No. D077380

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MAPLEBEAR INC. dba INSTACART,

Defendant and Appellant.

Appeal from Orders of the Superior Court of San Diego
Case No. 37-2019-00048731-CU-MC-CTL, Timothy B. Taylor, Judge

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF THE CHAMBER COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA GROCERS ASSOCIATION, BAY AREA COUNCIL, SAN FRANCISCO CHAMBER OF COMMERCE, AND VALLEY INDUSTRY & COMMERCE ASSOCIATION IN SUPPORT OF APPELLANT

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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Defendant and Appellant.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Under California Rules of Court, rule 8.200(c), the Chamber of Commerce of the United States of America, California Grocers Association, Bay Area Council, San Francisco Chamber of Commerce, and Valley Industry and Commerce Association request permission to file the attached amici curiae brief in support of defendant and appellant Maplebear Inc. dba Instacart.

The Chamber of Commerce of the United States of America 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. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The California Grocers Association is a non-profit, statewide trade association representing the food industry since 1898. CGA represents

approximately 500 retail members operating over 6,000 food stores in California and Nevada, and approximately 300 grocery supplier companies. Retail membership includes chain and independent supermarkets, convenience stores, and mass merchandisers. CGA actively promotes and protects the legislative and regulatory interests of the retail food industry before Congress, the California State Legislature, local governments, and state and local regulatory agencies. CGA files *amicus* briefs in cases of importance to its members, such as the pending action.

Thousands of shoppers using the Instacart platform purchase groceries from CGA's retail members on behalf of the most vulnerable consumers in California. Shoppers using the Instacart platform ensure CGA's members can provide affordable groceries to these consumers, who need safe and reliable access to food and other essential items while lacking the ability to shop on their own. These vulnerable consumers include seniors and others at high risk of contracting COVID-19. During the ongoing pandemic, shoppers using the Instacart platform have played a critical role in providing these vulnerable consumers with safe and reliable access to affordable groceries. This is one of the many reasons CGA supported Proposition 22. CGA's members and the consumers they serve will both suffer significant harm if Instacart is forced to increase its costs or, worse, ceases operations in light of the injunction.

The Bay Area Council has been at the intersection of business and civic leadership, shaping the future of the Bay Area since 1945. The Council includes and welcomes business leaders committed to working with public and community leaders to keep the Bay Area innovative, globally competitive, inclusive, and sustainable.

The San Francisco Chamber of Commerce includes businesses of every size, industry, and neighborhood across the City and region, as well as other business organizations, community benefit districts, and industry

associations. The San Francisco Chamber focuses on advocacy, business development, and economic development to provide leadership on issues important to business and take collective action to advance sustaining economic growth.

The Valley Industry and Commerce Association serves to enhance the economic vitality of the greater San Fernando Valley region by advocating for a better business climate and quality of life. With input and guidance from its members, the Association maintains a regular presence at all levels of government to effectively represent Valley businesses.

This case raises issues of concern to amici curiae and its members, regarding the importance of the gig economy and how upending Instacart's business model would cause irreparable harm.

Amici curiae believe the proposed amici curiae brief will assist the Court in deciding whether (1) Instacart satisfies Prong B of the ABC test announced in *Dynamex Operations West, Inc.. v. Superior Court* (2018) 4 Cal.5th 903, in the event the Court does not find that Proposition 22 requires vacatur of the injunction, and (2) public policy considerations (particularly as they affect amici and their members) support vacatur of the injunction against Instacart. Amici respectfully request that this Court accept and file the attached amici curiae brief.

Dated: December 1, 2020

Respectfully submitted,

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INTRODUCTION

Countless California residents have secured work through the gig economy, using online platforms (such as Instacart's) to accept "gigs" from customers. They set their own hours, decide when and where to work, and choose which platforms they wish to use. No employer requires them to work nine-to-five or more on a rigid workweek schedule. In the gig economy, workers are free to choose. And that flexibility has been critical to the growing gig economy that has been a driver of growth in California.

Plaintiff seeks to take away that flexibility. It has asserted, among other things, that companies like Instacart—which operate technology platforms connecting service providers with customers—are engaged in the same kind of work as the service providers themselves, and so, under California's ABC employment test, are required to classify those service providers as employees rather than as independent contractors.

That argument is wrong. Instacart's business of operating a technology platform is *distinct* from the work that the service providers do in delivering groceries to customers who also use the platform. Unlike a delivery company (which merely provides a delivery service), Instacart brings customers and the grocers together in the first place and provides the technology by which the customers place their order, by which the grocers fill it, by which payment is made, and by which persons willing to shop for the groceries and deliver them are engaged. For this reason, Instacart satisfies Prong B of the ABC test, which is the focus of this brief, and should remain free to classify the service providers who use its platform as independent contractors.

Amici agree with the arguments made in Instacart's briefing, including that Proposition 22 requires vacatur and that Prongs A, B, and C are satisfied in any event. But amici focus on Prong B because of the dangers of an overly expansive interpretation of that prong that would make

it impossible for companies engaged in a distinct business to show they are using independent contractors and that would improperly sweep in many companies that have long been recognized as providing a distinct service. The purpose of Prong B is to capture situations in which a company's business is limited to providing the services its workers perform; in that circumstance, putting aside Proposition 22, it may make sense to treat those workers as employees. But where a company has a distinct business—such as providing an innovative platform that connects other businesses with their customers and with service providers—Prong B does not and should not apply.

Public policy further compels vacating the injunction against Instacart. Proposition 22 requires vacatur, as Instacart's brief makes clear. The people of California have decisively chosen to give workers the flexibility to work when they choose by allowing platform companies like Instacart to classify them as independent contractors. But even apart from Proposition 22, the public policy benefits of providing flexibility to workers support vacatur of the injunction. Plaintiff disregards these benefits. This Court should vacate the injunction.

ARGUMENT

I. INSTACART SATISFIES PRONG B OF THE ABC TEST.

Amici agree with Instacart that Proposition 22 requires vacatur and moots the application of the ABC test. But in response to plaintiff's argument that the ABC test still applies to companies like Instacart, amici supports Instacart's position that it satisfies the ABC test in any event, and in particular, Prong B of that test. Under that prong, to treat a person as an independent contractor rather than an employee, a hiring entity must prove (among other elements) that the person "perform[s] work that is outside the usual course of the hiring entity's business." (*Dynamex Operations West,*

Inc. v. Superior Court (2018) 4 Cal.5th 903, 959; see also Cal. Labor Code § 2775(b)(1)(B).)

In directing courts to consider the "usual course of the hiring entity's business," this element (Prong B) "does not refer to the type of business" in a general or colloquial sense, "but rather, to *the specific business activities engaged in by the enterprise*," and accordingly, an examination of "the particular activities engaged in by the" purported hiring entity is required. (*Mattatuck Museum-Mattatuck Hist. Soc. v. Adm'r, Unemployment Comp. Act* (1996) 238 Conn. 273, 279, emphasis added.) Significant to this examination, too, is the entity's "own definition of its business." (*Sebago v. Boston Cab Dispatch, Inc.* (Mass. 2015) 28 N.E.3d 1139, 1150; *Great N. Constr., Inc. v. Dep't of Labor* (Vt. 2016) 161 A.3d 1207, 1215–16.)

Instacart satisfies this element. Instacart's usual course of business is developing, providing, and maintaining a multi-sided online platform, which enables individuals to purchase groceries online by connecting them with grocery store companies and with drivers who shop for and deliver the groceries. The shoppers and delivery drivers perform work (shopping and driving) that is outside the usual course of operating the online platform business.

A. Instacart's Usual Course of Business is Operating a Multi-Sided Online Platform Connecting Grocery Buyers With Stores and With Shoppers And Drivers—Its Business Is *Not* Shopping and Driving.

The "specific business activities engaged in by" Instacart are developing, providing, and maintaining a digital platform, accessed through a smartphone application, designed to connect grocery buyers with grocery retailers and with shoppers and delivery drivers. (*Mattatuck*, supra, 238 Conn. at p. 279.) Instacart operates online interfaces for the buyers, grocery retailers, and shoppers and drivers who use Instacart's platform to communicate with one another and to conduct business transactions. (See

Instacart's Op. Br. 17–19.) Instacart's technology platform *allows* these separate users to engage in *their own business activities*: the retailers to sell their groceries online using virtual storefronts; and individuals to offer their services to shop for and deliver groceries to online buyers. (*Id.* at pp. 17–21.)

Instacart does not itself perform these business activities engaged in by users of its platform: it does not sell groceries (as the retailers do); nor does it pick up and deliver groceries to online buyers (as the drivers do). Serving instead as a digital hub, Instacart brings these various parties together (in ways not possible before the advent of smartphone technology) so that they may conduct their own business activities and transactions with one another and with customers. (See *ibid.*)

Far from *employing* those who use Instacart's platform, Instacart provides *services to them*: it serves retailers by providing them a digital space to market their wares; it serves individual buyers, who value the convenience of purchasing groceries online, by allowing them to select from an array of vendors; and it serves individuals, who wish to offer their own services for pay and have the flexibility to shop for and deliver groceries to online buyers, by matching them with buyers and retailers.

As a shopping mall provides a platform for retailers and shoppers to gather and engage in transactions, so too does Instacart provide a platform for its users to be connected and conduct business with one another through buying, selling, and delivering groceries. In providing such a platform, Instacart no more employs the users of its platform than an operator of a shopping mall employs the retailers and shoppers and deliverers who benefit from the use of its space. Instacart's business of operating a multi-sided marketplace is distinct from the business of those who use it.

1. Precedent confirms that Instacart does not perform the same work as shoppers and drivers.

A plethora of precedents in this and other jurisdictions confirms that shoppers and drivers perform work that is outside Instacart's business of operating an online marketplace. In *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, the California Court of Appeal held that Shell did not employ a manager of gas stations that were *owned* by Shell but *operated* by another company. (*Id.* at pp. 315–316.) "Shell was not in the business of operating fueling stations," the court held. (*Id.* at p. 315.) "[I]t was in the business of owning real estate and fuel." (*Ibid.*) "[M]anaging a fuel station was not the type of business in which Shell was engaged." (*Ibid.*) For these reasons, the court concluded that Shell had satisfied Prong B because Shell's business was "distinct" from the work the plaintiff manager performed. (*Id.* at pp. 315–316.)

The court's careful analysis in *Curry* controls here: Just as Shell's business of owning gas stations was distinct from the business of operating them, Instacart's business of operating an online platform is *distinct* from the work that the shoppers and delivery drivers perform.

The Indiana Supreme Court's decision in *Q.D.-A., Inc. v. Indiana Dep't of Workforce Dev.* (Ind. 2019) 114 N.E.3d 840, reinforces that conclusion. The court held that "a business that connects drivers with customers who need too-large-to-tow vehicles driven to them" did not employ the drivers. (*Id.* at p. 843.) The business would "contrac[t] with a Driver to pair him with customers needing this drive-away service," and the "Driver could choose his own hours," "contract with [the company's] competitors," and "decline any work offered by [the company]." (*Ibid*.) Applying a test that is materially identical to California's Prong B, the court reasoned that the "[d]river performed a service outside [the company's]

usual course of business," because the company "did not regularly or continually provide drive-away services." (*Id.* at pp. 847–848.)

The court rejected, as too general, characterizing the company as "a provider of one-way transportation of commodities," and abrogated a lower-court decision that had ruled that "transporting and delivering RVs was within the usual course of business of a company like Q.D.-A." (*Id.* at pp. 844, 848.) The court explained that the way a company may have "market[ed] itself" does not necessarily "fully reflect the activities a company regularly or continually performs." (*Id.* at pp. 847–848.) And so a court "cannot uncritically rely" on a company's "advertising" or "speculative customer belief" but must instead examine the business activities that the company actually and specifically engages in. (*Ibid.*)

A critical examination of Instacart's specific business activities compels the conclusion that Instacart is in the business of operating a multi-sided online marketplace. Just as Q.D.-A. "connect[ed] drivers with customers" for the delivery of large vehicles but did not provide driving services (*id.* at p. 840), so too does Instacart connect shoppers and drivers with customers for the shopping and delivery of groceries but does not itself provide shopping and driving services. (See also *Wachenfeld v. Bd. of Review, Dep't of Labor* (N.J. Super. Ct. App. Div. Mar. 12, 2015) 2015 WL 1057908, at *2–3 ["[W]hile Winchester Gardens is primarily a senior residence and it is the company's responsibility to maintain and preserve the premises for its residents, carpentry and painting are not within Winchester Garden's 'usual course of business.'"]; *Law Office of Gerard C. Vince, LLC v. Bd. of Review* (N.J. Super. Ct. App. Div. Sept. 3, 2019) 2019 WL 4165066, at *4 [holding that, because a contractor's "work did not involve specific clients or tasks typically performed by a paralegal, [such work] could be considered outside the usual course of business for the law firm"].)

Rather than "uncritically rely[ing]" on the generalization and "speculative customer belief" that Instacart is, in the colloquial sense, in the "grocery delivery business," a court must rigorously inquire into Instacart's actual and specific business activities. (*Q.D.-A.*, supra, 114 N.E.3d at pp. 847–848.) Here, Instacart did not perform delivery services but engaged in the business of operating an online platform that connected customers with shoppers and drivers.

Additional cases pertaining to the cab dispatch and brokering business validate the need for an exacting inquiry into the specific business activities of the purported hiring entity. In *Sebago v. Bos. Cab Dispatch, Inc.* (Mass. 2015) 28 N.E.3d 1139, the Massachusetts Supreme Judicial Court held that taxi cab drivers were independent contractors, reasoning as relevant here that they performed work "outside the usual course of the business of the [putative] employer." (*Id.* at p. 1150.) The court ruled that (a) the taxi medallion owners who leased the medallions to the drivers and (b) the radio associations, which dispatched the taxi drivers to pick up customers, engaged in distinct businesses from the taxi drivers themselves and could not be considered employers. (*Id.* at pp. 1149–1156.)

In *Daw's Critical Care Registry, Inc. v. Dep't of Labor* (Super. Ct. 1992) 42 Conn. Supp. 376, the court held that a company that "brokers nursing personnel" by providing nurses to its clients' medical facilities did not employ nurses. (*Id.* at pp. 402–403.) While the nurses provided health care at the facilities, the company "was not in the business of *providing* health care at any client's medical facility." (*Id.* at p. 403.) "In other words the business of providing health care personnel does not translate into the business of caring for patients." (*Ibid.*)

Similarly, in *Trauma Nurses, Inc. v. Bd. of Review* (App. Div. 1990) 242 N.J.Super. 135, the court held that providing health-care services was "clearly beyond the purview and usual course of [the company's]

business." (*Id.* at pp. 147–148.) The company did "not perform patient care" but rather "broker[ed] nurses." (*Ibid.*; see also *State Dep't of Emp't, Training & Rehab. v. Reliable Health Care Servs. of S. Nev., Inc.* (Nev. 1999) 983 P.2d 414, 418 [concluding that "the business of brokering health care workers does not translate into the business of treating patients for these purposes, and thus a temporary health care worker does not work in the usual course of an employment broker's business within the purview of [prong B]"]; *Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor* (1991) 125 N.J. 567, 584–585 [citing *Trauma Nurses* approvingly].)

Just as the dispatch entities in *Sebago* and the healthcare brokers in *Daw's*, *Trauma Nurses*, and *Reliable* were not employers, nor does Instacart employ the shoppers and drivers who use its platform.

Still more cases that involve entities connecting service providers with service recipients make clear that the connecting entities do not employ the service providers. In particular, these cases show that such entities are *not* employers, even though they may be directly paying the service providers. It is the nature of the *work* done by connecting entities (such as Instacart)—and not the method of payment—that determines whether they are engaged in the same business.

In *State, Dep't of Pub. Welfare v. Saville* (1985) 219 Neb. 81, the court held that a welfare office that "match[ed]" a service provider (such as a house cleaner or driver) with the needs of a recipient was "not in the business of providing such services but is, rather, in the business of paying for the services pursuant to welfare programs." (*Id.* at pp. 85–87.) In *Pettit v. State* (1996) 249 Neb. 666, the court similarly held that the Department of Social Services was "not in the business of cleaning houses or transporting persons to doctors or stores, but, rather, it [was] in the business of paying for the services pursuant to welfare programs," and thus did not employ the "chore provider[s]." (*Id.* at p. 676.)

Saiki v. United States (8th Cir. 1962) 306 F.2d 642 is instructive too. There, the court held that entities that connected hatchery owners with workers who provided services to the hatchery owners (by separating female chickens from male chickens) did not employ those workers but rather "t[ook] on every aspect of booking agents or brokers." (*Id.* at p. 652; see also *Walfish v. Nw. Mut. Life Ins. Co.* (D.N.J. May 6, 2019) No. 16-CV-4981, 2019 WL 1987013, at *8 [holding that Northwestern Mutual Life Insurance Company does not "sell insurance" but rather its "core business is underwriting, issuing, and servicing insurance policies" and thus does not employ the sales agents under Prong B's "course-of-business method"]; *Ruggiero v. Am. United Life Ins. Co.* (D. Mass. 2015) 137 F.Supp.3d 104, 122 [insurance sales agent, who could and did sell for other companies, was not an employee].)

Instacart likewise does not employ deliverers who use its platform even though Instacart facilitates payment between grocery consumers and deliverers. Not only does the payment facilitation not turn the deliverers into employees, it is a primary reason why Instacart should not be viewed as in the grocery delivery business. Payment facilitation, along with the other functions Instacart serves, is what makes Instacart a multi-sided platform rather than a grocery delivery service. As the provider of a multi-sided platform, Instacart provides services to grocery consumers, grocery retailers, and the shoppers and drivers who use Instacart to connect with consumers and retailers. As the United States Supreme Court has recognized, "[t]ransaction platforms" (like Instacart's) "are thus better understood as 'suppl[ying] only one product'—transactions." *Ohio v. Am. Express Co.* (2018) 138 S.Ct. 2274, 2287. Instacart enables "transactions" to take place between various parties that use its multi-sided platform. Instacart does not itself supply the services carried out by the deliverers or the goods offered by the grocery stores.

All of these cases, ignored by plaintiff, confirm that online platform companies like Instacart do not employ the individuals and entities that use the platform for their mutual benefit. Instacart's business activities (managing and operating the online platform) are not the same as the activities engaged in by the shoppers and drivers and the grocery store retailers that benefit from the use of Instacart's platform services.

People v. Uber Technologies, Inc. (2020) 56 Cal.App.5th 266, does not control the outcome here. It was wrongly decided, has not been disposed of on the merits and, in any event, is distinguishable. Instacart's multi-sided platform shows that it is in the business of connecting various parties through its online marketplace—not just connecting consumers with deliverers but also connecting consumers with grocery retailers. The court in *Uber* sought to distinguish *Trauma Nurses*, *Reliable*, and *Q.D.-A.* (cited *supra* at pp. 14, 16–17), stating that those cases did not "involv[e] the continual coordination between worker and company at every stage of the work performed" or "the financial interdependence that is present" in Uber and Lyft's case. (*Uber*, supra, 56 Cal.App.5th at p. 315.) But that point of distinction, as the *Uber* court seems to acknowledge in a later part of its opinion, bears on the "control" and "independent trade" prongs of the ABC test—not prong B. (*Id.* at p. 316.) In any event, Instacart's platform does not involve coordination "at every stage of the work performed." (See Instacart's Op. Br. 53.)

2. Instacart's understanding of its own business confirms that it does not perform the same work as shoppers and drivers.

Courts "have recognized that a purported employer's own definition of its business is indicative of the usual course of that business." (*Sebago*, supra, 471 Mass. at p. 333, citing *Athol Daily News v. Board of Review of the Div. of Employment & Training* (2003) 439 Mass. 171, 179.) "[H]ow

the purported employer defines its own business" is a critical factor in assessing whether Prong B is satisfied. (*Great N. Constr*, supra, 161 A.3d at pp. 1215–1216.) Prong B focuses on the entity's "business model and general operations" (*Carr v. Flower Foods, Inc.* (E.D. Pa. May 7, 2019) 2019 WL 2027299, at *20), and considering how that entity conceives of its own business model and general operations is integral to the Prong B analysis.

Applying this factor further confirms that Instacart satisfies Prong B. Instacart understands its own business as a provider of an online market-place platform that connects (1) individuals who want to buy groceries online with (2) grocery store retailers who provide the goods and (3) shoppers and drivers who deliver them. (See Instacart's Op. Br. 17–21.) The work that Instacart performs in managing and operating that online platform—from incorporating algorithms that connect the multi-sided platform users, to designing the user-interface of its online application, to facilitating payments between platform users, to deciding through quality checks who is allowed to use the platform, to providing suggested routes—all confirm Instacart's understanding of its own business as an online marketplace. Such work serves to enhance the quality of the online marketplace, rendering it easier for parties to use and participate in the marketplace.

Contrary to plaintiff's assertions (Opp. 36–41), the features of Instacart's online platform do not prove an employer-employee relationship. Just the opposite. As a shopping mall wants high-quality tenants and to provide a safe environment for sellers and shoppers, so too Instacart's business is to create and maintain an online market space that provides an environment in which various parties can freely sell and buy their wares: grocery buyers can buy groceries conveniently from the comfort of their home, stores can sell their groceries to such buyers, and

drivers can provide their services to both the grocery stores and the buyers in shopping for and delivering the groceries. Instacart provides a way to connect willing buyers and sellers of grocery goods and delivery services. Their work is not performed in the usual course of Instacart's business.

B. Instacart Cannot Reasonably Be Viewed as Employing Shoppers and Drivers, and a Contrary Conclusion Produces Absurd Results.

Instacart satisfies Prong B for a related but separate reason: Instacart cannot be "reasonably viewed" as an employer of the deliverers who use its platform. According to *Dynamex*, Prong B seeks to determine whether a person hired by an entity is "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." (4 Cal.5th at p. 959.) Accordingly, *Dynamex* instructs courts to compare whether a worker would be reasonably viewed as a *traditional* employee or independent contractor. (*Id.* at pp. 916, 949, 953, 959.)

The shoppers and drivers who use Instacart's platform services cannot be considered employees in the traditional sense. The flexibility afforded the shoppers and drivers supports the conclusion that they should be considered independent contractors instead. The shoppers and drivers are not required to work for any continuous period of time—indeed, that is one of the primary advantages of using Instacart's platform. Nor are they required to work exclusively with Instacart but instead are free to work with any other company, including companies that compete directly with Instacart. Indeed, many platform workers "multi-app," using multiple online platforms simultaneously to find customers.

The continuity of labor during the work week and the duty of loyalty—hallmarks of an employment relationship—are simply absent here. (See *Techno Lite, Inc. v. Emcod, LLC* (2020) 44 Cal.App.5th 462, 471.)

And thus it would be inapt to impose traditional labor requirements (*e.g.*, periodic meal-breaks, rigid minimum and maximum hour mandates, etc.) onto Instacart's flexible and fluid business model. For instance, how would meal-break requirements apply where the worker performs services throughout the workday for multiple online platform companies? Which, if any, company must provide the required breaks? Instacart cannot be considered an employer to the shoppers and drivers in the traditional sense.

The multi-sided nature of Instacart's business likewise demonstrates that Instacart cannot be reasonably viewed as a traditional employer. "Two-sided" or multi-sided "platforms differ from traditional markets in important ways." (*Am. Express Co.*, supra, 138 S.Ct. at p. 2280.) "As the name implies, a two-sided (or multi-sided) platform offers different products or services to two (or more) different groups who . . . depend on the platform to intermediate between them." (*Ibid.*) The use of smartphone app technology has created new ways of conducting business—including the provision of a multi-sided online marketplace that connects willing buyers and providers of goods and services. With the advent of this new technology, it is inappropriate to describe users of such platforms as *employees* of the platform provider. Platform users (such as the shoppers and drivers and the grocery retailers) use *Instacart*'s services as much as Instacart uses theirs.

To illustrate, platform users are able to take advantage of Instacart's technology in multiple ways: (1) drivers use Instacart to find customers; (2) grocery stores use Instacart to expand their ability to market their goods to a wider pool of grocery consumers; (3) grocery stores use Instacart to make their products available to shoppers and drivers who deliver their groceries to those consumers; (4) consumers use Instacart to find grocery stores, and to connect with shoppers and drivers who will deliver their groceries; and (5) shoppers and drivers and consumers all use Instacart to

coordinate with one another—with regard not just to the goods and services exchanged but the pricing of the goods and services as well.

Disregarding market realities, plaintiff characterizes Instacart, in one-sided fashion, as employing shoppers and drivers. But given the multi-sided nature of the platform, the relationship could just as easily have been recast the other way around. Plaintiff provides no reason why it could not equally be said, under plaintiff's logic, that shoppers and drivers employ Instacart by using its matching technology to find purchasers for their services; or that the consumers employ the shoppers and drivers (via Instacart) to deliver groceries to them. After all, each type of user of Instacart's platform (consumer, deliverer, retailer) takes advantage of the services offered by Instacart and by one another.

But consumers no more employ the shoppers and drivers than grocery stores do. And shoppers and drivers no more employ Instacart than Instacart employs shoppers and drivers. Instacart's multi-sided platform connects different parties seeking to benefit from using the platform through the mutual exchange of goods and services. No one party employs the other. Rather, Instacart's platform creates and sustains market opportunities for different parties (such as deliverers and retailers) to conduct their own businesses. The multi-sided nature of the online platform refutes plaintiff's outmoded and incorrect characterization that Instacart employs shoppers and drivers.

Plaintiff's view produces absurdities and disrupts common market arrangements. Plaintiff argues broadly that, because Instacart is in the "grocery delivery" business, the shoppers and drivers who are also in that business must be considered employees. (Opp. 41.) That characterization disregards the actual business activities engaged in by Instacart (see supra, at Part I.A) and contains no meaningful limit, improperly extending the

law's reach to market arrangements that do not involve employer-employee relationships.

Take a few examples. Under plaintiff's view, brokerage businesses (such as in *Daw's*, *Trauma Nurses*, and *Reliable*) would no longer be able to operate as such, because brokers could be characterized (incorrectly) as employing the providers whose services they are brokering since they arguably operate in the same business as the providers.

Under plaintiff's view, franchises would not be able to operate as such, because the franchisor could be characterized (incorrectly) as employing the franchisee since they arguably operate in the same franchise business. (See *Haitayan v. 7-Eleven, Inc.* (C.D. Cal. Feb. 19, 2020) No. 17-cv-7454, 2020 WL 1290613, at *8 [holding that 7-Eleven did not employ its franchisee who owned and operated a convenience store, because the parties are not "engaged in the same usual course of business"].)

Under plaintiff's view, joint ventures would not be able to operate as such either, since a partner to the venture could be characterized (incorrectly) as employing another partner in the same venture. (See *Party Cab Co. v. United States* (7th Cir. 1949) 172 F.2d 87, 93 [rejecting an employer-employee relationship where "the relation between the plaintiff and the drivers appears more like some kind of a joint venture, wherein the plaintiff provides the facilities for a fixed charge and the drivers contribute the fuel, their skill, energy and labor"].)

And under plaintiff's view, countless platform companies would be jeopardized as well. If plaintiff can sweepingly assert here that Instacart is in the business of "grocery delivery" to impose employment regulations on it, plaintiff can with ease apply that logic to others too: Zillow or Redfin would be considered the employer of real estate agents who use its platform to sell homes because both the platform and agents arguably offer "real estate services"; Airbnb would be considered the employer of landlords

who use its platform to lease space because both the platform and landlords arguably offer "leasing services"; an auction company would be considered the employer of individuals who use its platform to market their wares because both the company and seller arguably work in the same "merchandise selling" business; a clothing department store would be considered the employer of clothing manufacturers who use its space to sell their products because both store and manufacturers arguably offer "clothing products" and so are in the same business. Examples abound.

None of these businesses should be considered the employers of those who use their platforms. Yet plaintiff's flawed and overly broad definition of what constitutes a company's "usual course of business" would sweep in these businesses and destroy their business models. While some of those businesses might be able to satisfy Prongs A and C of the ABC test, they would need to satisfy Prong B as well in order to avert the employee classification. But plaintiff's all-encompassing view of Prong B makes that impossible, producing the absurdities discussed above. The absurdities of plaintiff's view confirm its invalidity.

Prong B must be given content in a way that does not upend business models that clearly do not involve employer-employee relationships. Prongs A and C would already capture situations where a purported platform company is essentially controlling all of the work; courts need not apply Prong B so broadly to swallow even those companies that exercise little to no control over their service providers and are truly providing a distinct connecting service.

II. PUBLIC POLICY SUPPORTS VACATING THE INJUNCTION AGAINST INSTACART.

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

Teamsters (1983) 140 Cal.App.3d 547, 555.) As Instacart's reply brief shows, Proposition 22 conclusively tilts the public interest in Instacart's favor and requires vacatur of the injunction. (See Instacart's Reply Br. 26–29.) But even apart from Proposition 22, public policy considerations support vacatur of the injunction.

The ABC test, if construed to invalidate Instacart's business model, would damage the gig economy to the detriment of workers and those who rely on their services. "In survey after survey, gig workers report that the primary benefit of gig work is flexibility. They gravitate to gig work because it allows them to make their own schedules and choose their own projects. They like feeling like their own boss. And for many of them, this is not simply a preference: they may be students, parents, or workers with other full-time jobs." (*Ready, Fire, Aim: How State Regulators are Threatening the Gig Economy and Millions of Workers and Consumers*, U.S. Chamber of Commerce Employment Policy Div. (Jan. 2020) at p. 36, http://www.uschamber.com/sites/default/files/ready_fire_aim_report_on_the_gig_economy.pdf, citing J. Sherk, *The Rise of the "Gig" Economy: Good for Workers and Consumers*, The Heritage Foundation Backgrounder No. 3143 (Oct. 7, 2016) at p. 4; Report on the Economic Well-Being of U.S. Households in 2018, Bd. of Governors of the Fed. Reserve Sys. (May 2019), https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-employment.htm; JPMorgan Chase & Co. Inst., *Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility* (Feb. 2016) at p. 24.)

Forcing Instacart and other platform companies like it to restructure their business models would take away the flexibility that countless workers enjoy. "[T]o ensure they can continue making a profit, platform holders" if subject to employment regulations imposing minimum wage, overtime, and other requirements "will have to take more control over when

and where gig employees work. They will have to limit the time gig workers can spend working and schedule the workers at places and times where the opportunities for revenue are the greatest." (*Ready, Fire, Aim*, supra, at p. 36.) "Gig employees will therefore no longer control their own schedules or projects or where they work; they will become more like shift workers." (*Ibid.*)

These changes will work to the detriment of gig workers. "Military spouses, transitioning service members, ex-offenders, students, parents, and moonlighters may no longer have access to the gig economy. Legislators [and courts] will have closed an avenue for millions of Americans to supplement their incomes or sustain themselves when they are in between jobs. In that sense, they may actually be raising costs for the state, which may need to provide social services to people who no longer have alternate work opportunities. And they will, perhaps, have smothered a nascent industry in its cradle." (*Id.* at p. 37.)

Platform companies such as Instacart would not be able to sustain their current business models if the Court were to hold that Proposition 22 does not moot the case and that Prong B is not satisfied. Because California may require that employers consider time spent waiting for active work to be compensable, an employer has the incentive to schedule shifts rather than let the worker decide when, where, how much he or she will work. (See *Augustus v. ABM Security Servs., Inc.* (2016) 2 Cal.5th 257, 272.) Similarly, because California requires that, if an employee works a split shift (where an employee is not working continuously for pay), the employer may have to pay an extra hour of wages (see Cal. Code Regs. tit. 8, § 11090(4)(C)), the employer has the incentive to prohibit employees from coming and going as they wish. And because "an employer is entitled to its employees' 'undivided loyalty'" under California law (see *Techno Lite*, supra, 44 Cal.App.5th at p. 471), an employer will

likely prohibit "multi-apping," barring its employees from working for other competing employers at the same time.

Other economic data confirm the preference for flexibility that would be eliminated under plaintiff's position. Many workers prefer the flexibility of an independent contractor relationship: a 2017 federal government survey found that 79 percent of independent contractors "overwhelmingly prefer their work arrangement" to "traditional jobs." (See *Contingent and Alternative Employment Arrangements*, U.S. Bureau of Labor Statistics (June 7, 2018), https://www.bls.gov/news.release/conemp.htm.) "Fewer than 1 in 10 independent contractors would prefer a traditional work arrangement." (*Ibid.*) Likewise, a 2016 study found that "for every primary independent worker who would prefer a traditional job, more than two traditional workers hope to shift in the opposite direction." (Manyika, et al., McKinsey Global Inst., *Independent Work: Choice, Necessity, and the Gig Economy* (Oct. 2016) at p. 7.) Other studies show "that roughly 60 to 80 percent of people who freelance do so by choice." (*Ibid.*, citing a 2015 Freelancers Union and Upwork survey.) The passage of Proposition 22 reflects, too, the desires of workers for flexibility. The public interest supports maintaining that job flexibility.

Gig economy companies like Instacart remain central to the California economy. Upending their business model would cause irreparable harm to the detriment of the public. And during a time of pandemic, when Instacart has been critical to grocery chains and individual retailers across the State, an injunction against Instacart is particularly unjustified. Countless customers rely on Instacart's platform to arrange for their groceries to be delivered. Many of these customers include seniors and others at high risk of contracting COVID-19 who need safe and reliable access to food and other essential items while lacking the ability to shop on their own. Instacart's services also allow for more social distancing at

stores to enable grocery retailers to abide by safety protocols that have been become more restrictive across the State.

CONCLUSION

For the reasons above, in the event that the Court does not find that Proposition 22 requires vacatur of the preliminary injunction, the Court should hold that Instacart satisfies Prong B of the ABC test and that public policy considerations support vacatur of the injunction against Instacart.

Dated: December 1, 2020

Respectfully submitted,

JONES DAY

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), counsel for amici curiae, the Chamber of Commerce of the United States, California Grocers Association, Bay Area Council, San Francisco Chamber of Commerce, and Valley Industry and Commerce Association hereby certify that the amici curiae brief has a length of 5911 words. This certification is made on reliance on the word count of the computer program used to prepare this brief.

Dated: December 1, 2020

Respectfully submitted,

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PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 California Street, 26th Floor, San Francisco, California 94104. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On December 1, 2020, I served true and correct copies of the following document(s):

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF THE CHAMBER COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA GROCERS ASSOCIATION, BAY AREA COUNCIL, SAN FRANCISCO CHAMBER OF COMMERCE, AND VALLEY INDUSTRY & COMMERCE ASSOCIATION IN SUPPORT OF APPELLANT

by causing to be placed the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

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Office of the Attorney General P. O. Box 85266 San Diego, CA 92186-5266	

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on December 1, 2020, at Martinez, California.

/s/ Margaret Landsborough
Margaret Landsborough