HORVITZ & LEVY LLP

Business Arts Plaza
3601 W. Olive Ave., 8th Fl.
Burbank, CA 91505
818.995.0800

January 12, 2021

The Honorable Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: ***People of the State of California v. Uber Technologies***
Case No. S265881
Amicus Curiae Letter in Support of Petitions for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Under rule 8.500(g) of the California Rules of Court, the Chamber of Commerce of the United States of America (the Chamber) respectfully submits this letter as amicus curiae urging this Court to grant the petitions for review filed by defendants Lyft, Inc. and Uber Technologies, Inc. in the above-referenced case.

The Court of Appeal's published opinion affirmed an extraordinary injunction that required defendants to reclassify a host of drivers as employees based on a law—Assembly Bill No. 5 (2019-2020 Reg. Sess.) (AB 5)—that no longer applies. Shortly after the court issued its decision in this case, the California voters overturned AB 5 by passing Proposition 22 in the November 2020 election. AB 5 had adopted a so-called " 'ABC' " test for assessing whether workers were independent contractors. (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 296-297 (*Uber*).) Relying on AB 5, the State of California brought this enforcement action alleging that defendants misclassified app-based drivers as independent contractors. (*Id.* at p. 302.) Applying the ABC test, the trial court determined, and the Court of Appeal agreed, that the elements for injunctive relief were satisfied. (*Id.* at pp. 302-303, 306-328.) But Proposition 22 changed the law, deeming app-based drivers to be independent contractors. (See Bus. & Prof. Code, § 7451.)

It is well settled that injunctions operate solely on a prospective basis. Going forward, Proposition 22, rather than AB 5, governs drivers' independent contractor status. As a result, the Court of Appeal's opinion affirming prospective injunctive

relief based on AB 5 cannot stand. This court should accordingly grant review and transfer the case to the Court of Appeal to vacate its published opinion with instructions for the trial court to vacate the injunction. The State's operative complaint does not claim that defendants misclassified any drivers under Proposition 22. But in the event that the State amends its complaint to assert such violations and seeks injunctive relief under the new law, the trial court can then consider whether injunctive relief is appropriate under Proposition 22. Important principles of judicial modesty and avoiding deciding moot cases, and the strong policy against issuing advisory opinions all counsel against preserving a published opinion that is plainly erroneous given materially changed legal circumstances. Moreover, in light of the important public policy of flexibility in the gig economy, as recently and resoundingly confirmed by an overwhelming majority of California voters, this Court should not require defendants to return to the trial court to vacate the existing injunction. This Court should instead instruct the Court of Appeal to vacate the injunction because it no longer has any basis in law.

Finally, the published opinion makes a number of conclusions about how AB 5 should be interpreted that potentially will affect numerous other employers in California. The Chamber agrees with defendants' pre-Proposition 22 arguments that under AB 5, the drivers were properly classified as independent contractors. The Court of Appeal's resolution of these arguments in favor of plaintiffs raises serious questions which were hotly litigated in the main Court of Appeal briefing before the passage of Proposition 22 and indisputably are of great state-wide importance. Given that they cannot be resolved in this case after the intervening change of law that governs the workers here, this Court should vacate the decision so that these important issues can be briefed and decided in a case where they are not moot and which will provide this Court an appropriate vehicle to resolve them in due course.

INTEREST OF AMICUS CURIAE

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three 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 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.

By passing Proposition 22, California's electorate decisively rejected AB 5's ABC test for app-based drivers like those at issue here, deeming them independent contractors. In doing so, the voters recognized the significant negative consequences for drivers who crave the flexibility afforded to them as independent contractors and to the state's economy as a whole were AB 5 to require reclassification of drivers as employees. Given the voters' repudiation of the legal framework used by the Court of Appeal's opinion to affirm prospective injunctive relief requiring such re-classification, the Chamber has a significant interest in whether the opinion is allowed to stand.

LEGAL ARGUMENT

I. This Court should grant review and vacate the Court of Appeal's opinion because of a material change in the law that occurred after the trial court issued its injunction and before the Court of Appeal's decision became final.

In this civil enforcement action, the State asserted that defendants misclassified drivers as independent contractors under AB 5's ABC test. (*Uber*, *supra*, 56 Cal.App.5th at p. 302.) At the State's urging, the trial court granted a preliminary injunction "restrain[ing] Lyft and Uber, during the pendency of this action," from classifying drivers " 'as independent contractors in violation of [AB 5].' " (*Ibid.*) In doing so, the trial court concluded that the State had shown a probability of prevailing on its claim that defendants were misclassifying drivers "as independent contractors in violation of AB 5." (*Ibid.*)

The Court of Appeal affirmed, determining that the trial court did not abuse its discretion in concluding that the State had shown a reasonable probability of prevailing "under the ABC test" codified by AB 5. (*Uber*, *supra*, 56 Cal.App.5th at pp. 306-319.) The court also decided that the trial court's harm analysis did not constitute an abuse of discretion (*id.* at pp. 319-328), emphasizing that AB 5 "matter[ed] in a profoundly important way to the bottom-line discretionary calculus" (*id.* at p. 323-324).

The court erred. Shortly after the Court of Appeal issued its decision, California voters, in a sharp rejection of AB 5, overwhelmingly passed Proposition 22. (Lyft PFR 16.) Now codified in Business and Professions Code section 7451, Proposition 22 provides that "[n]otwithstanding any other provision of law, including, but not limited to, the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations

or any board, division, or commission within the Department of Industrial Relations, an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company" assuming four additional conditions are met. (Bus. & Prof. Code, § 7451.)[1] Given that plain new law, the Court of Appeal erred as a matter of law by affirming an injunction predicated on a prior law (AB 5) that no longer applies. The court's judgment cannot stand.

This Court long ago recognized that on appeal, when the law that the trial court relied on in imposing an injunction changes, "[i]t would be an idle gesture to affirm this judgment . . ., because [the judgment was] correct when rendered, with full knowledge that it is incorrect under existing law, and with full knowledge that, under existing law, the decree as rendered settles nothing so far as the future rights of these parties are concerned." (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 527.) Because injunctions are always prospective, when reviewing an injunction's propriety, the relevant law must be the law current at the time of the appellate court's judgment. (See *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6.)

Indeed, "[t]o compel the petitioners to institute a new proceeding in the court below to reassert their position in the light of that change in the law would only be to foster unnecessary circuity of action." (*Renken v. Compton City School Dist.* (1962) 207 Cal.App.2d 106, 116.) When the law a plaintiff relies on to bring a claim changes on appeal, the Court of Appeal should apply the new law. It should be up to the plaintiff to thereafter seek to amend the complaint and to seek new relief in the trial court if appropriate. The unlawful injunction should not be affirmed and the burden should not be on the defendant to take additional action in the trial court to vacate what is plainly an improper injunction under new law.

Where, as here, the law has unquestionably changed, appellate courts should " 'not review questions which are moot and which are only of academic importance. They will not undertake to determine abstract questions of law at the request of a party who shows that no substantial rights can be affected by the decision either

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[1] As explained by the parties, if the State believes that the conditions under Proposition 22 are not met, the appropriate procedure is for the State to amend its complaint to allege a violation of Proposition 22 rather than a violation of AB 5, and then to seek a new injunction under that new standard, not to affirm the injunction already issued under AB 5 which is indisputably the wrong standard. (See, e.g., Lyft PFR 28.)

way.' " (*Paoli v. California Coastal Com*. (1986) 178 Cal.App.3d 544, 554, fn. 8.) This reluctance to decide issues that are irrelevant to deciding the actual case before the court rests on longstanding norms of judicial restraint. (See *People v. Contreras* (2018) 4 Cal.5th 349, 381 ["we find it prudent to follow a 'cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more' "].)

The Court of Appeal's published opinion violates these norms of judicial decision-making. As a result, this Court should grant review and transfer the case back to the Court of Appeal with instructions for the appellate court to vacate its opinion with a directive to the trial court to vacate the injunction. It would be especially improper to allow the Court of Appeal's opinion here to remain in effect because the opinion's review of moot questions exacerbates or creates conflicts in California law.

The opinion here also created a split of authority over which standard governs prong B of the ABC test. In *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 955-956 and footnote 23, this Court adopted Massachusetts's version of the ABC test. AB 5 codified *Dynamex*'s test. (*Uber*, *supra*, 56 Cal.App.5th at p. 296.) In direct conflict with this Court's adoption of Massachusetts's ABC standard, the Court of Appeal in this case held that California's ABC test does not include the same threshold " 'hiring entity' " requirement mandated by Massachusetts's ABC law, concluding that *Dynamex* is not limited by Massachusetts law. (See *id.* at p. 307.) Likewise, the Court of Appeal's opinion acknowledged that the "rebuttable presumption" framework it employed to justify an injunction once it concluded the State had shown a probability of prevailing on the merits had not been used in a prior published case. (See *id.* at p. 306.)

This court should refuse to countenance a Court of Appeal opinion that resolves an issue of exceptional statewide importance or that creates or exacerbates conflicts in the law in the course of reviewing moot legal issues. Both problems exist here. Such significant questions of law should be resolved only by appeals that involve live controversies to ensure such vital issues of public importance are not adjudicated through purely academic appellate decisions.

II. Important public policy considerations as reflected in the voters' adoption of a new standard for app-based drivers also support the grant-and-transfer order called for by defendants' petitions for review.

Allowing the Court of Appeal's injunction to stand would frustrate the will of California voters who overwhelmingly approved Proposition 22 and rejected application of AB 5 to app-based drivers. The voters presumably agreed that reclassifying drivers in app-based businesses as employees would harm California's economy by destroying the flexibility that such workers enjoy (or require) and which makes their work arrangements feasible.[2] Traditional employment 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?* (Apr. 28, 2017) Congressional Research Service, pp. 1-2 <https://crsreports.congress.gov/product/pdf/R/R44365> [as of Jan. 8, 2021].) And many other workers prefer—or even require—the flexibility of an independent contractor relationship. (*Contingent and Alternative Employment Arrangements News Release* (June 7, 2018) U.S. Bureau of Labor Statistics <https://bit.ly/3iNKEMm> [as of Jan. 8, 2021].)

Worker surveys have repeatedly confirmed this preference. 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 prior year. Two-thirds of the drivers surveyed said that "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. (*California app-based Driver Survey* (June 2020) Edelman Intelligence, p. 10 <https://bit.ly/2ZWnlbz> [as of Jan. 8, 2021] (hereafter *California app-based Driver Survey*); see Campbell, *Lyft & Uber Driver Survey 2019* (Oct. 1, 2020) Rideshare Guy <https://bit.ly/3hIXmKU> [as of Jan. 8, 2021].)

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

[2] The Chamber continues to believe that even under AB 5, the app-based drivers here were properly classified as independent contractors. The broader question of how to interpret AB 5 and whether the Court of Appeal erred in doing so, should be left for later cases not covered by Proposition 22 to litigate.

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 Jan. 8, 2021] (hereafter *Ready, Fire, Aim*).) Still other workers prefer a mix of traditional and flexible work. (*California app-based Driver Survey*, *supra*, pp. 12-14 <https://bit.ly/2ZWnlbz>; *The Gig Economy* (Dec. 2018) Edison Research & Marketplace, p. 5 <https://bit.ly/2Wr6Rag> [as of Jan. 8, 2021].) 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*, at p. 36.)

As Proposition 22 demonstrates, the voters of California want workers to retain this flexibility because it is crucial for the state's economy. 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, *Impacts of Eliminating Independent Contractor Status for California App-Based Rideshare and Delivery Drivers* (July 2020) Capital Matrix Consulting, p. 2 <https://bit.ly/3iQMThJ> [as of Jan. 8, 2021] (hereafter Williams Report) ["These drivers earned income totaling over $6 billion in 2018"].) AB 5 threatened 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 Jan. 8, 2021]; Malik, *Worker Classification and the Gig-Economy* (2017) 69 Rutgers U. L.Rev. 1729, 1741; 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. & Intellectual Property L. 298, 300-301.)

If drivers were reclassified as employees, it would not be economical for employers to maintain the flexible nature of the independent contractor work they provide. (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 Jan. 8, 2021].) Without Proposition 22, hundreds of thousands of drivers might have lost 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>.) Fewer jobs and work opportunities would mean "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, at p. 1.)

There is no basis in the law to allow any further economic harm caused by AB 5 to continue with respect to app-based drivers. The Court of Appeal refused to

consider driver perspectives, concluding that "[t]he governing ABC test is not decided by plebiscite." (*Uber*, *supra*, 56 Cal.App.5th at p. 326.) But California voters overwhelmingly disagreed shortly after the court issued its opinion, passing Proposition 22 to reject the ABC test's application to app-based drivers like those here and instead deeming them independent contractors. The people have made the democratic policy choice that app-based drivers are independent contractors and not employees. Proposition 22 also provides a wide array of new benefits and protections for drivers including health care, anti-discrimination, and safety. (See Bus. & Prof. Code, §§ 7454-7462.) The Court of Appeal's opinion thwarts that new balance adopted by the voters between flexible work arrangements and heightened benefits and instead imposes additional costs on app-based companies that Proposition 22 was designed to stop. The framework for any litigation going forward should be that set by Proposition 22, not the voter-repudiated AB 5.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court grant defendants' petitions for review and transfer the case to the Court of Appeal to vacate its published opinion with instructions for the trial court to vacate the injunction.

Respectfully Submitted,

HORVITZ & LEVY LLP
JEREMY B. ROSEN
FELIX SHAFIR
STEVEN FLEISCHMAN

By: _____
Jeremy B. Rosen
Attorneys for Amicus Curiae
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

cc: See attached Proof of Service

PROOF OF SERVICE

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.

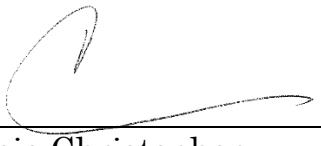
On January 12, 2021, I served true copies of the following document(s) described as **Amicus Curiae Letter In Support of Petition for Review** on the interested parties in this action as follows:

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:

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

Executed on January 12, 2021, at West Hills, California.



Connie Christopher

SERVICE LIST
People v. Uber Technologies
Case No. S265881

COUNSEL NAME/ADDRESS	PARTY(IES) REPRESENTED
Satoshi Yanai Minsu D. Longiaru Mana Barari Rosa Erandi Zamora Office of the Attorney General 1515 Clay Street, 20th Fl. P.O. Box 70550 Oakland, CA 94612-0550	Counsel for Plaintiff and Respondent People of the State of California
Marisa Beth Hernandez-Stern California Department of Justice 1515 Clay Street, 20th Fl. Oakland, CA 94612-0550	Counsel for Plaintiff and Respondent People of the State of California
Michael J. Bostrom Office of the Los Angeles City Attorney 200 North Spring St., 14th Fl. Los Angeles, CA 90012	Counsel for Plaintiff and Respondent People of the State of California
Mark D. Ankcorn Kevin B. King Marni Lynn Von Wilpert San Diego City Attorney's Office 1200 Third Avenue, Suite 1100 San Diego, CA 92101-4100	Counsel for Plaintiff and Respondent People of the State of California
Yvonne R. Mere Molly J. Alarcon Sara J. Eisenberg Matthew D. Goldberg Sara Jennifer Eisenberg Office of the San Francisco City Attorney 1390 Market Street, Sixth Floor San Francisco, CA 94102	Counsel for Plaintiff and Respondent People of the State of California

COUNSEL NAME/ADDRESS	PARTY(IES) REPRESENTED
Mana Barari Office of the Attorney General 600 West Broadway, Suite 1800 San Diego, CA 92101	Counsel for Plaintiff and Respondent People of the State of California
Rohit K. Singla Justin P. Raphael Emily Claire Curran-Huberty Munger, Tolles & Olson LLP 560 Mission Street, 27th Fl. San Francisco, CA 94105-3089	Counsel for Defendant and Appellant Lyft, Inc.
Jeffrey Y. Wu Benjamin G. Barokh John L. Schwab Fred Anthony Rowley Munger, Tolles & Olson LLP 350 South Grand Ave., 50th Fl. Los Angeles, CA 90071-3426	Counsel for Defendant and Appellant Lyft, Inc.
R. James Slaughter Christa M. Anderson Rachael E. Meny Brook Dooley Eric H. MacMichael Elizabeth K. McCloskey Keker, Van Nest & Peters LLP 633 Battery Street San Francisco, CA 94111-1809	Counsel for Defendant and Appellant Lyft, Inc.
Theane Evangelis Theodore J. Boutrous Blaine H. Evanson Heather Lynn Richardson Gibson, Dunn & Crutcher LLP 333 South Grand Ave Los Angeles, CA 90071-3197	Counsel for Defendant and Appellant Uber Technologies, Inc.

COUNSEL NAME/ADDRESS	PARTY(IES) REPRESENTED
Benjamin William Berkowitz Keker & Van Nest LLP 710 Sansome Street San Francisco, CA 9411	Counsel for Pub/Depublication Requestor Maplebear Inc.
California Court of Appeal First Appellate District, Division Four 350 McAllister Street San Francisco, CA 94102	Case Nos. A160701 & A160706 (Consolidated) *Service Copy via: TrueFiling*