

IN THE CALIFORNIA COURT OF APPEAL

FOURTH APPELLATE DISTRICT - DIVISION ONE

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

*Plaintiff and  
Respondent,*

v. COA Case No. D077380

MAPLEBEAR INC., DBA  
INSTACART,

*Defendant and  
Appellant.*

On Appeal From San Diego Superior Court No:

37:2019-00048731-CU-MC-CTL

Honorable Timothy B. Taylor, Judge

---

**APPLICATION FOR LEAVE TO FILE BRIEF OF  
AMICUS CURIAE INDEPENDENT WOMEN'S  
LAW CENTER**

---

Attorneys for *Amicus Curiae*  
Independent Women's Law Center

JENNIFER C. BRACERAS  
INDEPENDENT WOMEN'S LAW  
CENTER

4 Weems Lane, No. 312 500 Capitol Mall, Suite 2000 Winchester, VA 22602  
Sacramento, CA 95814

BRUCE J. SARCHET, Bar No. 121042  
MICHAEL J. LOTITO, Bar No. 108740  
LITTLER MENDELSON, P.C.

Telephone: 916.830.7200 Facsimile:  
916.561.0828 Prospective *amicus  
curiae* Independent Women's Law  
Center respectfully submits this

Application for Leave to File *Amicus Curiae* Brief in support of Defendant-Appellant Maplebear, Inc. dba Instacart. A copy of the proposed brief is attached hereto as Exhibit A. This application and proposed brief are timely filed in accordance with CRC 8.200(c)(1).

### **STATEMENT OF INTEREST**

Prospective *amicus curiae* Independent Women’s Law Center is a project of the Independent Women’s Forum (IWF), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government. Independent Women’s Law Center supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and respect for the American constitutional order.

IWF is particularly concerned that application of the so-called “ABC test,” articulated by the California Supreme Court in *Dynamex Operations W. Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), and later codified and expanded by California’s Assembly Bill 5 (AB5), to Appellant Instacart’s Shoppers by way of the lower court’s preliminary injunction will harm freelance workers, many of whom

are women who prefer the flexibility of contract work to working as employees. Moreover, in light of the enactment of Proposition 22, under which IWF understands that Instacart’s Shoppers will be classified as “independent contractors,” the State of California cannot demonstrate either a likelihood of success on the merits of the underlying litigation, or that the balance of harms supports injunctive relief. As *amicus curiae*, Independent Women’s Law Center seeks to bring to the Court’s attention the injury that will be suffered by independent workers who are not party to the instant matter and who would be directly harmed if preliminary injunctive relief is affirmed.

For these reasons, Independent Women’s Law Center respectfully requests that this Court grant its application and consider the attached *amicus curiae* brief in its deliberations on this matter.

Dated: December 1, 2020

Respectfully submitted,

By: /s/ Bruce J. Sarchet

Bruce J. Sarchet, Bar No. 121042 Littler  
Mendelson, P.C.

500 Capitol Mall, Suite 2000

Sacramento, CA 95814

Telephone: 916.830.7200 Facsimile:  
916.561.0828

Jennifer C. Braceras\*

Independent Women's Law Center

4 Weems Lane, No. 312 Winchester,

VA 22601

Attorneys for amicus curiae

Independent Women's Law Center \*Not

admitted in California

# EXHIBIT A

IN THE CALIFORNIA COURT OF APPEAL

FOURTH APPELLATE DISTRICT - DIVISION ONE

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

*Plaintiff and  
Respondent,*

v. COA Case No. D077380

MAPLEBEAR INC., DBA  
INSTACART,

*Defendant and  
Appellant.*

On Appeal From San Diego Superior Court No:

37:2019-00048731-CU-MC-CTL

Honorable Timothy B. Taylor, Judge

---

**BRIEF OF *AMICUS CURIAE* INDEPENDENT  
WOMEN'S LAW CENTER**

---

Attorneys for *Amicus Curiae*  
Independent Women's Law Center

JENNIFER C. BRACERAS    BRUCE J. SARCHET, Bar No. 121042  
INDEPENDENT WOMEN'S LAW CENTER    MICHAEL J. LOTITO, Bar No. 108740  
LITTLER MENDELSON, P.C.

	<b>Page</b>
STATEMENT OF INTEREST OF AMICUS CURIAE .....	
1	
INTRODUCTION AND SUMMARY OF ARGUMENT .....	
2	
ARGUMENT .....	
5	
A.    The Gig Economy, and the Independent Contractor Model Upon Which It Relies, Is Critical for Working Women .....	5
1.    The Vibrancy of the Gig Economy .....	5
2.    The Critical Importance to Women of the Gig Economy .....	8
B.    By Forcing Workers into Traditional Employment Arrangements, Preliminary Injunctive Relief Would Irreparably Harm Those Workers Who Have Chosen to Earn Their Livelihoods as Independent Contractors or Freelance Workers .....	11
C.    Freelancers, Independent Contractors, and Working Women Will Suffer Irreparable Harm if the Lower Court’s Grant of Preliminary Injunctive Relief Is Affirmed .....	14
D.    The Court Should Reverse the Trial Court’s Grant of Preliminary Injunctive Relief In Light of the Adoption of Proposition 22 .....	17
CONCLUSION .....	19

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*California v. Uber Technologies, Inc. & Lyft, Inc.*,  
COA Case Nos. A160701 & A160706 (Cal. App. Ct. 1st Dist., 4th  
Div. Aug. 20, 2020) ..... 18

*Dynamex Operations West Inc. v. Superior Court*,  
4 Cal. 5th 903 (2018) ..... 1, 2,  
3

*S.G. Borello & Sons, Inc. v. Department of Industrial Relations*,  
48 Cal. 3d 341 (1989) ..... 2

**Statutes**

California Labor Code

§ 225.7 ..... 11

§ 226.7 ..... 12

§ 512 ..... 11

**Other Authorities**

Annette Bernhardt & Sarah Thomason, UC Berkeley Labor Center,  
*What Do We Know About Gig Work in California?: An Analysis of  
Independent Contracting* (June 2017),  
[https://laborcenter.berkeley.edu/what-do-we-know-about-gig-  
work-in-california/](https://laborcenter.berkeley.edu/what-do-we-know-about-gig-work-in-california/) (last accessed Nov. 23, 2020) ..... 6



Bárbara J. Robles & Marysol McGee, Board of Governors of the Federal Reserve System, *Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey 12* (Oct. 2016), <https://bit.ly/35E8HHI>..... 9

Ben Gitis, Douglas Holtz-Eakin & Will Rinehart, *The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends*, AMERICAN ACTION FORUM (Jan. 10, 2017), <https://bit.ly/2WA34Gu> ..... 9

Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements – May 2017,” News Release date June 7, 2018 ..... 7

Bureau of Labor Statistics, “Contingent and Alternative Employment Relationships” (July 2005)..... 7

Chasing Work, Dori Lehner, AB5 Wrote Work Out of CA for this Transcriptionist, <https://www.iwf.org/chasing-work-dori-lehner/> (last accessed Nov. 23, 2020) ..... 15

Chasing Work, Jennifer O'Connell, Restricted by Government Regulations, a Writer and Yoga Instructor Loses Work, <https://www.iwf.org/chasing-work-jennifer-oconnell/> (last accessed Nov. 23, 2020) ..... 15

Chasing Work, JoBeth McDaniel, AB5 Completely Crushes a California Writer’s Dream, <https://www.iwf.org/chasing-work-jobeth-mcdaniel/> (last accessed Sept. 26, 2020) ..... 16

Chasing Work, Karen Anderson, Freelancer Fights for the Right to Work in California, <https://www.iwf.org/chasing-work-karen-anderson/> (last accessed Sept. 26, 2020) ..... 17

David Lewin, William Hamm & Mia Kim, Analysis of Driver Job Losses if Gig Economy Companies Must Re-Classify Drivers as Employees Rather than Independent Contractors, Report of the Berkeley Research Group (2020),

[https://protectdriversandservices.com/wpcontent/uploads/2020/05/BRG-REPORT-JOB-LOSS-SUMMARY-MAY-14-2020\\_FINAL.pdf](https://protectdriversandservices.com/wpcontent/uploads/2020/05/BRG-REPORT-JOB-LOSS-SUMMARY-MAY-14-2020_FINAL.pdf) .....  
 6 Diana Farrell, Fiona Greig & Amar Hamoudi, JPMorgan Chase & Co. Institute, *The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessons* 22 (Sept. 2018),  
<https://bit.ly/2L6aGv5> .....  
 9

Elaine Pofeldt, *Are We Ready For A Workforce That Is 50% Freelance?*, Forbes (Oct. 17, 2017),  
<https://www.forbes.com/sites/elainepofeldt/2017/10/17/are-weready-for-a-workforce-that-is-50-freelance/#3d25b02e3f82> (last accessed Nov. 24, 2020) .....  
 8

Faces of AB5 (@Ab5Of), TWITTER (May 2, 2020, 10:47 PM),  
<https://bit.ly/2YK0OyY> .....  
 16

Fran Maier, Lynn Perkins & Anna Zornosa, *Can't Stop, Won't Stop Her Side Hustle: Women in the Gig Economy 2018* (Sept. 5, 2018),  
<https://bit.ly/2YIfyyw> .....  
 10

Hyperwallet, “The Future of Gig Work is Female” (San Francisco: 2017),  
<https://www.hyperwallet.com/resources/ecommercemarketplaces/the-future-of-gig-work-is-female/> (last visited September 6, 2020) .....  
 10

IWC Order 5-2001, § 12 .....  
 11

Katy Macek, *The Gig Economy and What's In It For Women*, BRAVA MAG. (Sept. 5, 2019), <https://bit.ly/2SMwTIU> .....  
 9

Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015* (Nat'l Bureau of Econ. Research, Working Paper No. 22667, Sept.

2016), <https://bit.ly/3ck0b3m> .....  
9

MBO Partners, *The State of Independence in America: 2019: The Changing Nature of the American Workforce 3*, <https://bit.ly/3fwrLvU> (showing women made up 46 percent of full-time independent workers in 2019) .....  
9

Milja Milenkovic, *The Future of Employment—30 Telling Gig Economy Statistics*, SMALLBIZGENIUS (Aug. 20, 2019), <https://bit.ly/2xJewar> .....  
8 News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Contingent and Alternative Employment Arrangements – May 2017, at 4, 6 (June 7, 2018), <https://bit.ly/2WdUNJ6> (2017 survey showing that women are 47 percent of “contingent” workers and a third of independent contractors) .....  
9

Philip Garrity, *We Polled 573 Freelancers About AB5. They’re Not Happy*, THE FREELANCER (Jan. 30, 2020), <https://bit.ly/2WAO6Qv> .....  
8

State of California, Employment Development Department, “Data Trends about Workers in the Economy” (reflecting October 2020 data), <https://www.edd.ca.gov/Newsroom/unemployment-november-2020.htm> (last accessed Nov. 24, 2020) .....  
13

Upwork & Freelancers Union, <https://www.upwork.com/press/2019/10/03/freelancing-inamerica-2019/> (“Freelancing in America Study”) (last visited Nov. 24, 2020) .....  
6

*What are the Pros and Cons of the Gig Economy?* (Jan. 2019), <https://www.forbes.com/sites/quora/2019/01/08/what-are-the-prosand-cons-of-the-gig-economy/#3d0a27481388> (last accessed Dec. 1, 2020) .....  
6



## **STATEMENT OF INTEREST OF AMICUS CURIAE**

Prospective *amicus curiae* Independent Women’s Law Center is a project of the Independent Women’s Forum (IWF), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government. Independent Women’s Law Center supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and respect for the American constitutional order.

IWF is particularly concerned that application of the so-called “ABC test,” articulated by the California Supreme Court in *Dynamex Operations West Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), and later codified and expanded by California’s Assembly Bill 5 (AB5), to Appellant Instacart’s Shoppers by way of the lower court’s preliminary injunction will harm freelance workers, many of whom are women who prefer the flexibility of contract work to working as employees. Moreover, in light of the enactment of Proposition 22, under which IWF understands that Instacart’s Shoppers will be classified as “independent contractors,” the State of California cannot demonstrate either a likelihood of success on the merits of the underlying litigation, or that the balance of harms supports injunctive relief.

Accordingly, this Court should dissolve the injunctive relief entered by the lower court, and remand the case with directions to proceed under the new, applicable legal standard.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

In 2018, the California Supreme Court upended decades of well-settled law with its decision in *Dynamex Operations W. Inc. v. Superior Court*, 4 Cal. 5th 903 (2018). In *Dynamex*, the Court held that for purposes of California’s wage orders, the standard for determining whether a given worker was an employee or independent contractor was not the multi-factor test articulated decades earlier in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), but rather the so-called “ABC test,” under which a worker is presumed to be an employee unless a hiring entity can demonstrate that:

(a) The worker is free from the control and direction of the hirer in connection with the performance of the work in question;

(b) The worker performs work outside the usual course of the hiring entity’s business; and

(c) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work in question.

While the full scope and reach of the *Dynamex* decision is still being litigated, it is evident that under the ABC test, fewer workers are classified as independent contractors under the law, and more as statutory “employees.”

On the heels of *Dynamex*, in September 2019, the State of California adopted AB5, which both codified and expanded the application of the ABC test, subject to myriad exceptions. AB5 purported to cure the “harm” and “unfairness” to workers who are “exploited” when they are classified as independent contractors under state labor and wage and hour laws. AB5, §§1(b), (d). In fact, AB5, and the application of the ABC test more broadly, has had the opposite effect, making it harder for countless workers (and would-be workers) to earn their livelihood, while wreaking havoc on businesses, the consuming public, and the state’s economy writ large.

Millions of Californians choose to freelance in the “gig” economy because they prefer the flexibility and independence that these work opportunities afford, as compared to the rigid model that is part and parcel of being a full-time employee. These gig workers value the ability to work how they want, when they want, for as long as they want, and for whom they want. Many use gig work as an opportunity to supplement their regular income, or that of their household. While men and women alike enjoy these opportunities, many women especially value the flexibility and independence that freelancing offers as a work lifestyle option.

The preliminary injunctive relief granted by the lower court threatens to upend these arrangements for thousands of California workers. While ostensibly intended to “protect” workers by routinely classifying them as employees, rather than independent contractors, the injunction instead limits these workers’ choices by

imposing upon them a one-size-fits-all “solution” to a problem that the evidence suggests simply does not exist.

On its face, application of the ABC test threatens to make gig work broadly unavailable in the State of California by imposing tremendous legal risk on clients who wish to hire freelancers and independent contractors. As discussed further below, particularly in the case at bar, if the trial court’s imposition of preliminary injunctive relief is not reversed by this Court, t thousands of workers may find themselves deprived of their livelihood in the midst of the most severe public health and economic crisis our nation has witnessed in modern history. At the same time, the public—which has made clear its view that these workers should not be forced to be reclassified as employees—would suffer the loss of vital (and for many, essential) services at a uniquely inopportune moment. At worst, the ABC test threatens to destroy work in certain industries altogether, where certain business models will be simply unable to transition from a freelance/independent contractor business model to a traditional “employment” relationship with its contractors. These workers will suffer immediate and irreparable harm if the lower court’s order is left to stand.

### **ARGUMENT**

The lower court committed reversible error by failing to recognize the cataclysmic and irreparable harm that thousands of California workers—especially those in the gig economy—would suffer in the face of preliminary injunctive relief which

forecloses flexible work options. This Court should reverse the lower court's decision and vacate the injunction.

**A. The Gig Economy, and the Independent Contractor Model Upon Which It Relies, Is Critical for Working Women**

The preliminary injunctive relief granted by the lower court would limit employment opportunities for thousands of California workers, many of them women, at precisely a time where flexible work arrangements, and the ability to earn a living in the manner one chooses, is more critical than ever. In the face of the coronavirus pandemic, the ability to work flexibly at the time and location of one's choosing, whether to safeguard one's own health, or to be able to care for ailing family members, or children at home, is at an unprecedented premium. This Court should reverse the lower court and vacate its injunction.

**1. The Vibrancy of the Gig Economy**

In 2019, 57 million Americans, representing more than one-third of the nation's workforce worked as independent freelancers, contributing nearly one trillion dollars to the U.S. economy, some five percent of the nation's GDP.<sup>1</sup> The gig economy has afforded workers, particularly women, a range of economic opportunity in fields, ranging from computer programming and business consulting

---

<sup>1</sup> Press Release, Sixth annual "Freelancing in America" study finds that more people than ever see freelancing as a longer-term career path (Oct. 3, 2019), Upwork & Freelancers Union, <https://www.upwork.com/press/2019/10/03/freelancing-in-america2019/> ("Freelancing in America Study") (last visited Nov. 24, 2020).

to dog walking, selling goods, ridesharing, and, of direct relevance to the case at bar, food and grocery delivery.<sup>2</sup> In California, 8.5 percent of workers in 2016 considered independent contracting and the sorts of gig work at issue in this case their “main job.”<sup>3</sup>

These workers often choose gig work because it offers them significantly greater autonomy, work-life balance, and opportunities than do traditional modes of employment.<sup>4</sup> This is particularly evident on, *inter alia*, delivery platforms such as those operated by Appellant, where approximately 80 percent of all drivers choose to work fewer than 20 hours per week, and most work fewer than 10 hours per week.<sup>5</sup> For these workers, the opportunity to work the hours they want, as their schedule permits, is of paramount importance.

The State does not dispute these facts, and in fact acknowledges that Shoppers may set their own working hours, choosing “shift” or “on-demand” work schedules at their own discretion. *See* Resp.’s Br. 18. The State likewise acknowledges that

---

<sup>2</sup> *See id.*

<sup>3</sup> Annette Bernhardt & Sarah Thomason, UC Berkeley Labor Center, *What Do We Know About Gig Work in California?: An Analysis of Independent Contracting* (June 2017), available at: <https://laborcenter.berkeley.edu/what-do-we-know-about-gig-workin-california/> (last accessed Nov. 23, 2020).

<sup>4</sup> *See* <https://www.forbes.com/sites/quora/2019/01/08/what-are-the-pros-and-cons-of-the-gig-economy/#3d0a27481388>.

<sup>5</sup> David Lewin, William Hamm & Mia Kim, Analysis of Driver Job Losses if Gig Economy Companies Must Re-Classify Drivers as Employees Rather than Independent Contractors, Report of the Berkeley Research Group (2020), <https://protectdriversandservices.com/wp-content/uploads/2020/05/BRG-REPORT-JOB->

Shoppers are offered, and may accept or decline, orders (known as “batches”) when they are working on-demand. *See id.* These facts underscore why many gig workers choose to work independently, and why they are satisfied with their work arrangements. In a 2005 report, the Bureau of Labor Statistics (BLS) surveyed contractors and concluded that “[t]he majority of independent contractors (82 percent) preferred their work arrangement to a traditional job.”<sup>6</sup> This finding was largely unchanged in BLS’s 2017 survey of independent contractors, which found that independent contractors affirmatively choose their flexible work arrangements; 79 percent of independent contractors prefer their arrangements to traditional employment; and fewer than one in ten independent contractors would prefer a traditional work arrangement.<sup>7</sup>

[LOSS-SUMMARY-MAY-14-2020\\_FINAL.pdf](#) (“Berkeley Research Group Report”) (last accessed Nov. 23, 2020).

<sup>6</sup> Bureau of Labor Statistics, “Contingent and Alternative Employment Relationships” (July 2005).

<sup>7</sup> Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements – May 2017,” News Release date June 7, 2018.

Freelancers choose to work this way for a variety of reasons, individual to each, ranging from flexibility and independence to managing work/life balance or caring for family members. Surveys indicate that those who choose to freelance

have more job satisfaction than those who work as traditional employees.<sup>6</sup> It is perhaps no surprise that prior to the coronavirus pandemic, the independent workforce was growing at a rate three times faster than that of the total U.S. workforce.<sup>7</sup> Indeed, economists have predicted that by 2027, more than 50 percent of the U.S. workforce would participate in the gig economy.<sup>8</sup>

## 2. The Critical Importance to Women of the Gig Economy

Women in particular play an important role in the gig economy, and the gig economy is especially valuable to women. Patricia Mullins of the Wisconsin School of Business at the University of Wisconsin-Madison, identified three categories of women who typically go into free-lance or contract work”: (1) “At-home parents looking to fill their free time and continue their skills or learn new ones”; (2) “those who want income to supplement the salary of their spouse, who already carries the benefits of a traditional job”; and (3) “those who are working multiple jobs and picking up side gigs to support their family on one income.”<sup>11</sup> Women make up a large, and perhaps even dominant, share of the gig economy. Economic survey data

---

<sup>6</sup> See, e.g., Milja Milenkovic, *The Future of Employment—30 Telling Gig Economy Statistics*, SMALLBIZGENIUS (Aug. 20, 2019), <https://bit.ly/2xJewar> (84 percent of freelancers say that they are living their preferred lifestyle, compared to just 54 percent of those working as traditional employees); Philip Garrity, *We Polled 573 Freelancers About AB5. They're Not Happy*, THE FREELANCER (Jan. 30, 2020), <https://bit.ly/2WAO6Qv> (75 percent of freelancers say that they prefer it over a full-time job as a traditional employee).

<sup>7</sup> See Milenkovic, *supra* n.8.

<sup>8</sup> Elaine Pofeldt, *Are We Ready For A Workforce That Is 50% Freelance?*, Forbes (Oct. 17, 2017), <https://www.forbes.com/sites/elainepofeldt/2017/10/17/are-we-ready-fora-workforce-that-is-50-freelance/#3d25b02e3f82> (last accessed Nov. 24, 2020).

shows that women make up at least a third, and perhaps a majority, of gig economy workers, depending on the specific survey and its methodology.<sup>9</sup>

Freelance work is particularly important to women with children, as it allows them to earn money and to focus on their careers without compromising time with

<sup>11</sup> See Katy Macek, *The Gig Economy and What's In It For Women*, BRAVA MAG. (Sept. 5, 2019), <https://bit.ly/2SMwTIU>. family. Mullins notes that, “[f]or a long time, day care was the only option for us as working women” who sought to maintain a career while raising children, but “now there is more of an option with the gig economy.”<sup>10</sup> According to a 2018 survey of

---

<sup>9</sup> See, e.g., MBO Partners, *The State of Independence in America: 2019: The Changing Nature of the American Workforce* 3, <https://bit.ly/3fwrLvU> (showing women made up 46 percent of full-time independent workers in 2019); News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Contingent and Alternative Employment Arrangements – May 2017, at 4, 6 (June 7, 2018), <https://bit.ly/2WdUNJ6> (2017 survey showing that women are 47 percent of “contingent” workers and a third of independent contractors); Diana Farrell, Fiona Greig & Amar Hamoudi, JPMorgan Chase & Co. Institute, *The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessons* 22 (Sept. 2018), <https://bit.ly/2L6aGv5> (showing women are 80 percent as likely as men to work on online platforms); Ben Gitis, Douglas Holtz-Eakin & Will Rinehart, *The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends*, AMERICAN ACTION FORUM (Jan. 10, 2017), <https://bit.ly/2WA34Gu> (citing General Social Survey data showing that about 40 percent of gig workers were women in 2014); Bárbara J. Robles & Marysol McGee, Board of Governors of the Federal Reserve System, *Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey* 12 (Oct. 2016), <https://bit.ly/35E8HHI> (showing women are 56 percent of those who “participated in informal paid work activities”); Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*, at 12-13 (Nat’l Bureau of Econ. Research, Working Paper No. 22667, Sept. 2016), <https://bit.ly/3ck0b3m> (“[W]omen are now more likely than men to be employed in an alternative work arrangement.”).

<sup>10</sup> See Macek, *supra* n.11.

women who work in the gig economy by three San Francisco startups, more than half (54 percent) of those with children under the age of five said they were more likely to do side gigs to be able to increase the amount of time they have to spend with their children.<sup>11</sup>

Based on a 2017 survey of 2,000 women in the gig economy, 32 percent stated they turned to the gig economy because their full-time jobs were stressful and they wanted more flexibility; 28 percent needed more time to care for a child, parent or other relative; and 23 percent wanted a career change.<sup>1213</sup> The survey also showed that 70 percent of women working in the gig economy are the primary caregiver in their homes.<sup>14</sup> The plain message of the data is that 83 percent of women who work in the gig economy do so by choice and/or because they need the added flexibility of a nontraditional work structure.

**B. By Forcing Workers into Traditional Employment Arrangements, Who Have Chosen to Earn Their Livelihoods as Independent Preliminary Injunctive Relief Would Irreparably Harm Those Workers Contractors or Freelance Workers**

Traditional employment arrangements will irreparably harm independent workers, such as those with whom Appellants contract, by requiring that they give

---

<sup>11</sup> See Fran Maier, Lynn Perkins & Anna Zornosa, *Can't Stop, Won't Stop Her Side Hustle: Women in the Gig Economy 2018*, at 10 (Sept. 5, 2018), <https://bit.ly/2YIfyyw>.

<sup>12</sup> Hyperwallet, "The Future of Gig Work is Female" (San Francisco:

<sup>13</sup> ), <https://www.hyperwallet.com/resources/ecommerce-marketplaces/the-future-of-gig-work-is-female/> (last visited September 6, 2020).

<sup>14</sup> See *supra* n.6.

up the flexibility and freedom to be their own boss which independent contracting provides. Platforms such as Instacart simply do not function in a manner commensurate with an employment relationship between the platform company and its workers. These apps establish an online marketplace for users to find one another and to transact for services. For numerous reasons, California's state labor and employment laws often are incompatible with this independent-contractor based business model, particularly where work is platform-based. If forced to reclassify these workers as employees, it is likely that platform-based companies in particular will dramatically reduce, if not eliminate entirely, their operations in the State of California.

For example, California's Wage Orders require employers to provide an uninterrupted 10-minute rest period to employees for every four hours worked, or major fraction thereof. *See, e.g.*, IWC Order 5-2001, § 12. Failure to provide the required rest period results in a penalty of one hour of pay, due to the employee. California Labor Code § 225.7. California Labor Code § 512 requires that employees receive a duty-free, uninterrupted meal period before the end of the fifth hour of work. The failure to provide the required rest period triggers a penalty of one hour of pay, due to the employee. California Labor Code § 226.7. So, for an eight-hour work day, employees must be away from their homes and families for at least eight and a half hour per day.

These restrictions severely limit when, where, and how California employees work, making it impossible for them to have true flexibility. By contrast, independent contractors can work as many or as few hours in a day, with as many or as few breaks, as they choose, without cutting through any administrative red tape. They can eat when they like so they can end work when they want and pursue other endeavors, such as spending more time with their family. They can take unpaid time to conduct personal business or be with their family, and then return to work, as they choose. They can report to work, or ask about its availability, without requiring pay unless they actually work. And they are much freer to choose where they work because they cover their own expenses. The absence of this flexibility—the precise reasons Shoppers who avail themselves of Instacart’s platform do so—is likely to deprive many of them the ability and incentive to work as they have.

These freedoms are particularly salient in the context of the current COVID19 pandemic, when some drivers may desire to limit their exposure by avoiding work in certain areas or by not working at all, while others may be eager to work more than usual. Indeed, due to the large-scale shuttering of the nation’s (and the world’s) economy, unemployment in the United States now stands at 6.9 percent, with approximately 1.79 million unemployed workers in the State of California alone.<sup>15</sup>

---

<sup>15</sup> See State of California, Employment Development Department, “Data Trends about Workers in the Economy” (reflecting October 2020 data), <https://www.edd.ca.gov/Newsroom/unemployment-november-2020.htm> (last accessed Nov. 24, 2020).

As the pandemic enters a “second wave,” it is very possible these numbers will again increase. These recently displaced individuals need *work*—which does not necessarily mean that they need formal *employment*. The lower court’s grant of preliminary injunctive relief, if left to stand, would largely eliminate this work-life flexibility which independent contractors enjoy, and limit options for businesses, individual workers, and society as a whole—all at a time when we need as many options as possible to extricate our economy from its current morass.

Moreover, California’s wage and hours laws create potential compliance issues that are simply incompatible with the realities of the gig economy. For example, how do California’s meal-and-break requirements apply where a putative “employee” performs services throughout the workday for a series of different companies? Many gig economy workers “multi-app,” completing tasks for several platform-based companies each day. Which, if any, company must provide the required breaks? If a multi-apping worker uses their car to perform services for numerous companies for various purposes throughout the day—say, delivering groceries in the afternoon, passengers during rush hour, and restaurant meals in the evening—which company or companies must reimburse mileage and other businessrelated expenses? These difficult legal questions will inevitably arise, and the state labor code carries very serious consequences for potentially “wrong” answers. As a result, companies wishing to avoid this potential liability are likely to

prohibit “multi-apping,” reduce worker flexibility and discretion, and ultimately, reduce their demand for labor.

**C. Freelancers, Independent Contractors, and Working Women Will Suffer Irreparable Harm if the Lower Court’s Grant of Preliminary**

**Injunctive Relief Is Affirmed**

The havoc wreaked on independent workers by application of the ABC test is not speculative. Indeed, by forcing companies to re-classify as “employees” thousands of workers who may have been properly classified as independent contractors under well-settled state law, the law has resulted in the loss of livelihood and income for innumerable California workers. IWF continues to collect these workers’ stories, and shares just a few representative examples below:

- Dori Lehner, a senior citizen, worked as a general transcriptionist for numerous transcription agencies prior to the passage of AB5. In the wake of the law’s passage, many of these agencies ceased using her services, citing the impact of AB5 specifically. Ms. Lehner now “only [has] one direct client,” and estimates that her earnings have dropped by 75 percent.<sup>16</sup>
- Jennifer O’Connell was a writer, yoga instructor and career coach, operating her website under the brand “As The Girl Turns.” After AB5 became law, her

---

<sup>16</sup> Available at: <https://www.iwf.org/chasing-work-dori-lehner/> (last accessed Nov. 23, 2020).

work as an independent contractor was slashed, causing her the loss of about three quarters of her income.<sup>17</sup>

- A freelance optometrist who identified herself as “Nancy P., O.D.” reached out to IWF to express her support for maintaining her independent contractor status: “I have been an independent contractor optometrist for 18 years. I currently work part-time so that I can raise my two boys. Being an IC optometrist has given me the flexibility and the income to have the best of both worlds, a fulfilling career and be present for my children.” As a result of AB5, Nancy has seen her income slashed by almost 30 percent.<sup>18</sup>
- Rona Prestler, a mother of two, “relied on freelancing to earn a full-time income from home since 2016” but says she lost half of her clients as a result of AB5. She now thinks she will be forced to look for a traditional job requiring her to commute several hours a day or potentially move.<sup>19</sup>
- Kathy Seress is a phlebotomist who performs life insurance exams. She lost her independent status under AB5 and can no longer deduct her business expenses from her taxes. The law has also interfered with her ability to

---

<sup>17</sup> Available at: <https://www.iwf.org/chasing-work-jennifer-oconnell/> (last accessed Nov. 23, 2020).

<sup>18</sup> E-mail from Nancy P. to Indep. Women’s Forum (on file with Indep. Womens’ Forum).

<sup>19</sup> See Pofeldt, *California’s AB5 Leaves Women Business Owners Reeling*, n.10 *supra*.

continue freelancing work that she used to do as an instructor for how to use medical devices and as a technical support provider.<sup>20</sup>

- Freelance journalist JoBeth McDaniel explained: “The flexibility [of working as a freelancer] has been a blessing . . . was fine with making that trade-off of less money but more time to stay with my dad when he was dying . . . . There’s not a W-2 job out there that would have allowed any of that.”<sup>21</sup> Her forced reclassification as an “employee” under AB5 threatens to wholly upend the personal and professional choices she has made.
- Karen Anderson had been a freelance editor, writer, and photographer since the mid-1990s. Her work as an independent contractor allows her to write off office expenses, mileage, and her top-tier health insurance plan. AB5 took away her opportunity to work independently, while caring for her elderly mother. The law’s supporters argued that independent contractors would be able to find traditional jobs as W-2 employees. But in Ms. Anderson’s experience that “utopian notion” is “just a fantasy.”<sup>22</sup>

---

<sup>20</sup> Faces of AB5 (@Ab5Of), TWITTER (May 2, 2020, 10:47 PM), <https://bit.ly/2YK0OyY>.

<sup>21</sup> Chasing Work, JoBeth McDaniel, AB5 Completely Crushes a California Writer’s Dream, <https://www.iwf.org/chasing-work-jobeth-mcdaniel/> (last accessed Sept. 26, 2020).

<sup>22</sup> Chasing Work, Karen Anderson, Freelancer Fights for the Right to Work in California, <https://www.iwf.org/chasing-work-karen-anderson/> (last accessed Sept. 26, 2020).

If this Court affirms the trial court’s grant of injunctive relief, thousands of Shoppers will suffer the same fate. Appellants have made clear that if they are ordered to classify their Shoppers as employees under California state law, the consequences for these workers will be immediate and dramatic. Appellants have explained to the Court that if the lower court’s injunction is upheld, they would be likely to reduce the number of Shoppers they employ, and those Shoppers would lose the flexibility and freedom to set their schedules, work for other platforms, and control when and where they work. *See* Appellants Opening Brief at 65-66. At the same time, innumerable drivers would choose not to remain engaged with Appellants as employees, given the lack of flexibility in scheduling and working conditions reclassification would entail. *See id.*

**D. The Court Should Reverse the Trial Court’s Grant of Preliminary Injunctive Relief In Light of the Adoption of Proposition 22**

There is a final, practical reason why this Court should reverse the lower court’s grant of preliminary injunctive relief: the citizens of California voters have overwhelmingly voted to classify certain workers, including those at issue in the instant case, as independent contractors. In light of this fact, the State may no longer plausibly claim that there are likely to succeed on the merits of their argument that Shoppers are “misclassified” as employees. Perhaps more important, the voters in California have profoundly rejected the notion that the “balance of harms” weighs in favor of the State’s attempt to forcibly reclassify Shoppers as “employees” under state labor law.

Other California appellate courts have acknowledged that the outcome of Proposition 22 would be dispositive of claims similar to those made by the State in this case. In granting a writ of supersedeas in the State’s case against transportation network companies Uber and Lyft, the California Court of Appeals for the First Appellate District expressly acknowledged that adoption of Proposition 22 would directly bear on the outcome of claims similar to this one. *See Order Granting Writ of Supersedeas, California v. Uber Technologies, Inc. & Lyft, Inc.*, COA Case Nos. A160701 & A160706 (Cal. App. Ct. 1st Dist., 4th Div. Aug. 20, 2020). IWF respectfully submits that this Court should follow suit, acknowledge the dispositive impact on the case Proposition 22 will have, reverse the lower court’s grant of injunctive relief, and remand the case for proceeding appropriately under the new legal standard. *See generally* Appellant’s Reply Br. 21-26.

### **CONCLUSION**

The forced reclassification of workers who have chosen to pursue their livelihood as independent contractors as “employees” denies these workers the freedom to work independently and to be their own bosses. The law is particularly harmful to women, who represent the majority of workers in certain gig sectors, and many of whom value flexibility and independence over traditional employment benefits. If this Court affirms the lower court’s grant of preliminary injunctive relief, the livelihood of thousands of Californians, many of them working women and mothers, will suffer immediate and irreparable harm.

For all of the reasons set forth above, *amicus curiae* respectfully urges this Court to reverse the trial court's order granting preliminary injunctive relief.

Dated: December 1, 2020

Respectfully submitted,

By: /s/ Bruce J. Sarchet

Bruce J. Sarchet, Bar No. 121042 Littler  
Mendelson, P.C.  
500 Capitol Mall, Suite 2000  
Sacramento, CA 95814  
Telephone: 916.830.7200 Facsimile:  
916.561.0828

Jennifer C. Braceras\*  
Independent Women's Law Center  
4 Weems Lane, No. 312 Winchester,  
VA 22601

Attorneys for *amicus curiae*  
Independent Women's Law Center

\*Not admitted in California

## CERTIFICATE OF WORD COUNT

The text of this brief consists of 4,443 words according to the word count feature of the computer program used to prepare this brief.

Dated: December 1, 2020

By: /s/ Bruce J. Sarchet

Bruce J. Sarchet

Attorneys for *amicus curiae*  
Independent Women's Law Center

CA 4th District Court of Appeal Division 1 Court Name	<b>PROOF OF SERVICE</b>	D077380 Case Number
---	-------------------------	------------------------

1. At the time of service, I was at least 18 years of age.
2. My email address used to e-serve: **bsarchet@littler.com**
3. I served a copy of the following document(s) indicated below:

Title(s) of documents served:

**APPLICATION - APPLICATION TO FILE AMICUS CURIAE BRIEF:** People v. MapleBear -- Application for Leave to File Amicus Curiae Brief of Independent Women's Law Center

Person Served	Service Address	Type	Service Date
Erin Meyer	emeyer@keker.com	e-Serve	12-01-2020 12:03:56 PM
Keker, Van Nest & Peters LLP		254a8290-ebe7-4c74-b4af-50f4f8527864	
Donna Zamora-Stevens	dzamora-stevens@keker.com	e-Serve	12-01-2020 12:03:56 PM
Keker, Van Nest & Peters LLP		27cc77d1-ee35-431f-ad78-703871764993	
Mark Ankcorn	mankcorn@sandiego.gov	e-Serve	12-01-2020 12:03:56 PM
San Diego City Attorney's Office		4ccdee02-74a4-495a-a437-4b11321f09d7	
Kevin King	kbking@sandiego.gov	e-Serve	12-01-2020 12:03:56 PM
Office of the City Attorney		42723eb4-3eea-45fd-ac14-ed9755da8d72	
Marissa Gutierrez	marissag@sandiego.gov	e-Serve	12-01-2020 12:03:56 PM
San Diego City Attorney		012af887-502d-454c-991d-2ff10fb97fcc	
Julia Allen	jallen@keker.com	e-Serve	12-01-2020 12:03:56 PM
Keker, Van Nest & Peters LLP		11232246-2070-41b8-80b2-a03672233c36	
Benjamin Berkowitz	bberkowitz@keker.com	e-Serve	12-01-2020 12:03:56 PM
Keker, Van Nest & Peters LLP		30d5b25d-ac53-4730-9ab7-c6ce273f85e0	
Jill Habig	jill@publicrightsproject.org	e-Serve	12-01-2020 12:03:56 PM
Public Rights Project		6d603979-d4fc-4971-a511-d1738a23df45	
Melissa Cornell	mcornell@keker.com	e-Serve	12-01-2020 12:03:56 PM
Keker, Van Nest & Peters LLP		af5b4e97-e67d-4bdb-be29-10d49cd2a0fe	
Taylor Reeves	treeves@keker.com	e-Serve	12-01-2020 12:03:56 PM
Keker, Van Nest & Peters		182580c6-4693-4f0e-9d9b-0b6a95ebfd49	
Rachael Meny	rem@keker.com	e-Serve	12-01-2020 12:03:56 PM
Keker, Van Nest & Peters LLP		24348912-3a78-4ec1-9d62-9ed2d61ebca6	
Rachael Meny	rmeny@keker.com	e-Serve	12-01-2020 12:03:56 PM
Keker, Van Nest & Peters LLP		f47c4510-e0b2-49e2-9951-77074ac70ccb	
Laura Lind	llind@keker.com	e-Serve	12-01-2020 12:03:56

			PM
Keker, Van Nest & Peters LLP		cf85030a-b681-4d04-89ca-ee1d32498708	
Ryan Wong	rwong@keker.com	e-Serve	12-01-2020 12:03:56 PM
Keker, Van Nest & Peters LLP		3c18066c-8f7e-4a8c-9e0d-c3238a97c00d	

TrueFiling created, submitted and signed this proof of service on my behalf through my agreements with TrueFiling.

The contents of this proof of service are true to the best of my information, knowledge, and belief.

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

12-01-2020

Date

/s/Bruce Sarchet

Signature

Sarchet, Bruce (121042)

Last Name, First Name (Attorney Number)

Littler Mendelson, PC

Firm Name