little choice but to accept the local employers' conditions of employment. Even in areas where there are many employers, many employees live paycheck-to-paycheck and are unwilling to quit their jobs based on the speculative possibility of obtaining higher pay elsewhere. This divergence in bargaining power creates the risk that employees will accept work for substandard wages or working conditions. Wage and hour statutes were designed to correct that bargaining imbalance.

But that justification does not make sense in the context of services like Grubhub. Overtime rules protect employees from abusive overtime requirements. But drivers can use Grubhub whenever they want, for as long as they want. That makes the flexible relationship between drivers and Grubhub very different from the relationships that form the basis for wage-and-hour laws.

Moreover, drivers have significant control over the amount of money they earn. Drivers largely determine the amount of revenue they take in from Grubhub, based on whether, when, where, and for how long they choose to drive. Further, drivers must make substantial out-of-pocket capital investments—and they decide how to manage those investments. The driver decides whether to buy, lease, or rent the vehicle they use, and on what terms (subject to market availability). And the driver chooses how to manage carrying costs, like gasoline, vehicle maintenance and upkeep, and insurance. The ability to turn a greater profit by operating more efficiently is a classic hallmark of an independent contractor. By contrast, wage-and-hour orders are intended to protect employees who *cannot* earn a greater profit by operating more efficiently, but whose hours and wages are at the discretion of an employer that enjoys greater bargaining power.

Workers also benefit from their capital investments even after they stop using the Grubhub app. An employee of a trucking company who quits his job cannot take the truck with him. By contrast, a person who buys a car and use the Grubhub app can keep the car even after he stops using the app. This decreases drivers' economic dependence on Grubhub and decreases the need for a wage-and-hour law.

The California Supreme Court's specific justifications for adopting the "ABC test," as opposed to the multifactor test used by federal courts under the FLSA, also support classifying Grubhub's drivers as independent contractors. The court stated

that a "multifactor, 'all the circumstances' standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision." *Dynamex*, 4 Cal. 5th at 954. But ruling in Plaintiff's favor would muddy rather than clarify the law. There assuredly has to be *some* point where an app relinquishes so much control over its users' activities that it becomes a matching service rather than an employer. It seems obvious, for instance, that Craigslist does not "employ" the people who post on its bulletin boards looking for customers. Declaring Grubhub to be an "employer," despite the extraordinary freedom it grants its drivers and its platform-based business model, will leave the line between matching services and employers shrouded in obscurity. By contrast, if the court rules for Grubhub and announces a general rule that Internet-based matching services are not "employers," such a ruling would, for practical purposes, resolve the classification of numerous services, including Uber, Lyft, and others. Thus, such a ruling would clarify the law considerably.

The California Supreme Court also emphasized that "the use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying the working conditions of individual workers

within such categories with an eye to the many circumstances that may be relevant under the multifactor standard." *Dynamex*, 4 Cal. 5th at 955. That justification does not apply to Grubhub and similar apps. Grubhub neither divides "its work force into disparate categories" nor varies the "working conditions" of drivers with an eye to any multifactor test. *Id.* Rather, Grubhub offers a tool for drivers to find customers without imposing any "working conditions" *at all*.

The California Supreme Court's reasoning makes clear that the "ABC test" was not designed to apply to apps like Grubhub, and the Court should therefore hold that drivers who use Grubhub are not "employees" under that test.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,432 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5).

Dated: January 16, 2019 /s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that that on January 16, 2019, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: January 16, 2019 /s/ Adam G. Unikowsky