A160701 & A160706 (CONSOLIDATED)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

LYFT, INC. and UBER TECHNOLOGIES, INC.,
Defendants and Appellants.

APPEAL FROM SAN FRANCISCO COUNTY SUPERIOR COURT
ETHAN SCHULMAN, JUDGE • CASE NO. CGC-20-584402

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CALIFORNIA CHAMBER OF COMMERCE, THE NATIONAL RETAIL FEDERATION, AND THE HR POLICY ASSOCIATION IN SUPPORT OF APPELLANTS LYFT, INC. AND UBER TECHNOLOGIES, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.200(c), the Chamber of Commerce of the United States of America (the U.S. Chamber), the California Chamber of Commerce (CalChamber), the National Retail Federation (NRF), and the HR Policy Association (HRPA) (collectively, amici) request permission to file the attached amici curiae brief in support of appellants Lyft, Inc. and Uber Technologies, Inc.[1]

The U.S. Chamber is the world's largest business federation. It represents approximately 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—including throughout California. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the U.S. 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.

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[1] No party or counsel for a party in the pending appeal authored the proposed amici curiae brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution to fund the preparation or submission of the brief other than the amici curiae, their members, or their counsel. (See Cal. Rules of Court, rule 8.520(f)(4).)

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing businesses on a broad range of legislative, regulatory, and legal issues. CalChamber participates as amicus curiae only in cases that have a significant impact on California businesses.

The NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 52 million American workers—and contributing $3.9 trillion to the annual GDP. The NRF regularly submits amicus curiae briefs in cases raising significant legal issues for the retail community

The HRPA is a public policy advocacy organization that represents the chief human resource officers of more than 390 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the

private sector workforce. Since its founding, one of the HRPA's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace. The HRPA members have closely monitored the legal developments associated with independent contractor status—particularly in California—and the HRPA has consistently advocated on behalf of its members on such issues and other important labor and employment legal developments.

Amici's members use independent contractors extensively and rely on the flexibility of independent contractor relationships—work arrangements that have promoted innovation and growth for businesses and contractors alike. In this case, the State of California seeks to upend the status quo in which gig economy drivers have long benefited from flexibly operating as independent contractors by calling for an injunction reclassifying those drivers as employees. The State's request and the trial court's ruling imposing such an injunction are based on an erroneous understanding of California law and, if adopted by this court, would substantially impair the ability of amici's members to enter into vital independent contractor relationships. Such injunctive relief also threatens to subject a broad swath of Californians to catastrophic economic consequences and to devastate California's business community.

Amici therefore have a significant interest in how this court interprets and applies California's so-called "ABC test," which governs independent contractor relationships. The trial court's

analysis of the likelihood-of-success factor for injunctive relief turned heavily on the standards which control the ABC test. Amici also have a substantial interest in whether, and if so the extent to which, injunctive relief in this case would harm the public interest given the economic devastation such relief would inflict throughout California. Consequently, amici believe this court would benefit from additional briefing on these subjects and respectfully request that this court accept and file the attached amici curiae brief addressing the foregoing subjects.

October 2, 2020

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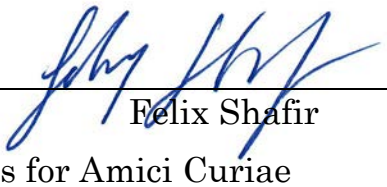
By: 
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AMICI CURIAE BRIEF

INTRODUCTION

Two years ago, *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*) held that a so-called "ABC" test derived from Massachusetts law would now govern whether California workers were employees or independent contractors for purposes of California wage order obligations. Under this test, workers can be classified as independent contractors only if their "hiring entity" demonstrates the workers meet each of three requirements. (*Id.* at pp. 956-957 & fn. 23.) These three requirements are: "(a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Id.* at pp. 955-956.) California's Legislature subsequently codified this ABC test for some (but not all) kinds of businesses by enacting Assembly Bill No. 5 (AB 5).

In this lawsuit, the State of California asserts that appellants Lyft, Inc., and Uber Technologies, Inc., have misclassified drivers as independent contractors in contravention of AB 5's ABC test. The trial court granted the State's request for injunctive relief, entering an extraordinary mandatory preliminary injunction requiring appellants to reclassify hundreds of thousands of drivers.

As appellants explain in their opening and reply briefs, the trial court's ruling should be reversed. Amici curiae the Chamber of Commerce of the United States of America, the California Chamber of Commerce, the National Retail Federation, and the HR Policy Association agree with appellants and file this brief to focus on three of the trial court's errors requiring reversal.

First, the trial court erroneously concluded that California's ABC test applies regardless of whether a business is the entity that actually hired the workers in question. This directly contravenes both *Dynamex* and AB 5, which both limit the ABC test's applicability to those businesses that were the workers' hiring entities. This hiring-entity requirement is a threshold prerequisite that must be surmounted before the ABC test applies; if the business at issue is *not* the workers' hiring entity, then the ABC test does not apply. Under this requirement, the ABC test is inapplicable here because the drivers did not provide services directly *to* appellants.

Second, the trial court wrongly decided that the State could show a likelihood of prevailing on prong B of the ABC test, which deems workers to be employees if they perform work within the usual course of the hiring entity's business. The court assessed prong B by disregarding appellants' definition of their businesses and applying its own subjective understanding of appellants' operations. But that is not the proper standard for analyzing prong B. Rather, the prong B inquiry turns on how entities define their own businesses and structure their operations in practice. Once this proper standard is applied, the State cannot

demonstrate that the drivers here are employees under prong B. Appellants are not in the business of driving passengers. Rather, they are software platforms that match people seeking to provide rides with those looking to connect with and purchase rides from drivers. Courts repeatedly have held that the workers matched up by such brokerage services do not perform work in the usual course of the brokerage's business.

Finally, the trial court erred by entering an injunction that threatens the public interest, which courts must consider when assessing whether a preliminary injunction is proper. The injunction here would result in substantial uncertainty over whether scores of reclassified drivers would be required to pay back federal benefits they received based on their independent contractor status. Worse yet, the injunction would likely result in the loss of hundreds of thousands of jobs and generate devastating economic consequences for the general public and business community that is already reeling from the COVID-19 pandemic. These public policy considerations weigh heavily against a preliminary injunction here. The trial court's order granting the injunction should be reversed.

LEGAL ARGUMENT

I. Assembly Bill No. 5's ABC test for independent contractor status does not apply where, as here, companies are not the workers' hiring entities.

A trial court may not grant a preliminary injunction unless the plaintiff can show it will ultimately prevail on the merits of its claims. (*Aiuto v. City and County of San Francisco* (2011) 201 Cal.App.4th 1347, 1361 [First Dist., Div. Four].) The trial court's preliminary injunction order concluded the State had shown a likelihood of prevailing on the merits of its claim that appellants violated AB 5. (10 AA 2901-2911.) The court erred because, in assessing the State's likelihood of success, the court incorrectly concluded that AB 5's ABC test applies even absent a threshold showing that the defendants are the workers' hiring entities and that, in any event, appellants here are the drivers' hiring entities. (See 10 AA 2904-2905.)

The trial court was wrong, and AB 5's threshold requirement is dispositive here. A company is a worker's hiring entity only if the worker provides labor or services directly *to* the company. Because drivers do not provide labor or services to appellants, appellants are not drivers' hiring entities.

A. AB 5's ABC test applies only to hiring entities.

AB 5 added California's ABC test to the Labor Code. (Assem. Bill No. 5 (2019-2020 Reg. Sess.) § 2; Stats. 2019, ch. 296, § 2.)[2] The test provides in pertinent part:

> [A] person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(Stats. 2019, ch. 296, § 2; accord, Lab. Code, § 2775, subd. (b)(1).) AB 5's plain language therefore requires a defendant to demonstrate that a worker is not an employee under the three

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[2] AB 5 added this ABC test to former Labor Code section 2750.3, applying the test to work performed after January 1, 2020. (Stats. 2019, ch. 296, § 2.) In September 2020, Assembly Bill No. 2257 (AB 2257) repealed this provision and re-codified this ABC test in Labor Code section 2775. (Assem. Bill No. 2257 (2020-2021 Reg. Sess.) § 1; Stats. 2020, ch. 38, § 1.) Although AB 2257 added new exemptions to the ABC test (*ibid.*), the ABC test's substantive requirements remained unchanged. (Compare Stats. 2019, ch. 296, § 2 with Lab. Code, § 2775, subd. (b)(1).)

prongs of the ABC test *only* if, as a threshold prerequisite, the defendant is first shown to be the worker's hiring entity. In particular, the worker must first be shown to have provided labor or services directly to the defendant. (See Legis. Counsel's Dig., Assem. Bill No. 5 (2019-2020 Reg. Sess.) Stats. 2019, ch. 296 [AB 5 codified ABC test for workers who perform services "for a hirer"].)

Notably, when the Legislature added the ABC test to the Labor Code, the Legislature said that its intent in doing so was to codify *Dynamex*. (Stats. 2019, ch. 296, § 1(d); accord, *id.*, § 1(e).) *Dynamex* never said that the ABC test applies to all economic relationships. Instead, *Dynamex* specified that the test applies solely where workers perform work for a "hiring entity." (*Dynamex*, *supra*, 4 Cal.5th at pp. 916-917, 955-957.) Specifically, the ABC test "plac[es] the burden on the *hiring entity* to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage." (*Id.* at p. 957, emphasis added.) By definition, therefore, this burden does *not* apply to a defendant who has not been shown to be such a hiring entity. This is presumably why, both in the trial court and on appeal, the State has not contested that AB 5 and *Dynamex* conditioned the ABC test's applicability on a threshold hiring-entity requirement. (See 9 AA 2617-2618; RB 42-47.)

According to the trial court, AB 5 does not impose a threshold hiring-entity requirement because "[t]he ABC test focuses on the individual worker, not on the employer." (10 AA

2904.) But only the "hiring entity" is a business tasked with establishing that each of the test's three prongs is satisfied (Stats. 2019, ch. 296, § 2; accord, Lab. Code, § 2775, subd. (b)(1)), and as discussed below, the law does not indiscriminately foist this burden upon any participant of any economic transaction. (At pp. 21-24, *post*.) After all, an entity cannot misclassify a worker it never even hired. The ABC test is inapplicable to a defendant unless, as a threshold requirement, the defendant is first shown to be a hiring entity.

B. Massachusetts law, from which California's ABC test originates, imposes the same hiring-entity requirement.

That California law restricts the ABC test's applicability exclusively to a business which has first been shown to have been a worker's hiring entity is further borne out by Massachusetts law. California's Legislature adopted the ABC test to codify *Dynamex* (*ante*, p. 19), which in turn adopted Massachusetts's ABC test. (*Dynamex*, *supra*, 4 Cal.5th at pp. 955-956 & fn. 23.) Because Massachusetts's ABC test imposes a threshold hiring entity-requirement, California's test—originating as it does in Massachusetts law—is subject to the same restriction. (See, e.g., *Canfield v. Security-First National Bank of Los Angeles* (1939) 13 Cal.2d 1, 14; *Barger v. All-Coverage Ins. Exchange* (1971) 20 Cal.App.3d 675, 680.)

Massachusetts's ABC test " 'establishes a standard to determine whether *an individual performing services for another* shall be deemed an employee or an independent contractor for

purposes of [Massachusetts's] wage statutes.' " (*Sebago v. Boston Cab Dispatch, Inc.* (Mass. 2015) 28 N.E.3d 1139, 1146 (*Sebago*), emphasis added.) Courts examine whether the "recipients of those services misclassified the plaintiffs as independent contractors" under Massachusetts's ABC test only if the plaintiffs are first found to have "provided services to the defendants" in cases involving alleged misclassification. (*Id.* at p. 1147.) Massachusetts's ABC test therefore "does not apply where the plaintiff worker did not 'provide[ ] services to the defendant.' " (*Jinks v. Credico (USA) LLC* (Mass.Super.Ct., Mar. 31, 2020, No. 1784CV02731-BLS2) 2020 WL 1989278, at p. *6 (*Jinks*) [nonpub. opn.].)

For example, in *Gallagher v. Cerebral Palsy of Mass.* (Mass.App.Ct. 2017) 86 N.E.3d 496, 497-501 (*Gallagher*), the Appeals Court of Massachusetts affirmed the dismissal of misclassification claims because the ABC test's " 'threshold' " hiring-entity requirement was not satisfied. A personal care attendant who provided in-home services to an elderly man claimed she had been misclassified as an independent contractor under Massachusetts's ABC test by a company that facilitated her work. (See *id.* at pp. 497-498.) The appellate court explained that, while the defendant earned money from an "intermediary" role by providing "facilitative services"—such as "issuing [the plaintiff's] paychecks" and "making payments into the unemployment insurance system"—the plaintiff did not provide services to this intermediary. (*Id.* at pp. 498-501.)

Likewise, in *Jinks*, a trial court dismissed misclassification claims because the " 'threshold' "can be satisfied "only where a worker provides services directly to" the defendant. (*Jinks*, *supra*, 2020 WL 1989278, at p. *6.) Individuals who worked for DFW Consultants "doing face-to-face sales for business clients of Credico (USA) LLC" claimed they had been "misclassified as independent contractors" by Credico under Massachusetts's ABC test. (*Id.* at p. *1) The court dismissed their claims against Credico because "Plaintiffs cannot be said to have provided services to Credico." (*Id.* at pp. *5-*7.)

Because AB 5 codified *Dynamex*'s adoption of the ABC test and *Dynamex* took that test from Massachusetts law, this court should hold that California's ABC test—like Massachusetts's test—applies to a defendant only if the workers are first shown to have provided services directly to that defendant.

C. The hiring-entity requirement is necessary to cabin the ABC test's application.

Absent some limiting principle, the ABC test could be applied whenever a company has virtually any economic relationship with an individual. (See *Sebago*, *supra*, 28 N.E.3d at pp. 1147-1148.) That would improperly result in workers being deemed presumptive employees, requiring countless companies to assume the default burden of rebutting this presumption under the ABC test—regardless of whether the companies hired the workers in question to provide them with services. (See *ibid.*) The threshold hiring-entity requirement operates as a necessary limiting principle that circumscribes the ABC test's reach.

Like Massachusetts's test, California's ABC test was never meant to apply to all economic relationships without limitation. When the California Supreme Court adopted Massachusetts's ABC test in *Dynamex*, the Court stressed that the test applies to a defendant only if the workers in question were hired by the defendant. (See *Dynamex*, *supra*, 4 Cal.5th at pp. 956-957 [ABC test only "plac[es] the burden" to show that a worker is an independent contractor under the test on the worker's "hiring entity"].) In other words, the ABC test applies only to certain limited relationships—everyone in the world need not make the showing with respect to anyone else in the world with whom they enjoy an economic relationship.

When the Legislature subsequently codified *Dynamex*, it likewise meant to impose the same hiring-entity limitation. As the Legislative Counsel's Digest for AB 5 explained, *Dynamex*'s presumption of employment and the ABC test applied only where the worker "performs services for a hirer" and therefore AB 5, with its intention "to codify the decision in the Dynamex case," applied only to "the hiring entity." (Legis. Counsel's Dig., Assem. Bill No. 5 (2019-2020 Reg. Sess.) Stats. 2019, ch. 296.) The Legislature is presumed to act with the " 'intent and meaning expressed in the Legislative Counsel's digest.' " (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169-1170.)

A threshold hiring-entity requirement is critical for the many businesses that enter into a diverse array of economic transactions with individuals, but do not hire those people to

provide any services to the business. Absent a hiring-entity requirement, companies that offer technology platforms allowing people voluntarily to sell their new or used products through an online marketplace could find themselves threatened with the onerous burden of rebutting a presumption that these individuals are employees. (See generally Complaint for Violations of Labor Code §§ 2698 et seq., *Inostroza v. Amazon.com Inc.* (Super. Ct. Alameda County May 29, 2020, RG20062641).) Likewise, companies that purchase products from individuals to sell in their brick-and-mortar stores or on their websites could face the same burden based on nothing more than their economic transactions with those individuals. Moreover, individuals and entities in "a vast array of industries" that "commonly elect to lease, rather than purchase, equipment that is necessary to their business operations . . . would be deemed presumptive employees of their lessors." (*Sebago*, *supra*, 28 N.E.3d at p. 1148.) The hiring-entity requirement protects businesses and courts from the burdens of such an overbroad application.[3]

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[3] The State insists that the hiring-entity requirement can be satisfied through minimal evidence of any link, however, tenuous, between a worker and the defendant. (See RB 44-46.) This court should reject that argument, which is practically the same as rejecting a hiring-entity requirement altogether because it would vest the ABC test with the same boundless application. And the authorities the State cites for its proposed standard are inapposite because they address the application of the different standard that governed independent contractor status in California *before Dynamex*. (See Lyft ARB 25-26; Uber ARB 25, fn. 5.) *Dynamex* adopted Massachusetts's ABC test to break from California's prior standard. (See *Dynamex*, *supra*, 4 Cal.5th at

D. Appellants are not the drivers' hiring entities.

Although the trial court rejected the existence of a threshold hiring-entity requirement, it also determined in the alternative that appellants were the workers' hiring entities. (10 AA 2905.) This too was reversible error.

AB 5 states that "a person providing labor or services for renumeration shall be considered" the employee of a hiring entity. (Stats. 2019, ch. 296, § 2; accord, Lab. Code, § 2775, subd. (b)(1).) As explained earlier, this hiring-entity requirement can be met only where the worker provides services directly to the defendant. (*Ante*, pp. 18-24.) That test is not satisfied here.

The drivers do not provide any service to appellants. Instead, it is appellants who provide services to both the drivers and riders by providing technology platforms that propose a match between drivers and individuals looking for rides. (Lyft AOB 18-19, 36-37; Uber AOB 23-24; Lyft ARB 26-27; Uber ARB 27-28.) In exchange for appellants' matchmaking services, appellants charge drivers a service fee. (See Lyft AOB 19; Uber AOB 24; Lyft ARB 27; Uber ARB 18.) A simple example confirms this point. A newspaper is not the hiring entity for a babysitter when an individual pays a newspaper to print a want ad for a babysitter and someone responds to that advertisement and provides the babysitting services. The newspaper simply provides the forum for connecting people who provide certain services with those who need those services.

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pp. 948-958; see also, e.g., *Salazar v. McDonald's Corp.* (9th Cir. 2019) 944 F.3d 1024, 1032 [*Dynamex* "adopted a new test"].)

In short, as the State of Wisconsin's Labor and Industry Review Commission explained in a proceeding involving Lyft, drivers are "user[s] of the technology developed and provided" by companies like appellants, for which the drivers "pay[ ] a fee." (8 AA 2426-2427.) Drivers therefore do "not perform services" for appellants, which simply "provide[ ] a technology platform through which a participating driver pays a fee to be connected to a passenger." (8 AA 2423; see 5 AA 1520, 1526 [U.S. Department of Labor explaining that virtual marketplace companies like appellants "provide[ ] a referral service" and do "not receive services from service providers," instead "empower[ing] service providers to provide services to end-market consumers"].)

The trial court emphasized that appellants benefited financially from the rides provided by drivers to passengers. (See 10 AA 2905, 2908.) But this is insufficient to satisfy the hiring-entity test, which, as discussed above (*ante*, pp. 18-24), requires proof that the workers provided services directly to the defendant. Indeed, in the *Gallagher* and *Jinks* cases discussed earlier (*ante*, pp. 21-22), defendants benefitted financially from the plaintiffs' work but nevertheless were not their "hiring entity" for purposes of triggering the application of the ABC test because none of the plaintiffs provided any services to those defendants. (*Gallagher*, *supra*, 86 N.E.3d at pp. 497-501; *Jinks*, *supra*,

2020 WL 1989278, at pp. *2-*3, *6.) This court should follow these cases and reach the same conclusion as to appellants here.[4]

II. Courts should assess whether workers are employees under prong B of the ABC test by looking to how the company structures and operates its business.

A. Whether workers are employees under prong B should be measured by how a company defines and structures its operations, rather than by a court's subjective impression of the business or public perception.

Where the ABC test applies, a hiring entity's workers are employees rather than independent contractors unless the workers meet each of the test's three requirements. (*Dynamex*, *supra*, 4 Cal.5th at pp. 956-957 & fn. 23.) Prong B—the second of these requirements—asks whether the worker "performs work that is outside the usual course of the hiring entity's business." (Stats. 2019, ch. 296, § 2; accord, Lab. Code, § 2775, subd. (b)(1)(B).) This prong's focus is "on the nature of the workers' role within a hiring entity's usual business operation"; if a worker's services are "within the usual course of the hiring entity's business," the worker is an employee under prong B. (*Dynamex*, at p. 960.)

The trial court here concluded that drivers perform work within, rather than outside, the usual course of appellants'

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[4] Courts from other jurisdictions with similar ABC tests likewise refuse to apply these tests unless the worker provides services directly to the defendant even where the defendant benefits financially from the work. (See Lyft AOB 31, 33, 37; Lyft ARB 24; Uber AOB 22; Uber ARB 25-26.)

businesses under prong B by focusing on statements about appellants' businesses made in dicta by different courts in different cases, as well as on the trial court's intuitive impression of the nature of appellants' businesses. (See 10 AA 2906-2911; see also Lyft AOB 44-45 & fn. 6; Uber AOB 35-39 & fn. 5.) The court failed meaningfully to assess how appellants structure and operate their businesses in practice. (See 10 AA 2906-2911; see also Lyft AOB 44-45; Uber AOB 33, 35-39.) This was reversible error because these latter considerations are the proper standards that guide the prong B adjudication of whether people perform work outside the hiring entity's business.

Dynamex stated generally that the prong B test 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*, *supra*, 4 Cal.5th at p. 959.) But *Dynamex* did not specify or provide clear guidelines for how this general standard should work in practice, let alone in the gig economy.

Helpful guidance nonetheless can be found in *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289 (*Curry*)—the only published California Court of Appeal decision to date that addresses prong B's contours on the merits—as well as in the Massachusetts law from which California's ABC test originates. These authorities demonstrate that the prong B inquiry should turn on how a company structures its business and actually operates in practice.

Curry was a wage-and-hour class action against a company that did business as Shell Oil Products US. (*Curry*, *supra*, 23 Cal.App.5th at pp. 292-293.) Prior to May 2003, 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 service stations 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 ARS fueling stations, 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's test for independent contractor status "because managing a fuel station was not the type of business in which Shell was engaged." (*Ibid*.)

In short, *Curry* analyzed how Shell defined its own business as well as the substance of how Shell's business operated in practice, differentiating between (1) Shell's ownership of the gas sold at gas stations, receipt of revenue from

those sales, and control over the sales price and (2) ARS's operation of the gas stations where the plaintiff worked.

Massachusetts cases construing the Massachusetts ABC test from which California's ABC test derives follow the same approach to the prong B inquiry. The Massachusetts Supreme Judicial Court's decision in *Sebago* is instructive.

In *Sebago*, licensed taxicab drivers claimed they were misclassified as independent contractors by defendants from whom the drivers leased taxicabs and taxicab medallions and received radio dispatch services. (*Sebago*, *supra*, 28 N.E.3d at p. 1145.) Applying Massachusetts's ABC test to these defendants, Massachusetts's highest court concluded the drivers were not these defendants' employees. (*Id.* at pp. 1149-1156.)

Sebago emphasized that, under prong B, "a purported employer's own definition of its business is indicative of the usual course of that business," and that courts also look to "the realities" of how the business operates in practice. (*Sebago*, *supra*, 28 N.E.3d at pp. 1150, 1152.) 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*, 28 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.)[5]

Ruggiero v. American United Life Ins. Co. (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's ABC test, the court considered the defendants' own definition of their business and the fact that their website did "not present itself as actually selling the insurance and financial products it offers." (*Id*. at p. 118.) Instead, the website "educate[d] consumers about

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[5] 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*.) *Sebago* therefore remains persuasive authority as to prong B.

[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.) 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.)[6] "[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

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[6] Similarly, in the gig economy industry, many workers frequently use multiple smartphone applications 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 (Apr. 29, 2019) 2019 WL 1977301, at pp. *2, *7 (hereafter Opn. Letter).)

parties, [citation] the independent contractor [law] cannot be used to expand those boundaries." (*Ruggiero*, 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 p. 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].)

B. Under prong B, drivers are not appellants' employees because appellants' business is providing technology platforms that match people looking for certain services with individuals providing those services.

Appellants demonstrated that they structure and operate their businesses as technology companies that provide a digital platform matching those seeking to sell certain services (for example, rides, food preparation, food delivery, and freight delivery in Uber's case) with those looking to secure those services and facilitating the financial transactions between these groups (for example, by providing payment processing and digital marketplaces where helpful information—like preferred vehicle type, location, and requested destination—can be shared). (See Lyft AOB 18-20, 45-49; Lyft ARB 37-47; Uber AOB 6-8, 31-33, 36-38; Uber ARB 32-44 & fn. 8.)

In effect, appellants are technology companies that broker services through their digital platforms rather than provide those services themselves. (See, e.g., *In re Grice* (9th Cir., Sept. 4, 2020, No. 20-70780) ___ F.3d ___ [2020 WL 5268941, at p. *1] [Uber is a "technology company" whose smartphone application "connects riders needing transportation with local drivers available to drive them to their destinations for a fare"]; *id.* at p. *3, fn. 4 ["Lyft, like Uber, is a technology company specializing in smartphone-application-based rideshare services"]; 8 AA 2423 [State of Wisconsin's Labor and Industry Review Commission explaining that Lyft "provides a technology platform through

which a participating driver pays a fee to be connected to a passenger"].)[7]

California appellate courts have not addressed whether, in cases involving companies that broker services, the individuals whose services have been brokered are the company's employees under the ABC test. But decisions from other jurisdictions that apply ABC tests similar to California's test provide useful guidance. Courts in those jurisdictions repeatedly have concluded that individuals whose services have been brokered are not the brokerage company's employees under prong B because the individuals do not perform work in the company's usual course of business.

For example, in *Trauma Nurses v. Board of Review* (N.J.Super.Ct.App.Div. 1990) 576 A.2d 285, 286 (*Trauma Nurses*), a company was "in the business of supplying hospitals with nurses on a temporary basis." The company "act[ed] as an employment broker, matching nursing professionals with hospitals and other health care institutions seeking to

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[7] The United States Department of Labor has likewise characterized other gig economy companies operating similar " '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.)

supplement their staffs on a temporary, short-term basis." (*Ibid.*) One of the nurses claimed she had been misclassified as an independent contractor rather than an employee. (See *id.* at pp. 286, 288.) The Board of Review of the state's Department of Labor concluded the nurse was an employee, but a New Jersey appellate court reversed. (*Id.* at pp. 286, 288-292.)

Applying New Jersey's ABC test, the appellate court held that the nurses whose services were brokered by the company did not qualify as employees under prong B. (*Trauma Nurses*, *supra*, 576 A.2d at pp. 291-292.) In doing so, the court rejected the state's insistence that the brokering company was itself in the business of providing health care, explaining: "The service of supplying health care personnel does not translate into the business of caring for patients." (*Id.* at p. 291.) The court held: "The simple and overriding fact is that [the service broker] does not perform patient care. It brokers nurses. [The claimant nurse], as well as other nurses placed by [the service broker], performed nursing services, a function clearly beyond the purview and usual course of [the service broker's] business." (*Id.* at p. 292.)

Similarly, in *State Emp. Sec. v. Reliable Health Care Services* (Nev. 1999) 983 P.2d 414, 415-416 (*Reliable Health*), a state agency determined a health care worker had been misclassified as an independent contractor under Nevada's ABC test by a company that referred health care workers to medical facilities. A Nevada trial court reversed this determination and the Nevada Supreme Court affirmed. (*Id.* at pp. 416, 419.) In

doing so, the Nevada Supreme Court held that "the business of brokering health care workers does not translate into the business of treating patients" and therefore a "health care worker does not work in the usual course of an employment broker's business" under prong B. (*Id.* at p. 418.)

Likewise, in *Daw's Critical Care v. Dept. of Labor* (Conn.Super.Ct. 1992) 622 A.2d 622, 624 (*Daw's*), a state agency claimed that nurses provided by a company that furnished nurses to medical facilities were the company's employees under Connecticut's ABC test. The Connecticut Superior Court disagreed, finding that the nurses were not employees under prong B. (*Id.* at pp. 636-637.) The court explained that the company was in the "business [of] brokering" nurses to "its clients' medical facilities" and concluded that "the business of providing health care personnel" in this fashion did "not translate into the business of caring for patients." (*Id.* at p. 636.) Consequently, the court found the nurses' work in performing nursing services at those medical facilities was a "function beyond the usual course" of the company's brokering business. (*Id.* at p. 637.) The Connecticut Supreme Court "adopt[ed] the trial court's well-reasoned decision . . . ." (*Daw's Critical Care v. Dept. of Labor* (Conn. 1993) 622 A.2d 518, 519.)[8]

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[8] The Connecticut Supreme Court subsequently disagreed with a component of the superior court's prong A analysis in *Daw's*, but Connecticut's high court otherwise cited *Daw's* with approval and did not reject the *Daw's* prong B analysis. (See *Standard Oil v. Adm'r, Unemployment Comp.* (Conn. 2016) 134 A.3d 581, 593-597, 607.)

Nor are the brokerage cases restricted to the context of health care workers. For example, in *Q.D.-A v. IN Dept. of Workforce Development* (Ind. 2019) 114 N.E.3d 840, 842-843, a state agency claimed that a company in the business of "match[ing] drivers with customers who need large vehicles driven to them" misclassified the drivers as independent contractors under Indiana's ABC test. The Indiana Supreme Court disagreed, holding the drivers were independent contractors where the company did no more than broker motor carrier transportation services between parties. (*Id.* at pp. 843, 847-848.)

The same reasoning should apply to companies—like Lyft and Uber—that broker services through technology platforms. As Florida's Department of Economic Opportunity recently explained in assessing a misclassification case against Uber:

> For at least hundreds of years, people have made money by bringing willing buyers and sellers together. They are called middlemen or brokers. Sometimes middlemen even provide specific platforms for that service, such as a physical location. Everyday examples include flea markets, art galleries, street fairs, food truck festivals, and gun shows. The vendors at these events use the common platform because it attracts customers, and typically they must agree to some standard conditions (e.g., size of a booth, operating hours, noise restrictions, clean-up routine), but no one thinks of the vendors as employees of the platform provider. Technological advances like the Internet and smartphones have provided new platforms for middlemen, and new

> services abound—like eBay, StubHub, Expedia, Amazon Marketplace, and Airbnb. None of these would be in business without the sellers who use the platform, but that does not mean the sellers are automatically employees of the platform company.

(Final Order, *Raiser LLC v. Florida Department of Economic Opportunity* (Fl. Dept. of Economic Opportunity Reemployment Assistance Appeals, Dec. 3, 2015) pp. 18-19 <https://bit.ly/2HeJk7j> [as of Oct. 1, 2020] (hereafter *Raiser* Final Order).)[9] Thus, the "Internet and the smartphones that can now access it are transformative tools" that allow connections between people "undreamed of just a decade ago." (*Id.* at p. 19.) "This is economic progress based on new technology, but the law's foundational principles are equipped to handle these changes." (*Ibid.*)

This is so because courts have long recognized that "workers' services fall outside [the hiring entity's] usual course of business" under prong B of ABC tests where the hiring entity is a "broker of services." (Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?* (2020) 11 Wm. & Mary Bus. L.Rev. 733, 756-757.) There is no reason this longstanding principle governing entities that broker services through means other than digital technology platforms should not apply to entities (like appellants) that

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[9] Although the Florida agency did not apply an ABC test in that case, its commentary explaining that technological middleman in the modern era are fundamentally no different than brokers in prior eras remains true under any legal test.

engage in this same business through modern technology. (See *Raiser* Final Order, *supra*, pp. 17-20 <https://bit.ly/2HeJk7j>.) Consequently, Lyft and Uber are "middlem[e]n or broker[s] for transportation services" that do not themselves provide transportation services. (*Id.* at pp. 13-14 <https://bit.ly/2HeJk7j>.)

C. A business's financial profits from workers' services do not transform those workers into the business's employees.

The trial court indicated that drivers must necessarily perform work within appellants' usual course of business because appellants would not be viable but for the fact drivers transport passengers for compensation. (See 10 AA 2908-2910.) This too was error.

No brokers—whether those who carried out their brokering services in prior eras or those like appellants who now do so through modern technology—"would be in business without the sellers who use the platform, but that does not mean the sellers are automatically employees of the platform company." (*Raiser* Final Order, *supra*, p. 19 <https://bit.ly/2HeJk7j>.) That brokers "profit[ ] solely from referring" workers to others does not change "the simple fact" that the activities these workers perform and the distinct operation of "brokering workers are two distinct businesses." (*Reliable Health*, *supra*, 983 P.2d at p. 418.)

Indeed, the trial court's rationale cannot be squared with the California Court of Appeal's interpretation of prong B. In *Curry*, Shell controlled the price of the gasoline sold at the gas

stations it leased to other entities and retained all of the revenue from the sale of the gasoline there. (See *Curry*, *supra*, 23 Cal.App.5th at p. 316.) Nonetheless, the court held that the manager who supervised such gas stations did not perform work within the usual course of Shell's business because, despite the significant financial benefits Shell derived from the work done at the gas stations, " 'Shell was not in the business of operating fueling stations—it was in the business of owning real estate and fuel.' " (*Id.* at pp. 315-316.) In other words, Shell's financial gains from the plaintiff's work had no bearing on the prong B analysis. Likewise, the fact appellants benefit financially when the drivers whose work they broker proceed to perform work for the passengers who purchased the drivers' services does not mean appellants are in the business of transporting passengers rather than in the business of brokering drivers' services.[10]

Any conclusion to the contrary would mean that, under ABC tests, all brokers must necessarily employ the individuals whose service they broker. This is not the law.

In *Reliable Health*, the broker's "sole source of revenue" was "derived from referring health care workers" to medical

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[10] The State tries to downplay *Curry*'s importance by noting that *Curry* "was not sure that [the ABC test] even applied, and included an analysis by reference under Part B 'out of an abundance of caution.' " (RB 57, quoting *Curry*, *supra*, 23 Cal.App.5th at pp. 314-315.) But the fact *Curry* included its prong B determination as an alternative holding does not diminish its importance. When an appellate decision rests on two alternate grounds, neither is dictum. (*Varshock v. Department of Forestry & Fire Protection* (2011) 194 Cal.App.4th 635, 646, fn. 7.)

facilities, yet the Nevada Supreme Court held that this was "insufficient" to show the health care workers were the broker's employees under prong B. (*Reliable Health*, *supra*, 983 P.2d at p. 418.) Similarly, in *Daw's*, the court explained that the broker's " 'economic dependence on provision of nurses' services" at medical facilities made no difference. (*Daw's*, *supra*, 622 A.2d at pp. 636-637.) The broker was "a conduit for payment of the nurses by the particular medical facility involved" and its "business of *providing* health care at any client's medical facility" did "*not* translate into the [nurses'] business of caring for patients." (*Id.* at p. 637, second emphasis added.)

As such cases confirm, the fact brokers profit financially from their role as middlemen who match up workers with those looking for the workers' services does not mean the broker is in the same business as the workers. Our nation's economy has evolved to a point where technology now "allow[s] hundreds of thousands of people to go into business for themselves" with the aid of technology platforms like those provided by appellants, which broker the workers' independent services. (*Raiser* Final Order, *supra*, p. 20 <https://bit.ly/2HeJk7j>.) "Those in business for themselves may not have the same guarantees and benefits of those in the employ of others, but there are many other benefits of being your own boss. This is probably why such status has long been part of the American dream. Technological advances are opening up that dream to many more people, and we should not malign (or, perhaps, misclassify) that trend as worker misclassification." (*Ibid.*)

III. The injunction should be reversed because it harms the drivers, the general public and business community, and the State.

" 'It is well established that when injunctive relief is sought, consideration of public policy is not only permissible but *mandatory*.' " (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1471 [First Dist., Div. Four], emphasis added, quoting *Teamsters Agricultural Workers Union v. International Brotherhood of Teamsters* (1983) 140 Cal.App.3d 547, 555.) Contrary to the State's assertions (RB 77, fn. 28), "in determining the availability of injunctive relief, the court must consider the interests of third persons and of the general public" and injunctive relief must be denied if it would be contrary to public policy. (*Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 588-590; accord, e.g., *O'Connell*, at p. 1471; *Teamsters Agricultural Workers Union*, at p. 555.)

A. Injunctive relief would create havoc and uncertainty surrounding entitlement to federal COVID-19 benefits.

In response to the COVID-19 pandemic's "devastating impact" on the United States, "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].) The trial court's injunction would undermine this relief by injecting unnecessary confusion and uncertainty.

For example, the Families First Coronavirus Response Act provided "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] (*Rogers*), app. pending, citing Pub.L. No. 116-127, § 7002 (Mar. 18, 2020), 134 Stat. 178, 212.) If drivers were reclassified as employees now, resulting in Lyft and Uber workforces consisting of thousands of employees, the drivers might lose their entitlement to these benefits because this law "funds sick pay for employees too, but it excludes people who work for companies with 500 or more employees." (*Rogers*, at pp. *1-*2, citing Pub.L. No. 116-127, §§ 5102, 5110(2)(B)(i)(I)(aa) (Mar. 18, 2020), 134 Stat. 178, 195-196, 199.) Consequently, drivers could be required to pay back any benefits they wrongly received if, as a result of the injunction, it turned out they were employed by companies that exceeded this mandatory 500-person limit.

In addition, the Coronavirus Aid, Relief and Economic Security 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.' " (*Rogers*, *supra*, 2020 WL 1684151, at p. *2, citing Pub.L. No. 116-136, § 1102(a)(2) (Mar. 27, 2020), 134 Stat. 281, 286-293.) If drivers were "switched from independent contractor to employee status" at this time, "they could lose their entitlement to this relief" (*ibid.*) and may need to pay back these loans right away in the event of immediate reclassification.

Such adverse consequences weigh against injunctive relief. (See *Rogers*, *supra*, 2020 WL 1684151, at pp. *1-*3.)

B. Injunctive relief reclassifying drivers as employees would devastate California's economy and irreparably harm gig economy businesses.

Construing ABC tests too broadly to encompass companies like appellants here would harm the gig economy industry, its workers, and California.

The most devastating harm would be suffered by the workers themselves. As employees, many of their jobs would be lost completely, and those drivers who remain would likely earn less money and receive fewer benefits. (See, e.g., Lyft AOB 63-65; Uber AOB 47-48.) But the impact will extend much further, to the detriment of all gig economy workers. Reclassifying gig economy workers, like the drivers here, as employees would destroy the flexibility that such workers enjoy (or require) and which makes their work arrangements feasible.

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) Congressional Research Service, pp. 1-2 <https://bit.ly/2SM8CMR> [as of Oct. 1, 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://bit.ly/3iNKEMm> [as of Oct. 1, 2020].)

This preference has been confirmed again and again. A recent 2020 survey, for example, interviewed 718 Californian app-based rideshare and food delivery drivers who had driven with any rideshare or food delivery app within the past year, and two-thirds of the drivers surveyed said "they wouldn't continue driving if they didn't have the flexibility they have now" as independent contractors and were required to "work a fixed shift" as employees. (Edelman Intelligence, *California app-based Driver Survey* (June 2020) pp. 2, 10 <https://bit.ly/2ZWnlbz> [as of Oct. 1, 2020] (hereafter *California app-based Driver Survey*).) More than 85 percent of the drivers surveyed indicated they took up app-based driving precisely because they "[t]hey needed a job where they could choose when or where to work" or "needed a work option with a flexible schedule" (*id.* at p. 9, original formatting omitted)—the hallmarks of independent contractor status. This was especially true of drivers who were caregivers for others. (*Ibid.*) Likewise, another survey collecting such data in 2020 confirmed that 71 percent of drivers wanted to be independent contractors. (Campbell, *Lyft & Uber Driver Survey 2019: Uber Driver Satisfaction Takes a Big Hit* (Aug. 1, 2020) Rideshare Guy <https://bit.ly/3hIXmKU> [as of Oct. 1, 2020].)

Similarly, a 2019 survey found that 51 percent of freelancers said there was no amount of money that would cause them to definitely take a traditional job, and 46 percent said that freelancing gave needed flexibility because they were unable to work for a traditional employer due to personal circumstances. (Edelman Intelligence, *Freelancing in America: 2019* (Sept. 23, 2019) Scribd: SlideShare, pp. 9, 25 <https://bit.ly/2WqwmZ8> [as of Oct. 1, 2020].) And a 2016 study found that for every primary independent worker who would prefer a traditional job, more than two traditional workers hoped to shift in the opposite direction. (Manyika et al., *Independent Work: Choice, Necessity, and the Gig Economy* (Oct. 2016) McKinsey Global Inst., p. 7 <https://mck.co/3bdqOFx> [as of Oct. 1, 2020].)

In short, "[i]n 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." (*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., p. 36, fns. omitted <https://bit.ly/2Sgwo31> [as of Oct. 1, 2020] (hereafter *Ready, Fire, Aim*).)

Still other workers prefer a mix of traditional and flexible work. For instance, a 2020 survey found that 74 percent of app-based drivers drove to earn supplemental income rather than a primary source of income. (*California app-based Driver Survey*, *supra*, pp. 12-14 <https://bit.ly/2ZWnlbz>.) Likewise, a 2018

study found that 53 percent of gig economy workers considered 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 Oct. 1, 2020].) Thus, for many gig economy workers, this flexibility "is not simply a preference: they may be students, parents or workers with other full-time jobs" who need the flexibility afforded by gig economy work. (*Ready, Fire, Aim*, *supra*, p. 36 <https://bit.ly/2Sgwo31>.)

If the ABC test is construed broadly to encompass gig economy companies like Uber and Lyft and results in immediate reclassification of drivers as their employees, this will make it more difficult to structure work opportunities as independent contractor relationships instead of employer-employee relationships. (See, e.g., *Ready, Fire, Aim*, *supra*, pp. 36-37 <https://bit.ly/2Sgwo31> [wage-and-hour restrictions governing employees would bring an end to gig economy workers' flexible arrangements in the event of reclassification].) Consequently, 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 Institute, pp. 1-2 <https://bit.ly/2WFE1lv> [as of Oct. 1, 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"].)

Studies confirm that reduction of flexible work opportunities stemming from the reclassification of California drivers threatens to harm the vast majority of independent workers. Hundreds of thousands of "Californians provide rides or deliveries through app-based platforms each month." (Williams, *Impacts of Eliminating Independent Contractor Status for California App-Based Rideshare and Delivery Drivers* (July 2020) Capital Matrix Consulting, p. 1 <https://bit.ly/3iQMThJ> [as of Oct. 1, 2020] (hereafter Williams Report).) "[I]f drivers become employees, app-based platform company costs will rise sharply because of higher expenses for unengaged driver time, loss of driver efficiencies, higher benefit and overtime costs, additional management and overhead, and technology investments to develop new products for monitoring and controlling employees. This will lead to much higher per-trip prices, less coverage (especially in areas with less population density), reduced consumer demand, and a major loss of earning opportunities." (*Ibid.*)

Consequently, the reclassification of drivers as employees could result in the loss of hundreds of thousands of jobs (up to 90 percent of the gig economy driving workforce) and a sharp curtailment of driving opportunities (and the corresponding income earned) for the drivers who keep their jobs. (See Williams

Report, *supra*, pp. 1, 6-8 <https://bit.ly/3iQMThJ>; see also *Ready, Fire, Aim*, *supra*, p. 37 <https://bit.ly/2Sgwo31> [in the event gig economy workers were reclassified as employees, a host of workers—including military spouses, transitioning service members, ex-offenders, students, parents, and moonlighters—stand to lose a vital avenue "to supplement their incomes or sustain themselves when they are in between jobs" through the flexible independent contractor relationships they currently enjoy with companies like appellants].) The evidence presented by appellants confirms this catastrophic harm. (See, e.g., Lyft ARB 49 [explaining that injunction would result in "hundreds of thousands" of workers "los[ing] the ability to earn money using Lyft and Uber"], 51; Uber AOB 47-48 [explaining that Uber estimates that reclassification would cause approximately a 76 percent reduction in the number of quarterly active drivers]; Uber ARB 53 [same].)

Moreover, the economic havoc that would be wrought upon the many drivers who use Lyft's and Uber's technological platforms is but the tip of the iceberg. In recent years, Americans have increasingly turned to e-commerce for their everyday needs, purchasing a broad range of goods electronically and arranging for their delivery to their homes or offices. (See, e.g., Banker, *Last Mile Deliveries: Complex, Costly, And Critical* (Aug. 26, 2020) Forbes <https://bit.ly/2HQ0cSb> [as of Oct. 1, 2020] (hereafter Forbes) [describing retailers' increasing shift to e-commerce fulfillment of orders that involve the shipment of goods]; Acosta, *Why the gig economy keeps growing* (Nov. 21,

2018) Retail Leader <https://bit.ly/34caNye> [as of Oct. 1, 2020] (hereafter Retail Leader) [describing sharp growth in delivery of packages and food via gig economy drivers].) One of the most important components of this process are so-called "last mile" deliveries (see Forbes, *supra*, <https://bit.ly/2HQ0cSb>), which involve the delivery of packages or food over the final leg of a shipment to the ultimate recipient" (*Mark IV Transportation & Logistics v. Lightning Logistics, Inc.* (3d Cir. 2017) 705 F.App'x 103, 105, fn. 1). Gig economy drivers play a vital role in these last mile deliveries. (See Forbes, *supra*, <https://bit.ly/2HQ0cSb>.) Moreover, a broad range of gig economy technology platforms are involved in facilitating such services. (See Retail Leader, *supra*,<https://bit.ly/34caNye>.) An injunction reclassifying gig economy drivers as employees threatens to sharply curtail, and perhaps virtually eliminate, the last mile delivery services provided by gig economy drivers and significantly harm the many technology platforms that match the drivers with those looking for such deliveries.

The approximately 400,000 California workers who provide rides or deliveries through app-based platforms every month collectively earn billions of dollars in income. (Williams Report, *supra*, p. 2 <https://bit.ly/3iQMThJ> ["These drivers earned income totaling over $6 billion in 2018"].) And such drivers are but one facet of the diverse gig economy industry. The State's efforts to reclassify the drivers here threatens to kill this entire industry. (See, e.g., Helper, *Uber, Lyft and why California's war over gig work is just beginning* (Aug. 21, 2020) CalMatters

<https://bit.ly/2FSssm3> [as of Oct. 1, 2020] [what happens with this lawsuit will play a major role "in determining the fate of California gig workers"]; Malik, *Worker Classification and the Gig-Economy* (2017) 69 Rutgers U. L.Rev. 1729, 1741 ["[I]ncreased enforcement efforts could have a devastating effect on gig-economy companies if they are caught in the crosshairs of a regulatory agency and forced to change their business models"]; Holloway, *Keeping Freedom in Freelance: It's Time for Gig Firms and Gig Workers to Update Their Relationship Status* (2016) 16 Wake Forest J. Bus. & Intell. Prop. L. 298, 300-301 ["Forcing employment status on gig workers will not only destroy the financial incentives that allow these fledgling businesses to obtain capital, but will obviate the *raison d'être* for gig work: freedom from employer control"]; cf. RB 46 [the State signaling its arguments here would extend to all "app-based companies"].) Reclassification may therefore "smother[ ]" the "nascent [gig economy] industry in the cradle." (*Ready, Fire, Aim*, *supra*, p. 37 <https://bit.ly/363h6Xq3ciU5RA>.)

The enormous loss of jobs and income opportunities that will follow among drivers providing rides or deliveries through gig economy platforms in the event of reclassification—and the even greater economic devastation that would follow if the entire gig economy collapses—threatens not only the drivers but California's general public and business community. These losses will mean "fewer jobs, less income, and lower tax receipts to state and local governments in California — at a time when the state has the highest unemployment since the

Great Depression." (Williams Report, *supra*, p. 1 <https://bit.ly/3iQMThJ>.)

"The losses will be magnified by the fact that five of the six largest app-based platform companies in the U.S. are located in California. Losses of revenues and company values will impact personal income tax revenues through lower capital gains and stock option values, which the state depends on to fund schools, healthcare, and social services." (Williams Report, *supra*, pp. 1-2 <https://bit.ly/3iQMThJ>.) "Such losses, which could range into the low-to-mid-hundreds of millions of dollars per year, will be all the more devastating over the next several years, as California struggles to deal with historically high unemployment and massive budget shortfalls." (*Id.* at p. 2; accord, *id.* at p. 9; see *Ready, Fire, Aim*, *supra*, p. 37 <https://bit.ly/2Sgwo31> [the loss of gig worker jobs not only deeply harms the workers but is also likely to "rais[e] costs for the state, which may need to provide social services to people who no longer have alternate work opportunities"].)

In sum, the State's requested injunction contravenes the public interest, which favors allowing drivers to remain independent contractors.

CONCLUSION

This court should reverse the trial court's order granting the State's motion for a preliminary injunction.

October 2, 2020

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

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Dated: October 2, 2020

Felix Shafir

PROOF OF SERVICE

People of the State of California v. Lyft, Inc. & Uber Technologies, Inc. et al.
Case Nos. A160701 & A160706 (Consolidated)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On October 2, 2020, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CALIFORNIA CHAMBER OF COMMERCE, THE NATIONAL RETAIL FEDERATION, AND THE HR POLICY ASSOCIATION IN SUPPORT OF APPELLANTS LYFT, INC. AND UBER TECHNOLOGIES, INC.** on the interested parties in this action as follows:

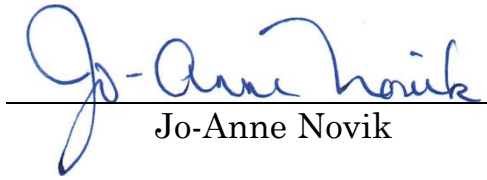
SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 2, 2020, at Burbank, California.



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