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IN THE SUPREME COURT OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

CHARLES LEE et al.
Real Parties in Interest.

ON REVIEW FROM A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION SEVEN • CASE NO. B249546

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER DYNAMEX OPERATIONS WEST, INC.

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Pursuant to California Rules of Court, rule 8.520(f), the Chamber of Commerce of the United States of America (U.S. Chamber) and the California Chamber of Commerce (CalChamber) respectfully request permission to file the attached amici curiae brief in support of defendant and petitioner Dynamex Operations West, Inc. (Dynamex).

The U.S. Chamber is the world's largest federation of business, trade, and professional organizations, representing

300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country.[1] In particular, the U.S. Chamber has many members located in California and others who conduct substantial business in the State and have a significant interest in the sound and equitable development of California employment law. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of similar vital concern. In fulfilling that role, the U.S. Chamber has appeared many times before this Court, the California Courts of Appeal, the United States Supreme Court, and the supreme courts of various other states.

CalChamber is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a

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[1] The U.S. Chamber and CalChamber certify that no person or entity other than the U.S. Chamber, CalChamber, and their counsel authored this proposed brief in whole or in part and that no person or entity other than the U.S. Chamber, CalChamber, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

broad range of legislative, regulatory, and legal issues. CalChamber often advocates before the state and federal courts by filing amicus curiae briefs in cases, like this one, involving issues of paramount concern to the business community.

Every California business has a critical interest in whom it is deemed to employ, and under what circumstances it may deal with sole proprietors and other service providers as independent contractors. For more than a century, California courts and administrative agencies have answered these questions by looking exclusively to the common law, as summarized by this Court in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), to determine the employee or independent contractor status of workers. The key factor under the common law test for determining employment, as elucidated in *Borello*, has traditionally been the right to control the manner and means by which the work is to be performed.

In *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*), this Court held that, in determining which of several possible employers were subject to suit by employees for unpaid minimum wages under Labor Code section 1194, the persons who may be liable as joint employers should be determined under the definitions of "employer" set by the Industrial Welfare Commission (IWC) in wage orders dating back nearly a century. But until it granted review here, this Court had "le[ft] for another day" the question whether these wage order tests for *employer* status also govern the determination of *employee* status. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530-531.)

The U.S. Chamber and CalChamber agree with and support Dynamex's position that the trial court and the Court of Appeal erred in concluding that the IWC wage order tests should apply beyond the joint employment context addressed by *Martinez* to extend to cases where workers challenge their independent contractor status. As Dynamex explained in its briefing on the merits, these wage order tests as applied by the trial court and the Court of Appeal—and in particular the "suffer or permit" test as interpreted by the trial court—would effectively eliminate independent contractor status in California.

Should this Court disagree with Dynamex's position, however, and conclude that the IWC wage order tests *do* govern the assessment of whether workers are employees rather than independent contractors, then the U.S. Chamber and CalChamber believe their amici curiae brief can assist this Court by offering a different perspective on how the IWC wage order tests should be properly applied in future cases. In short, in the event this Court decides to apply the wage order tests beyond the context of joint employment status, this Court can benefit from the additional briefing here showing that, when properly interpreted and applied, the IWC's two alternatives to the common law test are not meaningfully different from the common law test explicated in *Borello*. By harmonizing the wage orders' three tests—which *Martinez* confirmed all hinge on the right of control—this Court can avoid upsetting decades of settled law, and the disruption that would result if the IWC's tests were instead applied in a manner

that eliminated independent contractor status for virtually all service providers in California.

Accordingly, the U.S. Chamber and CalChamber respectfully request that this Court accept and file the attached amici curiae brief.

December 4, 2015

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AMICI CURIAE BRIEF

INTRODUCTION

The independent contractor relationship is vital to the health of California's economy and the job satisfaction of its workers. Nationwide, more than 10 million workers are independent contractors and account for almost one-half *trillion* dollars in annual personal income. Surveys show that the vast majority prefer to be independent contractors rather than employees, and that as a group, independent contractors have higher job satisfaction than employees.

For businesses, especially small businesses that are the lifeblood of local communities, independent contractors play a vital role. The availability of independent contractors allows businesses to respond to short-term economic changes by temporarily supplementing their existing workforce, avoiding the cost of extraneous permanent workers while financially protecting current employees. For small businesses in particular, use of independent contractors allows companies to hire workers with functional knowledge of critical gap areas—particularly regarding rapidly evolving technology—without requiring the substantial investment that would be required to hire permanent employees with expertise that is used only on a sporadic basis.

Independent contractors' vital role in California's economy has long been fostered by the standards articulated by this Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*). *Borello* articulated the common law

test for deciding whether workers are independent contractors under California law—a test that focuses on the right to control the manner and means by which the work is to be performed. This common law test provides the guidance necessary for both workers and those hiring them to assess who is an independent contractor. It simultaneously sets meaningful limits on independent contractor status while at the same time leaving sufficient breathing space for the formation of the type of independent contractor relationships that have proved so critical to California's economic growth and so satisfying to workers.

Imposing severe limitations on the use of independent contractors, such as those called for by plaintiffs here, would lead to reduced workforce flexibility, slower economic growth, and higher unemployment in California. It would be particularly devastating to small businesses, which rely most heavily on the availability of independent contractors. As Dynamex has explained in its briefs on the merits, the Court of Appeal's application of such limitations—particularly, its application of the "suffer or permit" test drawn from the wage orders promulgated by the Industrial Welfare Commission (IWC)—threatens to eliminate or severely restrict the ability of businesses and even consumers to hire workers under an independent contractor relationship.

In *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*), this Court applied three alternative tests set by the IWC's wage orders to determine which of multiple possible employers could be sued as joint employers by workers whom nobody disputed were employees. Thus, as Dynamex argues, *Martinez* merely applies to the

determination of who is an employer of an undisputed employee, but leaves in place the *Borello* common law test as the exclusive test for distinguishing between employees and independent contractors.

However, if this Court instead determines that *Martinez* governs the determination of *both* employer and employee status, then the Court should still avoid upsetting decades of settled independent contractor jurisprudence by clarifying, in conformance with *Martinez*, that the IWC's alternative tests are not meaningfully different in application from the modern-day common law test explained in *Borello*. As *Martinez* itself confirms, the three tests all hinge on the extent to which the hirer has the right to control the work. And as shown below, every subsequent state court decision after *Martinez*, and nearly every subsequent federal district court decision, has determined that application of the three tests—either holistically or individually—leads ineluctably to the same conclusion about whether a worker is an employee or an independent contractor regardless of which of the three tests is applied.

LEGAL ARGUMENT

I. INDEPENDENT CONTRACTORS ARE ESSENTIAL TO A FUNCTIONING BUSINESS ENVIRONMENT AND TO CALIFORNIA'S ECONOMIC PROSPERITY.

A. The history and development of the independent contractor relationship.

Employment laws have their origin in the master and servant relationship, which has existed for centuries. (See 1 Blackstone's Commentaries 410.) Traditionally, the master and servant relationship has been highly regulated, with laws setting the rate and method of payment required; the terms, responsibilities, and duties of employment; and limitations on when the relationship may be terminated. (Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying* (2001) 22 Berkeley J. Emp. & Lab. L. 295, 302 (hereafter Carlson).) Concurrently, society also saw the development of the predecessors of modern independent contractors—workers for the public at large and not under the control of a master. (*Id.* at p. 303.)

By the mid-nineteenth century, as the country entered the Industrial Revolution, determining employee status became important because an employer could face potential tort liability for the actions of an employee. (Carlson, *supra*, 22 Berkeley J. Emp. & Lab. L. at pp. 301, 304.) Employee classification further increased in importance as worker protection became a prevalent social and

political concern, and worker protection legislation was enacted. (*Id.* at pp. 306-307.) To distinguish between servants and independent contractors, courts analyzed the master's right to control the servant and the servant's dependence on the master. (*Id.* at pp. 304-305; see, e.g., *Bennett v. Truebody* (1885) 66 Cal. 509, 512 ["The plumber was left to produce the desired result in his own way. If that did not constitute him an independent contractor, we do not know what would."]; *Bernauer v. Hartman Steel Co.* (1889) 33 Ill.App. 491, 493 [property owner not liable for actions of worker who did not act under owner's direction]; *Hilliard v. Richardson* (1855) 69 Mass. 349, 366 [employer not liable for negligent act "not done by one whom he had the right to command"].)

Although determining a method for ascertaining whether workers were employees has long been an issue for resolution by the legal system, courts have consistently recognized both the existence of independent contractors and the fact that certain workers should not, and cannot, be considered employees. (Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification* (2009) 9 U.C. Davis Bus. L.J. 111, 112 ["the hiring of independent contractors is a legitimate and useful business practice with deep historical roots"].)

B. The current prevalence of independent contractors.

As of 2005, there were at least 10.3 million independent contractors in the United States, representing 7.4 percent of the

total workforce.[2] (See U.S. Dept. of Labor, Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements (2005) p. 1 <http://goo.gl/M9tXfA> [as of Nov. 13, 2015] (hereafter BLS Report).) In the decade preceding 2005, the number of independent contractors grew by approximately 25 percent, suggesting similar or greater growth in the following decade through the present. (U.S. Govt. Accountability Office, Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification (July 2006) Appendix III: Size and Characteristics of the Contingent Workforce, Table 4, p. 47 <http://goo.gl/2IktTU> [as of Nov. 13, 2015].)

Surveys reveal that independent contractors are more likely to have a college education than those in traditional employment arrangements. (See BLS Report, *supra*, p. 4.) Many older, educated workers have chosen to become independent contractors as the job

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[2] This data is found in the Bureau of Labor Statistics' 2005 Contingent Work Supplement (CWS) survey. The CWS survey measured the contingent workforce and tracked the demographics of alternative arrangement workers such as independent contractors. Previously, the Bureau of Labor Statistics performed the CWS survey in 1995, 1997, 1999, and 2001, but it has not received funding for the survey since 2005. (See U.S. Govt. Accountability Office, Contingent Workforce: Size, Characteristics, Earnings, and Benefits (Apr. 2015) p. 3 <http://goo.gl/GjmQRz> [as of Nov. 13, 2015].) While other surveys have attempted to capture similar data, the United States Department of Labor recently noted that no other survey is as well-suited to track the contingent workforce as the CWS. (*Id.* at Enclosure V: Agency Comments, p. 69.) Therefore, these statistics are the most accurate and recent data tracking the presence of independent contractors in the United States economy.

market has become less secure and more volatile. (See Kunda et al., *Why Do Contractors Contract? The Experience of Highly Skilled Technical Professionals in a Contingent Labor Market* (2002) 55 Indus. & Lab. Rel. Rev. 234, 235 (hereafter Kunda) [layoffs, market volatility, and expansion of the "contingent labor force" have shaken the longstanding belief that a traditional employment relationship is an ideal work situation].)

Independent contractors have a particular prevalence in certain categories of positions, including: (1) cab drivers and couriers; (2) caregivers; (3) construction industry workers; (4) financial advisers; (5) forest product suppliers; (6) physicians; and (7) truck drivers. (Eisenach, The Role of Independent Contractors in the U.S. Economy (Dec. 2010) p. 21 <http://goo.gl/gphW3A> [as of Nov. 13, 2015] (hereafter Eisenach).) More specifically, approximately 88 percent of taxi drivers, 22 percent of construction workers, 64 percent of practicing registered financial representatives, 23 percent of forest product suppliers, 12 percent of physicians, and 14 percent of truck transportation workers consider themselves independent contractors. (*Id.* at pp. 21-22, 24-28.)

Use of independent contractors is particularly prevalent among small businesses. According to a 2008 poll of small business owners, 61 percent reported hiring independent contractors within the preceding three years to perform construction, transportation, or computer work, with most hiring such workers on multiple occasions. (NFIB, National Small Business Poll, Independent Contractors (2008) vol. 8, issue 6, p. 7 <http://goo.gl/182Bpl> [as of Nov. 13, 2015] (hereafter National Small Business Poll).)

Altogether, independent contractors account for at least $473 billion in annual personal income, signifying a significant and permanent presence in the United States economy. (Eisenach, *supra*, p. 35.)

C. Common misconceptions regarding the classification of workers as independent contractors.

Some have suggested that employers intentionally misclassify employees to avoid compliance with statutory employee protections. (See, e.g., Comment, *The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers from the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them* (2003) 43 Santa Clara L.Rev. 901, 911.) But most workers become independent contractors not due to coercive or manipulative demands by employers, but by choice. (Polivka, *Into contingent and alternative employment: by choice?* (1996) 119 Monthly Lab. Rev. 55, 70 <http://goo.gl/bHa2n9> (hereafter Polivka) ["the fear that large numbers of employers are abusing their employees by switching them from traditional to alternative arrangements appears unfounded"].)

In fact, when surveyed about their work arrangements, over 82 percent of independent contractors responded that they preferred their alternative work arrangement; only 9 percent answered that they would rather work in a traditional employment relationship. (BLS Report, *supra*, Table 11.) Job satisfaction is actually much

higher among independent contractors than among traditional employees. (See Pew Research Center, *Take this Job and Love It* (Sept. 17, 2009) <http://goo.gl/pF5Mqr> [as of Nov. 24, 2015] [39 percent of self-employed workers (i.e., independent contractors) are "completely satisfied" with their jobs, compared to 28 percent in traditional arrangements]; Cohen and Eimicke, *Independent Contracting Policy and Management Analysis* (Aug. 2013) Columbia University's School of International Affairs, at pp. 16-17 (hereafter Cohen and Eimicke) [self-employed individuals report greater job satisfaction because they generally "have more control over their economic destiny"].)

The growth and development of the independent contractor role has been largely augmented by the labor market's continued expansion to include more women with children, students, the elderly, "moonlighters" with second jobs, and those on temporary layoffs. (Comment, *The Employee/Independent Contractor Classification: Do Loan Officers Working with California Mortgage Brokers Qualify as Statutory Independent Contractors* (1995) 32 San Diego L.Rev. 895, 902 (hereafter *Employment/Independent Contractor Classification*).) Independent contracting is attractive to these growing populations because the contractual relationship allows workers to move frequently from project to project, to work multiple projects at once (or none at all), and to develop ownership capital in their own business or work product. (Eisenach, *supra*, at p. 29; accord, Polivka, *supra*, 119 Monthly Lab. Rev. at p. 74 [for individuals "who are constrained by conditions outside of the labor market (for example, those with family or school obligations)," self-

employment provides "an opportunity to work that they might not otherwise have"]; Cohen and Eimicke, *supra*, at p. 16 ["the flexibility and independence" that the self-employed have "to choose [their] own hours, clients and manner in which the work is completed" is "[o]ne of the most frequently cited benefits of engaging in independent contracting"].) Further, the flexibility of independent contracting allows workers to create portfolios of various work experiences, making them more marketable in today's volatile and competitive job market. (See Harned et al., *Creating a Workable Legal Standard for Defining an Independent Contractor* (2010) 4 J. Bus. Entrepreneurship & L. 93, 98 (hereafter Harned).)

Most independent contractors are not seeking a traditional employment arrangement precisely because they find their work situation to be more lucrative and more secure than traditional employment, and their independent contractor role gives them a greater sense of autonomy. (Kunda, *supra*, 55 Indus. & Lab. Rel. Rev. at p. 255 [contractors "generally prefer[ ] contracting and consciously accept[ ] its risks in hope of making more money while escaping the constraints of organizational life"]; accord, Polivka, *supra*, 119 Monthly Lab. Rev. at p. 65 ["being an independent contractor affords them more job security than being someone else's employee does, as well as giving them a degree of autonomy that they have come to enjoy"].) Because "independent contractors choose their own jobs and clients, the quantity and quality of work is better correlated with the amount of money they make." (Cohen and Eimicke, *supra*, at p. 16.) Thus, "highly motivated contractors

are more likely to earn more money than regular employees." (*Ibid.*)

Being an independent contractor also provides tax benefits to workers, as they can defer taxes until the following year rather than being subject to payroll deductions on a regular basis, and can claim business tax deductions for many expenses. (Barton, *Reconciling the Independent Contractor Versus Employee Dilemma: A Discussion of Current Developments as They Relate to Employee Benefit Plans* (2001) 29 Cap. U. L.Rev. 1079, 1082 (hereafter Barton).)

D. The economic benefits of independent contractors in a fluctuating employment market.

Hiring an independent contractor allows the employer to reduce his capital requirements, shift some of the risk (and reward) to a separate business, and avoid the many costs of the employment relationship, including the rigidity of federal and state employment laws. Independent contracting has flourished based on both supply factors (benefitting the worker) and demand factors (benefitting the employer). (See *Employee/Independent Contractor Classification*, *supra*, 32 San Diego L.Rev. at p. 902.) The benefits of independent contractors to businesses include allowing companies to respond to short-term changes in demand, compensating for temporary or sudden shortages in a supply of labor, and giving employers the ability to evaluate job performance (and base compensation) on the

work product of the workers rather than only their time spent working. (Eisenach, *supra*, at p. 29.)

The temporary and contractual nature of independent contractors allows an employer to temporarily supplement its workforce, implement new technology, and screen potential employees, while also financially protecting current employees' jobs by avoiding the cost of extraneous workers. (*Employee/Independent Contractor Classification*, *supra*, 32 San Diego L.Rev. at p. 902.) Employers frequently utilize independent contractors to supplement their labor supply when they do not want or cannot afford to hire additional employees. (*Id.* at p. 902 & fn. 28.)

At other times, independent contractors are necessary because an employee would not be able to perform the same work as effectively. For example, because of constantly evolving technology, most businesses are unable to keep their systems up to date without the use of independent contractors who specialize in technology services, including installing, explaining, and implementing new technological products for businesses. (Barton, *supra*, 29 Cap. U. L.Rev. at p. 1087.) Because of this specific need, up to 10 percent of workers in the technology industry are independent contractors. (*Ibid.*)

Employers often form short-term business contracts with independent contractors, allowing for workforce flexibility and avoidance of the significant fixed costs associated with hiring new employees (e.g., providing training and acquiring the capital to fund the position). (Eisenach, *supra*, p. 30.) For small businesses in particular, contracting allows companies to hire workers with

functional knowledge of gap areas without requiring a substantial investment by the business. (See National Small Business Poll, *supra*, p. 8; accord, Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem* (2015) 12 Rutgers J.L. & Pub. Pol'y 138, 143 [eliminating independent contractors "would require classifying all workers as employees, which would ultimately devastate small businesses who are already struggling in this economy"].) Small businesses are especially vulnerable because their limited resources prohibit them from preparing for and protecting against every contingency, requiring them to rely heavily on independent contractors to patch these holes. (National Small Business Poll, *supra*, p. 7.)

In short, all employers, regardless of size, continue to find that in the ever-changing workplace, using independent contractors is more cost-effective and produces a higher level of work satisfaction. (Harned, *supra*, 4 J. Bus. Entrepreneurship & L. at pp. 98-99 ["As the marketplace changes, employers and individuals find lower costs and increased satisfaction in using the independent contracting model rather than traditional employment arrangements"].)

E. The negative consequences of curtailing the availability of independent contractors.

Curtailing the role of independent contractors would lead to reduced workforce flexibility and would likely result in slower economic growth and higher unemployment. (Eisenach, *supra*, at

pp. 39-40 [discussing relationship among lack of labor force flexibility, sluggish economic growth, and increased unemployment rates]; see also Cohen and Eimicke, *supra,* at p. 85 ["Ultimately, the tradeoff for government's heightened enforcement of misclassification seems to come down to choosing between ease of tax collection on the one side and job creation and economic growth on the other"].) And because the use of independent contractors is particularly field-specific (see *ante*, p. 12), the elimination or limitation of independent contractors in the workforce could wreak havoc in particular industries or sectors (Eisenach, at p. 38).

For example, the majority of small businesses employ only five or fewer employees, relying heavily on independent contractors. (See Eisenach, *supra*, p. 36.) Limiting the availability of contractors would lead "to reduced small business creation, a reduction in small business employment, and less entrepreneurial activity." (*Id.* at p. 37.) Companies throughout California, and small businesses in particular, would be left debilitated as they attempt to cope with replacing a vital portion of their workforce. (See National Small Business Poll, *supra*, p. 7; see also Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry* (2013) 39 J. Legis. 295, 303 [explaining that diminished availability of independent contractors could "be devastating for businesses that make substantial use of independent contractors"].)

In sum, "the independent contractor relationship benefits the contractors themselves, the companies with which they contract, and the economy as a whole." (*Employee/Independent Contractor*

Classification, *supra*, 32 San Diego L.Rev. at pp. 902-903.) Entering into an independent contractor relationship is a choice the law generally leaves open to the parties. Courts should be exceedingly cautious before disregarding the parties' decision to structure their relationship as an independent contractor arrangement, especially in light of the array of mutual benefits such a relationship can provide.

II. IN DETERMINING EMPLOYMENT STATUS, THE WAGE ORDER TESTS CAN AND SHOULD BE HARMONIZED WITH *BORELLO*'S COMMON LAW TEST.

A. The disruption of long-settled jurisprudence can be avoided by clarifying that the alternative IWC tests are not meaningfully different in application from *Borello*'s common law test.

Dynamex's briefs on the merits cogently explain why an overbroad interpretation of the IWC tests—under which one becomes an employer merely by knowing work is being performed and failing to prevent such work, or merely by contracting with someone to perform services and thereby indirectly exercising control over their wages, hours, or working conditions—would effectively eliminate independent contractor status in California, chilling entrepreneurial activity and hurting California's economy. (See, e.g., OBOM 19-28; RBOM 2-5, 8-9.). Under such an

interpretation of the IWC tests, California would be deprived of the benefits discussed in the previous section, and would be put at an economic disadvantage in its competition with other jurisdictions for businesses, workers, and investment capital.[3] As Dynamex correctly explains, this Court should hold that these IWC tests, however they could be construed, do not govern whether a worker is an employee rather than an independent contractor, and should be limited to the specific context addressed by *Martinez*—namely, determining whether multiple possible employers can all be sued as joint employers by workers who no one disputes were employees.

However, even if this Court disagrees with Dynamex and extends the IWC tests beyond the joint employment context to govern employee status too, there is still no justification for interpreting the IWC tests as if they imposed broad, materially different limitations than the limits set by the common law test for

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[3] Plaintiffs suggest that this Court should decide the present appeal by focusing exclusively on "businesses (like Dynamex, in this case) which require a large workforce" (see ABOM 1, 61, fn. 5), and should ignore how its decision here will impact the many others who rely heavily on independent contractors. But the standards this Court applies will equally govern *everyone* who seeks to hire independent contractors, including the numerous consumers, sole proprietors, and small businesses who do so. Moreover, even if this Court's decision here could somehow be confined solely to businesses with large workforces, there is no reason to think that imposing broad limitations on the ability of large businesses to engage independent contractors would be any less detrimental to California's economic prosperity than if those same limits applied equally to everyone. As explained earlier, curtaining the role of independent contractors would lead to reduced workforce flexibility and likely result in slower economic growth and high unemployment. (*Ante*, pp. 18-20.)

employee status articulated in *Borello*. This Court observed in *Martinez* that "the phrases the IWC presently uses to define the terms 'employ' and 'employer' in all 16 of its current industry and occupation wage orders . . . first appeared in orders dated 1916 and 1947, respectively, *yet the courts of this state have never considered their meaning or scope.*" (*Martinez, supra,* 49 Cal.4th at p. 50, emphasis added, fns. omitted.) *Martinez* was thus the first decision by this or any other California court to construe the IWC tests, and it did so narrowly.

As explained below, the critical requirement under *Borello*'s common law test and the alternative IWC tests is the right of control. Accordingly, to the extent this Court concludes that the IWC tests apply in this case, it should—in conformance with *Martinez*—confirm that they are not meaningfully different in application from *Borello*'s common law test. That holding would also avoid the numerous procedural and substantive problems that would arise if the alternative IWC tests and the *Borello* common law test yielded different results in "mixed determinations." (See RBOM 16-19.)

B. The application of the IWC's three tests in *Martinez* confirms that the "right of control" is the determinative consideration underlying all three tests, as it is under *Borello*'s common law test.

Martinez did not involve the essential question confronted by the lower courts here, i.e., what test should be used to determine

whether workers are employees rather than independent contractors. Rather, it was undisputed in *Martinez* that the plaintiff seasonal agricultural workers *were* the employees of a farming business. The question presented was instead whether certain third-party produce merchants and others were *also* plaintiffs' employers, and therefore should be liable for failing to pay these employees minimum wages under Labor Code section 1194. (*Martinez, supra*, 49 Cal.4th at pp. 42-49.)

To "identify the persons who may be liable as employers, in actions under section 1194," *Martinez* examined the historical backdrop of the IWC's wage orders and authority. (*Martinez, supra*, 49 Cal.4th at p. 51.) The Court concluded that the IWC defined employers to include those who: (1) "suffer or permit [workers] to work"; (2) "exercise[ ] control over the wages, hours, or working conditions" of workers; or (3) constitute employers under the "common law employment relationship" test. (*Id.* at pp. 52-60, 64-65.) Characterizing these as "three alternative definitions," the Court held that these tests governed "in actions under section 1194," and determined that the plaintiffs had failed to show that the merchants were their employers under either alternative to the common law test. (*Id.* at pp. 64, 66, 68-77.)

Plaintiffs concede that the third of these IWC tests—the "common law employment relationship" test (*Martinez, supra*, 49 Cal.4th at p. 64)—is the same common law test articulated by this Court in *Borello* (ABOM 54 [plaintiffs explaining that IWC's " 'common law employment relationship' " test "is defined by the common law criteria included in the *Borello* factors test"]). But

plaintiffs argue that the two other IWC tests—which this Court held were *not* satisfied in *Martinez*—supposedly set materially different limitations than this common law test. (See ABOM 51-54.) Plaintiffs are mistaken.

The existence of three alternative tests is a function of history; the IWC first adopted the two alternatives to the common law test (i.e., the IWC's third test) in 1916 and 1947 to bring within its regulatory jurisdiction entities that controlled workers but who were not considered employers under the common law at the time. (See *Martinez, supra,* 49 Cal.4th at pp. 57-59, 69.) But as plaintiffs assert, this Court's 1989 decision in *Borello* "revisit[ed]" and "expan[ded]" the "traditional common law test of employment" that had once governed independent contractor status in California, and applied an even "more expansive definition of 'control' " than under the traditional common law test. (ABOM 20-22.) It is therefore unsurprising that today, following further development of the common law after the IWC's adoption of alternative tests in 1916 and 1947, those tests are not meaningfully different in application from the modern-day common law test explained in *Borello*—assuming the alternative tests apply at all to a determination of independent contractor status.

Under *Borello's* common law test, "the foremost consideration" is "the extent of the hirer's right to control the work." (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531-532 (*Ayala*).) In *Martinez*, this Court analyzed the two alternatives to the common law test, the "suffer, or permit to work" test, and the "exercises control" test. (49 Cal.4th at pp. 69-77.) At bottom, this

Court's application of these two alternative IWC tests was based on the very same consideration—the right of control—that would determine whether defendants were plaintiffs' employees under *Borello*'s common law test.

The "suffer, or permit to work" test. The IWC's "suffer, or permit to work" test historically applied to a "proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage," but who "clearly suffers or permits that work by failing to prevent it, while having the power to do so." (*Martinez, supra,* 49 Cal.4th at p. 69.) As plaintiffs themselves observe here, this test originated in the context of child labor statutes, and was "crafted by the IWC . . . to address those situations where a purported employer's intent to hire someone may be subject to some sort of subterfuge or denial." (ABOM 52-53.) Otherwise, an unscrupulous employer might claim a child " 'was not employed to do the work which caused the injury, but that he did it of his own choice and at his own risk.' " (*Martinez,* at p. 58.)[4]

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[4] This Court relied exclusively on out-of-state cases construing the meaning of the "suffer or permit to work" test. (*Martinez, supra,* 49 Cal.4th at pp. 57-59 & fn. 26, 69-70.) None of the authorities involved the issue of whether a worker was an employee or independent contractor, but rather the statutory liability of employers under labor laws that prohibited suffering or permitting women and children to perform certain types of work, where the employers generally argued the employees had not been hired to perform the particular work that caused injury. (See, e.g., *Curtis & Gartside Co. v. Pigg* (1913) 39 Okla. 31 [134 P. 1125, 1129] ["If the statute went no farther than to prohibit employment, then it could be easily evaded by the claim that the child was not employed to do

(continued...)

In present-day application, the gravamen of the "suffer, or permit to work" test is the extent of the hirer's right to control the work (see *Martinez*, *supra*, 49 Cal.4th at pp. 69-70), just as that factor is "the foremost consideration" under the common law test (*Ayala*, *supra*, 59 Cal.4th at pp. 531-532). Even plaintiffs acknowledge that this test "is essentially another expression of employer control" (ABOM 53), rather than a test that hinges on a factor other than the right of control. As this Court explained in *Martinez*, an employer "suffers or permits . . . work by failing to prevent it"—but only "while having the power to do so." (*Martinez*, at p. 69.) Thus, neither of the merchants who benefitted from plaintiffs' work in *Martinez* "suffered or permitted plaintiffs to work because *neither had the power to prevent plaintiffs from working.*" (*Id.* at p. 70, emphasis added.) Rather, plaintiffs' employer, not the merchants who purchased strawberries from plaintiffs' employer and thereby benefited from plaintiffs' labor, had "the exclusive

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(...continued)
the work which caused the injury, but that he did it of his own choice and at his own risk"]; *Purtell v. Philadelphia & Reading Coal & Iron Co.* (1912) 256 Ill. 110, 117 [99 N.E. 899, 902] ["It is the child's working that is forbidden by the statute, and not his hiring, and, while the statute does not require employers to police their premises in order to prevent chance violations of the act, they owe the duty of using reasonable care to see that boys under the forbidden age are not suffered or permitted to work there contrary to the statute"]; *Casperson v. Michaels* (1911) 142 Ky. 314 [134 S.W. 200, 201] [rejecting argument that plaintiff's certificate of employment defined the scope of her employment and employer should be liable because "she was injured at a part of the machinery where she was not employed to work, and at a time when she was not actually engaged in work"].)

power to hire and fire [plaintiffs], to set their wages and hours, and to tell them when and where to report to work." (*Ibid.*)

In focusing on the right of control, this Court rejected any interpretation of the "suffer, or permit to work" test that would create employer status based on mere knowledge that plaintiffs were working and that plaintiffs' work benefited defendants. (*Martinez, supra,* 49 Cal.4th at p. 70.) There is accordingly no support for plaintiffs' remarkable contention that this test is satisfied whenever one knows of and "*recei[ves]*" the "*benefits of*" a worker's labor. (ABOM 53.) To the contrary, this Court has held that "the concept of a benefit is neither a necessary nor a sufficient condition under the 'suffer or permit' standard." (*Martinez,* at p. 70.) Rather, "the basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring"—"while having the power to do so." (*Id.* at pp. 69-70.)

Significantly, the "power to do so"—i.e., to prevent work from occurring—does not include the *economic* power to prevent plaintiffs from working, such as "by ceasing to buy strawberries." (*Martinez, supra,* 49 Cal.4th at p. 70.) That is so even if not buying strawberries "might as a practical matter have forced [plaintiffs' employer] to lay off workers or to divert their labor to other projects." (*Ibid.*) As this Court noted, "any substantial purchaser of commodities might force similar choices on a supplier by withdrawing its business" but "[s]uch a business relationship, standing alone, does not transform the purchaser into the employer of the supplier's workforce." (*Ibid.*) Such an interpretation of the wage order would be "unreasonably broad" because it would create

"potentially endless chains of liability" extending to "grocery stores that purchased strawberries from defendants" and even on to "consumers who in turn purchased strawberries from the grocery stores." (*Ibid.*)[5]

This same logic applies as forcefully to the purchaser of *services* from an independent contractor as it does to the purchaser of *commodities* such as the merchants in *Martinez*. The purchaser of services has the power to prevent the independent contractor (and its employees) from working by ceasing to purchase such services, but "[s]uch a business relationship, standing alone, does not transform the purchaser [of services] into the employer of the [independent contractor's] workforce." (*Martinez, supra*, 49 Cal.4th at p. 70.)

Here, as Dynamex cogently explains, the trial court misapplied the "suffer or permit to work" test to "make[ ] an employee out of anyone who passively receives the benefits of labor despite having the power to stop it." (RBOM 8.) Under that erroneous application of the test, the plaintiffs would be Dynamex's employees simply because Dynamex receives the benefits of their services and "takes no action to prevent performance of the services." (RBOM 2.) But as *Martinez* explained, neither the

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[5] Had the IWC intended the rule to apply so broadly, it would "have announced it in the plainest terms after vigorous debate." (*Martinez, supra*, 49 Cal.4th at p. 70.) And even if that had been the IWC's intent, it "would be difficult to justify as an appropriate exercise of the commission's power." (*Ibid.*) Thus, "the IWC has not, in nearly a century of administering the minimum wage, seen fit to propose [such a] downstream-benefit theory of liability." (*Id.* at p. 71.)

receipt of benefits from plaintiffs nor the economic leverage to prevent them from working by declining to purchase their services is sufficient to meet the "suffer or permit to work" test. Rather, at minimum, a contractual retention of authority to unilaterally terminate services that is functionally equivalent to an employer's power to fire—i.e., the right to control the work—should be required.

The "exercises control" test. The "exercises control over the wages, hours, or working conditions" of workers test in the IWC wage orders focuses on *actual* control of the work, and thus is narrower than *Borello*'s common law test, which focuses on "the hirer's *right* to control the work." (*Ayala*, *supra*, 59 Cal.4th at pp. 531-532.) In *Ayala*, this Court emphasized that "what matters under the common law is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise." (*Id.* at p. 533.) The trial court therefore erred in *Ayala* by rejecting class certification "based not on differences in [defendant's] right to exercise control, but on variations in how that right was exercised." (*Id.* at p. 528.) Because the *right* to exercise control necessarily precedes the actual *exercise* of control, the IWC's "exercises control" test is subsumed within the common law test.

In *Martinez*, this Court rejected the argument that the IWC's "exercises control" test could be met where a defendant's financial domination over plaintiffs' employer allowed it to exercise "*indirect* control over his employees' wages and hours." (*Martinez*, *supra*, 49 Cal.4th at p. 71, emphasis added.) *Martinez* held that because the defendants could not compel the plaintiffs to work, lacked the right

to hire, fire, train, and supervise them, and did not set their hours or break times, the defendants were not the plaintiffs' employees under the "exercises control" test. (*Id.* at pp. 71-74.) Rather, plaintiffs' employer "alone controlled plaintiffs' wages, hours and working conditions." (*Id.* at p. 71.) The fact-intensive analysis in *Martinez* into the defendants' right of control over how the plaintiffs did their jobs illustrates that the IWC's "exercises control" test is subsumed by—and certainly no broader than—*Borello*'s common law test.[6] Indeed, even plaintiffs appear to acknowledge that the "exercises control" test turns on the right of control, for they contend that this test is satisfied if the company who hires a worker had the "power and authority to negotiate and set the rate of pay" for the worker (ABOM 59)—in other words, had the right of control.

C. In post-*Martinez* cases, the California and federal courts have focused on the right of control to conclude the same result is required regardless which test is applied.

Because the alternative tests from *Borello* and *Martinez* hinge on a factual inquiry into the right of control, courts have considered

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[6] As part of its analysis, *Martinez* considered whether there would be any different result under the common law test as applied in *Borello*, and concluded "the case does not advance plaintiffs' argument." (*Martinez, supra*, 49 Cal.4th at p. 73.) Thus, when this Court applied the "exercises control" test in *Martinez*, it saw no meaningful difference between that test and *Borello*'s common law test.

those tests holistically when evaluating the predominance requirement in putative class actions in lieu of mechanically assessing the propriety of class treatment alternative by alternative. Thus, even if this Court disagrees that the IWC tests should be restricted to the joint employment context, then holding that the alternative IWC tests are no different in application than the *Borello* common law test would avoid the disruption of existing law that would result from the Court of Appeal's approach here.

For example, as explained in *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129 (*Bradley*)—on which plaintiffs rely (see ABOM 16, 37-38)—"under the *Borello* or *Martinez* tests . . ., the focus is not on the particular task performed by the employee, but the global nature of the relationship between the worker and the hirer, *and whether the hirer or the worker had the right to control the work.*" (*Bradley*, at p. 1147, emphasis added.) In other words, under any test, class treatment depends on whether or not there is common proof of a right of control that is "uniform throughout the class." (*Id.* at pp. 1146-1147.)

As far as we can determine, no California appellate decision that has applied the IWC wage order and *Borello* common law tests has ever found that those tests lead to different outcomes. In other words, even when separately applying the three tests, the courts have focused on the right of control under each test and have never determined that one of the alternate wage order tests required a different conclusion than the *Borello* common law test:

- *Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019-1024 (summary judgment reversed where evidence showed triable issue under the " 'three alternative

definitions' " in *Martinez*, and focusing on defendant's right of and exercise of control over plaintiff's employer without differentiating among the three definitions in its analysis).

- *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 662 (trial court's application of only the common law test to determine existence of employer-employee relationship was harmless error; "consideration of *Martinez* would not have affected the trial court's conclusions").

- *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1190 ("7–Eleven's evidence . . . satisfies its prima facie burden of showing it was not the employer of Aleksick or other class members *under any definition of the employment relationship*, whether based strictly on common law or on the additional IWC wage order definitions of the type considered in *Martinez*" (emphasis added)).

- *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1431-1435 (no employer-employee relationship existed under any of the "control over wages, hours or working conditions," "to suffer or permit work," or "common law employment" tests).

The same holds true for the vast majority of post-*Martinez* federal district court decisions applying the common law and alternate IWC wage order tests. Almost every such decision has either ignored any distinctions among the tests in applying them holistically, or has found that all require the same result. For example:

- *Vasquez v. Wells Fargo Bank, National Association* (N.D.Cal. 2015) 77 F.Supp.3d 911, 923 (applying the three *Martinez* tests holistically to find that "Plaintiff has alleged *no* specific facts showing that Wells Fargo & Company exercised control over Plaintiff's work activities" and that his "allegations are not sufficient to hold Wells Fargo & Company liable as an employer under California law").

- *Ochoa v. McDonald's Corp.* (N.D.Cal., Sept. 25, 2015, No. 14-cv-02098-JD) 2015 WL 5654853, at pp. *4-*7 [nonpub. opn.] (applying the three *Martinez* tests individually to determine summary judgment on claims alleging defendant was plaintiffs' joint employer should be granted under each test).

- *Betancourt v. Advantage Human Resourcing, Inc.* (N.D.Cal., Sept. 3, 2014, No. 14-cv-01788-JST) 2014 WL 4365074, at pp. *4-*6 [nonpub. opn.] (allegations of employment relationship found adequate under each of the *Martinez* tests applied separately).

- *Hammitt v. Lumber Liquidators, Inc.* (S.D.Cal. 2014) 19 F.Supp.3d 989, 1002-1003 (applying the three *Martinez* tests holistically to determine that "disputed facts preclude summary judgment on the question of whether Lumber Liquidators was an 'employer' of Plaintiff").

- *Taylor v. Waddell & Reed Inc.* (S.D.Cal., Feb. 1, 2013, No. 09-cv-02909 AJB (WVG)) 2013 WL 435907, at pp. *3-*6 [nonpub. opn.] (applying the three *Martinez* tests individually and finding plaintiff an independent contractor under all three).

- *Braboy v. Staples, Inc.* (N.D.Cal., Feb. 24, 2011, No. C 09-4534 PJH) 2011 WL 743139, at p. *1 [nonpub. opn.] (granting summary judgment that Staples was not plaintiff's employer by applying "the controlling legal standard set forth in *Martinez*" holistically to determine Staples did not "exercise control over [plaintiff's] wages, hours or working conditions").

- *Martinez v. Antique & Salvage Liquidators, Inc.* (N.D.Cal., Feb. 8, 2011, No. C09-00997 HRL) 2011 WL 500029, at p. *5 [nonpub. opn.] (applying *Martinez* definitions holistically to find defendant "not liable as an 'employer' under California law" because he "was not involved with [plaintiffs' employer's] day-to-day operations and never had any involvement in the hiring, firing, hours, breaks, or compensation of Plaintiffs").

- *Rodriguez v. SGLC, Inc.* (E.D.Cal., July 23, 2010, No. 2:08-cv-01971-MCE-KJN) 2010 WL 2943128, at p. *5 [nonpub. opn.] (applying *Martinez*'s "three alternate definitions of 'to employ' " holistically to determine plaintiffs alleged sufficient

facts to "establish a joint employer relationship" where "Plaintiffs claim that Defendants controlled Plaintiffs' work schedules, number of hours worked, and rates of pay").[7]

In sum, amici fully support Dynamex's position that the IWC tests should not be extended beyond the joint employment context to govern employee status as well. But should this Court disagree with that position, then rather than requiring courts to assess independent contractor status through a mechanical application of the three alternative tests, this Court should follow the approach taken by *Bradley,* where the Court of Appeal recognized that, "under the *Borello* or *Martinez* tests," the "focus" is on "the global nature of the relationship between the worker and the hirer, and whether the hirer or the worker had the right to control the work." (*Bradley, supra,* 211 Cal.App.4th at p. 1147.) In other words, in conformance with its application of each of the IWC's three wage order tests in *Martinez*, this Court should harmonize the *Borello* common law test and the alternative IWC tests by holding that the same factors associated with the right to control are determinative under all three tests.

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[7] But see *Arredondo v. Delano Farms Co.* (E.D.Cal. 2013) 922 F.Supp.2d 1071, 1088 (finding plaintiffs were employees only under the "control" test, where plaintiffs did not argue the common-law test and no determination under the "suffer or permit to work" test was made due to "the limited scope of this trial"); *Lazaro v. Lomarey Inc.* (N.D.Cal., Feb. 21, 2012, No. C-09-02013 RMW) 2012 WL 566340, at p. *7 [nonpub. opn.] (defendant not plaintiffs' employer under *Martinez* "definitions (a) and (c)," but "were employers of plaintiffs under the 'to suffer' or 'permit them to work' standard").

CONCLUSION

For the reasons explained above, the continuing existence of the hirer-independent contractor relationship is vital to the health of California's economy and to the interests of its workers. This Court should hold either that the common law test as explicated in *Borello* remains the exclusive test for determining independent contractor status, or should harmonize the three tests set forth in *Martinez* by holding that the *Borello* factors associated with the right of control are determinative under all three tests.

December 4, 2015

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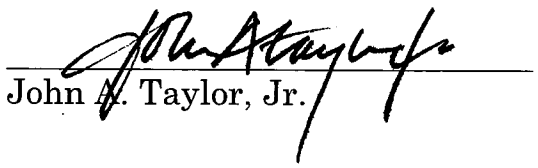
Dated: December 4, 2015



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On December 4, 2015, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER DYNAMEX OPERATIONS WEST, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on December 4, 2015, at Encino, California.

Millie Cowley

Millie Cowley

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Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County

Case No. S222732

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