UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MELODY CUNNINGHAM and FRUNWI MANCHO, individually and on behalf of all others similarly situated, Plaintiffs, v. LYFT, INC., LOGAN GREEN, and JOHN ZIMMER, Defendants.	Case No. 1:19-cv-11974-IT

PLAINTIFFS' EMERGENCY MOTION
FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs Melody Cunningham and Frunwi Mancho seek an emergency preliminary injunction enjoining Defendant Lyft, Inc. ("Lyft") from misclassifying its drivers as independent contractors when they are actually employees under Massachusetts law. Because of this misclassification, Lyft is in particular violating the Massachusetts Earned Sick Leave Law, M.G.L. c. 149 § 148C, by failing to provide the drivers with paid sick leave – which will exacerbate the global health crisis of COVID-19 (the "coronavirus") and which requires immediate emergency redress.[1]

The urgency of enforcing § 148C under the unprecedented circumstances presented by the novel coronavirus is undeniable. The Commonwealth has already declared a state of emergency due to the coronavirus[2], and earlier today, Governor Baker declared that a stay-at-home order will take effect in Massachusetts on Tuesday, March 24, 2020.[3] As of this writing, Massachusetts has reported 777 confirmed cases of coronavirus and nine confirmed deaths.[4] Public health institutions and executive officials across the county are ordering residents to stay home and go out only if essential.[5] In particular, they have made clear that anyone who is feeling sick (regardless of whether they have been diagnosed with the coronavirus) should stay home and isolate themselves in order to prevent spread of the disease.[6]

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1 On March 20, 2020, the Court granted Plaintiffs' emergency motion to file an amended complaint to add a claim for violation of M.G.L. c. 149 § 148C. Dkt. 87.

2 Massachusetts Exec. Order No. 5891: Declaration of a State of Emergency to Respond to COVID-19 (March 10, 2020), available at https://www.mass.gov/executive-orders/no-591-declaration-of-a-state-of-emergency-to-respond-to-covid-19.

3 *Gov. Charlie Baker Issues Stay-At-Home Order*, WCVB, March 23, 2020, https://www.wcvb.com/article/gov-charlie-baker-issues-stay-at-home-order/31898661.

4 *Mass. Issues Stay-At-Home Advisory, Closes Non-Essential Businesses, As Death Toll Rises to 9,* Boston Globe (March 23, 2020), https://www.wcvb.com/article/massachusetts-covid-19-coronavirus-update-march-22-2020/31879392.

5 California, New York, and Illinois have issued state-wide shelter-in-place orders.

6 *What To Do if You Are Sick,* Center for Disease Control and Prevention (CDC), https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html.

Lyft drivers, along with other "gig economy" workers, have continued to work during this crisis, as they have generally been recognized to be providing critical essential services.[7] Yet these drivers are being denied basic workplace protections due to Lyft's policy of misclassifying its drivers as independent contractors. Because Lyft does not classify its drivers as employees, Lyft does not even pretend to provide its drivers with paid sick leave as mandated by Massachusetts law. Thus, Lyft drivers who cannot afford to not work are being forced to continue driving *despite feeling sick* in order to earn an income and afford basic necessities. In the words of one Lyft driver, Mariah Mitchell:

> I can't self-quarantine because not working is not an option. If I don't make enough money, I can't feed my children for the next six weeks. I'm not stopping, fever or no fever. And that's what most other gig workers would do too, because none of us makes enough money to save up for an emergency like this.[8]

As described in the attached declaration, Massachusetts Lyft driver Martin El Koussa continued to drive for Lyft a week while feeling sick since the outbreak of the coronavirus pandemic. He explains that during that week, he "experienced body aches, a cough, and a sore throat" that may "be symptoms of coronavirus"; despite being instructed by his doctor to not even come into the doctor's office (in order to avoid infecting other patients), he explains that without paid sick leave, "I felt that I had no choice but to keep driving because I do not have any other way to make money." Declaration of Martin El Koussa (**Exhibit 1**) (El Koussa Decl.) ¶¶

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[7] Rideshare drivers, such as Lyft drivers, have been exempted from the Massachusetts stay-at-home order, as Gov. Bakers has indicated that "transportation" services are "essential" and will continue operating. Jaclyn Reiss, *A List of What Can Stay Open in Massachusetts*, The Boston Globe, March 23, 2020, https://www.bostonglobe.com/2020/03/23/metro/list-what-can-stay-open-during-bakers-stay-at-home-advisory/. Gig economy workers have generally been excluded from other states' shelter-in-place orders. See, e.g., Megan Rose Dickey, *San Francisco's Shelter-In-Place Order Does Not Apply to Gig Workers*, TechCrunch, March 16, 2020, https://techcrunch.com/2020/03/16/sf-shelter-in-place-gig-workers/.

[8] Mariah Mitchell, *I Deliver Your Food, Don't I Deserve Basic Protections*, N.Y. Times, March 17, 2020, https://www.nytimes.com/2020/03/17/opinion/coronavirus-food-delivery-workers.html?referringSource=articleShare. See also Matthew Foresta, *Uber Is My Primary Source of Income. Each Time I Drive, I Risk Contracting Coronavirus*, USA Today, March 19, 2020, https://www.usatoday.com/story/opinion/voices/2020/03/19/uber-my-primary-income-each-time-drive-risk-contracting-covid-19-column/2866159001/ ("Driving is frequently my primary source of income. During those times, there is no way I can pay for essentials without putting my health, and the health of my riders, at risk.").

4, 8.[9]

Similarly, Massachusetts Lyft driver Vladimir Leodonis attests that he continued to drive for Lyft over the last few weeks, despite feeling so sick with coronavirus symptoms that he went to the emergency room (where he was denied a coronavirus test because he was only exhibiting some, and not all, the COVID-19 symptoms); Leodonis explains that he continued to drive for Lyft while sick because driving is his sole source of income and Lyft does not provide state-mandated paid sick leave that would have enabled him to afford to stop working. Declaration of Vladimir Leodonis (Leodonis Decl.) (**Exhibit 2)** ¶¶ 3-6, 8-9.[10]

As these declarations demonstrate, Lyft drivers may drive many passengers each day, including those who have been ordered to self-quarantine or who are coming from high-risk locations – and drivers and passengers are clearly not able to maintain the six-foot distance recommended by experts to prevent the rapid spread of the coronavirus. Lyft's misclassification policy is now, indisputably, endangering Lyft drivers, Lyft passengers, and the general public.

In short, Lyft drivers are facing an immediate threat of irreparable harm – contracting and infecting passengers with the coronavirus and contributing to the spread of the disease to the general public – due to Lyft denying its drivers state-mandated paid sick leave.[11]

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[9] Further, as he attests, driving for Lyft put him in a vulnerable position to contract the coronavirus, as his job requires him to "frequently pick up riders at the airport" and other high risk locations – including from the Biogen conference that recorded a high number of confirmed coronavirus infections – that he felt he could not decline without risking deactivation. Id. ¶¶ 5-6.

[10] Leodonis (like El Koussa) suspects he was infected with the coronavirus from Lyft passengers, specifically from picking up a passenger from the Biogen conference or from other high risk locations (such as the airport or University of Massachusetts – Boston, where a student had a confirmed case of COVID-19). Id. ¶ 6. While Leodonis felt a social responsibility to stop driving in order to prevent the spread of the virus, he was simply unable to stop driving due to financial straits created by Lyft's lack of state-mandated paid sick leave (just as he was similarly unable to be selective about his passengers because he was afraid Lyft would deactivate his account if he rejected too many rides). Id. ¶¶ 6-10.

[11] In recognition of the threat to public health as a result of employers denying paid sick leave during this pandemic, last week Congress passed emergency federal legislation to provide paid sick leave to some employees. See Emergency Paid Sick Leave Act, H.R. 6201 – 2, 116th Congress § 5101 (2020). However, the federal Act will not cover Lyft drivers if they are not

This Court should adjudicate this emergency motion forthwith and grant the motion for a preliminary injunction. On Friday, March 20, 2020, the Court denied Plaintiffs' earlier motion for preliminary injunction. Dkt. 88. Plaintiffs describe below why the instant motion should nevertheless be granted. First, Plaintiffs note that M.G.L. c. 149 § 150 permits them to seek injunctive relief on behalf of themselves and all others similarly situated – regardless of whether the injunction they seek qualifies as "public injunctive relief".[12] Second, Plaintiffs have met the standard for a preliminary injunction to issue pursuant to Fed. R. Civ. P. Rule 65. Indeed, the emergency presented by the current crisis creates much more stark grounds for an immediate order than were presented in Plaintiffs' prior request for preliminary injunction.

First, as Plaintiffs have previously briefed (and reincorporate here by reference), see Dkt. 4 at 12-16, Plaintiffs can easily show a likelihood of success on the merits of their misclassification claim, as Lyft will be unable to carry its burden under Prong B of the conjunctive, three-pronged "ABC" test that Massachusetts requires alleged employers to prove in order to justify independent contractor status for their workers. See M.G.L. c. 149 §

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recognized as employees and because of the exemption for large employers. Liss-Riordan Decl. ¶ 2, 13. The state of emergency that led Congress to take this historic action only further confirms the need for immediate enforcement of any state law protections already in place.

[12] The reason that Plaintiffs tried to explain in their earlier motion filed in September 2019, Dkt. 4, that the requested injunction qualified as public injunctive relief was so that they could obtain the injunction from this Court, notwithstanding Lyft's arbitration clause. See id. at 14-15. However, this Court has already determined that it would address Plaintiffs' Motion for Preliminary Injunction *prior to* addressing Lyft's motion to compel arbitration. See Dkt. 88 at 2 (stating that "the court still retains the power to grant interim relief, if otherwise justified, for the interval needed to resort to the arbitrator.") (citing Next Step Med. Co. v. Johnson & Johnson Int'l., 619 F3d 67, 70 (1st Cir. 2010)); Tr. Hr'ing, March 16, 2020, at 17-19, 23. Thus, based on its conclusion that Plaintiffs' motion for preliminary injunction should be decided before Lyft's motion to compel arbitration, the Court need not even concern itself at this juncture with the question of whether Plaintiffs' request qualifies as public injunctive relief (and whether Massachusetts law would recognize this same exception to arbitration as California law). However, Plaintiffs reincorporate their argument from their previous motion for preliminary injunction, see Dkt. 4 at 14-16 (and set forth the argument briefly below as well) that their request for this injunction cannot be limited by Lyft's arbitration clause, in order to preserve this argument in the event that the Court of Appeals determines that Lyft's motion to compel arbitration would need to be considered before Plaintiffs' request for preliminary injunction.

148B(a)(2).[13] As Plaintiffs can show likelihood of success on the merits of their misclassification claim, it is a foregone conclusion that Plaintiffs can show the likelihood of success of the merits of their paid sick leave claim brought under § 148C (as Lyft does not even pretend to comply with this statute).[14]

Second, Plaintiffs can show irreparable harm to themselves and other Lyft drivers. Lyft's ongoing refusal to acknowledge its drivers as employees, and thereby provide basic state-mandated workplace protections including paid sick leave, poses an imminent, substantial risk of harm to its drivers. Drivers who are sick and stay home are not receiving state-mandated sick pay that they are in desperate need of immediately.[15] Further, faced with the choice of staying

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[13] See Somers v. Converged Access, Inc., 454 Mass. 582, 590-91 (2009) (alleged employer must prove all three prongs of the three-part test of § 148B in order for individual to be properly classified as an independent contractor).

[14] Further, Plaintiffs also reincorporate their earlier argument that they can establish their likelihood of success in showing that Lyft's arbitration clause cannot thwart their attempt to obtain injunctive relief, Dkt. 4 at 14-15, both because the relief Plaintiffs seek is in the nature of "public injunctive relief" (and Massachusetts would adopt the rationale of McGill v. Citibank, N.A., 2.Cal.5th 945 (2017)), and because Lyft drivers are exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, as they fall within the transportation worker exemption to the FAA, see Singh v. Uber Techs., 2019 WL 4282185 (3rd Cir., Sept. 11, 2019) (rideshare drivers may fall under § 1 transportation worker exemption); Nieto v. Fresno Beverage Co., Inc., 33 Cal. App. 5th 274, 276-77 (2019) (delivery drivers fall under transportation worker exemption, despite only making intrastate deliveries); Waithaka v. Amazon, 2019 WL 3938053, at *2–4 (D. Mass., Aug. 20, 2019) (same); Rittman v. Amazon, 383 F. Supp. 3d 1196, 1201-02 (W.D. Wash. 2019) (same). See further discussion infra at note 24.

[15] Courts have recognized that employees' failure to receive pay that is due can comprise "irreparable injury" in extreme circumstances. For example, in Aguilar v. BaineService Systems, Inc., 538 F. Supp. 581, 584 (S.D.N.Y. 1982), the court found a showing of irreparable harm under Rule 65 due to lost wages when the plaintiffs would lose their job and sole source of income in the absence of an injunction. See also Roland Machinery Co. v. Dresser Industries, Inc., 749 F. 2d 380, 386 (7th Cir. 1984) (finding irreparable harm when plaintiff proved a damage award seriously deficient, as it "may come too late to save plaintiff's business. He may go broke while waiting, or may have to shut down his business"); Donohue v. Mangano, 886 F. Supp. 2d 126, 153-54 (E.D.N.Y. 2012) ("'For a poor man ... to lose part of his salary often means his family will go without the essentials.'") (quoting Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342 n. 9, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (quoting statement of Congressman Gonzales, 114 Cong. Rec. 1833)).

This is one of those extreme circumstances, where Lyft drivers' failure to receive state-mandated sick pay will put them back into an unsafe situation if they have to continue working to make ends meet. See, e.g., Leodonis Decl. ¶¶ 3, 8-9 (feeling forced to work despite sick, due to lack of paid sick leave and the fact that driving is his sole source of income on which he relies to support himself and his parents); El Koussa Decl. ¶¶ 3, 7, 10 (also continuing to drive despite feeling sick because of financial necessity); see also Mitchell, supra note 8; Foresta, supra note 8.

home without pay and risking losing access to housing, food, and other necessities of living, Lyft drivers across Massachusetts will continue working and thus further expose themselves to dozens, or even hundreds, of riders on a weekly due to this deadly disease.[16]

Third, as to the balancing of harms, there can be no serious argument that helping prevent the spread of a global pandemic is outweighed by the cost to Lyft of coming into compliance with M.G.L. c. 149 § 148B, which predates Lyft's creation.[17] Lyft has simply

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[16] Plaintiffs submit that the irreparable injury prong is heightened by the fact that the public is subject to increased harm if an injunction does not issue, since Lyft drivers who are not receiving sick pay and cannot afford to stay home are continuing to work even if they are feeling sick and thus endangering the public. Although the Court has stated that it does not believe that Massachusetts law permits Plaintiffs to seek a "public injunction", Plaintiffs respectfully disagree (see infra at note 24) but also submit that the Court can take the risk of injury to the public into account in evaluating this prong of Rule 65. See, e.g., Holt v. Continental Group, Inc., 708 F. 2d 87, 91 (2d Cir. 1983) (instructing the district court to consider on remand whether the retaliatory discharge harmed public interest by deterring enforcement of Fair Labor Standards Act (by chilling employees from asserting their rights), such that it constituted irreparable injury under the second prong of Rule 65); Perez Gutierrez c. Mariscos El Puerto, Inc., 2019 WL 6050727, at *3 (D.Nev. Nov. 15, 2019) (citing Holt and weighing "strong public interest in favor of enforcement of the FLSA" in finding "allowing defendants to continue to flout the requirements of the FLSA will likely result in immediate and irreparable injury to plaintiffs, similarly situated employees, and the public interest" and therefore plaintiffs had meet their burden on the second prong of Rule 65(b)); Acosta v. RK Apparel, Inc., 2018 WL 1942400, at *3 (C.D. Cal. March 15, 2018) (weighing irreparable injury to "public interest in that any shipment of [] hot goods," produced under substandard labor standards, would result in unfair competition, in finding that plaintiffs had meet their burden on the second prong of Rule 65(b)). Further, the Court may consider the irreparable harm to government revenue (insofar as the government may need to foot the bill for drivers' unemployment during this crisis) under this prong. See, e.g., United States v. Bailey Family Chiropractic, 2018 WL 4271449, at *1 (W.D. Pa. Aug. 21, 2018) (finding irreparable injury to the government when employer failed to pay unemployment taxes).

Moreover, in order to obtain an injunction, the strength of Plaintiffs' showing on the other Rule 65 prongs can overcome a weaker showing on one prong. Braintree Labs, Inc. v. Citigroup Global Markets, Inc., 622 F. 3d 36, 42-43 (1st Cir. 2010) (irreparable harm should be measured "on a sliding scale, working in conjunction with a moving party's likelihood of success on the merits, such that the strength of the show necessary on irreparable harm depends in part on the degree of likelihood of success shown."); Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F. 3d 12 (1st Cir. 1996) (instructing that likelihood of success and irreparable harm must be weighed in tandem). Thus, if the Court is concerned about the strength of Plaintiffs' showing on this irreparable injury prong, the overwhelming strength of Plaintiffs' showing on the other prongs should alleviate this concern.

[17] The current version of the "ABC test" has been the law in Massachusetts under M.G.L. c. 149 § 148B since 2004. See 2004 Mass. Legis. Serv. Ch. 193 (S.B. 2358) (WEST) (approved July 19, 2004). M.G.L. c. 149 § 148C in its current form was enacted in 2015.

ignored the laws of the Commonwealth and the applicability of M.G.L. c. 149 §§ 148B and 148C to its drivers, and the consequences of that choice are now being wrought in dire form.

Fourth, it is not in the public interest to allow Lyft to continue to misclassify its drivers and inflict public harm on its drivers, passengers, and the general public. Lyft should not be allowed to use litigation tactics to stall resolution and enforcement of §§ 148B and 148C no matter the consequences. Plaintiffs and the public simply cannot wait years, or even weeks, for Lyft to comply with Massachusetts' state-mandated paid sick leave law. In the interim, the rapid proliferation of the virus that occurs will be irreversible.

Moreover, the Court has the authority to and should grant this motion for a preliminary injunction at this stage in the litigation, prior to class certification. See infra Part III.B, at 18-20.

For the foregoing reasons, and as set forth further below, this Court should issue an emergency preliminary injunction enjoining Lyft from misclassifying its drivers, so that they will receive the protections of Massachusetts law, including state-mandated paid sick leave, so as to prevent irreparable harm to Lyft drivers and serve the immediate interests of the general public.

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 17, 2019, Plaintiff Cunningham filed this class action complaint alleging that Lyft has misclassified its drivers as independent contractors, when they are employees under Massachusetts law and therefore entitled to employment protections under various provisions of the Massachusetts wage laws. See Compl. Dkt-1, at ¶2.

On September 23, 2019, Plaintiff moved for preliminary injunctive relief against Lyft for misclassifying Massachusetts drivers as independent contractors, based on the argument that Lyft has exacted an irreparable harm on drivers, as well as on the public generally and the Commonwealth of Massachusetts, by diminishing labor standards, depriving the state of tax revenue, and costing the state and taxpayers money in public assistance that is needed for Lyft drivers who cannot meet their basic needs due to their being deprived of their rights under the

Massachusetts wage laws. Dkt. 4. On October 3, 2019, Lyft filed a Motion to Compel Arbitration. See Dkts. 16-17. The Court heard oral argument on December 9, 2019.[18]

While those motions remained pending, on March 12, 2020, in light of the coronavirus pandemic, Plaintiffs submitted an emergency motion to amend their complaint in order to add a claim that Lyft has denied its drivers paid sick leave they are entitled to under M.G.L. c. 149 § 148C, see Dkt. 68, and a renewed motion for preliminary injunction based upon the pressing crisis, Dkt. 79. The Court held a telephonic conference on March 16, 2020. At the conference, the Court stated that it would deny Plaintiffs' earlier motion for preliminary injunction and would allow them to submit a new motion for preliminary injunction, assuming it allowed the motion to amend. Tr. Hr'ing March 16, 2020, at 29.[19]

On March 18, 2020, the Court granted Plaintiffs' motion to amend, Dkt. 87.[20] Plaintiffs now file this renewed motion for preliminary injunction.

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[18] At the argument, the Court discussed whether Plaintiffs may need to show they crossed state lines in order to establish they fall under the transportation worker exemption to the FAA. Hr'ing Tr., Dec. 9, 2019, at 44-45. While Plaintiffs do not believe that the drivers themselves need to cross state lines to fall under this exemption, in order to address this concern and bolster their argument, they filed an Amended Complaint adding Plaintiff Mancho. See Dkt. 61.

[19] The Court then terminated Plaintiffs' new emergency motion for preliminary injunction, stating they could refile it after the Court ruled on the motion to amend. Tr. Hr'ing March 16, 2020, at 29. The Court issued its order denying the original motion for preliminary injunction on March 20, 2020, Dkt. 88.

[20] Plaintiffs have now filed their Second Amended Complaint. Dkt. 89. Plaintiffs plan to file a new motion to amend tomorrow, to add as named plaintiffs the two drivers who have submitted affidavits in support of this motion, Martin El Koussa and Vladimir Leodonis. At the telephonic status conference held on March 16, 2020, Lyft argued that Plaintiff Cunningham has not driven recently enough to be affected by Lyft's failure to provide Massachusetts sick leave pay during the coronavirus crisis. While Plaintiffs disagree that Plaintiff Cunningham would not have standing to pursue this claim, they attempted to submit a revised emergency motion to amend to add an additional named plaintiff in response to this argument raised by Lyft. Dkt. 79. The Court declined to allow Plaintiffs to substitute a new emergency motion to amend and ordered that Plaintiffs could file a new motion to amend that would be briefed and heard in the ordinary course, Dkt. 85, which Plaintiffs are now doing. Whether as named plaintiffs or class members, El Koussa and Leodonis have provided here evidence showing the harm to Lyft drivers (as well as the public) caused by Lyft's failure to provide paid sick leave to its drivers.

III. ARGUMENT

A. The Court Should Grant Plaintiff's Motion for a Preliminary Injunction

This Court has the authority to issue a preliminary injunction under Fed. R. Civ. P. 65(a) and (b). In order to prevail on a motion for a preliminary injunction, Plaintiffs must establish: (1) likelihood of success on merits; (2) that plaintiffs will suffer irreparable injury in absence of a preliminary injunction; (3) that such injury outweighs any harm to the defendants; and (4) that the injunction will not harm public interest. See Lanier Prof'l Serv., Inc. v. Ricci, 192 F.3d 1, 3 (1st Cir. 1999). As set forth below, Plaintiffs meet all these requirements.

1. Plaintiffs Have Shown Likelihood of Success on the Merits

With respect to the merits, all that the Court must decide at this juncture is whether Plaintiffs have shown a *likelihood* of success on the merits. There can be little question that Plaintiffs satisfy this requirement.

Indeed, Plaintiffs clearly have a likelihood of proving that they have been misclassified as independent contractors, since Lyft will be unable to carry its burden under Prong B of the conjunctive, three-prong "ABC" test: Lyft is a transportation company and its drivers provide transportation services. See Cotter v. Lyft, 60 F.Supp.3d 1067, 1069 (N.D. Cal. 2015) ("[T]he argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one"); see also O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1144 (N.D. Cal. 2015) ("[I]t strains credulity to argue that Uber is not a 'transportation company' or otherwise is not in the transportation business.").[21] Massachusetts courts regularly grant summary judgment

[21] At the conference held on March 16, 2020, Lyft argued that it would not be in a position to address the merits of this case any time soon because the case raises a "complicated" analysis that would require an extensive showing, the submission of expert affidavits, etc. That is simply not the case. The entire point of Massachusetts rigid independent contractor law, M.G.L. c. 149 § 148B, is that it creates a bright line test, easing the analysis of the law. Indeed, California recently adopted the Massachusetts "ABC" test for determining employee status in order to simplify the analysis. See Dynamex Operations West Inc. v. Superior Court, 4 Cal.5th 903, 964 (2018) (adopting Massachusetts "ABC" test to "provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis."). The "ABC" test was later codified by the California legislature in California Assembly Bill No. 5 ("AB 5"), which the California public and legislature understood to require that "gig economy" workers such as Lyft drivers would be recognized as employees. See, e.g., Kate Conger and Noam

on employee status based on an alleged employer's inability to carry its burden under Prong B.[22] Even without the crisis of the coronavirus, a California Superior Court recently issued a preliminary injunction against the "gig economy" company Instacart, finding the likelihood that

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Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES, Sept. 11, 2019 ("California legislators approved a landmark bill on Tuesday that requires **companies like** Uber and **Lyft** to treat contract workers as employees") (emphasis supplied). A.B. 5, which codified the Massachusetts ABC test adopted by Dynamex, has even been referred to as the "gig labor bill". Cheryl Miller, *Newsom Signs Landmark Gig Labor Bill, as Court Cases Loom*, THE RECORDER, Sept. 18, 2019, https://www.law.com/therecorder/2019/09/18/newsom-signs-landmark-gig-labor-bill-as-court-cases-loom/?slreturn=20200217185740; *Calif. Gov. Signs Worker Misclassification Bill Into Law*, LAW360, Sept. 18, 2019, http://law360.com/articles/1200449/calif-gov-signs-worker-misclassification-bill-into-law.

Thus, Lyft is incorrect that there is anything complicated or difficult about the Court determining whether Lyft drivers are employees under the "ABC" test. In any event, all the Court need to decide at this point is whether Plaintiffs can show a mere "likelihood of success" on the merits under this test.

[22] In doing so, courts frequently look to logic and commonsense in determining a defendant's usual course of business. See, e.g., Schwann v. FedEx Ground Package Sys., Inc., 2013 WL 3353776, *5 (D. Mass. July 3, 2013) (rejecting FedEx's attempt to characterize itself as a "logistics" company rather than a "delivery" company, and noting "[w]hether intended as shorthand for a more metaphysical purveyor of logistics business entity or not, FedEx advertises that it offers package pick-up and delivery services and its customers have no reason to believe otherwise"), aff'd in part rev'd in part on other grounds, 13 F.3d 429 (1st Cir. 2016); Awuah v. Coverall North Am., 707 F.Supp.2d 80 (D. Mass. 2010) (granting summary judgment to cleaning "franchisees" on misclassification under Prong B, rejecting defendant's contention that it was in the "franchising" business, rather than the cleaning business); Chaves v. King Arthur's Lounge, 2009 WL 3188948, *1 (Mass Super. July 30, 2009) (rejecting strip club's attempt to characterize itself as akin to a sports bar, rather than an adult entertainment business and granting summary judgment to exotic dancers under Prong B). The Appeals Court recently affirmed a trial court's grant of summary judgment to plaintiff newspaper delivery drivers on liability for misclassification, considering such factors as how the business holds itself out and whether the services provided by the plaintiffs are core to the business or merely incidental. See Carey v. Gatehouse, 92 Mass. App. Ct. 801, 807, 813–14 (2018).

For other cases in which Massachusetts courts have granted summary judgment in favor of plaintiffs on liability for misclassification, see also Oliveira v. Advanced Delivery Sys., Inc., 2010 WL 4071360 (Mass. Super. July 16, 2010) (delivery drivers); Amero v. Townsend Oil 2008 WL 5609064 (Mass. Super. Ct. Dec. 3, 2008) (oil delivery driver); Meier v. Mastec N. Am., Inc. Hampden C.A. No. 13-00488 (Mass. Super. April 8, 2015) (cable installers); Granite State Ins. Co. v. Truck Courier, Inc. 2014 WL 316670, *4 (Middlesex Super. Ct. Jan. 17, 2014) (truck couriers); Barbosa v. Kilnapp Enter., Inc. d/b/a Real Clean, Norfolk C.A. No. 2013-00266, *11-19 (Mass. Super. Ct. June 13, 2014) (auto detailers); Martins v. 3PD, Inc., 2013 WL 1320454 (D. Mass. Mar. 28, 2013) (delivery drivers); De Giovanni v. Jani-King Int'l, Inc. C.A. No. 07-10066 (D. Mass. June 6, 2012) ("franchisee" cleaning workers); Monteiro v. PJD Ent. of Worcester, Inc. d/b/a Centerfolds 29 Mass. L. Rptr. 202 (Mass. Super. Ct. Nov. 23, 2011) (exotic dancers); Jenks v. D & B Corp., d/b/a The Golden Banana, 28 Mass. L. Rptr. 579 (Mass. Super. Ct. Aug. 24, 2011) (exotic dancers); Fucci v. E. Connection Operating, Inc. C.A. No. 2008-2659, *9 (Mass. Super. Sept. 21, 2009) (delivery drivers).

its workers ("Shoppers") would be held to be employees under the "ABC" test. See Ruling on Mot. For Preliminary Injunction, People of the State of California v. Maplebear, Inc., Case No. 2019-48731, at *4 (Cal. Sup. Ct. Sept. 13, 2019) (**Exhibit 3**).

Furthermore, Plaintiffs have established a likelihood of success that Lyft has violated M.G.L. § 148C, since Lyft does not even acknowledge its drivers to be employees entitled to the benefits of the Massachusetts wage laws and is not even pretending to comply with this law, or other Massachusetts wage laws, with respect to its drivers.[23]

Thus, Plaintiffs have established a likelihood of success on the merits.[24]

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[23] At the conference on March 16, 2020, Lyft said that it was providing pay for drivers affected by the coronavirus crisis. However, Lyft's recently issued policy does not comply with § 148C. *Lyft's Latest Info on Coronavirus*, Lyft, https://www.lyft.com/safety/coronavirus. First, Lyft has merely said that it will provide "funds" for drivers, without any specific information of what funds would be made available. Id. Second, in order to receive these funds, Lyft drivers must first receive a COVID-19 diagnosis (or be put under individual quarantine by a public health agency). Massachusetts law, M.G.L. c. 149 § 148C does not require a coronavirus diagnosis (or indeed *any* diagnosis or a quarantine order or even a doctor's note) in order for an employee to begin receiving sick pay. See M.G.L. c. 149 § 148C; *Earned Sick Time in Massachusetts Frequently Asked Questions*, Mass. AGO, Sept. 21, 2018, at *17, https://www.mass.gov/files/documents/2018/09/21/est_faq_1.pdf. Moreover, coronavirus tests are in notably short supply, such that receiving an official diagnosis Lyft requires for this "benefit" is out of reach for most drivers. Public health recommendations advise anyone to stay home *as soon as* they begin feeling sick, and Massachusetts law would allow employees to receive sick pay as soon as they are feeling sick.

[24] In opposing this motion, Lyft will attempt to rely on its arbitration clause, claiming that the Court cannot grant any relief. However, Lyft cannot thwart Plaintiffs from obtaining this relief for two reasons, and again, at this juncture, the Court only needs to find that Plaintiffs are *likely* to succeed on the merits of (at least one of) these arguments. First, the relief Plaintiffs seek is in the nature of a public injunction, and Plaintiffs submit that the Massachusetts Supreme Judicial Court would follow the California Supreme Court in McGill v. Citibank, N.A., 2.Cal.5th 945, 962 (2017), which held that arbitration clauses cannot thwart a request for public injunctive relief; and second, Lyft drivers fall under the transportation worker exemption to the Federal Arbitration Act.

The Court has stated that it has the authority to address Plaintiffs' request for preliminary injunction notwithstanding the arbitration clause, but Plaintiffs reiterate these arguments in order to preserve these arguments, if necessary for appeal. Plaintiffs thus reincorporate the arguments they made in support of these two points from their earlier briefing and the oral argument held on December 9, 2019. See Dkts 4, 53. Plaintiffs also state the following in response to the Court's order of March 20, 2020, and its comments at the conference held on March 16, 2020.

First, the Court has stated that McGill was based on statutory language in California law that does not exist in Massachusetts law. However, the Court's conclusion that public injunctive relief (i.e. request for an injunction that would benefit the public, not just the plaintiffs) cannot be thwarted through an arbitration clause derives from court-made caselaw, namely the Court in McGill itself. In Massachusetts, only the SJC can say whether it would reach the same

conclusion under Massachusetts law. Thus, Plaintiffs urge again that the Court consider certifying this critical issue to the SJC.

Furthermore, the statute at issue in McGill mirrors the statute Plaintiffs have brought their claims under here. McGill concerned a claim brought under the UCL, Cal. Bus. & Prof. Code §§ 17203, 17353. The UCL is similar to M.G.L. c. 149 § 150 in that it provides a private right of action for violations of the California Labor Code (which do or do not have their own private right of action), just as § 150 provides a private right of action for Massachusetts wage law violations. Like the UCL, M.G.L. c. 149 § 150 allows an individual to "institute and prosecute … for himself and for others similarly situated, a civil action for injunctive relief…" Thus, § 150 mirrors the language of the UCL**,** which allows that "[a]ny person may pursue representative claims or relief on behalf of others." Both statutes thus provide for an individual plaintiff to pursue class actions and injunctions extending relief to individuals beyond themselves. Moreover, it has been widely recognized that the Massachusetts wage laws (like the consumer law at issue in McGill) are for the public good and not simply the good of the employees. The SJC has made this clear repeatedly. See, e.g., Somers v. Converged Access, Inc., 454 Mass. 582, 590-91 (2009) ("Misclassification *not only hurts the individual employee*; it also imposes significant financial burdens on the Federal government and the Commonwealth in lost tax and insurance revenues. Moreover, it gives an employer who misclassifies employees as independent contractors an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden."); Depianti v. Jan-Pro Franchising Intern., Inc., 465 Mass. 607, 620-21 (2013) (quoting language from Somers); *An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B, 2008/1*, AGO 1 ("The need for proper classification of individuals in the workplaces if of *paramount importance to the Commonwealth*") (emphasis added).

Second, in its recent order, Dkt. 88, the Court cited two decisions from California in which courts declined to apply the McGill exception to arbitration to Labor Code claims in which drivers sought to be declared employees so they would be entitled to unpaid wages. See Colopy v. Uber Techs., Inc., 2019 WL 6841218 at *2 (N.D. Cal. Dec. 16, 2019); Magana v. DoorDash, Inc., 343 F.Supp. 3d 891, 901 (N.D. Cal. 2018). However, in those two cases, the courts rejected the argument (as this Court did) based on their conclusion that plaintiffs' request for an injunction against their misclassification as independent contractors did not constitute a "public injunction" because their attempt to obtain their own wages and reimbursement primarily affected themselves and the harm to the public was too attenuated. Magana, 343 F.Supp. 3d at 901 (referring to the public benefit as "derivate of and ancillary" to the benefit to employees); Colopy, 2019 WL 6841218 at *3 (quoting Magana and following its analysis). Here, however, the connection between the plaintiffs' request for relief and the public good is far more clear; the harm to the public if injunctive relief is not issued here is far more stark. Those rulings cannot stand for the more general proposition that workers seeking their rights under wage laws can never constitute a request for a public injunction. Moreover, the Magana decision was appealed, see Magana v. DoorDash, Inc., Case No. 18-17232 (9th Cir.); that appeal has been placed on hold pending a proposed classwide settlement. In a newly filed case based on the coronavirus pandemic that has been related to the Colopy case, Plaintiffs are seeking a renewed motion for injunctive relief, like they are here, based upon the emergency presented by the current emergency.

Finally, Plaintiffs note that paid sick leave, even more so than other wage rights, clearly have a "public purpose", since paid sick leave laws advance public health by enabling sick (and especially low wage workers) to stay home and not spread their illnesses to others.

2. Plaintiffs Have Shown That They (as Well as Lyft Drivers Generally) Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction

Irreparable harm is typically found when there exists no adequate remedy at law. Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004). Here, the harm to Lyft drivers generally is starkly apparent. Drivers are forced to expose themselves to high-risk situations (such as picking people up from the airport) that could expose them to the coronavirus, in order to maintain good standing with Lyft, at the risk of contracting COVID-19. See El Koussa Decl. ¶ 6; Leodonis Decl. ¶¶ 6-7. Drivers are forced to continue working and driving despite being sick, and risk exposing dozens (perhaps hundreds) of passengers to the coronavirus, because they simply cannot afford to stay home due to lack of state-mandated sick leave. El Koussa Decl. ¶¶ 7-10; Leodonis Decl. ¶¶ 3, 9-10. Any argument Lyft may raise to downplay the risk of harm drastically underestimates (or simply ignores) guidance from experts and public health institutions that have determined the threat of coronavirus is very real, and concrete steps must be taken to prevent the spread of the virus.

Although Lyft may try to argue that its failure to pay wages that Plaintiffs contend they and class members are owed cannot constitute irreparable harm, courts have regularly found that defendants' failure to make payments that may impact plaintiffs' health can constitute irreparable harm, warranting the issuance of a preliminary injunction. See Harris v. Blue Cross Blue Shield of Missouri, 995 F. 2d 877, 878-79 (8th Cir. 1993) (finding irreparable harm when plaintiff was denied insurance coverage that could provide "the only possibility of long-term control or care" of plaintiffs' health); Boldon v. Humana Ins. Co., 466 F. Supp. 2d 1199, 1207-1208 (D. Ariz. 2006) (finding also that denial of insurance coverage constitutes irreparable harm when plaintiff faced liver-threatening liver cancer); B.E. v. Teeter, 2016 WL 3033500 at *5 (W.D. Wash. May 27, 2016) (finding that denial of Medicaid services constituted irreparable harm because it creates "(1) substantial risk to plaintiffs' health; (2) severe financial hardship; (3) inability to purchase life's necessities; and (4) anxiety associated with uncertainty") (quoting LaForest v. Former Clean Air Holding Co., Inc., 376 F. 3d 48, 55 (2d Cir. 2004)); International Schools

Services, Inc. v. AAUG Ins. Co., Ltd., 2010 WL 4810847, at *5 (S. D. Fla. Nov. 19, 2010) (finding irreparable harm to employees when health care insurer stopped covering payment of claims, leading to significant possibility that employees could be turned away from health care providers; "[t]he death of a child, the loss of a limb, or prolonged suffering due to lack of treatment cannot be undone by monetary means") (internal quotation marks and citation omitted); Sluiter v. Blue Cross Blue Shield of Mich., 979 F. Supp. 1131, 1145 (E.D. Mich. 1997) ("each plaintiff will suffer irreparable harm without this preliminary injunction because she will be unable to receive the course of treatment recommended by her physician").[25]

Similarly, courts have found irreparable harm when plaintiffs face dangerous working conditions. See, e.g., Dominion Energy Transmission, Inc. v. 0.11 Acres of Land, More or Less, in Doddridge Cty, W. Va., 2019 WL 4781872 at *5 (N.D. W. Va. Sept. 30, 2019) (threat to safety of employees working in close proximity to heavy machinery contributed to finding of irreparable harm (citing United Steelworkers of Am. AFL-CIO v. Blaw-Knox Foundry & Mill Mach. Inc., 319 F. Supp. 636, 641 (W.D. Pa. 1970) (finding threat to the health and safety of employees sufficient to justify the issuance of a preliminary injunction)). And, as discussed supra at p. 6, note 15, under extreme circumstances, failure to pay wages that impose hardships that extend beyond ordinary financial hardships may constitute irreparable harm under Rule 65.

Here, Plaintiffs will be unable to protect their health and will be subject to a life-threatening illness (or to becoming a "vector" of a life-threatening illness[26]) absent a preliminary injunction enjoining Lyft from violating M.G.L. c. 149 § 148C. Plaintiffs and other Lyft drivers will not only be unable to protect their own health, but also unable to protect the health of Lyft

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[25] Courts have found that preliminary injunctions are warranted under these circumstances even when the requested injunction will subvert the status quo. Id. at 1136 (although "an injunction is more commonly used to maintain the status quo rather than alter it," when Plaintiffs face "certain[] and grav[e]" irreparable harm "competing concerns" arise that justify a preliminary injunction); id. ("[t]he prevention of irreparable harm should outweigh re–establishment of the status quo in fashioning interlocutory relief....") (quoting Stenberg v. Cheker Oil Co., 573 F.2d 921, 925 (6th Cir.1978)).

[26] Alexis C. Madrigal, *The Gig Economy Has Never Been Tested by a Pandemic*, The Atlantic, Feb. 28, 2020 https://www.theatlantic.com/technology/archive/2020/02/coronavirus-gig-economy/607204/.

passengers and the general public, if Lyft continues to deny drivers state-mandated paid sick leave in violation of § 148C, as drivers will be forced to work in order to afford basic necessities.

There can be no question that enforcing employee protections already in place would increase safety for both Lyft drivers and the general public. Even in ordinary circumstances, Lyft's failure to provide its drivers with the basic workplace protections they should have unacceptably increases the likelihood that its drivers and passengers will get sick and spread illnesses. In the current crisis, denying workers these protections poses an intolerable risk to the health and safety of Lyft's drivers, as well as its customers and the public at large.

The connection between public health and the availability of basic employment protections like paid sick days and leave policies is well established.[27] A recent study found a that state-mandated access to paid sick leave policies reduced population-level flu infection rates by an average of eleven percent within the first year of the implementation of such laws.[28] Unsurprisingly, low-wage workers are the most likely to lack these basic workplace protections.[29] Without the protections afforded by these and other workplace laws, workers like Lyft drivers are more likely to work while they are sick, increasing the likelihood they will

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[27] See, e.g., Supriya Kumar, John J., et al., *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent-Based Model*, American Journal of Public Health 103, no. 8 (Aug. 1, 2013): pp. 1406–1411, https://doi.org/10.2105/AJPH.2013.301269 (concluding that paid sick day policies reduce influenza transmission owing to presenteeism, and thus reduce the burden of influenza illness in workplaces).

[28] Stefan Pichler, Katherine Wen & Nicolas Ziebarth, *Positive Health Externalities of Mandating Paid Sick Leave.* ResearchGate, Feb. 2020, https://www.researchgate.net/publication/336832189_Positive_Health_Externalities_of_Mandating_Paid_Sick_Leave. Studies have also linked the dearth of paid sick leave policies in the United States with negative health outcomes during the 2009–10 H1N1 outbreak. Robert Drago and Kevin Miller, *Sick at Work: Infected Employees in the Workplace During the H1N1 Pandemic*, Institute For Women's Policy Research, Jan. 31, 2010. https://iwpr.org/publications/sick-at-work-infected-employees-in-the-workplace-during-the-h1n1-pandemic/. The American Public Health Association estimates an additional 7 million people were infected and 1,500 deaths due to contagious employees who did not (or could not) stay home from work to recover. *Support for Paid Sick Leave and Family Leave Policies*, American Public Health Association, Nov. 5, 2013, https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/16/11/05/support-for-paid-sick-leave-and-family-leave-policies.

[29] Elise Gold and Jessica Schieder, *Work Sick Or Lose Pay?*, Economic Policy Institute, June 28, 2017, https://www.epi.org/files/pdf/130245.pdf.

transmit illnesses among the general public, particularly because they regularly come into contact with the general public in the course of their work.[30] Because they also lack the protection of other workplace protections like minimum wage and overtime laws, misclassified workers have no choice but to continue working while sick to make ends meet, and risk being infected with or infecting others with the coronavirus, as drivers and passengers cannot maintain a six-foot distance as recommended by public health authorities.

The irreparable harm presented by the advent of the coronavirus thus makes stark the harm wrought by Lyft's misclassification scheme – to both the Plaintiffs and the general public. In the context of a global pandemic, Lyft's ongoing refusal to provide basic workplace protections to its drivers poses an imminent, substantial risk of harm to its drivers and to the general public. Faced with the choice of staying home without pay and risking losing access to housing, food, and other necessities of living, Lyft drivers across Massachusetts will continue working, subjecting themselves to grave danger, as well as risking exposing hundreds of riders on a weekly basis to this deadly disease and thus exacerbating this global emergency.

3. The Balance of Hardships Tips Sharply in Plaintiffs' Favor.

Plaintiffs submit that the balance of hardships tips sharply in Plaintiffs' favor. For this factor, the court considers "the hardship to the nonmovant if the restrainer issues as contrasted with the hardship to the movant if interim relief is withheld." Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991). Here, this factor weighs easily in favor of Plaintiffs.

Lyft is a massive international corporation, which recently received a $24 billion valuation in March of 2019.[31] If Lyft is enjoined from classifying its drivers as independent contractors and required to provide paid sick days, any financial harm, immediate or otherwise, pales in comparison to that shouldered by its drivers, its passengers, and the general public. For instance, issuing a preliminary injunction even well before the current coronavirus pandemic

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30 Id.

31 Carl O'Donnell and Joshua Franklin, *Lyft Valued at $24.3 Billion in First Ride-Hailing IPO*, Reuters, March 28, 2019, https://www.reuters.com/article/us-lyft-ipo/lyft-valued-at-24-3-billion-in-first-ride-hailing-ipo-idUSKCN1R92P4(last accessed Sept. 12, 2019).

(and before considering the defendant's motion to compel arbitration), a California Superior Court found that the "balance of harms" resulting from Instacart's similar misclassification scheme favored its "Shoppers" and the public. See Ruling on Mot. For Preliminary Injunction, Maplebear, Inc., Case No. 2019-48731, at*3-4 (Ex. 3), discussed supra p. 11. Here, there is no question that any potential "harm" Lyft faces in being required to comply with employment standards that predated Lyft's arrival in the Commonwealth is drastically outweighed by the public health risk posed by Lyft's ongoing refusal to properly classify and provide paid sick time to its drivers.

Given the substantial likelihood of success Plaintiffs have on the merits of their underlying misclassification claim (and thus on their paid sick leave claims), Lyft is almost certainly legally required to comply with Massachusetts's state-mandated paid sick time law and therefore cannot point to costs due to reclassification as a harm that should be weighed in the preliminary injunction analysis. See Id., at *4 (Ex. 3) (discounting any costs to Instacart in the preliminary injunction analysis, as the company had two years to come into compliance with the law and cannot now "claim surprise").

4. An Injunction Is in the Public Interest

Finally, enjoining Lyft's conduct is in the public interest. As discussed, the irreparable harm suffered by Lyft drivers, passengers, and the general public is enormous. The legislature has made a clear determination that paid sick time—in the manner it specified by statute—guarantees substantial benefits to workers and benefits public health. Lyft's ongoing noncompliance with that law poses a substantially greater harm to its drivers and to the general public. Lyft should not get to decide what level of compliance with workplace protections it deems sufficient to serve its employees and the public.

The Court should thus grant an immediate emergency preliminary injunction to require Lyft's compliance with these laws.

B. This Court Has the Authority to Issue the Preliminary Injunction Requested

Lyft has argued that the Court has no power to issue a class-wide preliminary injunction prior to the certification of a class. See Dkt. 38, at 9-11; Tr. Hr'ing at 7. This contention is incorrect. A wealth of authority establishes that district courts in the First Circuit (and elsewhere) have the authority to issue preliminary injunctions enjoining harm to a putative class *prior* to class certification. See Martinez v. Rhode Island Housing and Mortg. Finance Corp., 738 F. 2d 21, 22, 36 (1st Cir. 1984) (affirming issuance of preliminary injunction in a putative class action); Devitri v. Cronen, 289 F. Supp. 3d 287, 289-290 (D. Mass. 2018) (district court granted preliminary injunction in putative class action without class certification).[32] Particularly

[32] See also LaForest v. Former Clean Air Holding Co., Inc., 376 F.3d 48, 55-58 (2nd Cir. 2004); Chhoeun v. Marin, 306 F. Supp. 3d 1147, 1164 (C.D. Cal. 2018) ("an injunction is necessary to forestall harm to putative class members that is likely to transpire before the parties can litigate a motion for class certification"); Hamama v. Adducci, 261 F. Supp. 3d 820, 840 n.13 (E.D. Mi. 2017) (preliminary injunction ordered prior to class certification noting that "the Sixth Circuit has held that 'there is nothing improper about a preliminary injunction preceding a ruling on class certification.'" (quoting Gooch v. Life Inv'rs Ins. Co. of Am., 672 F. 3d 402, 433 (6th Cir. 2012) vacated on other grounds, 912 F. 3d 869 (6th Cir. 2018)); Fish v. Kobach, 189 F. Supp. 3d 1107, 1147-1148 (D. Kan. 2016) ("case law supports this Court's authority to issue classwide injunctive relief based on its general equity powers before deciding the class certification motion"); Planned Parenthood of Kansas v. Mosier, 2016 WL 3597457, at *26 (D. Kan. July 5, 2016) aff'd in part, vacated in part sub nom. Planned Parenthood of Kansas v. Andersen, 882 F.3d 1205 (10th Cir. 2018) ("case law supports this Court's authority to issue classwide injunctive relief based on its general equity powers before deciding a class certification motion"); Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015) (granting classwide injunctive relief, prior to certification of class, noting "'[a] district court may, in its discretion, award appropriate classwide injunctive relief prior to a formal ruling on the class certification issue based upon either a conditional certification of the class or its general equity powers" (quoting Thomas v. Johnston, 557 F. Supp. 879, 917 (W.D.Tex.1983)); Lee v. Orr, 2013 WL 6490577 at *1 (N.D. Ill. 2013) ("District courts have the power to order injunctive relief covering potential class members prior to class certification. The court may conditionally certify the class or otherwise order a broad preliminary injunction, without a formal class ruling, under its general equity powers. The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons") (internal quotation marks and citations omitted); Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1019 (C. D. Cal. 2011) (granting a class-wide injunction prior to class certification); Brantley v. Maxwell–Jolly, 656 F.Supp.2d 1161, 1178 n. 14 (N.D. Cal. 2009) ("[d]istrict courts are empowered to grant preliminary injunctions 'regardless of whether the class has been certified.'") (citing Schwarzer, Tashima and Wagstaffe, *Federal Civil Procedure Before Trial,* § 10:773 at 10–116 (TRG 2008)) V.L. v. Wagner, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) (also issuing preliminary injunction in putative class action); National Organization for Reform of Marijuana Laws (NORML) v. Mullen, 608 F. Supp. 945, 963-964 (N.D. Cal. 1985) (same).

when a putative class collectively faces urgent or life-threatening harm, courts have issued preliminary injunctions enjoining harm to the putative class, regardless of whether a motion for class certification has been brought or even considered. See, e.g., Coalition for Basic Human Needs v. King, 654 F. 2d 838, 843 n.2 (1st Cir. 1981) (affirming injunctive relief prior to class certification, "[w]here the need for class-wide relief is so clear and compelling and where time is of such urgency"); Doe v. Trump, 2019 WL 6324560, at *22 (D. Or., Nov. 26, 2019) (issuing preliminary injunction in putative class action when family members visas would be (at a minimum) delayed, as it would constitute extreme hardship on family members to be separated); B.E. v. Teeter, 2016 WL 3033500 at *1 (W.D. Wash. May 27, 2016) (issuing a preliminary injunction before addressing pending motion for class certification).[33]

The Court's authority to issue a class-wide injunction is even more pronounced when the individual plaintiffs seek relief that is inevitably identical to that which would be provided to the class, for example, when relief demands a change in policy that will inevitably offer relief to

[33] Lyft has claimed that Brown v. Trustees of Bos. Univ., 891 F.2d 337 (1st Cir. 1989), prevents this Court from issuing a classwide preliminary injunction prior to the certification of a class. However, this decision does not stand for any broad proposition that the First Circuit prohibits district courts from issuing preliminary injunctions in putative class action cases prior to certification. At least one district court in the First Circuit has approved preliminary injunctions providing relief to putative class members since Brown was decided. See Devitri v. Cronen, 289 F. Supp. 3d 287, 289-290 (D. Mass. 2018). Besides, the decision in Brown was based on its facts, not a broad prohibition on class-wide preliminary injunctions prior to class certification. In Brown, a professor sought an injunction enjoining her employer from "discriminating on the basis of sex with respect to the appointment, promotion and tenure of faculty members." Id. at 361 (quoting the lower court's order). That injunction was overturned as overbroad because "there is no such reason here for an injunction running to the benefit of nonparties. [Plaintiff's] case established that *she alone* had been the victim of sex discrimination." Id. (emphasis supplied). In contrast, it is clear that Lyft is not even attempting to comply with Massachusetts sick pay law, and thus the violation Plaintiffs seek to remedy is one that affects all Lyft drivers. In discrimination cases (other than disparate impact cases), it is far from clear at the outset of a case whether alleged discrimination goes beyond the plaintiffs. That is not the case with a wage case in which plaintiffs are challenging an employer's policy. Here, Lyft is uniformly denying its drivers state-mandated sick leave, and thus putative class members are victims of the same deprivation of employee protections as Plaintiffs. In order to prevent irreparable harm to the putative class (as well as the public as a whole), the Court must enter a class-wide injunction.

putative class members. See Just Film, Inc. v. Merchant Services, Inc., 474 Fed. Appx. 493, 495 (9th Cir. 2012) (affirming issuance of preliminary injunction in putative class action, in part because "plaintiff has shown that a class-wide injunction is necessary to remedy the alleged class-wide harm"); Price v. City of Stockton, 390 F.3d 1105, 1117-18 (9th Cir. 2004) (affirming issuance and scope of preliminary injunction).[34]

IV. CONCLUSION

For the foregoing reasons, this Court should enjoin Lyft from misclassifying its drivers as independent contractors, thus entitling them to the protections of Massachusetts wage laws, including paid sick leave. Doing so immediately is essential to avoiding imminent harm to Lyft drivers, as well as the general public.

[34] While Lyft may argue that not every Lyft driver in Massachusetts will need to take sick leave, and thus not every driver is harmed by Lyft's alleged violation of M.G.L. c. 149 § 148C, a classwide injunction is required in order to ensure that Lyft will abide by the law with respect to any drivers in Massachusetts who may need it. Even in deciding class certification, courts have not required every member of a class to actually be harmed by the alleged violation. See In re Nexium Antitrust Litig., 777 F.3d 9, 32 (1st Cir. 2015); Messner v. Northshore University HealthSystem, 669 F. 3d 802, 825 (7th Cir. 2012) (once plaintiffs had shown broad antitrust impact, certification could not be denied just because defendants pointed to a class of uninjured members); Gammella v. P.F. Chang's China Bistro, Inc., 482 Mass. 1, 14, 120 N.E.3d 690, 702 (2019) ("possibility that a well-defined class will nonetheless encompass some class members who have suffered no injury" is "generally unproblematic") (citing 1 Newberg on Class Actions, at § 2:3 (Supp. 2018)); Frank v. Gold'n Plump Poultry, Inc., 2007 WL 2780504, at *4 (D. Minn. Sept. 24, 2007) (holding that some employees having no damages did not detract from the point that defendant maintained an uniform corporate policy that plaintiffs alleged violated the law); see also In re Whirlpool Corp. Front–Loading Washer Products Liability Litig., 722 F.3d 838, 854–55 (6th Cir.2013) (where defendants contended that class included owners who are "pleased with the performance of their" machines and are thus dissimilar to consumers who complained of a mold problem, court held that commonality was not defeated where plaintiffs showed washer models were nearly identical).

Dated: March 23, 2020

Respectfully submitted,

MELODY CUNNINGHAM and
FRUNWI MANCHO, individually and on behalf of all others similarly situated,

By their attorneys,

/s/ Shannon Liss-Riordan
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CERTIFICATE OF CONFERENCE

I, Shannon Liss-Riordan, hereby certify that I conferred with counsel for Defendants regarding the subject matter of this motion and was informed that Defendants oppose the relief sought in this motion.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, Esq.

CERTIFICATE OF SERVICE

I, Shannon Liss-Riordan, hereby certify that a copy of this document was delivered on March 23, 2020, via electronic filing CM/ECF system to counsel for Defendants.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, Esq.

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MELODY CUNNINGHAM and FRUNWI MANCHO, individually and on behalf of all others similarly situated, Plaintiffs, v. LYFT, INC., LOGAN GREEN, and JOHN ZIMMER, Defendants.	Case No. 1:19-cv-11974-IT

AFFIDAVIT OF MARTIN EL KOUSSA

I, Martin El Koussa, being duly sworn, hereby depose and state as follows:

1. I have personal knowledge of the facts seth forth in this declaration.

2. I began working as a driver for Lyft and Uber in approximately August 2014 in the Boston, Massachusetts, area. I often drive up to 60 or 70 hours per week for Lyft and Uber (roughly half for each company).

3. Driving for Lyft and Uber is my primary source of income.

4. Over the past two weeks, I have not been feeling well. I have experienced body aches, a cough, and a sore throat. I am concerned that I may be experiencing symptoms of the coronavirus. I called my doctor several days ago to talk about my symptoms. I was told not to go to the doctor's office unless my symptoms get worse because I could get infected by another patient at the hospital. I have been taking Tylenol and Dayquil to try to make me feel better.

5. Prior to feeling sick, I picked up a rider in Waltham, Massachusetts, who had attended the Biogen conference that I later learned was where a number of people were infected with the coronavirus. I am concerned that I could have gotten sick from that rider.

6. I am also worried that I could have gotten sick from a rider who had been traveling recently. I frequently pick up riders at the airport. I often wish that I could avoid picking up riders at the airport, especially during the current coronavirus pandemic, but I am afraid to cancel rides to the airport because I am concerned that I will get deactivated for having a high cancellation rate.

7. I continued to drive for Lyft and Uber for the first week that I was feeling sick. I was concerned about infecting my riders, but I felt I had no choice but to keep driving because I do not have any other way to make money. I live by myself, so there is no one else who can help me pay for my living expenses if I do not work.

8. Over the past day or two, I have started to feel a bit better. However, I am concerned that I still might be infected with the coronavirus and I am afraid of passing it on to other people.

9. I have not driven for Lyft or Uber since Monday of this week. I am very concerned about how I will pay my upcoming bills. I expect I will need to continue driving for Uber and Lyft in order to make money to survive.

10. I do not receive sick pay working for Lyft or Uber. If I did receive sick pay, I would be able to stay home instead of working while sick.

Signed under pains and penalties of perjury this 20th day of March, 2020.

Martin El Koussa

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MELODY CUNNINGHAM and FRUNWI MANCHO, individually and on behalf of all others similarly situated, Plaintiffs, v. LYFT, INC., LOGAN GREEN, and JOHN ZIMMER, Defendants.	Case No. 1:19-cv-11974-IT

AFFIDAVIT OF VLADIMIR LEONIDAS

I, Vladimir Leonidas, being duly sworn, hereby depose and state as follows:

1. I have personal knowledge of the facts set forth in this declaration.

2. I began working as a driver for Uber and Lyft in approximately May, 2016 in the Boston, Massachusetts, area. On average, I drive about 30 – 40 hours per week for Lyft and Uber (somewhat more for Uber than for Lyft).

3. Driving for Lyft and Uber are my sole sources of income. I also help support my parents with the income that I receive as a driver.

4. About three weeks ago, I started not to feel well. I got very sick with a stuffy nose, sore throat, headaches, body aches, and a lot of phlegm. The worst of my symptoms resolved after about two weeks, but I still have a sore throat. I think it is possible that I could have the coronavirus.

5. I went to the emergency room shortly after I first got sick. However, I was told that I was not able to get tested for the coronavirus because I was only exhibiting some – not all

– of the symptoms. I had to resort to going to CVS to get over-the-counter cold and flu medications.

6. I am concerned that I got sick from one of the riders who have been in my car over the past several weeks. I have driven several Biogen conference attendees, students who have recently returned from spring break (including some students who went to Italy and other countries reporting high numbers of people infected with the coronavirus), and a lot of riders from the airport. I also drove a lot of students who go to the University of Massachusetts – Boston right after a student there was reported to have been infected with the coronavirus.

7. I do not want to pick up riders who were either coming from or going to risky locations, such as airports or college campuses, while the coronavirus is spreading across the state, but I am afraid to cancel rides because there are not very many ride requests right now and I need the money. I also am afraid to cancel rides because I cannot afford to be suspended or deactivated because my cancellation rate is too high.

8. I have had to continue driving for Lyft and Uber even though I am sick because I need to be able to pay my bills. I am concerned that I could be passing the coronavirus on to my riders, but I do not feel like I have a choice because I need the money.

9. I do not receive sick pay working for Uber or Lyft. If I did receive sick pay, I would have been able to stay home instead of working while being sick.

10. I clean my car often and am providing hand sanitizer to riders in order to try to keep my riders from getting sick. I have to pay for the supplies to clean my car on my own.

11. Over the past week, I have seen a sharp decline in ride requests on Lyft amd Iber. I started the sign-up process to drive for Uber Eats. I am concerned that delivering food for Uber Eats will continue to put customers at risk if I am sick but I need the money.

Signed under pains and penalties of perjury this 20th day of March, 2020.

Vladimir Leonidas

EXHIBIT 3

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 02/18/2020 TIME: 08:00:00 AM DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor
CLERK: Yvette Terronez
REPORTER/ERM: not reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2019-00048731-CU-MC-CTL** CASE INIT.DATE: 09/13/2019
CASE TITLE: **The People of the State of California VS MAPLEBEAR INC [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

APPEARANCES

The Court, having taken the above-entitled matter under submission on 2/14/20 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Ruling on Motion for Preliminary Injunction

People v. Maplebear, Inc., Case No. 2019-48731

Argued: February 14, 2020, 1:30 p.m., <st1:address w:st="on"><st1:street w:st="on">Dept.</st1:street> 72</st1:address>

1. Overview and Procedural Posture.

This is a Bus. & Prof. Code section 17200 case brought by the City Attorney of San Diego on behalf of the People of the State of California against Maplebear, Inc. dba Instacart (defendant). Plaintiff alleges in its complaint:

A. Defendant is a participant in the "rising gig economy."
B. Defendant is a "same-day grocery delivery company" that employs approximately 130,000 employees nationwide as independent contractors; defendant partners with several supermarket chains.
C. Defendant's "customers use its smartphone application software program (the "Instacart App") to select and purchase their groceries. Defendant hires people to work as "Shoppers" to gather the groceries and deliver them to the customer, directing its Shoppers in great detail on exactly how to complete the delivery."
D. Defendant "maintains an unfair competitive advantage by misclassifying its Shoppers and evading long-established worker protections under California law. Since 2012, defendant has and continues to unlawfully classify its Shoppers as independent contractors instead of employees." Through this misclassification, defendant "avoids paying its Shoppers a lawful wage and unlawfully defers substantial expenses to its Shoppers, including the cost of equipment, car registration, insurance, gas,

maintenance, parking fees, and cell phone data usage."
E. Defendant "also has an unfair advantage over its law-abiding competitors because, due to the misclassification, it contributes less to California's unemployment insurance, disability insurance and other state and federal taxes."
F. Defendant "cannot meet its burden of showing its Shoppers are independent contractors under California law."

ROA 1, paragraphs 1-5.

The complaint was filed in September of 2019, and the case was assigned to Judge Trapp. Defendant challenged her, and the case was reassigned to Dept. 72. ROA 24, 42.*

On the Dept. 72 *ex parte* calendar on February 4, 2020, the City Attorney's Office sought a TRO and an OSC re preliminary injunction. ROA 12-18. The court denied the TRO and set the request for a preliminary injunction on calendar for today. ROA 52-53. The court deemed the *ex parte* moving papers (ROA 45-46) to be the moving papers for the preliminary injunction motion, and deemed the February 3, 2020 opposition brief (ROA 47) to be the opposition brief.** The court set a reply deadline of February 7. The court has reviewed the moving, opposition and reply (ROA 60) papers. Supplemental authority was lodged by the City Attorney as recently as February 13 (the court had already found and considered the case referenced). The court heard lengthy argument on February 14, and took the matter under submission. This is the court's ruling.

Defendant has filed a motion to compel arbitration, set for hearing two weeks hence. ROA 17-23, 27.

The case is set for a CMC on April 17, 2020. ROA 25.

2. Applicable Standards.

A. The decision whether to grant a *pendente lite* injunction is within the trial court's discretion. *IT Corp v. County of Imperial* (1983) 35 Cal.3d 63, 69. The trial court must evaluate two interrelated factors when deciding whether to issue such an injunction (1) the likelihood the plaintiff will prevail on the merits at trial; and (2) the interim harm that will occur if the injunction is denied as compared with the harm that the defendant would be likely to suffer if the preliminary injunction were issued. *Department of Fish & Game v. Anderson-Cottonwood Irrig. Dist.* (1992) 8 <st1:place w:st="on"><st1:state w:st="on">Cal.</st1:state></st1:place> App. 4th 1554, 1560. Plaintiff has the burden to show it is entitled to relief. *Casmalia Resources, Ltd. v County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838. An injunction will rarely be granted where a suit for damages provides a clear remedy. Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (The Rutter Group 2019), § 9:510.

"Where a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties." *IT Corp v. County of Imperial, supra,* 35 Cal.3d at 72.

B. The case is brought under the "unlawful", "unfair", and "fraudulent" prongs of Bus. & Prof. Code section 17200. To state a cause of action under the "unlawful" prong, the cause of action must plead a statute, law, or regulation that serves as the predicate for the section 17200 violation. *E.g., Farmers Ins.*

Exchange v. Superior Court (1992) 2 Cal.4th 377, 383 (section 17200 permits a cause of action under the "unlawful" prong if the practice violates some other law). To state a cause of action under the "unfair" prong, the cause of action must allege conduct by defendant "tethered to any underlying constitutional, statutory or regulatory provision." *E.g.*, *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1366. To state a cause of action under the "fraudulent" prong, the plaintiff must allege that members of the public are likely to be deceived. *E.g.*, *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1144.

C. Last year, the court conducted what was probably one of the first "independent contractor" cases to go to trial after *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. *Vendor Surveillance v. Henning and EDD,* Case No. 2016-37096, went to trial between March 4-12, 2019, and gave rise to a lengthy Statement of Decision. The case is now on appeal.

D. In *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), the Supreme Court adopted the ABC test, a standard used in many jurisdictions in different contexts to determine a worker's classification. Under the ABC test, a worker is considered an employee unless the hiring entity establishes that the worker (a) is "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact"; (b) "performs work that is outside the usual course of the hiring entity's business"; and (c) is "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *See Dynamex, supra*, 4 Cal.5th at 916-917. *Dynamex* applied the ABC test to all employers and workers covered by California Industrial Wage Commission (IWC) wage orders. *Id.* at 964. The case was decided in April of 2018, and the Chief Justice's decision was unanimous.

E. On September 18, 2019, the State of California enacted AB 5; it took effect January 1, 2020, and it codifies the *Dynamex* holding and adopts the ABC test for all provisions of the California Labor Code, the Unemployment Insurance Code, and IWC wage orders, with many exemptions. *See* AB 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019); *see also* Labor Code § 2750.3.

Last month, a federal judge in the Southern District of California granted a preliminary injunction in *California Trucking Association v Becerra*, 18-CV02485 (S.D.Cal. filed October 25, 2018), barring the State of California from enforcing AB 5 on motor carriers, including trucking companies and independent contractors.

On Monday, February 10, a federal judge in the Central District of California denied Uber's and Postmates' motion for a preliminary injunction against AB 5 in *Olson v. California*, 19-CV10956 (C.D. Cal. filed December 30, 2019).

3. <u>Discussion and Ruling</u>.

The motion for a preliminary injunction is granted, although not on the terms suggested by the City Attorney.

Initially, the People have demonstrated a probability of success on the merits of their claims. The City makes a very plausible showing of improper classification under the ABC test, and defendant's opposition does not establish defendant will probably prevail under the ABC test at trial. The matter is not free from doubt, and there is some evidence to the contrary: Prong A (*see, e.g.*, Twersky opposition declaration, paragraphs 10, 16-17, 20, 23, 25-26, 33, 36, 38; *see also, e.g.,* Temkin supporting declaration, paragraphs 10, 17); Prong B (*see, e.g.*, Twersky opposition declaration, paragraphs 10-15;

see also, *e.g.*, Evans opposition declaration, paragraphs 6-15); Prong C (*see*, *e.g.*, Twersky opposition declaration, paragraph 38). But the court finds the evidence preponderates in favor of a finding that defendant cannot satisfy at least one prong of the ABC test. At this point is it more likely than not that the People will establish at trial that the "Shoppers" perform a core function of defendant's business; that they are not free from defendant's control; and that they are not engaged in an independently established trade, occupation or business. Establishing any one of these would be enough, and it must be remembered that although the People would have the burden of going forward with the evidence, the burden of establishing proper classification is on defendant.

The balancing of harms favors the People. Defendant suggests it would be irreparably harmed if a preliminary injunction is issued. *See* Twersky opposition declaration, paragraphs 37-52 (*e.g.*, defendant would be required to hire tens of thousands of Shoppers in California; defendant would have to develop rules, protocols, and management teams to monitor the new employees' performance and control their work; defendant would have to invest in infrastructure, such as supervisory staff and software, to enforce new rules on how Shoppers allocate their time; defendant would have to redesign its business model to ensure Shoppers were actively working during compensable time; defendant would have to require Shoppers to accept all orders and prohibit them from using competing platforms during their shifts with defendant; defendant would have to secure a large workforce that would work on scheduled shifts under defendant's supervision as opposed to the flexibility of the current platform; defendant's engineers would have to design new software systems to monitor and manage the new employees; defendant's scientists would have to design systems to analyze shopping patterns and project customer demand to ascertain how many employees to schedule for shifts at specified times and places; the additional costs associated with onboarding, managing, and retaining new employees could force defendant to change its pricing strategies; and the conversion to an employment model would harm defendant's ability, the sole target of this litigation, to compete with other companies that use an independent contractor model like defendant's current model).

However, much of the evidence adduced by defendant actually suggests it already took steps to bring itself into compliance with *Dynamex*, and from that evidence it seems to the court that relatively minor additional steps will allow it to be in full compliance by ensuring the shoppers are true "free agents." It bears repeating that the unanimous Supreme Court's decision is now nearly 2 years old. While change is hard, defendant cannot legitimately claim surprise or that it has not had time to adjust its business model.

The policy of California is unapologetically pro-employee (in the several senses of that word). *Dynamex* is explicitly in line with this policy. While there is room for debate on the wisdom of this policy, and while other states have chosen another course, it is noteworthy that all three branches of California have now spoken on this issue. The Supreme Court announced *Dynamex* two years ago. The decision gave rise to a long debate in the legal press and in the Legislature. The Legislature passed AB 5 last fall. The Governor signed it. To put it in the vernacular, the handwriting is on the wall.

By contrast, the moving papers contain evidence that defendant's Shoppers and the public will be irreparably harmed unless a preliminary injunction is issued. A balancing of the equities favors the People. The harms alleged by the City (*see* complaint, p. 11, seeking civil penalties and "restitution to the misclassified employees ... for unpaid wages, overtime, and rest breaks, missed meals, and reimbursement for expenses necessary to perform the work") will take many months to sort out, and if indeed defendant's survival is in jeopardy (as it claims), may never be remedied by monetary compensation. Shoppers may move on to other occupations, or out of California altogether. The underpaid payroll taxes may never be recovered.

Accordingly, the motion for a preliminary injunction is granted. However, the form of order presented by the City Attorney at the time of the TRO hearing was in the form of a mandatory injunction which would, if signed by the court, almost surely result in the court essentially supervising a significant portion of the operations of the defendant. The court is not qualified to do so, lacks the inclination to do so, and given the 900+ other cases assigned to Dept. 72, lacks the wherewithal to do so. See also Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (The Rutter Group 2019), § 9:532 ("Mandatory injunctions rarely granted"). The court ordered the City Attorney to re-draft the order as a prohibitory injunction; the version tendered at the February 14 hearing was little better. The court has signed a significantly simplified version of the order.

The ruling on the motion for preliminary injunction is not an adjudication of the ultimate rights in controversy. It simply represents the court's discretionary decision whether defendant should be restrained from exercising a claimed right pending trial. *See Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286. Nothing more.

The preliminary injunction is not a final order. It is subject to modification or dissolution at any time upon a showing of either (1) a material change in the facts upon which the preliminary injunction was granted; (2) the law upon which the preliminary injunction was granted has changed; or (3) "the ends of justice would be served" by the modification or dissolution of the injunction." Code of Civil Procedure § 533.
The court does not find persuasive defendant's assertion that the court is somehow precluded from issuing a ruling by the federal injunction issued last month in *California Trucking Association v. Becerra.* Neither side here was a party in that case. That case has no more impact on this case than does the subsequent federal decision (*Olsen*) denying injunctive relief to parties other than these ones. Further, the "Shoppers" are not "motor carriers" within the meaning of the federal legislation at issue in *California Trucking.* Their principal role is described in their name: shoppers. Their delivery role is secondary to their faithful execution of defendant's customer's shopping list. In many cases, the delivery function could just as easily be carried out on a bicycle.

There is further support for the court's ruling today: the immediate availability of an appeal, a request for expedited briefing, and a definitive explication of the rights and duties of the parties by the Court of Appeal. This is a lively area of the law right now; there are numerous cases pending which may ultimately bear on the rights and duties of the parties. Also, there are evidently efforts underway to present the difficult questions raised by the conflict between traditional employment concepts and the so-called "gig economy" to the voters in the form of an initiative. Frankly, the sooner the Court of Appeal can hold forth on these issues, the sooner the parties will have a clear and definite signal of what is expected of them. This predictability is, after all, one of the key functions of law.

Having resolved the motion on the foregoing grounds, the court declines to address the other contentions of the parties. *See PDK Labs. Inc. v. DEA* (D.C. Cir. 2004) 362 F.3d 786, 799 (Roberts, J., concurring in part and concurring in the judgment) (noting "the cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more"); *Compare Natter v. Palm Desert Rent Review Comm'n.* (1987) 190 Cal.App.3d 994, 1001 (reversal on stated grounds made it unnecessary to resolve other contentions challenging constitutionality); *Young v. Three for One Oil Royalties* (1934) 1 Cal.2d 639, 647-648 (court declined to rule on matters unnecessary to resolving the case before the court, as to do so would be to provide "dictum pure and simple").

IT IS SO ORDERED.

*Defense counsel should address with the clerk's office the apparent problem with defense counsel's address. ROA 28-40.
**The court also allowed the overlong brief.

Judge Timothy Taylor