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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SAN FRANCISCO

14 THE PEOPLE OF THE STATE OF
CALIFORNIA,

15 Plaintiff,

16 vs.

17 DOORDASH, INC., and DOES 1 through
18 10, inclusive,

19 Defendants.

Case No. CGC-20-584789

Date: November 5, 2020
Time: 9:15 a.m.

**Application for Leave to File Brief for
Amicus Curiae Independent Women's
Law Center in Opposition to Motion for
Preliminary Injunction**

Department 304
Honorable Anne-Christine Massullo

Complaint Filed: June 16, 2020
Trial Date: None set

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
09/25/2020
Clerk of the Court
BY: JUDITH NUNEZ
Deputy Clerk

1 TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 Prospective amicus curiae Independent Women's Law Center respectfully submits
3 this Application for Leave to File Brief in opposition to Plaintiff's Motion for Preliminary
4 Injunction. The proposed brief is attached as Exhibit A.

5 For the reasons explained below, the proposed amicus curiae respectfully submits
6 that the attached amicus curiae brief will assist the Court in deciding the matter currently
7 set for hearing. See Cal. Rule of Court 8.200(c)(2) ("The application [for leave] must state
8 the applicant's interest and explain how the proposed amicus curiae brief will assist the
9 court in deciding the matter.").

10 This brief has not been funded or authored by any party in this action.

11 **IDENTITY AND INTEREST OF PROPOSED AMICUS CURIAE**

12 Independent Women's Forum ("IWF") is a nonprofit, non-partisan 501(c)(3)
13 organization founded by women to foster education and debate about legal, social, and
14 economic policy issues. IWF promotes access to free markets and the marketplace of
15 ideas, supporting policies that expand liberty, encourage personal responsibility, and limit
16 the reach of government. IWF does so in part through the Independent Women's Law
17 Center ("IWLC"), which advocates—in the courts, before administrative agencies, in
18 Congress, and in the media—for equal opportunity, individual liberty, and respect for the
19 American constitutional order.

20 IWLC is concerned that California's AB5 law will harm and dramatically limit
21 opportunities for freelance workers, many of whom are women who prefer the flexibility
22 of contract work to the rigid requirements of working as traditional employees. IWLC is
23 particularly concerned that government actors are using AB5 in cases such as this one, in
24 ways that will dramatically limit flexible work opportunities for women in the middle of a
25 pandemic, when women need those opportunities more than ever.

1 **THE PROPOSED AMICUS CURIAE BRIEF WILL ASSIST THE COURT IN**
2 **DECIDING THE MOTION FOR PRELIMINARY INJUNCTION**

3 This Court has “broad discretion over the conduct of pending litigation,” including
4 the authority to grant applications for leave to file amicus briefs relevant to matters
5 pending before the Court. See *In re Marriage Cases* (2008) 43 Cal. 4th 757, 791, n. 10
6 (“[T]he superior court, in exercising its traditional broad discretion over the conduct of
7 pending litigation, retained the authority to determine the manner and extent of . . .
8 entities’ participation as amici curiae that would be of most assistance to the court.”).

9 The Court should grant this Application because IWLC's proposed amicus curiae
10 brief will aid this Court’s consideration of the government's motion for preliminary
11 injunction. The proposed brief explains how the DoorDash food ordering platform, even
12 more than other gig economy platforms such as ridesharing, plays a vital role in helping
13 California women address the economic and other burdens they are shouldering,
14 particularly in the current COVID-19 pandemic. The proposed brief illuminates the fact
15 that the irreparable harm that will result from a grant of the injunction will fall most
16 heavily upon working women in California. IWLC asks the Court to consider these
17 important realities for California women as it evaluates the pending motion for preliminary
18 injunction, and submits that this brief will assist the Court in doing so.

19
20 Dated: September 18, 2020

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MALLORY & NATSIS LLP

21
22 By: Marshall C. Wallace
23 MARSHALL C. WALLACE
24 MICHELLE F. CATAPANG
25 Attorneys for Amicus Curiae
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28

1 Dated: September 18, 2020
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INDEPENDENT WOMEN'S LAW CENTER

By: JC Braceras

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1 **PROOF OF SERVICE**

2 I am employed in the County of San Francisco, State of California. I am over the age of
3 eighteen (18) and am not a party to this action. My business address is Three Embarcadero
Center, 12th Floor, San Francisco, CA 94111-4074.

4 On September 18, 2020, I served the within document(s) described as:

5 **Application for Leave to File Brief for Amicus Curiae Independent Women's Law**
6 **Center in Opposition to Motion for Preliminary Injunction**

7 on the interested parties in this action as stated below:

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14 ☒ **BY OVERNIGHT DELIVERY:** I deposited in a box or other facility regularly
15 maintained by FedEx, or delivered to a courier or driver authorized by said express service
16 carrier to receive documents, a true copy of the foregoing document(s) in sealed envelopes
17 or packages designated by the express service carrier, addressed as indicated above on the
18 above-mentioned date, with fees for overnight delivery paid or provided for.

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

21 Executed on September 18, 2020, at San Francisco, California.

22 Cynthia D. Lynch
23 (Type or print name)

24 Cynthia D. Lynch
25 (Signature of Declarant)

EXHIBIT A

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1 **I. INTRODUCTION**

2 The injunction sought by the San Francisco District Attorney – purportedly on
3 behalf of the “people” of the State of California – asks the Court to shut the door on one of
4 the most accessible sources of flexible income and independence for California women.
5 Millions of Californians, both male and female, prefer control and flexibility over the
6 regimented structures required in full-time, traditional employment. Women, in particular,
7 often rely on freelance gigs to make their lives work: For many women, independent
8 contracting is the *only* way they can “do it all.” Some women use freelance work as their
9 primary means of income; many others use occasional gigs to supplement their regular
10 employment income or their household’s income. Not surprisingly, **83 percent** of women
11 who work in the gig economy prefer their gig work to traditional employment, and a
12 significant majority *choose* to freelance part time.

13 The DoorDash platform is especially beneficial for women, as it allows them to
14 work where, when, how, and as much as they choose. The efficiency of the platform
15 allows women juggling a variety of demands to earn money spontaneously, as time
16 permits. An injunction forcing DoorDash to classify all Dashers as employees will, as a
17 practical matter, shut off these advantages, permanently ending the opportunity to earn
18 money on the DoorDash platform for Dashers requiring flexibility in their work. And it
19 will do so at the worst time imaginable – during a global pandemic when jobs are
20 particularly difficult to find for those who need them the most.

21 The injuries resulting from injunction-compelled employment would truly be
22 irreparable:

- 23 • If DoorDash has to shutter California delivery opportunities for several months,
24 as it says the injunction would require, Dashers will lose thousands of dollars
25 they are counting on to feed their families, pay their rent, and meet other basic
26 household needs during the COVID-19 pandemic.
- 27 • For those whom DoorDash offers to keep on its platform as employees, those
28 workers will be forced to choose between not working for DoorDash at all or

1 working much longer hours on an inflexible schedule. This is particularly
2 burdensome at this time when the COVID-19 pandemic is placing
3 unprecedented additional demands -- such as supervising remote learning,
4 home-schooling and caring for loved ones -- on the lives of many Dashers.

- 5 • For those whom DoorDash decides not to offer employment, these workers will
6 be left seeking part-time work in a historically bad job market.

7 The Independent Women’s Law Center understands that another Department of this
8 Court has issued an injunction against Uber and Lyft. That injunction, if upheld, will cut
9 off independent work opportunities for tens of thousands of California women. But there
10 are features of food-ordering platforms such as DoorDash that would make this particular
11 injunction even more injurious to California women than a rideshare injunction:

- 12 • Nearly half of Dashers are women, a proportion much higher than rideshare.
- 13 • Unlike rideshare drivers, Dashers may bring others – including children, other
14 family members, and friends – in their vehicles, creating greater opportunities to
15 juggle competing demands of day-to-day life.
- 16 • Many women prefer delivery over ridesharing for safety and security reasons:
17 Instead of a stranger in their vehicle, they have a food order or other product.

18 In the face of the very real harms the proposed injunction would impose upon
19 working women, the District Attorney relies on a “presumption of injury.” But the District
20 Attorney offers essentially no admissible evidence of actual irreparable harm that would
21 occur should the injunction not issue. By contrast, the harm that would occur from
22 issuance of the injunction would be immediate, deep, and irreversible – especially so for
23 working women in California. This Court therefore should decline the District Attorney’s
24 request that it immediately mandate reclassification of DoorDash’s California Dashers.

II. LEGAL ANALYSIS

A. The Gig Economy is a Critical Part of the Labor Market, Especially for Women

In 2019, 57 million Americans, representing 35 percent of the workforce, worked as independent freelancers, contributing nearly one trillion dollars to the U.S. economy or five percent of the country's GDP.¹ The "gig economy" provides a platform for freelancers and independent contractors to provide a variety of services such as computer programming and business consulting, as well as other services like dog walking and ridesharing, selling goods, and other activities.²

Many workers choose gig work because it offers them significantly greater autonomy, work-life balance, and opportunities than do traditional modes of employment.³ This is evident on ridesharing and food-ordering platforms, 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.⁴ Further, according to 2017 data from the U.S. Bureau of Labor Statistics, independent contractors affirmatively choose their flexible work arrangements, with 79 percent of independent contractors preferring their arrangements to a traditional job.⁵

Women in particular play an important role in the gig economy, and the gig economy is especially valuable to women. Based on a 2017 survey of 2,000 women in the

¹ 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-america-2019/> ("Freelancing in America Study") (last visited September 6, 2020).

² See Freelancing in America Study, *supra* note 1.

³ <https://www.forbes.com/sites/quora/2019/01/08/what-are-the-pros-and-cons-of-the-gig-economy/#ac4830713885>

⁴ 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-LOSS-SUMMARY-MAY-14-2020_FINAL.pdf ("Berkeley Research Group Report") (last visited September 8, 2020).

⁵ Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements – May 2017," News Release date June 7, 2018.

1 gig economy, 32 percent stated they turned to the gig economy because their full-time jobs
2 were stressful and they wanted more flexibility; 28 percent needed more time to care for a
3 child, parent or other relative; and 23 percent wanted a career change.⁶ The survey also
4 showed that 70 percent of women working in the gig economy are the primary caregiver in
5 their homes.⁷ The plain message of the data is that 83 percent of women who work in the
6 gig economy do so by choice and/or because they need the added flexibility of a
7 nontraditional work structure.

8 **B. AB5 Has Harmed Working Women**

9 While AB5 was promoted as helping workers by giving them rights under minimum
10 wage, unemployment insurance, and workers compensation laws, the reality for many
11 women is that AB5 has harmed them by taking away needed workplace flexibility.

12 In markets where AB5 has forced businesses to reclassify independent contractors
13 to employees, the effects have been devastating. Here are just a few examples of what
14 working women have told the Independent Women's Forum:

- 15 • Freelance journalist JoBeth McDaniel explains: "The flexibility has been a
16 blessing. . . I was fine with making that trade off of less money but more time to
17 stay with my dad when he was dying," she says. "There's not a W-2 job out
18 there that would have allowed any of that."⁸
- 19 • Interpreter Katerina Borghi agrees. "As a working professional and as someone
20 who spent a lot of time and money investing and creating my own [translating
21 and interpreting] business, I don't feel that I need those protections. . . I set my
22 own rates, I have a flexible schedule, I have my own insurance. I wish they
23 would leave us out of it."⁹

26 ⁶ Hvrnerwallet. "The Future of Gig Work is Female" (San Francisco:
27 2017). [https://www.hvrnerwallet.com/resources/ecommerce-marketplaces/the-future-of-](https://www.hvrnerwallet.com/resources/ecommerce-marketplaces/the-future-of-gig-work-is-female/)
28 [gig-work-is-female/](https://www.hvrnerwallet.com/resources/ecommerce-marketplaces/the-future-of-gig-work-is-female/) (last visited September 6, 2020).

⁷ See supra note 6.

⁸ <https://www.iwf.org/chasing-work-jobeth-mcdaniel/>
⁹ <https://www.iwf.org/katerina-borghi/>

- 1 • American Sign Language Interpreter and single mother of two Sophia Aguirre
2 used to get work through agencies, but explains that since the implementation of
3 AB5, agencies view independent contractors differently: “Instead of being an
4 asset to them, we’re a liability to them. . . . AB5 will not only disrupt my life, it
5 will destroy my life,” she said. “My livelihood and everything I’ve worked
6 for.... It will devastate me and place me in a different social-economic status.”¹⁰
- 7 • Marketing professional Karen Anderson agrees: “AB5 affects my future, and
8 my family. It has a detrimental effect on my family because it takes away
9 opportunities for me to work independently while still taking care of my elderly
10 mother in her home. And it will probably take away my ability to keep the house
11 I grew up in, and prevent me from living out the rest of my life in California . . .
12 These politicians can say what they want about misclassifying...but the result is
13 that lives are being destroyed, tangibly.”¹¹
- 14 • Jennifer O’Connell, a writer, yoga instructor and career coach, says the
15 independent contractor income that used to make up 75% of her income as a
16 yoga advisor and instructor has been wiped out by AB5: “A mom-and-pop
17 studio can’t hire me and put me on payroll for a one or two hour lecture that I do
18 once per month. That’s wiped out so much work. A lot of studios have shut their
19 doors because of AB5 and COVID-19.”¹²
- 20 • Dori Lehner, a freelance transcriptionist and senior citizen, stated that
21 freelancing offered her more work opportunities than people her age usually
22 find, but soon after AB5 was passed her contracts started to dry up: “I only have
23 one direct client now, and I only get work when they have it...My income has
24 dropped down to a quarter of what it was before AB5.”¹³

27 ¹⁰ <https://www.iwf.org/chasing-work-sophia-aguirre/>
28 ¹¹ <https://www.iwf.org/chasing-work-karen-anderson/>
¹² <https://www.iwf.org/chasing-work-jennifer-oconnell/>
¹³ <https://www.iwf.org/chasing-work-dori-lehner/>

1 **C. DoorDash Provides Flexible And Safe Work Opportunities That Are**
2 **Particularly Attractive To Women**

3 DoorDash is among the most popular sources of independent contracting work for
4 women. That is so for several good reasons:

5 *First*, many women enjoy the autonomy. DoorDash imposes no minimums on
6 hours or orders. Dashers can work as much or as little as they choose.¹⁴ Dashers can also
7 accept or reject every opportunity they receive on the DoorDash platform.¹⁵ Unlike an
8 employer, DoorDash does not tell Dashers when to show up for work or for how long they
9 must work.

10 *Second*, DoorDash offers maximum flexibility. Dashers can choose the days of the
11 week and times they work – for instance, when not in class, when children are in school, or
12 when another caregiver is able to cover a family member. And they can do so
13 spontaneously when a window of opportunity opens without notice.¹⁶

14 *Third*, DoorDash accommodates all modes of transport. Urban Dashers may choose
15 to walk, ride a bicycle, or use public transit.¹⁷ You can get exercise while Dashing – a
16 benefit enjoyed by many Dashers.

17 *Fourth*, Dashers are at complete liberty to multitask while on the DoorDash app
18 (consistent of course with safety) – they can care for children, make phone calls, learn a
19 language, listen to books on tape, or do myriad other “personal” things that, if done on
20 “company time,” might be considered cause for termination.

21 *Fifth*, Dashers can and do source work on multiple different platforms. They can do
22 so at the same time. Unlike employees, they owe no duty of loyalty to a particular
23 company. A Dasher is free to complete a delivery, accept a Lyft opportunity and
24 immediately pick up a rider – while still on the DoorDash app.¹⁸

26 ¹⁴ Declaration of Cody Aughney ISO DoorDash, Inc.'s Opposition to Plaintiff's Motion
27 for Preliminary Injunction ("Aughney Decl.") ¶ 26.

27 ¹⁵ Aughney Decl. ¶ 31.

27 ¹⁶ Aughney Decl. ¶ 35.

28 ¹⁷ Aughney Decl. ¶ 24.

28 ¹⁸ Aughney Decl. ¶ 29.

1 Indeed, many Dashers also drive to earn money on rideshare platforms such as Lyft
2 and Uber. In addition, many women prefer DoorDash and other food-ordering platforms
3 to rideshare because they present distinct advantages:

- 4 • Rideshare companies restrict drivers from having passengers other than
5 customers in their vehicle. Dashers are entirely free to have passengers and
6 often do.¹⁹ Those passengers can include children, infants (who often can catch
7 up on needed sleep), friends with whom they can catch up, or those for whom
8 the Dasher is a caregiver, who might need a change of scene.
- 9 • A Dasher seeking to make money while minimizing COVID-19 or other
10 infection risks can avoid direct contact with other people, as DoorDash has
11 taken measures to permit distanced order pick-up and contactless delivery.
- 12 • By its nature, ridesharing puts the driver in a confined space, in close proximity
13 with a person whom she has never met, and whose activities she cannot monitor
14 as the driver pilots the vehicle. Many women are not comfortable about their
15 physical safety in that setting. Delivering orders sourced via DoorDash does not
16 involve such risks or fears.
- 17 • A Dasher is free to conduct other business, call family and friends, and
18 otherwise use her phone to address items on the checklist while Dashing.

19 Due to these advantages, women make up about half of the Dashers using the
20 DoorDash platform to source work opportunities.

21 These features have become even more important as the COVID-19 pandemic has
22 altered our lives and driven a spike in demand for delivery. Delivery has become a vital
23 lifeline to restaurants that are struggling to survive without dine-in customers. Many
24 households sheltering in place under government order, or because they are at heightened
25 risk if infected, depend on app-based ordering and home delivery of food and other family
26 essentials.

27
28 ¹⁹ Aughney Decl. ¶24.

1 Opportunities for individuals safely to make money through the DoorDash platform
2 have increased commensurately. Now, more than ever, DoorDash is providing critical
3 income-earning opportunities for those who may have lost their jobs, who cannot work 40-
4 hour weeks because their children cannot be at school, or who have to care for sick or
5 homebound family or friends.

6 **D. The Injunction Sought By The San Francisco District Attorney Would**
7 **Cause Irreparable Harm To Dashers, Particularly Women**

8 The motion the Court is now considering would, as a practical matter, strip away
9 these benefits of flexible work for hundreds of thousands of Californians.

10 DoorDash's evidence makes plain that DoorDash will have to shut down all or a
11 large part of its California operations for several months if the Court issues the injunction
12 sought by the District Attorney.²⁰ That would have devastating effects, particularly on the
13 approximately 150,000 female Dashers in California. Households depending on income
14 from the DoorDash platform would see that source suddenly dry up in the middle of a
15 global pandemic and economic downturn.²¹ *White v. Davis*, 30 Cal. 4th 528, 559 (2003)
16 (irreparable injury occurs where shutting off payments to workers would detrimentally
17 "affect the availability of the essential necessities of life for tens of thousands of
18 Californians"). Parents supervising their children's remote learning will lose one of the
19 most flexible ways to continue to make income. Pandemic-furloughed workers will lose
20 dashing as a vital means of making ends meet while they wait to return to full-time work.
21 To replace the lost dashing income, some Dashers will have to engage in new work putting
22 them at greater risk of infection.

23 Even if DoorDash reopens in California under an employment model, the damage
24 would persist. Basic economics dictate that, as Dashers presently dash about 10 hours per
25 week on average, forced conversion of Dashers to 40-hour week employees would mean
26

27
28 ²⁰ Declaration of Christopher Payne ISO DoorDash, Inc.'s Opposition to Plaintiff's
Motion for Preliminary Injunction ("Payne Decl.") ¶¶ 5-7.

²¹ Payne Decl. ¶ 8.

1 that about 75 percent of Dashers would be deactivated and have no further opportunities to
2 make money on the DoorDash platform.²² The losses for those Dashers would be
3 permanent.

4 And for those Dashers who receive offers of employment under a court-mandated
5 employment model, those offers will lack most, if not all, of the attributes that drew
6 Dashers to the DoorDash platform in the first place. Dashers will be required to work a
7 minimum number of hours each week and will be told when and where to work.²³ They
8 will have to ask permission to stay home with a sick child or take time off to take an
9 elderly parent to the doctor. DoorDash would have the right to insist that Dashers honor
10 their duty of loyalty under Labor Code sections 2860 and 2863, so Dashers might have to
11 forego opportunities to make deliveries through other platforms, even if those
12 opportunities paid more and better fit the Dashers' schedules. And given liabilities that
13 come with employees acting within the scope of employment, forced reclassification will
14 almost certainly mean the end of having family members in the car, multi-tasking, and
15 taking care of family errands while dashing.

16 That might work for some. But for many women, compelled employment will
17 mean the end of the flexibility and freedom that they require. Forced to give up flexibility,
18 many female Dashers will likely turn down an offer of employment because they will be
19 unable to make it work given their other responsibilities.²⁴

20 In sum, the injunction sought by the District Attorney would irreversibly disrupt
21 hundreds of thousands of contractual relationships – relationships that are working for both
22 sides, and vital to many households, particularly during this pandemic. The harm from
23 that disruption would especially disadvantage working women.

24
25
26 ²² Payne Decl. ¶ 10; Declaration of Jessica Lachs ISO DoorDash, Inc.'s Opposition to
Plaintiff's Motion for Preliminary Injunction ("Lachs Decl.") ¶ 6.

27 ²³ Payne Decl. ¶ 10.

28 ²⁴ Michael Farrin and Trace Mitchell, Assembly Bill 5 is Bad for Uber and Lyft, But it
Will be Worse for Workers (Sept. 30, 2019), The Orange County Register,
<https://www.ocregister.com/2019/09/30/assembly-bill-5-is-bad-for-uber-and-lyft-but-it-will-be-worse-for-workers/> (last visited September 18, 2020).

1 **III. CONCLUSION**

2 The simple truth is that the Court is being asked to grant an injunction that, if
3 issued, would immediately and irreparably harm hundreds of thousands of Californians,
4 particularly women, at a terrible time. The Court should deny the motion.

5
6 Dated: September 18, 2020

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7
8 By: Marshall C. Wallace

9 MARSHALL C. WALLACE
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