

Case No. D077380

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

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

MAPLEBEAR INC. dba INSTACART
Defendant and Appellant.

Appeal from San Diego Superior Court
Case No. 37-2019-00048731-CU-MC-CTL
The Honorable Timothy B. Taylor

**AMICI CURIAE BRIEF IN SUPPORT OF
DEFENDANT AND APPELLANT
MAPLEBEAR INC. DBA INSTACART
BY COMMUNITIES-OF-COLOR ORGANIZATIONS**

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INTRODUCTION

On November 3, 2020, the people of the State of California enacted Proposition 22 by a wide margin of almost three million votes. That ballot initiative classifies “app-based drivers” as independent contractors, rather than as employees, and guarantees such workers certain benefits and workplace protections. Through the ballot, the People of the State of California decided that gig economy workers like those using Instacart’s app-based platform—many of whom are people of color—should continue to enjoy the freedom they have enjoyed as independent contractors to decide when, where, and how they make money.

The voters’ overwhelming endorsement of Proposition 22 should effectively resolve this appeal. The central finding underpinning the trial court’s preliminary injunction—that workers using the Instacart platform should likely be classified as employees under California’s “ABC” test—is directly undermined by Proposition 22. The injunction cannot stand under obsolete law.

Enforcing the preliminary injunction would also cause irreparable harm to workers earning income through Instacart’s

platform, and to communities of color that depend on delivery services facilitated through the app. To comply with the injunction, Instacart may suspend operating in San Diego. That would eliminate income-earning opportunities for thousands of San Diego workers using Instacart’s platform, many of whom are people of color, depriving them entirely of income earned through Instacart’s platform. It would also deprive delivery services to San Diego residents and retail locations.

Inflicting this hardship would be particularly egregious amid the ongoing COVID-19 pandemic. The rapid spread of the coronavirus has devastated communities of color, who are disproportionately likely to contract COVID-19 and to die from it. And the economic devastation resulting from the pandemic has disproportionately affected people of color, who are more likely to have lost their jobs and less likely to work in positions allowing them to work from home. Further, eliminating delivery services in San Diego at the apex of the COVID-19 pandemic would put people of color in greater personal contact with others potentially carrying the coronavirus. That would increase the risk of contracting and potentially dying of COVID-19—the most paradigmatic example of irreparable harm.

This Court should reverse the trial court’s preliminary injunction order and vacate the preliminary injunction.

ARGUMENT

I. Proposition 22 effectively resolves this case: Workers using Instacart’s app-based platform should be classified as independent contractors.

On November 3, 2020, California voters overwhelmingly approved Proposition 22. That initiative ensures that workers using app-based platforms will continue to be able to work as independent contractors—giving them “control over where, when, how long and for who they work.”¹ Proposition 22 also provides such workers with an array of new benefits, including “[g]uaranteed hourly earnings and per mile compensation toward expenses,” “[f]unding for new health benefits for drivers who work at least 15 hours a week,” “[m]edical and disability coverage for injuries and illnesses on the job,” and “[p]rotection against discrimination and sexual harassment.”²

Aside from these benefits, Proposition 22 “[i]mplements strong new public safety protections,” including “[r]ecurring

¹ Yeson22.com, Key Facts About Proposition 22, <https://yeson22.com/get-the-facts/> (last visited Nov. 30, 2020).

² *Id.*

background checks of drivers,” “[m]andatory new safety courses for drivers,” “[z]ero tolerance for alcohol and drug offenses,” and it “[m]ak[es] it a crime to impersonate a driver.”³ The initiative also aims to “[k]eep[] app-based services available and affordable” throughout the State.⁴

According to the California Secretary of State website, approximately 58.6 percent of voters voted in favor of Proposition 22, totaling approximately ten million voters. (41.4 percent voted against it, about seven million voters.) Although the vote count has not been certified (scheduled to occur no later than December 11, 2020), major news organizations have projected that Proposition 22 will pass.⁵

In passing Proposition 22, Californians conveyed a clear message: The State should not impose an employee-based model on app-based workers like those who use the Instacart platform. Under Proposition 22, it should treat them as independent

³ *Id.*

⁴ *Id.*

⁵ See, e.g., Taryn Luna, *California voters approve Prop. 22, allowing Uber and Lyft drivers to remain independent contractors*, LOS ANGELES TIMES, Nov. 3, 2020, <https://www.latimes.com/california/story/2020-11-03/2020-california-election-tracking-prop-22>.

contractors.

The trial court’s preliminary injunction rested on its determination that workers using Instacart’s platform should likely be classified as employees. That was directly undermined by Proposition 22. The trial court’s preliminary injunction therefore rests on obsolete law and should not stand.

II. App-based platforms facilitate income-earning opportunities and resources to workers and communities of color.

A. The gig economy provides workers with flexibility and a preferred lifestyle.

It is unsurprising that California voters overwhelmingly endorsed the independent-contractor model for app-based workers like those who use the Instacart platform. Indeed, app-based platforms facilitate valuable income-earning opportunities for California gig economy workers who prefer the flexibility and lifestyle offered by the independent-contractor model.

The gig economy⁶ has become a significant part of the

⁶ Although some people colloquially use “gig economy” as limited to those who use a digital “platform” like a “ridesharing” or “handyman app . . . to get work,” other “freelance and independent workers consider themselves part of the gig economy.” See, e.g., Katy Macek, *The Gig Economy And What’s In It For Women*, BRAVA MAGAZINE, Sept. 5, 2019, <https://bravamagazine.com/gig-economy-and-women/>.

general American economy. It includes a variety of highly skilled services such as “computer programming” and “business consulting,” as well as other services like “dog walking,” “ridesharing,” “selling goods,” and “other activities.”⁷ In 2019, “57 million Americans” performed independent freelance work, contributing nearly “one trillion dollars” of income to the U.S. economy.⁸

Freelancing gives gig economy workers the ability to choose when and where to work, and allows them to be their own boss rather than be supervised. Freelancing also allows people to turn to gig work to deal with temporary “financial hardships” or “to meet basic needs . . . to pay bills.”⁹ Further, freelancing is an attractive way to earn supplemental income, such as in retirement or while enrolled in school. For example, approximately 80 percent of all ride-share drivers work less than

⁷ Press Release, *Sixth annual “Freelancing in America” study finds that more people than ever see freelancing as a long-term career path*, Upwork & Freelancers Union, Oct. 3, 2019, <https://www.upwork.com/press/2019/10/03/freelancing-in-america-2019/>.

⁸ *Id.*

⁹ Gig Economy Data Hub, *What are the experiences of gig workers?*, <https://www.gigeconomydata.org/basics/what-are-experiences-gig-workers> (last visited Nov. 30, 2020).

20 hours per week, and approximately 70 percent work less than 20 weeks per year.¹⁰

Perhaps unsurprisingly, 84 percent of freelancers report that they are “living their preferred lifestyle,” compared to 54 percent of those working as traditional employees.¹¹ Similarly, 75 percent of freelancers say they prefer freelancing over a full-time job as a traditional employee.¹²

B. The gig economy benefits workers and communities of color.

Many workers of color find income-earning opportunities in the gig economy. According to one study, “almost one-third . . . of Hispanic adults” and 27 percent of African American adults “earn

¹⁰ David Lewin, William Hamm, and 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 (BRG), at 1, May 14, 2020, https://voteyesprop22.com/wp-content/uploads/2020/05/BRG-REPORT-JOB-LOSS-SUMMARY-MAY-14-2020_FINAL.pdf.

¹¹ See Damian Jugovic Sappic, *The Future of Employment—30 Telling Gig Economy Statistics*, SMALLBIZGENIUS, Aug. 20, 2019, <https://www.smallbizgenius.net/by-the-numbers/gig-economy-statistics/#gref>.

¹² Philip Garrity, *We Polled 573 Freelancers About AB5. They’re Not Happy*, THE FREELANCER, BY CONTENTLY, Jan. 30, 2020, <https://contently.net/2020/01/30/resources/we-polled-573-freelancers-about-ab5-theyre-not-happy/>.

money through the gig economy.”¹³ 14 percent of Asian Americans and Pacific Islanders in California also reported earning income in the gig economy in 2018.¹⁴

Freelance work is also important to caregivers, including caregivers of color, as it allows flexibility to earn money while accommodating child- or elder-care. According to a 2018 survey of women who work in the gig economy, more than half of those with only children under the age of five said they were more likely to do gigs to be able to increase the amount of time to spend with their children.¹⁵ Gig economy services have also proved to be a valuable resource empowering older adults to achieve personal independence, whether by working beyond retirement age for supplemental income or by using gig economy services (such as rideshares or delivery services) to address

¹³ Edison Research Marketplace, *The Gig Economy*, at 4, Dec. 2018, <http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf>.

¹⁴ PRRI Staff, *The Working Lives and Struggles of Asian Americans and Pacific Islanders in California*, PRRI, Nov. 18, 2019, <https://www.prrri.org/research/the-working-lives-and-struggles-of-asian-americans-and-pacific-islanders-in-california/>.

¹⁵ See Fran Maier, Lynn Perkins and Anna Zornosa, *Can't Stop, Won't Stop Her Side Hustle: Women in the Gig Economy 2018*, at 10, Sept. 5, 2018, [https://blog.urbansitter.com/wp-content/uploads/2018/09/Cant-Stop-Wont-Stop-Her-Side-Hustle - Women-in-the-Gig-Economy-2018.pdf](https://blog.urbansitter.com/wp-content/uploads/2018/09/Cant-Stop-Wont-Stop-Her-Side-Hustle-Women-in-the-Gig-Economy-2018.pdf).

mobility challenges.

Not only has the gig economy provided workers of color with opportunities to earn income, it has provided entrepreneurial opportunities for those historically underrepresented among that group. For example, in 2017, an African American woman founded Kiddie Commute, “a full-service transportation company” for children in San Diego.¹⁶ As of July 2019, Kiddie Commute was “the only Black woman-owned transportation company in the state,” offering gig economy workers the opportunity to earn income as independent contractors.¹⁷

C. Instacart’s app-based platform aids workers and communities of color.

Instacart’s app-based platform provides approximately 23,000 San Diego workers—many of which are people of color—

¹⁶ *Introducing the First Ever Black Woman-Owned Rideshare Service for Kids*, BLACKNEWS.COM, Jul. 29, 2019, <https://www.blacknews.com/news/kiddie-commute-first-ever-black-woman-owned-rideshare-service-for-kids/>.

¹⁷ *Id.*; see also Kiddie Commute Inc. Driver Training Program, *accessible* at https://consumers.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/Licensing/Transportation_Network_Companies/TNCAccess/KiddieCommute2019DriverTrainingProgram.pdf (last visited Nov. 30, 2020) (classifying “driver[s] using its platform as “contractors”).

with opportunities to earn income through delivery gigs.¹⁸ The platform also facilitates access to grocery delivery in areas more likely to be underserved by supermarkets or other stores selling fresh groceries.

For example, Instacart’s 2015 expansion into historically underserved neighborhoods in the City of San Francisco helped to ensure that “[e]veryone—no matter what neighborhood or part of the City they live in—[had] the ability to access healthy and fresh foods.”¹⁹ Similarly, Instacart provides delivery services in Chicago, Illinois for a local market that provides access to fresh groceries in areas underserved by traditional grocery stores and supermarkets.²⁰ Instacart’s entry into local markets has also increased sales for retailers, and is associated with a four-percent

¹⁸ See Appellant’s Opening Brief [“AOB”], at 19.

¹⁹ Malia Cohen, September 2015 Newsletter, https://myemail.constantcontact.com/Supervisor-Cohen--September-2015-Newsletter.html?soid=1109991760435&aid=H7HUo_7bg5Y (last visited Nov. 30, 2020).

²⁰ Ally Marotti, *The grocery store that put an end to South Shore’s food desert will start offering delivery via Instacart*, CHICAGO TRIBUNE, Jun. 18, 2020, <https://www.chicagotribune.com/business/ct-biz-south-shore-grocery-delivery-20200618-htl6pywvubbwblyqqgnkij3q2q-story.html>.

increase in employment by retail grocery stores.²¹

Instacart has also supported several hunger-relief campaigns that benefit communities of color. For example, as part of a June 2020 campaign by Feeding America, Instacart donated the financial equivalent of two million meals to the ten counties in the United States with the “highest food insecurity rates,” in which Blacks comprise 60 percent of the population.²² Instacart also participated in another Feeding America fundraising campaign in which Instacart shoppers were asked to donate the value of their last order to help “communities struggling with food insecurity.” Instacart matched each dollar donated by those customers from July 14 to August 14, 2020, up

²¹ Robert Kulick, Ph.D., *The Economic Impact of Instacart on the Retail Grocery Industry: Evidence from Four States*, NERA Economic Consulting 3, Feb. 2020. [https://www.nera.com/content/dam/nera/publications/2020/Instacart White Paper FINAL February 2020.pdf](https://www.nera.com/content/dam/nera/publications/2020/Instacart%20White%20Paper%20FINAL%20February%202020.pdf).

²² Instacart, *Instacart Partners with Feeding America To Launch The #GiveFromTheCart Challenge To Fight Rising Hunger In The Wake of COVID-19*, Cision PR Newswire, Jul. 14, 2020, <https://www.prnewswire.com/news-releases/instacart-partners-with-feeding-america-to-launch-the-givefromthecart-challenge-to-fight-rising-hunger-in-the-wake-of-covid-19-301092738.html#:~:text=Instacart%20has%20been%20a%20Feeding,Instacart%20Serves%20social%20impact%20program.&text=In%20June%202020%2C%20Instacart%20donated,insecurity%20rates%20in%20the%20nation.>

to the financial equivalent of one million meals.²³

III. The preliminary injunction, if affirmed, will cause irreparable harm to workers and communities of color.

The trial court’s preliminary injunction will likely result in irreparable harm to workers and communities of color in San Diego. Instacart predicts that, to comply with the trial court’s preliminary injunction, it may suspend its operations in San Diego and sever ties with 2,000 workers using the Instacart platform.²⁴ The injunction will deprive those workers of income-earning opportunities facilitated by the Instacart platform, and will reduce valuable delivery services in communities of color. This will constitute disproportionate, devastating—and irreparable—harm.

Instacart’s predictions of the injunction’s likely impact on its business are not hypothetical. Indeed, worker reclassification has caused artists, writers, and other contractors to lose contracts, jobs, and critical income.²⁵ For example, after AB5

²³ Abby Kleckler, *Instacart Teams Up With Serena Williams*, PROGRESSIVE GROCER, Jul. 14, 2020, <https://progressivegrocer.com/instacart-teams-serena-williams>.

²⁴ AOB, at 64.

²⁵ Sophia Bollag and Dale Kaslerthe, *California workers blame new* [Footnote Text Cont’d on Next Page]

went into effect, the popular web company Vox Media severed ties with hundreds of freelance journalists rather than hire them as employees.²⁶

Given the havoc AB5 wreaked on the gig economy, in September 2020 the State legislature passed a law exempting a litany of occupations from the burdens of AB5, including, as examples, physicians, surgeons, dentists, lawyers, architects, engineers, accountants, and investment advisers.²⁷ Workers of color, however, are dramatically underrepresented in these white-collar occupations. App-based workers—who are disproportionately likely to be people of color—did not secure such special treatment by the politicians in Sacramento.

labor law for lost jobs. Lawmakers are scrambling to fix it, THE NORTH BAY BUSINESS JOURNAL, Feb. 10, 2020, <https://www.northbaybusinessjournal.com/article/article/california-workers-blame-new-labor-law-for-lost-jobs-lawmakers-are-scrambl/> (AB5 “has generated outrage from a wide range of Californians, from musicians to therapists to truckers to freelance journalists”; noting challenges posed by AB5 to the Sacramento Jazz Cooperative, a nonprofit struggling even before the COVID-19 pandemic).

²⁶ *Id.*; see also Suhauna Hussain, *Vox Media cuts hundreds of freelance journalists as AB 5 changes loom*, LOS ANGELES TIMES (Dec. 17, 2019), <https://www.latimes.com/business/story/2019-12-17/vox-media-cuts-hundreds-freelancers-ab5>.

²⁷ Assembly Bill No. 2257 (approved Sept. 4, 2020), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257.

IV. Enforcing the preliminary injunction during the ongoing COVID-19 pandemic will compound the irreparable harm to workers and communities of color.

The ongoing COVID-19 pandemic has disproportionately affected people and communities of color. People of color are disproportionately likely to contract and die from COVID-19, and are more likely to have lost jobs or income from the economic depression stemming from the pandemic. Enforcing the preliminary injunction now—at the apex of the worst pandemic the United States has experienced in more than a century—would compound the irreparable harm workers and communities of color will suffer.

A. COVID-19 has devastated people and communities of color.

According to the California Department of Public Health, Latinos, who comprise 38.9 percent of the state population, are 59.7 percent of the number of confirmed COVID-19 cases and 48.5 percent of the deaths.²⁸ African Americans, who comprise 6

²⁸ California Department of Public Health, *COVID-19 Race and Ethnicity Data*, Nov. 23, 2020, <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Race-Ethnicity.aspx>.

percent of the state's population, are 7.3 percent of the deaths, despite being only 4.1 percent COVID cases.²⁹ By contrast, Whites, who comprise 36.6 percent of the state's population, are only 19.2 percent of the cases and 30.4 percent of deaths.³⁰ As the COVID-19 pandemic rages and case counts climb to previously unimaginable levels, communities of color have suffered disproportionately.

Adding insult to injury, the COVID-19 pandemic has had a severe impact on minority employment. A report by the UCLA Latino Policy and Politics Initiative and the UCLA Center for Neighborhood Knowledge shows that in April 2020, then the peak of the COVID-19 pandemic, 22 percent of African American and 26 percent of Latinos in California were jobless, as compared to 17 percent for both white and Asian workers.³¹ Further, from

²⁹ *Id.*

³⁰ *Id.* Asians, which comprise 15.4 percent of the state's population, have fared somewhat better; they are 5.7 percent of cases, and 11.7 percent of the deaths. *Id.*

³¹ Eliza Moreno, *State's Black, Latino workers less likely to be covered by unemployment insurance amid COVID-19*, UCLA NEWSROOM, Jun. 11, 2020, <https://newsroom.ucla.edu/releases/california-black-latino-workers-unemployment-insurance>; Paul Ong, Ph.D., et al., *Jobless During a Global Pandemic: The Disparate Impact of COVID-19 on Workers of Color in the World's Fifth Largest Economy*, at 12, Jun. [Footnote Text Cont'd on Next Page]

mid-March to mid-May, greater than a quarter of California’s Black and Asian workers filed jobless insurance claims, as did 21 percent of Latinos.³² That Latinos are overrepresented among the population of workers ineligible for unemployment insurance compounds the economic calamity.³³

The rise in unemployment among people of color is augmenting the economic uncertainty communities of color are experiencing. A study showed that “neighborhoods with significant Latino and Asian American populations” were “particularly vulnerable to economic uncertainty during the COVID-19 pandemic.”³⁴ That study indicates that almost 60 percent of Latino-majority neighborhoods and 40 percent of Asian-majority neighborhoods in Los Angeles will be affected; by

11, 2020, <https://latino.ucla.edu/wp-content/uploads/2020/06/LPPI-CNK-Unemployment-Report-res-1.pdf>.

³² Margot Roosevelt and Taylor Avery, *There’s a black jobs crisis. Coronavirus is making it worse*, LOS ANGELES TIMES, Jun. 5, 2020, <https://www.latimes.com/business/story/2020-06-05/black-jobs-coronavirus>.

³³ Moreno, *supra* note 31 (“Latinos are 59% of Californians who are ineligible for unemployment insurance.”).

³⁴ *Latino, Asian American Areas at High Economic Risk, According to New Report*, UCLA LUSKIN SCHOOL OF PUBLIC AFFAIRS, Apr. 1, 2020, <https://luskin.ucla.edu/latino-asian-american-neighborhoods-at-high-economic-risk-new-ucla-report-finds>.

contrast, only 12 percent of white-majority neighborhoods will face the same level of economic disruption stemming from the crisis.³⁵ Residents in majority Latino neighborhoods were also less likely to receive the stimulus payments under the federal CARES Act,³⁶ and many African Americans and Latinos live in neighborhoods with restricted access to open spaces and limited access to food.³⁷

B. The injunction will likely reduce access to delivery services in San Diego, which will increase exposure to strangers potentially carrying the coronavirus.

If the preliminary injunction is affirmed and Instacart suspends its operations in San Diego, residents there will experience a reduction in food delivery services when the COVID-19 pandemic is at its apex.³⁸ Many people, including people of color, rely on the delivery services provided by Instacart to reduce

³⁵ *Id.*

³⁶ Eliza Moreno, *Residents in L.A.'s Latino neighborhoods less likely to receive relief funds amid COVID-19*, UCLA NEWSROOM, Apr. 14, 2020, <https://newsroom.ucla.edu/releases/latino-neighborhoods-covid19-relief-funds>.

³⁷ Eliza Moreno, *For many Blacks and Latinos in L.A., neighborhood conditions make safer-at-home orders harder*, UCLA NEWSROOM, May 20, 2020, <https://newsroom.ucla.edu/releases/blacks-latinos-los-angeles-neighborhoods-safer-at-home>.

³⁸ AOB at 67.

their exposure to COVID-19 outside the home. People of color are at greater risk of contracting COVID-19, in part because they are more likely to work in occupations in which they are not able to work from home.³⁹ The preliminary injunction will put people of color at greater risk of contracting COVID-19 and suffering serious bodily harm or death from it—perhaps the most paradigmatic example of irreparable harm.

CONCLUSION

Instacart’s app-based platform facilitates income-earning opportunities that are critical to the economic wellbeing of workers and communities of color. Proposition 22, passed by millions of voters in November 2020, preserves the ability of workers using app-based platforms to work as independent contractors, rather than as employees, and preserves their flexibility to work when, where, and how they prefer. The People,

³⁹ Associated Press, *People of color, women shoulder front-line work during pandemic*, NBC News, May 4, 2020, <https://www.nbcnews.com/news/nbcblk/people-color-women-shoulder-front-line-work-during-pandemic-n1199291>; Sarah Thomason and Annette Bernhardt, *Front-line Essential Jobs in California: A Profile of Job and Worker Characteristics*, UC Berkeley Labor Center, May 14, 2020, <http://laborcenter.berkeley.edu/front-line-essential-jobs-in-california-a-profile-of-job-and-worker-characteristics/>.

by passing Proposition 22, have spoken definitively on the issue. That should effectively resolve this case.

If affirmed, the trial court's preliminary injunction will not only contravene the People's will in passing Proposition 22, it will also cause serious irreparable harm to workers and communities of color. To comply with the preliminary injunction, Instacart may suspend its operations in the San Diego. That will result in lost income to thousands of workers using Instacart's platform, and a reduction of grocery and food delivery services there. Those effects would be particularly egregious amid the ongoing COVID-19 pandemic, which has disproportionately impacted communities of color.

The trial court's order granting the preliminary injunction should be reversed, the preliminary injunction should be vacated, and the case should be remanded for further proceedings.

Dated: December 1, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 3,224 words, not counting items excluded under rule 8.204(c)(3).

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