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May 29, 2018

VIA FEDEX

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: **Amici Curiae Letter in Support of Petition for Rehearing**
Dynamex Operations West, Inc. v. Superior Court of Los Angeles
Case No. S222732

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Chamber of Commerce of the United States of America (U.S. Chamber) and the California Chamber of Commerce (CalChamber) respectfully submit this amici curiae letter in support of defendant Dynamex Operations West, Inc.'s petition for rehearing.[1] The U.S. Chamber and CalChamber (collectively, amici) urge this Court to grant rehearing and hold that its opinion here applies only on a prospective basis.

As the Labor Commissioner's office recently informed the California Court of Appeal in another appellate proceeding, the Court's opinion in this case was "unexpected" and "*dramatically changed the law concerning employment status.*" (Application for Extension of Time to File Brief, *Su v. Stephen S. Wise Temple* (May 24, 2018, B275426), at p. 2, emphasis added (Application for Extension of Time).)[2] The Court should decline to apply its opinion retroactively because the opinion's sharp,

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[1] No party or party's counsel authored this letter in whole or in part or made a monetary contribution intended to fund the preparation or submission of this letter. No person other than amici curiae, their members, or their counsel made a monetary contribution to fund the preparation or submission of this letter.

[2] For the Court's convenience, a true and correct copy of the application that the Labor Commissioner's office filed in *Su v. Stephen S. Wise Temple* is attached at the end of this letter.

unexpected break from prior law threatens to have far-ranging impacts on numerous California employers, who reasonably and justifiably relied on the prior, far different state of the law and could otherwise be exposed to substantial liability for the past actions they took in good faith compliance with long-standing California law predating the opinion. By choosing to apply the opinion solely on a prospective basis, the Court would avoid creating the constitutional issues that are otherwise likely to arise in future litigation over the retroactive application of the opinion, given that retroactivity here would violate due process should employers be threatened with devastating liability based on the opinion's surprising adoption of a new, unforeseen legal test that abruptly deviates from prior California law.

Interest of Amici Curiae

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. 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.

CalChamber is a nonprofit 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 job climate by representing business on a broad range of legislative, regulatory, and legal issues.

The U.S. Chamber and CalChamber have a significant interest in this Court's interpretation of laws that implicate the distinction between employees and independent contractors. A number of amici's members hire independent contractors. Those members have an interest in clarifying their legal obligations, as well as in developing a workforce in a manner conducive to growth and prosperity for businesses and workers alike.

For decades, California courts had looked to what this Court had previously described as the common law test embodied by *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. (See typed opn. 22-23, 33; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530-531 (*Ayala*).)

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, the persons who may be liable as joint employers should be determined under the definitions of "employ" and "employer" set by the Industrial Welfare Commission (IWC) in wage orders dating back nearly a century. *Martinez* explained that the wage orders "embodied three alternative definitions of 'employ': '(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby, creating a common law employment relationship.' " (Typed opn. 45.) The third of those definitions represented *Borello*'s standard. (Typed opn. 46.) But until it granted review here, this Court had left for another day the question whether only *Borello*'s test governed the determination of whether a worker is an employee or independent contractor, or whether the wage orders' alternative standards applied too. (See *Ayala*, *supra*, 59 Cal.4th at pp. 530-531.)

Given businesses' critical interest in which standard is used to determine employee status, amici filed an amici curiae brief and two supplemental briefs to address that issue. The Court's opinion has now concluded that, in addition to *Borello*'s test, at least one other alternative test—"the suffer or permit to work standard"—"properly applies to the question whether a worker should be considered an employee or, instead, an independent contractor," and decided that this alternative standard requires employers to establish each of the three requirements set by Massachusetts's version of the so-called " 'ABC' test." (Typed opn. 6-7, 46, 64, fn. 23, 66.)

As explained more fully below, the ABC test is a standard that originates outside California and, before the Court's opinion here, California courts had not indicated the ABC test governs employee status in *this* state. Amici and their members have a significant interest in whether this Court's new interpretation of the "suffer or permit to work" standard as embodying an ABC test—a test that had not been endorsed by any California appellate court until now—will be applied retroactively. If this new rule were to be retroactively applied, it could create crushing liability for thousands of employers who had no notice that such a test could become the law of the state and would threaten to violate employers' due process rights.

This Court should grant rehearing and hold that the ABC test does not apply retroactively.

A. The ABC test has been adopted via legislative or regulatory action in other jurisdictions, but California's legislature has never embraced this test and the regulatory agencies charged with promulgating and enforcing California wage orders have never referred to it. Rather, California businesses have long complied with a different test that this Court previously endorsed.

ABC tests trace their roots to unemployment compensation laws. (See, e.g., *Carpet Remnant Warehouse, Inc. v. Dept. of Labor* (N.J. 1991) 593 A.2d 1177, 1184 (*Carpet Remnant*); *F. A. S. Intern., Inc. v. Reilly* (Conn. 1980) 427 A.2d 392, 394-395.) The federal government's enactment of the Social Security Act in 1935 spurred state legislation defining who qualified as an employee for purposes of unemployment compensation. (January 17, 2018 Supplemental Amici Curiae Letter of Chamber of Commerce of the United States of America and California Chamber of Commerce in Support of Petitioner Dynamex (Chambers' Jan. 2018 Supp. Letter) 3-4; accord, *Carpet Remnant*, at p. 1183.)

One aspect of these laws that varied greatly from state to state was each state's view of who qualified as an employee for unemployment compensation purposes. (See *Carpet Remnant*, *supra*, 593 A.2d at p. 1183.) To address this issue, some states codified variations of the ABC test as their statutory definition of "employment." (Chambers' Jan. 2018 Supp. Letter 4; see *Carpet Remnant*, at p. 1183; Asia, *Employment Relation: Common-Law Concept and Legislative Definition* (1945) 55 Yale L.J. 76, 83-85 (hereafter *Employment Relation*).)

New Jersey was one of the earliest states to adopt the ABC test, which was codified by statute in New Jersey's Unemployment Compensation Law in the 1930s. (See *Hargrove v. Sleepy's, LLC* (N.J. 2015) 106 A.3d 449, 456 (*Hargrove*); *Carpet Remnant*, *supra*, 593 A.2d at p. 1184.) Vermont has utilized the ABC test since 1947 (see *Vermont Securities v. Vermont Unemploy. Comp. Com'n* (Vt. 1954) 104 A.2d 915, 917 [applying the ABC test set forth in V.S. 1947, § 5343, subd. VI.(b), now codified as Vt. Stat. Ann., tit. 21, § 1301, subd. (6)(B)]; *State v. Stevens* (Vt. 1951) 77 A.2d 844, 847), while Massachusetts and Connecticut have used the ABC test since 1971 (Mass. Gen. Laws, ch. 151A, § 2 [ABC test adopted by session law at 1971 Mass. Acts 832]; *Standard Oil v. Adm'r, Unemployment Compen.* (Conn. 2016) 134 A.3d 581, 606).

The ABC test is embodied in many unemployment compensation statutes that remain in effect today. (E.g., N.J. Stat. Ann. § 43:21-19, subd. (i)(6); Md. Code Ann., Lab. & Empl., § 3-903, subd. (c)(1); Del. Code Ann., tit. 19, §§ 3501, subd. (a)(7), 3503, subd. (c); Neb. Rev. Stat. Ann., § 48-604, subd. (5); Vt. Stat. Ann., tit. 21, § 1301, subd. (6)(B); Conn. Gen. Stat. Ann., § 31-222, subd. (a)(1)(B)(ii); Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes* (2015) 18 U.Pa. J.L. & Soc. Change 53, 67 (hereafter *ABC on the Books*) [examining state statutes codifying ABC test].) But even in states where the ABC test was codified by formal legislation, these ABC tests differed from state to state. (See *Employment Relation*, *supra*, 55 Yale L.J. at pp. 83-84 & fns. 24-32.)

As this Court has noted, several states, such as Massachusetts and New Jersey, have extended application of the ABC test beyond the unemployment insurance context and apply the test "more generally in determining the employee or independent contractor question with respect to a variety of employee-protective labor statutes." (Typed opn. 64-65, fn. 23.) This approach is based on the specific statutory and regulatory schemes that exist in such states. (See *Hargrove*, *supra*, 106 A.3d at p. 456; *Carpet Remnant*, *supra*, 593 A.2d at p. 1184; Mass. Gen. Laws, ch. 151A, § 2.)

For example, the Massachusetts Legislature codified the ABC test as the basis for determining whether workers are employees for purposes of Massachusetts' wage-and-hour laws. (Mass. Gen. Laws, ch. 149, § 148B.)

A similar result was achieved in New Jersey via regulatory action. After the New Jersey Legislature codified the ABC test as the statutory methodology for determining whether workers were employees for purposes of unemployment compensation, the New Jersey Department of Labor (the agency charged with implementing and enforcing that state's labor laws) implemented a regulation adopting this statutory ABC test for use in determining whether individuals were employees under New Jersey's wage-and-hour laws. (See N.J. Admin. Code, § 12:56-16.1; *Hargrove*, *supra*, 106 A.3d at pp. 455-456, 457-459, 465.) The New Jersey Supreme Court subsequently declined to second-guess the state agency's regulatory decision, concluding it owed deference to the agency. (See *Hargrove*, at pp. 456, 463-464.)

There is no comparable legislative or regulatory support in California for the ABC test. Unlike other states, California did not adopt a statutory ABC test (see Spandorf, *Who's the Boss? Franchisors Must Be Able to Demonstrate the Separate and Distinct Businesses That They and Their Franchises Operate* (Mar. 2011) 34 L.A. Law.

18, 21), much less enact the specific version of the ABC test passed by Massachusetts's Legislature, which requires that employers satisfy all three requirements comprising Massachusetts's ABC test (see *Awuah v. Coverall North America, Inc.* (D.Mass. 2010) 707 F.Supp.2d 80, 82-84).[3]

Instead of following an ABC test, California courts "applied the *Borello* standard in distinguishing employees from independent contractors in many contexts, including in cases arising under California's wage orders." (Typed opn. 49.) Indeed, as this Court has emphasized, until this Court issued its 2010 decision in *Martinez*, "no California decision had discussed the wage orders' suffer or permit to work language"—i.e., the very standard this Court has now equated to the ABC test—"in *any* context." (Typed opn. 50, 66, emphasis added.) Likewise, the Division of Labor Standards Enforcement (DLSE)—the agency charged with enforcing California labor laws—indicated nearly two decades ago that the *Borello* test, with its emphasis on the right to control test and its balancing of other relevant factors, governs in California. (Chambers' Jan. 2018 Supp. Letter 9 ["as the DLSE emphasized in an opinion letter applying the IWC's definition of an ' "employer" ' . . . the DLSE views *Borello*'s methodology for distinguishing between employees and independent contractors as the 'current law' that 'appli[es] to labor laws governing minimum wage and hour statutes' "], quoting Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 2000.05.17-1 (May 17, 2000) pp. 2-3, 8 <http://www.goo.gl/cvn52b> (hereafter DLSE Opn. Letter No. 2000.05.17-1) [as of May 29, 2018].)

The *Borello* standard differs sharply from ABC tests, including the Massachusetts version of the ABC test adopted by this Court. Under that ABC test, workers can be classified as independent contractors only if employers demonstrate that the workers meet all three of the test's requirements. (Typed opn. 64.) By

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[3] Under Massachusetts's version of the ABC test, which was adopted by this Court, workers may be "classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (Typed opn. 64; accord, typed opn. 66-67.)

contrast, although those requirements are each included as *factors* under *Borello*'s standard (Chambers' Jan. 2018 Supp. Letter 4-6), the individual factors comprising *Borello*'s test " '*cannot* be applied mechanically as separate tests,' " but " 'are intertwined and their weight depends often on particular combinations' " (*Borello*, *supra*, 48 Cal.3d at p. 351, emphasis added; see also DLSE Opn. Letter No. 2000.05.17-1, *supra*, p. 2 <http://www.goo.gl/cvn52b> [*Borello*'s factors "are not separate individual tests; but rather, are interrelated with their weight dependent upon the particular combination of factors"]).

In sum, until the 2010 *Martinez* decision, courts and the DLSE had applied *Borello*'s distinct standard for distinguishing employees from independent contractors in the wage-and-hour context and *no* California appellate decision had even discussed the wage orders' suffer-or-permit-to-work language that this Court has associated with the significantly different ABC test. Moreover, we are not aware of a single prior California appellate decision—either before 2010 or after—that had analyzed whether workers are independent contractors in the wage-and-hour context under the ABC test, nor did this Court identify any such decision in its opinion here. Furthermore, the Court's opinion does not suggest that the IWC actually considered whether an ABC test (much less Massachusetts's particular ABC test) should be used to give substance to the suffer-or-permit-to-work language in the IWC's wage orders. In fact, the IWC added this language to the wage orders in 1916 (typed opn. 37)—decades before the inception of the ABC test in the 1930s. Thus, instead of citing evidence of the IWC formally adopting the test, the Court concludes that the ABC test best effectuates the IWC's suffer-or-permit-to-work standard. (See typed opn. 54-67.) Consequently, this Court's adoption of the ABC test represents an enormous break from the far different *Borello* standard that courts and the DLSE applied for decades to determine employee status for wage-and-hour purposes—a result achieved not through direct legislative or regulatory action, as in Massachusetts or New Jersey, but through judicial decision.

B. Retroactive application of this Court's new ABC test would completely undermine the reasonable actions of businesses taken in reliance on the former test because there was no legislative, administrative, or judicial indication that the ABC test would ever be adopted in California.

In California, businesses entered into independent contractor arrangements under *Borello* in reliance on the decades of settled jurisprudence and administrative practice on this issue, never expecting this Court would import an ABC test that has governed for decades in some states but has never before been embraced by the

California Legislature, IWC, DLSE, or California courts. (See Kay, *Retroactivity and Prospectivity of Judgments in American Law* (2014) 62 Am. J. Comp. L. Supp. 37, 41 [courts view some areas of the law "as especially likely to induce such reliance"—"these are fields where individuals may have actually paid attention to existing rules of law, perhaps even consulted legal advisers, before engaging in a given transaction"].)

Had the ABC test been adopted in California by legislative or regulatory action, as has been done in other states where it governs, the statute or regulation, like most, would have applied only prospectively. (See *City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 419-420 [" 'New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise' "]; *California State Auto. Assn. Inter-Ins. Bureau v. Garamendi* (1992) 6 Cal.App.4th 1409, 1422 ["A legislative grant of power to develop new [regulatory] rules is by definition the power to create rules having prospective application"].)

By contrast, judicial decisions can apply retrospectively under certain circumstances. (See *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 967.) But this Court has explained that it will apply its opinions only prospectively "when [they] alter[ ] a settled rule upon which parties justifiably relied," such as "when a decision constitutes a ' "clear break" ' with decisions of *this* [C]ourt or with practices [the Court] ha[s] sanctioned by implication." (*Ibid.*) "Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule." (*Woods v. Young* (1991) 53 Cal.3d 315, 330 (*Woods*).)

As explained in detail above (*ante*, pp. 1-7), this Court's opinion embracing the ABC test is a clear break from existing law: For decades, California courts applied a far different test—the flexible, multi-factor *Borello* standard—to differentiate between employees and independent contractors. Although this Court has equated the ABC test to the suffer-or-permit-to-work language from the wage orders, no California court had even discussed that language—much less applied it to the wage-and-hour context—until this Court issued its 2010 decision in *Martinez*, many decades after the IWC adopted this language in 1916. And, until the opinion here, we are aware of no California appellate court—either before or after *Martinez*—using the ABC test to implement the suffer-or-permit-to-work standard. Thus, before the opinion here, businesses operating in California had no reason whatsoever to expect that the ABC test governed in California. Instead, they reasonably believed the *Borello*

standard governed whether workers were independent contractors for wage-and-hour purposes and entered into what they reasonably believed were independent contractor relationships based on their justifiable reliance on *Borello*.

Consequently, this Court's new embrace of the ABC test from out-of-state jurisdictions upends existing law and the reasonable expectations of businesses who had justifiably relied on the prior, far different state of the law. As an Assistant Chief Counsel from the Labor Commissioner's office recently informed the Court of Appeal in another appellate proceeding, the Court's opinion in this case was "unexpected" and "*dramatically changed the law concerning employment status.*" (Application for Extension of Time, *supra*, at p. 2, emphasis added.) Moreover, the Court's striking break from prior law threatens to have far-ranging impacts on numerous California businesses, as the multiple amicus curiae letters demonstrate.

Retroactive application of the Court's opinion would be especially problematic for at least two further reasons.

First, the opinion threatens to have significant consequences in light of California's Private Attorneys General Act (PAGA). "PAGA authorizes an employee who has been the subject of particular Labor Code violations" to seek penalties "on behalf of himself or herself and other aggrieved employees." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 538-539, 545.) Such PAGA representative actions are not subject to class certification requirements in California courts. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980-987.) California Courts of Appeal have allowed plaintiffs to proceed with representative PAGA claims: (1) without satisfying the intent requirement of the Labor Code provision for whose violation they are suing, even though plaintiffs would have been obligated to satisfy that requirement had they brought an action directly under that provision; and (2) to recover civil penalties on behalf of other aggrieved employees who did not even suffer the same alleged violation as plaintiffs. (See *Huff v. Securitas Security Services USA, Inc.* (May 23, 2018, H042852) ___ Cal.App.5th ___ [2018 WL 2328672, at pp. *1, *3-*8]; *Raines v. Coastal Pacific Food Distributors, Inc.* (May 22, 2018, C083117) ___ Cal.App.5th ___ [2018 WL 2315877, at p. *1]; *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 788.) Thus, the recovery plaintiffs can secure under PAGA can "be quite substantial." (*Munoz v. Chipotle Mexican Grill, Inc.* (2015) 238 Cal.App.4th 291, 311.)

Given that California courts have authorized plaintiffs to maintain broad PAGA representative actions that sidestep the legal elements of the allegedly violated Labor Code provisions and seek substantial recovery for others who never even suffered the

same injury, it is unsurprising that "[h]undreds of reported cases have invoked PAGA seeking millions of dollars in recoveries." (Clopton, *Procedure Retrenchment and the States* (2018) 106 Cal. L.Rev. 411, 451.) Retroactive application of the opinion would thus expose employers who had reasonably followed the well-settled *Borello* standard used by California courts and the DLSE to potentially crippling PAGA penalties should their workers be deemed employees under a sharply different, retroactively-applicable ABC test. Employers should not be punished with costly PAGA representative actions for following the law as it existed before the opinion, when they had no reason to expect the independent contractor relationships they entered into in California would be governed by an ABC test that had never before been formally adopted by the California Legislature, IWC, DLSE, or California courts.

Second, this Court gave no notice that it planned to adopt Massachusetts's version of the ABC test. In December 2017, the Court asked for supplemental briefing to address whether the suffer-or-permit-to-work standard embodies a "test similar to the 'ABC' test that the New Jersey Supreme Court" applied in *Hargrove*. (Dec. 28, 2017 Supp. Briefing Order.) But Massachusetts's ABC test is distinctly different than New Jersey's ABC test. Under the Massachusetts test this Court adopted, a worker is an employee if she or he "performs work that is outside the usual course of the hiring entity's business." (Typed opn. 64 & fn. 23.) By contrast, pursuant to New Jersey's test, a worker is an employee if she or he performs work "*either* outside the usual course of the business for which such service is performed, *or that such service is performed outside all of the places of business of the enterprise for which such service is performed.*" (*Hargrove, supra*, 106 A.3d at p. 458, emphases added.) This is a significant difference that can result in more workers being classified as employees under Massachusetts's test. (See *ABC on the Books, supra*, 18 U.Pa. J.L. & Soc. Change at pp. 69-70.) Having been asked for briefing on New Jersey's version of the ABC test, Dynamex and the many amici here had no reason to anticipate that they should address Massachusetts's materially distinct version, and businesses likewise had no reason to expect this Court might adopt Massachusetts's version.

Under the circumstances, this Court should grant rehearing and hold that its decision applies only prospectively. " '[C]onsiderations of fairness and public policy preclude full retroactivity' " of the Court's new rule (*Moradi-Shalal v. Firemen's Fund Ins. Co.* (1988) 46 Cal.3d 287, 305; *Woods, supra*, 53 Cal.3d at p. 319), as California businesses lacked fair notice that they could face millions of dollars in liability when they relied on the guidance of the DLSE and prior California appellate decisions.

Indeed, by choosing not to apply its opinion retroactively, this Court would avoid creating the constitutional issues that are otherwise likely to arise in future litigation over whether its retroactive application violates due process. (See, e.g., *Bouie v. City of Columbia* (1964) 378 U.S. 347, 354-355 [84 S.Ct. 1697, 12 L.Ed.2d 894] [where a state court's unforeseeable interpretation of a state law is applied retroactively to past conduct, "the effect is to deprive [the defendant] of due process of law"]; *Gibson v. American Cyanamid Co.* (7th Cir. 2014) 760 F.3d 600, 622 ["There are indeed Due Process limits on the retroactive application of a [state court's] judicial decision" in a civil lawsuit where the decision " 'is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue' "]; *Spielbaier v. County of Santa Clara* (2009) 45 Cal.4th 704, 730, fn. 9 [invoking *Bouie* in a civil proceeding].)

Conclusion

The Court's decision to adopt the ABC test is a clear break from prior California law, which for decades has determined independent contractor status under a markedly different standard. Giving the decision retroactive effect would threaten businesses' due process rights by putting thousands of businesses at risk for significant liability for past actions they made in good faith compliance with long-standing California law under circumstances where they had no reason to expect their arrangements with California workers would be subject to Massachusetts's ABC test.

Respectfully submitted,

HORVITZ & LEVY LLP
JOHN A. TAYLOR, JR.
JEREMY B. ROSEN
FELIX SHAFIR
LACEY L. ESTUDILLO

By: _____
Felix Shafir

Attorneys for Amici Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; CALIFORNIA CHAMBER OF COMMERCE

cc: See attached Proof of Service

TO BE FILED IN THE COURT OF APPEAL

APP-006

COURT OF APPEAL Second APPELLATE DISTRICT, DIVISION Three	COURT OF APPEAL CASE NUMBER: B275426
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 136273 NAME: David Balter FIRM NAME: Division of Labor Standards Enforcement STREET ADDRESS: 455 Golden Gate Ave., 9th Floor CITY: San Francisco STATE: CA ZIP CODE: 94102 TELEPHONE NO.: 415-703-4863 FAX NO.: 415-703-4807 E-MAIL ADDRESS: dbalter@dir.ca.gov ATTORNEY FOR (name): Julie Su, State Labor Commissioner	SUPERIOR COURT CASE NUMBER: BC520278
APPELLANT: Julie Su RESPONDENT: Stephen S. Wise Temple	
APPLICATION FOR EXTENSION OF TIME TO FILE BRIEF (CIVIL CASE)	
Notice: Please read Judicial Council form APP-001 before completing this form.	

1. I *(name):* David M. Balter request that the time to file *(check one):*
   - [ ] appellant's opening brief (AOB)
   - [ ] respondent's brief (RB)
   - [ ] combined respondent's brief (RB) and appellant's opening brief (AOB) (see rule 8.216)
   - [ ] combined appellant's reply brief (ARB) and respondent's brief (RB) (see rule 8.216)
   - [x] appellant's reply brief (ARB)

   now due on *(date):* June 1, 2018 be extended to *(date):* June 29, 2018
2. I [x] have [ ] have not received a rule 8.220 notice.
3. I have received:
   - [ ] no previous extensions to file this brief.
   - [x] the following previous extensions:

   (number of extensions): 1 extensions by stipulation totaling *(total number of days):* 60

   (number of extensions): extensions from the court totaling *(total number of days):*

   Did the court mark any previous extension "no further?" [ ] Yes [x] No
4. I am unable to file a stipulation to an extension because
   - [ ] the other party is unwilling to stipulate to an extension.
   - [x] other reason *(please specify):*

   The parties have already stipulated to a 60 day extension.
5. The last brief filed by any party was: [ ] AOB [x] RB [ ] RB and AOB [ ] ARB and RB

   filed on *(date):* March 13, 2018
6. The record in this case is:

	Volumes (#)	Pages (#)	Date filed
Appendix/Clerk's Transcript:	5	1247	October 2, 2017
Reporter's Transcript:	1	17	Jun 14, 2017
Augmentation/Other:			

7. [ ] The trial court has ordered the proceedings in this case stayed until this appeal is decided.

Received by Second District Court of Appeal

APPELLANT: / RESPONDENT:	Julie Su / Stephen S. Wise Temple	COURT OF APPEAL CASE NUMBER: B275426

8. The reasons that I need an extension to file this brief are stated
   [x] below
   [ ] on a separate declaration. You may use *Attached Declaration (Court of Appeal)* (form APP-031) for this purpose.

   (Please specify; see Cal. Rules of Court, rule 8.63, for factors used in determining whether to grant extensions):
   I, David Balter, declare,
   I serve as an Assistant Chief Counsel for the Labor Commissioner. Since April 30, 2018, I have unexpectedly been engaged in developing policy responses to the Ca. Supreme Court decision in Dynamex which has dramatically changed the law concerning employment status. Additionally in April I was required to unexpectedly devote a large amount of time to supervision and writing in the Oto v. Kho case before the Ca. Supreme Court which concerns arbitration of wage claims. These unexpected occurrences have delayed work on the brief as well as deliberation with attorneys in other offices which is necessary to completion of the reply brief.

   In this case the Labor Commissioner for the State of California sues the Stephen S. Wise Temple for violations of the California Labor Code and Order 4-2001 of the Industrial Welfare Commission. Appellant asserts that statutory rights of respondent's preschool teachers were violated. Respondent contends that those teachers are "ministers" under the law and that the State's labor laws afford them no protection. Thus this case presents difficult issues concerning application of the First Amendment to the religious rights of respondent and their employees. Because of the Church/State issues presented by the case, additional deliberation within the State executive branch, including counsel, is crucial because the positions taken concern a broader range of issues than cases which simply present questions regarding labor law enforcement.

   An additional four weeks (28 days) is necessary to obtain the input and approval of other offices within the state.

   Respondent has indicated that it does not oppose this request.

9. For attorneys filing application on behalf of client, I certify that I have delivered a copy of this application to my client (Cal. Rules of Court, rule 8.60).

10. A proof of service of this application on all other parties is attached (see Cal. Rules of Court, rule 8.50). You may use *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) for this purpose.

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

Date: May 24, 2018

David M. Balter
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

Order on Application is [ ] below [ ] on a separate document

ORDER

EXTENSION OF TIME IS:

[ ] Granted to *(date)*: _____

[ ] Denied

Date: _____

(SIGNATURE OF PRESIDING JUSTICE)

PROOF OF SERVICE (Court of Appeal) [x] Mail [ ] Personal Service	
Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form. Do not use this form for proof of electronic service. See form APP-009E.	
Case Name: Julie Su v. Stephen S. Wise Temple Court of Appeal Case Number: B275426 Superior Court Case Number: BC520278	

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My [ ] residence [x] business address is *(specify)*:
   455 Golden Gate Avenue, 9th Floor, San Francisco, California, 94102

3. I mailed or personally delivered a copy of the following document as indicated below *(fill in the name of the document you mailed or delivered and complete either a or b)*:
   APPLICATION FOR EXTENSION OF TIME TO FILE BRIEF

   a. [x] **Mail.** I mailed a copy of the document identified above as follows:

      (1) I enclosed a copy of the document identified above in an envelope or envelopes **and**

         (a) [x] **deposited** the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.

         (b) [ ] **placed** the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

      (2) Date mailed: May 24, 2018

      (3) The envelope was or envelopes were addressed as follows:

         (a) Person served:
            (i) Name: Michael C. Blacher, Esq.; David A. Urban, Esq.; Hengameh S. Safaei, Esq.
            (ii) Address:
            Liebert Cassidy Whitmore
            6033 W. Century Blvd., 5th Floor
            Los Angeles, CA 90045

         (b) Person served:
            (i) Name: Jeremy B. Rosen, Esq.; Felix Shafir, Esq.; Joshua C. McDaniel, Esq.
            (ii) Address:
            Horvitz & Levy LLP
            3601 West Olive Avenue, 8th Floor
            Burbank, CA 91505

         (c) Person served:
            (i) Name:
            (ii) Address:

         [ ] Additional persons served are listed on the attached page *(write "APP-009, Item 3a" at the top of the page).*

      (4) I am a resident of or employed in the county where the mailing occurred. The document was mailed from (city and state): San Francisco, California

Form Approved for Optional Use
Judicial Council of California
APP-009 [Rev. January 1, 2017]

Case Name: Julie Su v. Stephen S. Wise Temple	Court of Appeal Case Number: B275426
	Superior Court Case Number: BC520278

3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

(1) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(2) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(3) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

☐ Names and addresses of additional persons served and delivery dates and times are listed on the attached page *(write "APP-009, Item 3b" at the top of the page)*.

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

Date: May 24, 2018

Joanne M. LeDuc
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

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 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

On May 29, 2018, I served true copies of the following document(s) described as **AMICI CURIAE LETTER IN SUPPORT OF PETITION FOR REHEARING** 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 May 29, 2018, at Burbank, California.

Jo-Anne Novik

SERVICE LIST

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

Case No. S222732

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Hon. Michael L. Stern Los Angeles Superior Court 111 N. Hill Street, Dept. 62 Los Angeles, CA 90012	Case No. BC332016
California Court of Appeal Second Appellate District, Division Seven 300 S. Spring Street, 2nd Floor North Tower Los Angeles, CA 90013	Case No. B249546

Attorney General Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	Service Required by Bus. & Prof. Code, § 17209 and Cal. Rules of Court, rule 8.212(c)
District Attorney's Office County of Los Angeles 320 West Temple Street, #540 Los Angeles, CA 90012	Service Required by Bus. & Prof. Code, § 17209 and Cal. Rules of Court, rule 8.212(c)