

IN THE COURT OF APPEAL FO  
CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

**The People of the State of  
California,**

Petitioner,

v.

**The Superior Court of the State  
of California, County of San  
Diego**

Respondent,

**Maplebear Inc., dba Instacart  
and Does 1-20 inclusive,**

Real Party in Interest.

Court of Appeal  
Case No.

**Related Appeal Pending  
Court of Appeal  
Case No. D077380**

San Diego Superior Court  
Case No. 37-2019-00048731-  
CU-MC-CTL

**Emergency Petition for Writ of Mandate and/or Other  
Extraordinary Relief**

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

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<b>COURT OF APPEAL 4TH DISTRICT APPELLATE DISTRICT, DIVISION ONE</b>	COURT OF APPEAL CASE NUMBER:
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 309397 NAME: Kevin B. King FIRM NAME: San Diego City Attorney STREET ADDRESS: 1200 Third Avenue CITY: San Diego STATE: ZIP CODE: 92101 TELEPHONE NO.: 619-533-5800 FAX NO.: E-MAIL ADDRESS: kbking@sandiego.gov ATTORNEY FOR (name): The People of the State of California, Appellant	SUPERIOR COURT CASE NUMBER: 37-2019-00048731-CU-MC-CTL
APPELLANT/ The People of the State of California PETITIONER: RESPONDENT/ Superior Court of of the State of California, San Diego REAL PARTY IN INTEREST: Maplebear Inc. dba Instacart	
<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b>	
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
<b>Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.</b>	

1. This form is being submitted on behalf of the following party (name ): The People of the State of California
2. a.  There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b.  Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
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- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 26, 2020

Kevin B. King \_\_\_\_\_  
 (TYPE OR PRINT NAME)

  
 \_\_\_\_\_  
 (SIGNATURE OF APPELLANT OR ATTORNEY)

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San Diego Superior Court  
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CU-MC-CTL

**Emergency Petition for Writ of Mandate and/or Other  
Extraordinary Relief**

To the Honorable Presiding Justice and Honorable Associate  
Justices of the Fourth District Court of Appeal, Division One

**Introduction**

Instacart is an on-demand grocery delivery company that hires Shoppers, who gather and delivery the groceries, as independent contractors. Instacart has misclassified tens of thousands of its Shoppers throughout California as independent contractors instead of employees for years. Through this misclassification, Instacart has denied Shoppers minimum labor

protections, including minimum wage, overtime pay, workers' compensation, unemployment insurance, sick pay and family leave – protections of even higher importance during the COVID-19 pandemic.

On March 23, 2020, Instacart announced that it plans to hire more than 300,000 Shoppers nationwide, over the next three months, to respond to the overwhelming demand for its grocery delivery service. The minimum protections afforded to employees under California law, such as sick pay, family leave, workers' compensation, and overtime, have become that much more important because Shoppers are more likely to avail themselves to these protections and the sheer number of Shoppers needing those protection is growing as Instacart expands.

The People of the State of California prevailed in the trial court, obtaining an injunction against Instacart enjoining Instacart from continuing to misclassify its Shoppers. However, over the People's objection, the trial court stayed its injunction pending resolution of Instacart's appeal.

The People request that this Court intervene and order the trial court to lift the stay on its order and modify its order. This relief is necessary to protect tens of thousands of workers providing essential services to Californians during the COVID-19 health crisis.

## Petition for Writ of Mandate

### Beneficial Interest of Petitioner and Capacities of Respondent and Real Parties in Interest

1. Petitioner the People of the State of California are the Respondent in a related appeal pending before this Court captioned *People of the State of California v. Maplebear dba Instacart*, Case Number D077380 (Cal. Sup. Ct. March 12, 2020). This petition and the related appeal stem from court orders in San Diego Superior Court Case Number 37-2019-00048731-CU-MC-CTL.

2. Respondent is the San Diego County Superior Court, which issued the order staying its preliminary injunction pending Instacart's appeal in Case Number D077380.

3. Maplebear dba Instacart is the Defendant and Real Party in Interest in *People of the State of California v. Maplebear dba Instacart*.

### Jurisdiction

4. This is an appeal from an order out of San Diego Superior Court's unlimited civil division. Said court is an "inferior tribunal" of this Court under California Code of Civil Procedure section 1085 subdivision (a).

### Procedural Background

5. Petitioner the People of the State of California brought an Unfair Competition Law lawsuit against Instacart for misclassifying its Shoppers seeking statewide injunctive relief, civil penalties, and restitution. (Complaint attached as Exhibit A). On January 29, 2020, the People filed for a temporary



restraining order against Instacart seeking an order requiring Instacart to stop misclassifying its Shoppers. (Pl.'s Ex Parte Application for a Temporary Restraining Order attached as Exhibit B). On February 18, 2020, the trial court issued a preliminary injunction against Instacart finding Instacart likely could not meet any of the three required prongs under *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018).

[T]he 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[.]

(Final Ruling on Prelim. Injunction, p. COSD\_000579).

6. The trial court also found the People would suffer irreparable harm and the balance of hardships weighed in favor of the People:

[T]he 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.

(Final Ruling on Prelim. Injunction).

7. The trial court issued the following order: "During the pendency of this action, Defendant is hereby enjoined and

restrained from failing to comply with California employment law with regard to its Full-Service Shopper employees within the City of San Diego.” (Order Granting Pl.’s Motion for Prelim.Injunction, attached as Exhibit F). The trial court stayed enforcement of the order for ten days under California Civil Procedure section 918.

8. Instacart filed its notice of appeal on February 26, 2020. At a motion to compel arbitration hearing on February 28, 2020, over the People’s objection, the trial court extended the stay on its preliminary injunction order until after Instacart’s appeal.

9. On March 12, 2020, Instacart’s appeal was transferred to this Court. On March 13, 2020, the People filed a motion for calendar preference arguing irreparable harm continued to accumulate with each passing day.

### **Factual Background**

10. Instacart is an on-demand grocer delivery company employing over 130,000 “Shoppers” nationwide as independent contractors. Customers place orders for groceries at Instacart’s various partner stores, such as Ralph’s, Vons, and Costco. Once a customer places an order, Instacart sends the order to a Shopper to gather the groceries and deliver them to the customer’s doorstep. Shoppers perform their job at the control and direction of Instacart through Instacart’s smartphone application. Instacart maintains control over its Shoppers through training, scheduling, unilateral payment determination, control over every detail of the shopping and delivery process, and the constant threat of termination. Instacart unilaterally classifies its Shoppers as independent contractors and does not guarantee its

Shoppers the numerous protections under California employment law.

11. On March 23, 2020, Instacart announced its plans to hire approximately 300,000 additional Shoppers nationwide, over the next three months, to meet the demand caused by the COVID-19 pandemic. (Medium Post by Instacart CEO Apoorva Mehta, attached as Exhibit N).

### **Timeliness of the Petition**

12. The trial court issued the stay at issue on February 28, 2020. After *People of the State of California v. Maplebear dba Instacart* was transferred to this Court under Case Number D077380, the People immediately moved for calendar preference. After Instacart's announced it plans to triple its workforce over the next three months in response to the COVID-19 pandemic, the People immediately began preparing this emergency petition. *Cal. W. Nurseries, Inc. v. Superior Court* 129 Cal.App.4th 1170, 1173 (2005) ["As a general rule, a writ petition should be filed within the 60-day period that applies to appeals."]

### **Grounds for Writ Relief**

13. The People have no other speedy, adequate remedy at law. The People's motion for calendar preference in Instacart's appeal is pending before this Court. If granted as requested, the appeal would not be fully briefed until mid-June and there is no timetable for a final decision. This petition is the only mechanism available to the People to stop the imminent, irreparable harm at an earlier date.

14. Tens of thousands of Shoppers will suffer irreparable harm absent this Court's intervention. Every day tens of thousands of California Shoppers are working without minimum protections, such as minimum wage, overtime pay, workers' compensation, paid sick leave, family leave, unemployment benefits, and reimbursement for expenses. Given the COVID-19 pandemic, these minimum protections are that much more necessary for Shoppers. Furthermore, tens of thousands of additional Shoppers will be impacted as Instacart quickly expands to meet the demand created by the COVID-19 pandemic. The public at large will also suffer irreparable harm as Instacart's harmed Shoppers increasingly rely on public assistance and Instacart deprives the State of necessary payroll taxes to absorb the costs of the COVID-19 pandemic.

15. The trial court erroneously stayed the injunction pending Instacart's appeal in Case Number D077380. Per California Code of Civil Procedure section 916, once Instacart filed its notice of appeal, the trial court lacked jurisdiction to later issue a stay pending the appeal.

16. The trial court erroneously limited the injunction's terms and jurisdictional reach. There was no basis for the trial court to limit the People's injunction to the City of San Diego. The People have statewide authority to obtain injunctive relief and the facts warranted statewide relief. There is no meaningful factual distinction between a Shopper in the City of San Diego and the thousands of other Shoppers throughout the State.

17. This petition presents an issue of widespread interest. *Brandt v. Superior Court*, 37 Cal. 3d 813, 816 (1985). Instacart employs over 130,000 Shopper nationwide and is seeking to hire more than double that amount over the next three months. Some of its largest markets are in California and the People are seeking to cease the misclassification of tens of thousands of Shoppers throughout California.

**Authenticity of Exhibits**

18. The exhibits accompanying this petition are true and correct copies of original documents filed in San Diego Superior Court Case Number 37-2019-00048731-CU-MC-CTL. The exhibits are paginated consecutively from page COSD\_000001 to page COSD\_000883. All page references in this petition are to this consecutive pagination.

19. Attached as Exhibit N, COSD\_000880 though COSD\_000883, is a true and accurate copy of a Medium post by Instacart CEO Apoorva Mehta on March 23, 2020.

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**Prayer for Relief**

WHEREFORE, PETITIONER PRAYS that this Court issue a writ of mandate directing Respondent to:

1. vacate its February 28, 2020 order staying its preliminary injunction pending Instacart's appeal and;
2. modify its order to extend to the State of California, clarify Instacart must guarantee its Shoppers paid sick leave, family leave, workers' compensation, and unemployment benefits, and require Instacart to provide bi-weekly data on new Full-Service Shoppers hired under a newly adapted employment contract.

Dated: March 26, 2020

Mara W. Elliott, City Attorney

*Kevin King*

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Kevin B. King  
Deputy City Attorney

## Verification

I, Kevin B. King, declare as follows:

I am an attorney at law, duly admitted and licensed to practice law in this Court. I am a Deputy City Attorney at the San Diego City Attorney's Office. In that capacity, I am the attorney representing the People of the State of California. I have read the foregoing Petition for Writ of Mandate and/or Other Extraordinary Relief and have knowledge of its contents. The facts alleged in the Petition are within my own knowledge and I believe these facts to be true to the best of my knowledge. Because of my familiarity with the relevant facts pertaining to this matter, I verify this Petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and that this verification was executed on March 26, 2020, at San Diego, California.

Dated: March 26, 2020

Mara W. Elliott, City Attorney

*Kevin King*

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Kevin B. King  
Deputy City Attorney

## Memorandum of Points and Authorities

### I. Tens of Thousands of Instacart's Employees Will Suffer Irreparable Harm during the ongoing COVID-19 Pandemic.

Misclassification on its own already causes substantial harm to low-wage workers like Instacart's Shoppers.<sup>1</sup> When employees are misclassified as independent contractors, they are unlawfully denied their guaranteed rights to minimum wage and overtime pay, paid rest breaks, meal breaks, workers' compensation coverage if injured on the job, paid sick leave, family leave, and unemployment insurance. Misclassified workers also have no right to organize or unionize and are not protected against employer retaliation.<sup>2</sup>

The harm to Instacart's Shoppers will be magnified by the COVID-19 pandemic. Due to the COVID-19 pandemic, the demand for grocery delivery has increased dramatically.<sup>3</sup> In California specifically, grocery delivery is in high demand as

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<sup>1</sup> There are approximately 24,000 Shoppers in the State of California and 2,000 Shoppers in the City of San Diego. Twersky Decl. in support of Def.'s Opp'n to Pl. Ex Parte Application for a Temporary Restraining Order, ¶¶ 5-6 attached as Exhibit C.

<sup>2</sup> California Department of Industrial Relations, *Misclassification*, last accessed March 25, 2020, [https://www.dir.ca.gov/Fraud\\_Prevention/Misclassification.htm](https://www.dir.ca.gov/Fraud_Prevention/Misclassification.htm).

<sup>3</sup> Wall Street Journal, *Grocery Delivery Strains to Meet Voracious Demand*, last accessed March 25, 2020, <https://www.wsj.com/articles/grocery-delivery-strains-to-meet-voracious-demand-11584533936>.



Californians have been ordered to stay at home under statewide and local orders.<sup>4</sup> Increased demand means longer hours for Shoppers, which makes basic labor worker protections that much more necessary. If a Shopper gets sick, they need sick pay protections. The probability of Shoppers getting sick is very likely given that, in addition to common colds and the seasonal flu, approximately 56% of Californians could be infected with COVID-

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<sup>4</sup> San Diego Union-Tribune, *Online grocery delivery grinds to a halt due to high demand in San Diego County*, last accessed on March 25, 2020, <https://www.sandiegouniontribune.com/business/retail/story/2020-03-16/online-grocery-delivery-grinds-to-a-halt-due-to-high-demand-in-san-diego-county>.

Tech Crunch, *Grocery delivery apps see record downloads amid coronavirus outbreak*, last accessed on March 25, 2020, <https://techcrunch.com/2020/03/16/grocery-delivery-apps-see-record-downloads-amid-coronavirus-outbreak/>.

Office of Governor Gavin Newsom, *Governor Gavin Newsom Issues Stay at Home Order*, last access on March 25, 2020, <https://www.gov.ca.gov/2020/03/19/governor-gavin-newsom-issues-stay-at-home-order/>.

City and County of San Francisco, *Stay safe. Keep others safe. Stay home except for essential needs*, last access on March 25, 2020, <https://sf.gov/stay-home-except-essential-needs>.

City of Los Angeles Mayor Eric Garcetti, *Mayor Garcetti: Angelenos are 'safer at home' / New emergency order stops non-essential activities outside of residences in response to COVID-19*, last accessed on March 25, 2020, <https://www.lamayor.org/mayor-garcetti-angelenos-are-%E2%80%98safer-home-new-emergency-order-stops-non-essential-activities-outside>.

San Diego County, Corona Disease 2019, *Stay home except for essential needs*, last accessed on March 25, 2020, [https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community\\_epidemiology/dc/2019-nCoV/health-order.html](https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/health-order.html).

19 by mid-May.<sup>5</sup> If a Shopper's family member gets sick, then they need family leave protections. The probability of a Shopper's family member getting sick is high given the spread of COVID-19. If a Shopper gets injured on the job during longer, more difficult shifts resulting from the increased demand, they need the protection of workers' compensation. If a Shopper loses their job with Instacart during the pandemic or after the pandemic with a drop in demand, that Shoppers need the protection of unemployment benefits.

Instacart recently announced an "extended pay" policy for Shoppers "diagnosed with COVID-19 or placed in individual mandatory isolation or quarantine, as directed by a local, state, or public health authority."<sup>6</sup> Instacart offers to pay Shoppers up to 14 days, if, in addition to the above requirement, the Shopper has "an active shopper account, completed a batch within the last 14 days, and been active on the platform for a minimum of 30 calendar days."<sup>7</sup> This is no substitute for guaranteed sick pay under California Labor Code section 246. First, the extended pay requires a COVID-19 diagnosis or quarantine placement, which is impractical. There is a shortage of COVID-19 testing and

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<sup>5</sup> Letter from Governor Newsom to President Donald Trump Requesting Deployment of the USNS Mercy Hospital Ship to Port of Los Angeles on March 25, 2020, last accessed on March 23, 2020, <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.18.20-Letter-USNS-Mercy-Hospital-Ship.pdf>.

<sup>6</sup> Medium, Instacart, *New Updates and Support for the Shopper Community*, last accessed on March 25, 2020, <https://medium.com/shopper-news/new-updates-and-support-for-the-shopper-community-ad757ffdec5>.

<sup>7</sup>*Ibid.*

several local authorities are encouraging individuals to self-quarantine rather than visit a hospital.<sup>8</sup> The California Attorney General and 14 other Attorney Generals across the country also oppose limiting to sick pay to situations where a worker has been diagnosed with COVID-19 or quarantined and explained these concerns in a letter to Whole Foods and Amazon: “By limiting paid sick leave only to those who have been definitively diagnosed with COVID-19 or who have been placed into quarantine, Whole Foods and Amazon are placing their employees, customers, and the public at large at significant risk of exposure.”<sup>9</sup>

Second, Instacart unilaterally made the decision to offer “extended pay” and made clear that it may stop offering it beginning April 16, 2020: “Extended pay is available for 30 days, after which time we will reassess and share an updated go-forward plan.”<sup>10</sup> Contrary to Instacart’s business decision to create “extended pay,” offering paid sick leave to employees is not

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<sup>8</sup> Los Angeles Times, *L.A. County gives up on containing coronavirus, tells doctors to skip testing of some patients*, last accessed on March 25, 2020, <https://www.latimes.com/california/story/2020-03-20/coronavirus-county-doctors-containment-testing>.

<sup>9</sup> Xavier Becerra Attorney General, *Attorney General Becerra Joins Coalition Urging Whole Foods and Amazon to Step Up on Worker Protections and Paid Sick Leave*, last accessed on March 26, 2020, <https://oag.ca.gov/news/press-releases/attorney-general-becerra-joins-coalition-urging-whole-foods-and-amazon-step>.

<sup>10</sup> Medium, Instacart, *New Updates and Support for the Shopper Community*, last accessed on March 25, 2020, <https://medium.com/shopper-news/new-updates-and-support-for-the-shopper-community-ad757ffdecd5>.

*voluntary* under California employment law. Given that Shoppers are employees entitled to paid sick leave, their health and welfare must not be left at the whim of Instacart's voluntary business decisions. Therefore, Instacart's "extended pay" policy is not sufficient to replace Shoppers guaranteed paid sick leave.

Outside of the protections outlined above, more than ever due to high demand for grocer delivery, Shoppers need the protections associated with longer hours, such as overtime pay, meal breaks, and paid rest breaks. Lastly, as it gets tougher for Shoppers to make ends meet in a sinking economy, reimbursement for Shoppers' expenses in working for Instacart is that much more necessary. The money for Shopper's mileage and cell phone data should be reimbursed to Shoppers, as required by law, giving them the ability to put food on the table and pay rent. Instead, as it stands, that money is unlawfully supporting Instacart's bottom line.

In addition to the increased harm to thousands of existing Shoppers, thousands of *additional* Shoppers will be harmed as Instacart expands to meet the increased demand due to the COVID-19 pandemic. On March 23, 2020, Instacart's CEO Apoorva Mehta announced Instacart plans to hire approximately 300,000 additional Shoppers nationwide, over the next three months, to meet this increased demand. (Medium Post by Instacart CEO Apoorva Mehta attached as Exhibit N). Just as the COVID-19 pandemic has grown, the harm to Instacart's Shoppers will be magnified and will grow in numbers. At this point, both harms are growing and inconceivable in magnitude.

The People ask this Court to intervene and ensure tens of thousands of Shoppers are guaranteed protections as they put their lives at risk to provide an essential public service.

The irreparable harm concerns outlined by the trial court are also magnified by the COVID-19 pandemic. Prior to the COVID-19 pandemic, the Honorable Judge Timothy Taylor found the following:

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.

(Final Ruling on Prelim. Injunction attached as Exhibit E, p.COSD\_000579). The rise of the COVID-19 pandemic has worsened the irreparable harm concerns in relation to Instacart's Shoppers. With more work and tens of thousands of additional Shoppers, restitution will be even more difficult to sort out in the future. Furthermore, the Shopper turnover issue noted by the trial court will also worsen as Instacart needs less Shoppers due to decreased demand when the COVID-19 wanes.

Finally, it is worth emphasizing that the risk that Instacart's Shoppers will be injured on the job during these increasingly demanding times is not some abstract possibility; therefore, Shoppers need the protection of workers' compensation. There are multiple opportunities for Shoppers to be injured during the performance of their work. To name a few, Shoppers can get

injured from lifting heavy items, slip and falls, and car accidents. Shoppers are required to lift up to 50 pounds, which carries an injury risk at each step of the shopping process – initially gathering the heavy item, transporting the heavy item to the Shoppers vehicle, and transporting the heavy item from the Shopper’s vehicle to the customer’s home.<sup>11</sup> Heavy orders are more likely given that consumers are “panic buying” packs of bottled water in response to the COVID-19 pandemic.<sup>12</sup>

Additionally, Instacart encourages its Shoppers to accept orders well over 50 pounds by offering a pay incentive. (Twersky Decl. In support of Def.’s Opp’n to Pl. Ex Parte Application for a Temporary Restraining Order, ¶ 18 attached as Exhibit C). That additional weight increases injury risk. This is especially true for older workers, which is a substantial percentage of Instacart’s Shoppers.<sup>13</sup>

Shopper Elizabeth Temkin is a prime example. Ms. Temkin suffered an injury while working for Instacart. She fractured her foot while completing a delivery on August 25, 2019. Because

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<sup>11</sup> Instacart, Full Service Shopper, Basic Requirements, last accessed on March 25, 2020, <https://shoppers.instacart.com/role/full-service#role-description>.

<sup>12</sup> USA Today, *Coronavirus fears spark 'panic buying' of toilet paper, water, hand sanitizer. Here's why we all need to calm down*, last accessed on March 25, 2020, <https://www.usatoday.com/story/money/2020/03/02/coronavirus-toilet-paper-shortage-stores-selling-out/4930420002/>.

<sup>13</sup> Approximately 25% of Instacart’s Shoppers nationwide are at least 45 years old. Instacart, *Introducing New Shopper Perks For A More Holistic Shopper Experience*, last accessed on March 25, 2020, <https://medium.com/shopper-news/shopper-perks-52e480f2788a>.

Instacart unilaterally classified Ms. Temkin as an independent contractor, she did not qualify for workers' compensation. Knowing this, Ms. Temkin did not apply for workers' compensation. Instead, Ms. Temkin delayed getting treatment due to the cost and continued working through the pain and swelling. Eventually, Ms. Temkin sought treatment through her private insurance, which included a high deductible. After multiple hospital visits, Ms. Temkin incurred hundreds of dollars in medical debt. Ms. Temkin suffered financially and emotionally because she was not covered when she suffered an injury working for Instacart. (Temkin Supp. Decl. In support of Pl. Ex Parte Application for a Temporary Restraining Order, ¶¶ 1-36 attached as Exhibit D, pp. COSD 000436-000440). This is the result of Instacart's unilateral decision to misclassify Ms. Temkin as an independent contractor. Ms. Temkin's experience is not unique and the same type of harm will continue to accumulate as the preliminary injunction appeal is litigated. The People ask this Court to intervene to prevent this harm.

In conclusion, the People ask this Court to intervene to protect tens of thousands of workers providing Californians with essential services during the COVID-19 health crisis. The high risk of imminent and pervasive harm warrants urgent action.

## **II. The Public at Large Will Suffer Irreparable Harm.**

The public at large will also suffer irreparable harm absent this Court's intervention. The California Supreme Court has long recognized that "the minimum employment standards imposed by wage orders are also for the benefit of the public at large, because

if the wage orders' obligations are not fulfilled the public will often be left to assume responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions." *Dynamex*, 4 Cal. 5th at 953; also see *S. G. Borello & Sons, Inc. V. Dep't of Indus. Relations*, 48 Cal. 3d 341, 358 (1989) (noting that California's worker protection statutes "have a public purpose beyond the private interests of the workers themselves. Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury"). Absent the lawful classification of tens of thousands of Instacart's Shoppers, there will be a substantial increase public assistance for those harmed by Instacart's unlawful business tactics.

The public will also suffer irreparable harm as Instacart continues to unlawfully evade state payroll taxes. In *Dynamex*, the California Supreme Court recognized, by misclassifying their workers as independent contractors, unscrupulous businesses are "depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled." *Dynamex*, 4 Cal. 5th at 913. The California Department of Industrial Relations estimates, "Worker misclassification results in an estimated loss of \$7 billion each year in payroll tax revenue to the state."<sup>14</sup> As noted by the

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<sup>14</sup> California Department of Industrial Relations, *Labor Commissioner's Office Files \$6.3 Million Misclassification and Wage Theft Lawsuit against Glendale Construction Company*, News Release No.: 2017-76, last accessed on March 25, 2020, <https://www.dir.ca.gov/DIRNews/2017/2017-76.pdf>.



Honorable Judge Timothy Taylor in his final ruling issuing the preliminary injunction, depending on the viability of Instacart as a business, “The underpaid payroll taxes may never be recovered.”(Final Ruling on Prelim. Injunction, p.COSD\_000579). These payroll taxes will be essential to the State of California as it attempts to absorb the costs of the COVID-19 pandemic and recover in the future.

Lastly, the public at large will suffer irreparable harm if Shoppers are not guaranteed paid sick leave because, without paid sick leave, Shoppers will likely continue to work when infected and spread COVID-19 to others. As the Legislature recognized in passing the bill codifying paid sick leave, “Paid sick days will have an enormously positive impact on the public health of Californians by allowing sick workers paid time off to care for themselves when ill, thus lessening their recovery time and reducing the likelihood of spreading illness to other members of the workforce.” Assembly Bill 1522, (2013–2014 Reg.Sess.) section 1(e). This concern is especially relevant amidst the COVID-19 pandemic. Without the ability to use paid sick leave and in need of income as low-wage workers, infected Shoppers will likely continue working and risk spreading COVID-19 to others. The risk is heightened given that Shoppers are in an environment where COVID-19 is more likely to spread – busy grocery stores where social distancing is less practical. Based on the above, it is clear the irreparable harm to the public at large is substantial and magnified by the COVID-19 pandemic.

**III. The People Request that this Court Order the Trial Court to Lift its Stay on its Preliminary Injunction Because the Trial Court Lacked Jurisdiction to Issue the Stay.**

To stop the irreparable harm to tens of thousands of Californian Shoppers as discussed above, the People request that this Court lift the trial court's stay of the preliminary injunction against Instacart. First, the trial court committed legal error because, once Instacart filed its notice of appeal, the trial court did not have jurisdiction to issue the stay. Under California Code of Civil Procedure section 916, outside of the enumerated exceptions, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order[.]" Therefore, after Instacart filed its notice of appeal on February 26, 2020, the trial court lacked jurisdiction moving forward. The court lacked jurisdiction when it stayed its injunction two days later on February 28, 2020. The People request that this Court lift the trial court's stay based on this legal error.

Alternatively, the People request that this Court exercise its discretion to lift the trial court's stay. As described in detail above, the ongoing irreparable harm is substantial and will continue to grow as Instacart expands its work force to meet the demand resulting from the COVID-19 pandemic. Absent this Court's intervention, the harm Instacart has caused tens of thousands of its Shoppers over the years will continue, that harm will multiply as Instacart hires tens of thousands more, and the

State of California will suffer as a safety net for Instacart's harmed workers.

**IV. The People Request that this Court Order the Trial Court to Modify its Preliminary Injunction because the Trial Court Erroneously Limited its Injunction.**

In addition to lifting the stay, the People request that this Court order the trial court to modify its preliminary injunction. First, the People request that the injunction's limit to the City of San Diego be stricken. Petitioner filed on behalf of the People of the State of California under Business and Professions Code section 17206. Because Instacart's unlawful and unfair conduct is widespread, statewide, Petitioner exercised its authority under section 17203 and requested statewide injunctive relief. (Exhibits A and B). The trial court did not provide any rationale in its Final Ruling or at oral argument for limiting the injunction to the City of San Diego. The facts are clear and warranted the opposite result. Instacart began offering its grocery delivery service in 2012 and spread throughout California in the years afterwards, entering several major markets. The unlawful conduct is the same locale to locale – worker misclassification and the failure to provide workers with basic employee protections. Accordingly, limiting the injunction the City of San Diego is arbitrary and does not account for the thousands of harmed Shoppers outside of the City of San Diego. The People request that this Court order the trial Court to extend its injunction to the State of California.

Next, the People request that this Court order the trial court to add the suggested language by the People, which the trial

court struck upon modifying the order. Accordingly, the People request that the following be added to the trial court's order:

1. Defendant is enjoined and restrained from hiring additional Full-Service Shoppers as independent contractors, including requiring Shoppers to sign its Independent Contractor Agreement.
2. Defendant is enjoined and restrained from failing to comply with California employment law, including, but not limited to the Wage Orders of the Industrial Welfare Commission relating to reimbursement for expenses, overtime pay, minimum wage, and meal and rest breaks.
3. Defendant is further ordered to cooperate with the City Attorney's Office to ensure compliance with this Injunction, including but not limited to sending relevant data regarding the hours worked and amounts paid to its Full-Service Shopper employees in California.

Additionally, the People request that this Court order the trial court to clarify that "California employment law", in item 2 above, includes paid sick leave, family leave, workers' compensation and unemployment insurance. Lastly, the People request that this Court order the trial court to add a requirement that Instacart provide bi-weekly data on new Full-Service Shoppers hired under a newly adapted *employment* contract.

### **Conclusion**

The irreparable harm to tens of thousands of Instacart's Shoppers and the public at large is abundantly clear. This irreparable harm has magnified and multiplied due to increased demand for Shoppers' services during the COVID-19 pandemic. The People respectfully request that this Court intervene to

ensure tens of thousands of Shoppers are guaranteed protections while they provide an essential services to the public.

Dated: March 26, 2020

Mara W. Elliott, City Attorney

*Kevin King*

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Kevin B. King  
Deputy City Attorney  
Attorneys for Petitioner

**Certificate of Compliance**  
**[CRC 8.204(c)(1)]**

Pursuant to California Rule of Court, Rule 8.204(c)(1), I certify that this Motion to Expedite Appeal, contains 5,844 words and is printed in a 13-point typeface.

Dated: March 26, 2020

Mara W. Elliott, City Attorney

*Kevin King*

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Kevin B. King  
Deputy City Attorney

Attorneys for Petitioner

COURT OF APPEAL, STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION ONE  
PROOF OF SERVICE

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*The People v. Maplebear Inc. dba Instacart*  
4th District Related Appeal Pending Case No.D077380  
San Diego County Superior Court Case  
No. 37-2019-00048731-CU-MC-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California, where the mailing occurs; and, my business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I served the foregoing **Emergency Petition for Writ of Mandate**, on **March 26, 2020**, by sealing each envelope and placing it with for collection and mailing with the United States Postal Service, on this same day, at my business address shown above, following ordinary business practices, addressed to:

<p>Keker, Van Nest &amp; Peters LLP  633 Battery Street  San Francisco, CA 94111-1809  Ph: 415-391-4500  <a href="mailto:rwong@keker.com">rwong@keker.com</a>  <a href="mailto:Instacart-Service@keker.com">Instacart-Service@keker.com</a>  <a href="mailto:rmeny@keker.com">rmeny@keker.com</a>,  <a href="mailto:bberkowitz@keker.com">bberkowitz@keker.com</a>,  <a href="mailto:emeyer@keker.com">emeyer@keker.com</a>,  <a href="mailto:jallen@keker.com">jallen@keker.com</a>, <a href="mailto:dzamora-stevens@keker.com">dzamora-stevens@keker.com</a>,  <a href="mailto:mcornell@keker.com">mcornell@keker.com</a></p> <p><b><i>Defendant</i></b></p>	<p><b>Via Electronic Service</b></p>
<p>Clerk of San Diego Superior Court  Honorable Timothy Taylor, Judge  330 West Broadway, D-71  San Diego, CA 92101</p>	<p><b>Via Electronic Service</b></p>
<p>Office of the District Attorney  Appellate Division  P. O. Box X-1011  San Diego, CA 92112</p>	<p><b>Via U.S. Mail</b></p>
<p>Office of the Attorney General  P. O. Box 85266  San Diego, CA 92186-5266</p>	<p><b>Via U.S. Mail</b></p>

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct. Executed on March 26, 2020, in San Diego, California.

*Marissa Gutierrez*  


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Marissa Gutierrez