CASE NO. 17-16096

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERARDO VAZQUEZ, GLORIA ROMAN, and JUAN AGUILAR, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

JAN-PRO FRANCISING INTERNATIONAL, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held corporation has a 10% or greater ownership in *amicus curiae*.

/s/ Adam G. Unikowsky

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All parties consent to the filing of this amicus brief. [1]

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving labor and employment matters.

Amicus has a strong interest in this case. *Amicus*'s members rely on the flexibility of independent contractor relationships, which has promoted innovation and growth for *amicus*'s members and contractors alike. Retroactive application of the *Dynamex* decision threatens to impose massive and unexpected liability on

[1] Pursuant to Federal Rule of Appellate Procedure 29, *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

amicus's members. *Amicus* therefore respectfully requests that the Court grant rehearing en banc and hold that *Dynamex* does not apply retroactively.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel erred in holding that *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018), applies retroactively. In deciding whether judicial decisions apply retroactively, California courts undertake a case-by-case analysis of whether those decisions unfairly impair parties' reliance interests. The panel's adoption of a blanket rule that *Dynamex* applies retroactively in every single case is irreconcilable with binding California law.

The Court should grant rehearing en banc in light of the potentially enormous economic consequences of the panel's erroneous ruling. *Dynamex* has precipitated a torrent of class actions against businesses who, under prior law, would never have been considered employers. This includes class actions against participants in the online "gig" economy, such as Grubhub, Uber, and Lyft.

There are many open questions surrounding how *Dynamex* will apply to workers who have historically been considered independent contractors. In *amicus*'s view, applying *Dynamex* to "gig" economy workers, either retroactively or prospectively, would contradict the text and purpose of *Dynamex*'s new rule. But if the California courts take a different view, businesses that have structured their operations in reliance on prior law will face massive retroactive liability.

By announcing an across-the-board rule that *Dynamex* applies retroactively, the panel unfairly stripped *all* businesses of the right to argue that *Dynamex* cannot be applied retroactively to them. No matter how economically devastating the application of *Dynamex* would be, no matter how reasonable a business's reliance on prior law may have been, the panel opinion provides that *Dynamex invariably* applies retroactively. That ruling conflicts with California law and unfairly creates bet-the-company litigation risk. The Court should therefore rehear this case en banc.

ARGUMENT

The Chamber agrees with the arguments in Jan-Pro's petition for rehearing en banc, including its argument that the panel decision conflicts with *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014). In this brief, however, the Chamber focuses on Jan-Pro's challenge to the panel's holding that *Dynamex* applies retroactively. That holding is wrong and may lead to enormous and unfair consequences to numerous businesses making up a vast swath of the economy.

I. The Panel Erred By Adopting an Across-the-Board Rule That *Dynamex* Applies Retroactively.

The panel's decision is incorrect. The panel offered no sound reason for holding that *Dynamex* applies retroactively in every single case.

The panel acknowledged that under well-settled California law, "there is an exception to the rule of retroactivity 'when a judicial decision changes a settled rule on which the parties below have relied.'" Op. 23 (citing *Williams & Fickett v. Cty.*

of Fresno, 395 P.3d 247, 262 (Cal. 2017)). The panel held, however, that individual litigants had no right to make a factual showing that they detrimentally relied on pre-existing law. According to the panel, it "would make little sense for a court to assess the retroactive effect of *Dynamex* by developing a factual record concerning a party's reliance on previous law. Such an approach could lead to the surprising result that *Dynamex* applies retroactively to some parties but not to others." Op. 23.

That reasoning was incorrect. The "result" the panel deemed "surprising" is actually required by California law. In *Estate of Propst*, 788 P.2d 628 (Cal. 1990), the California Supreme Court abolished the rule "prohibiting unilateral severance of a joint tenancy," and then considered whether to apply its decision retroactively. *Id.* at 636-37. The court recognized that "based on considerations of fairness and public policy," a "new decision" may not "be applied to impair contracts made or property rights acquired in accordance with the prior rule." *Id.* at 636. Applying that principle, the court held that few property owners "seem likely to have relied on the prior rule," but "there may be instances of persons who have incurred legal obligations or forgone substantial benefits in reasonable reliance, prior to this decision, upon the prior rule." *Id.* at 637-38. Rather than adopt an across-the board rule, the Court held: "If a party claiming a right of survivorship proves such reliance, and further proves that application of the new rule instead of the prior rule would therefore cause the party substantial detriment, the right of survivorship may be

enforced in accordance with the former rule." *Id.* at 638. It "remanded" the case "to afford respondent an opportunity to present such proof." *Id.*

Propst establishes that under California law, new judicial decisions may "appl[y] retroactively to some parties but not to others"—the very result that the panel deemed "surprising." Op. 23. Under *Propst*, the panel's across-the-board retroactivity rule is wrong. Individual businesses must be afforded the opportunity to prove that they relied on pre-existing law, and that retroactive application of *Dynamex* would cause them substantial detriment. The panel erred in stripping those businesses of their right to present that factual defense.

Even if the panel was correct that retroactivity should be applied on an all-or-nothing basis, it further erred in holding that *Dynamex* should be applied retroactively in all cases rather than none. The panel's primary basis for this conclusion was that the California Supreme Court silently denied a petition for rehearing that urged a "clarification" that its decision was prospective only. Op. 24-25. But the California Supreme Court may well have denied rehearing because the parties had not litigated the retroactivity issue. Indeed, if the California Supreme Court had intended to signal its substantive view on the retroactivity, it presumably would have made that view known. The Court should not decide the enormously consequential question presented here based on the California Supreme Court's

unexplained refusal to reopen its proceedings to consider an argument that had never previously been advanced.

As additional support for its holding, the panel referred to the *Dynamex* court's statement that its decision was "faithful … to the fundamental purpose of [California's] wage orders." Op. 26 (quoting *Dynamex*, 416 P.3d at 40 (alterations in original)). But that does not make *Dynamex* any less of a marked departure from prior law that unsettles reliance interests. The panel also referred to "the emphasis in *Dynamex* on its holding as a clarification rather than as a departure from established law." Op. 26. The panel did not identify any statement in *Dynamex* supporting that proposition, and none exists. To the contrary, *Dynamex* unambiguously departed from prior law: it explained that the pre-existing "*Borello* standard" has "significant disadvantages," and it therefore "adopted a simpler, more structured test … that minimizes these disadvantages." 416 P.3d at 33-34. The panel should have held that this departure from prior law applies prospectively.

II. In View of the Deleterious Consequences of the Panel's Ruling, En Banc Review Is Warranted.

The Court should grant rehearing en banc because the panel's decision creates a risk of catastrophic retroactive liability for numerous businesses. These businesses include—but are not limited to—"gig" economy businesses that form a large part of the modern economy. The Chamber's view is that both on a backward-looking and a forward-looking basis, "gig" economy workers are not employees under *Dynamex*.

But if California courts disagree, it would be grossly unfair to apply *Dynamex* retroactively. On a forward-looking basis, businesses can restructure their affairs to conform to the new law. But businesses cannot change the past. Thus, having structured their operations under the assumption that they would *not* have to treat workers as employees, businesses should not be subjected to the risk of retroactive liability premised on the view that their workers were employees all along.

A. Independent Contractor Arrangements Are Ubiquitous and Beneficial To Both Businesses and Workers.

Many businesses who work with independent contractors now face the risk of retroactive liability under *Dynamex*. These companies did not enter into independent contractor agreements to try to take advantage of a loophole to avoid California wage-and-hour laws. Rather, these companies entered into such agreements because they are beneficial for businesses and workers alike.

"Independent contractor arrangements are commonplace throughout the U.S. economy, from computer software engineers and emergency room physicians to home health care providers and timber harvesters." Jeffrey A. Eisenach, Navigant Economics, *The Role of Independent Contractors in the U.S. Economy*, at i (2010). "Independent contracting is especially prevalent in such broad industry categories as agriculture, construction and professional services, and in a diverse set of specific occupations, including cab drivers, construction workers, emergency room physicians, financial advisors, mystery shoppers, and truck drivers." *Id.*

As of 2017 there were more than 40 million independent workers in the United States—people "of all ages, skill, and income levels—consultants, freelancers, contractors, temporary or on-call workers—who work independently to build businesses, develop their careers, pursue passions and/or to supplement their incomes." MBO Partners, *The State of Independence In America: Rising Confidence Amid A Maturing Market* 2 (2017) ("*State of Independence*"). That segment of the workforce is "multi-faceted, economically powerful—and increasingly confident." *Id.* It is growing rapidly, too, at a rate three times faster than the overall economy. Freelancers Union & Upwork, *Freelancing In America: 2017* at 3 (2017) ("*Freelancing In America*"). If that growth rate holds, independent workers may be the majority of the U.S. workforce by 2027. *Id.*

Online products that facilitate the process of matching providers with customers have spurred the dramatic growth of the gig economy. These products are remarkably diverse. Some focus on specific areas, such as Gigster (software engineering), Airbnb (short term accommodations), and Postmates (local courier services). Others encompass a wider range of services, such as Thumbtack (home, business, wellness, creative design), Uber and Lyft (personal transportation, food delivery), and Upwork (accounting, copy editing, personal fitness). Still others are involved in commercial real estate, healthcare, handyman services, pet care, legal

services, finance, fundraising, customer services, logistics, and management consulting.

Thanks to the innovations of these companies and others, "millions of Americans [w]ork in jobs that didn't even exist 10 or 20 years ago." President Barack Obama, Remarks by the President in State of the Union Address (Jan. 20, 2015). The ranks of those workers continues to swell. In 2017, the number of people working through an internet-based company at least once per month "soared 23 percent to 12.9 million, up from 10.5 million in 2016." *State of Independence* 3.

The rise of the "gig" economy has created new job opportunities for workers of all stripes, especially those who want or need flexible arrangements. By working independently—when, where, how, and for whom they wish—workers who are constrained from taking traditional 9-to-5 jobs can nevertheless boost their income. A parent can work around school functions; a retiree can supplement savings; an artist can work in between shows; a person with a long commute can make extra money by driving someone else home. Independent work allows workers to take control of their earning potential and decide how to spend their time in a way they deem best. Many in the independent workforce take advantage of this flexibility. Roughly half of independent contractors use that job to supplement traditional employment. *State of Independence* 7.

Meanwhile, many gig-economy workers choose to contract with multiple companies simultaneously to ensure the greatest volume of work. Independent contractors may take full advantage of the flexible working relationship by "toggling back and forth between different … companies and personal clients, and by deciding how best to obtain business" such that profits are "increased through their initiative, judgment, or foresight—all attributes of the typical independent contractor." *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 144 (2d Cir. 2017) (internal quotation marks and alterations omitted).

This independent-contractor arrangement offers real benefits to workers. Because independent contractors own the necessary tools and equipment for the job, they have the flexibility and freedom to deploy those resources however they see fit. That provides them with "more control over their economic destiny" because they are empowered "to choose [their] own hours, clients and manner in which the work is completed." Steven Cohen & William B. Eimicke, Colum. Sch. of Int'l Affairs, *Independent Contracting Policy and Management Analysis* 16 (Aug. 2013). In turn, that independence and autonomy leads the overwhelming majority of independent workers to report being satisfied in the independent contractor relationship. *See, e.g.*, Eisenach, *supra* at 33-34; *Freelancing In America* 4; Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 71 ILR Rev. 705 (2018); Morning Consult & Chamber Technology

Engagement Center, *New Economy Report: Polling Presentation* 26, 27 (Feb. 22, 2018) ("*New Economy Report*") (finding 79% of independent workers describe working in the new economy positively and 72% have seen their financial situation improve since working in the "gig" economy). Independent workers also report feeling added security from having the power to choose diverse clients, rather than a single employer, and to control their own costs and benefits. *Freelancing In America* at 4; *New Economy Report* 22.

B. Retroactively Deeming "Gig" Economy Workers As Employees Would Impair Legitimate Reliance Expectations.

Dynamex has resulted in several lawsuits against "gig" economy businesses, alleging that their independent workers are employees for purposes of California's wage-and-hour laws. As one of many examples, a putative class of drivers who use Grubhub's service has sued Grubhub, alleging that those drivers are properly classified as Grubhub's "employees," and are therefore entitled to minimum wage and time-and-a-half overtime for all of the time their app was turned on. Before *Dynamex* was issued, the district court dismissed the drivers' claim based on a straightforward application of prior law; but on appeal, the drivers now contend that they *are* Grubhub's employees under *Dynamex*. *See Lawson v. Grubhub Holdings Inc.*, No. 18-15386 (9th Cir. filed Mar. 8, 2018). Similar suits are pending against other defendants. In the Chamber's view, those companies should not be classified as employers of the drivers using the companies' apps under *Dynamex* going forward

or going backwards.[2] But the plaintiff's bar has taken a different view, leading to substantial unresolved litigation risk for those businesses.

It would be unfair to impose retroactive liability on *any* business—but the unfairness is particularly acute with respect to "gig" economy businesses. From the ground up, these businesses have structured their affairs so as *not* to create traditional employer-employee relationships, but instead allow independent workers and independent consumers to find each other. In numerous respects, the entire business model of "gig" economy businesses is premised on the assumption that they will *not* be treated as employers under wage-and-hour statutes.

For instance, one core policy of many "gig" economy businesses that makes them so attractive to independent workers is that such workers may turn on the app without advance notice whenever, wherever, and for however long they wish. Of course, the premise of that policy is the business's assumption that those independent workers would not be deemed "employees" while the app was on, and thus entitled to minimum wage and time-and-a-half overtime pay. If those businesses had known that workers would retroactively be classified as "employees," they would never

[2] *See* Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* in support of Defendants-Appellees, *Lawson v. Grubhub Holdings Inc.*, No. 18-15386 (9th Cir. Jan. 16, 2019), ECF No. 46.

have granted workers such freedom and flexibility—lest the business's labor costs balloon unpredictably.

As another example, "gig" economy businesses typically do not regulate *where* drivers or other independent workers turn on the app. For example, a driver would be free to turn on an app at night in a low-yield area. This flexibility is beneficial to drivers, who may not want to drive to a high-traffic area but may nonetheless benefit from the off chance they will find a willing customer. Again, however, such a policy is inconceivable if businesses knew that drivers would be deemed employees, incurring wages, any time they turn on the app. To save on labor costs, businesses would inevitably micromanage their "employees" by blocking them from turning on the app in low-yield areas or by forcing them to be in high-yield areas at particular times of day.

Of course, these arguments are reasons not to apply *Dynamex* to independent workers going forward *and* going backwards. But if future courts hold that "gig" economy workers are employees under *Dynamex*, then the panel decision will compel them to apply that decision retroactively. As such, the panel's decision will create enormous and unfair litigation risk—and concomitant pressure to settle—because an adverse ruling on the classification of independent workers could expose businesses to overwhelming retroactive liability. Rehearing en banc is necessary to

avoid tying the hands of future courts and permitting them to conduct their own factual assessment of whether retroactive liability is fair.

At a minimum, the Court should grant rehearing en banc so as to certify the state-law retroactivity question to the California Supreme Court. Such a consequential question should not be decided via an oblique inference from an unexplained denial of rehearing. Indeed, this Court recently granted rehearing en banc in order to certify a seemingly much less consequential question to a state supreme court. *See Murray v. BEJ Minerals, LLC*, No. 16-35506, __ F.3d __, 2019 WL 2218919 (9th Cir. May 20, 2019) (granting rehearing en banc and certifying question to Montana Supreme Court of whether dinosaur fossils are "minerals" under Montana law). The same course is warranted here.

CONCLUSION

The petition for rehearing en banc should be granted.

Dated: June 10, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 3,125 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5).

/s/ Adam G. Unikowsky
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CERTIFICATE OF SERVICE

I hereby certify that that on June 10, 2019, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ Adam G. Unikowsky
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