HORVITZ & LEVY LLP

Business Arts Plaza
3601 W. Olive Ave., 8th Fl.
Burbank, CA 91505
818.995.0800

January 17, 2018

VIA FED EX

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

Re: ***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 and the California Chamber of Commerce (the Chambers) submit this supplemental letter brief in response to the Court's request for further briefing addressing whether the "suffer-or-permit-to-work" definition of "employ" in California wage orders should be construed as embodying a test similar to the "ABC" test that the New Jersey Supreme Court, in *Hargrove v. Sleepy's, LLC* (N.J. 2015) 106 A.3d 449 (*Hargrove*), held should be used to distinguish between employees and independent contractors under New Jersey statutory and regulatory law. The answer is no.

I. INTRODUCTION

The issue presented for review in this case is which test should control when distinguishing between employees and independent contractors—the common law test discussed in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), or the Industrial Welfare Commission (IWC) wage order definitions as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*)? As explained in its two prior amici briefs, the Chambers support Dynamex's position that the IWC wage order tests discussed in *Martinez* apply only to the determination of who is an employer, and that the *Borello* test continues exclusively to provide the proper test for distinguishing between employees and independent contractors.

But the Chambers have further explained that if this Court rejects Dynamex's position, at minimum it should harmonize the IWC tests and the *Borello* test, all of which focus on the extent to which a hirer has the right to control the work. As plaintiffs assert, this Court's 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 the traditional common law test. (ABOM 20-22.) The Division of Labor Standards Enforcement (DLSE)—the California agency charged with enforcing California labor laws—has long recognized that the *Borello* test provides the proper standard for distinguishing between employees and independent contractors. Likewise, no California appellate decision that has applied the IWC tests and *Borello* has ever found that they lead to different outcomes, because all of these tests focus on the right of control. Consequently, if this Court were to confirm—consistent with *Martinez* and the approach followed by the DLSE and California Courts of Appeal—that the *Borello* factors are determinative under all three tests, the Court's decision would avoid upsetting decades of settled law, and the loss of economic benefits that would result if the IWC tests were applied in a manner that essentially eliminates independent contractor status for any use in California.

In this supplemental letter brief, the Chambers further explain that while the *Hargrove* decision chose to determine independent contractor status under New Jersey law by following an "ABC" (three-factor) test set by New Jersey's unemployment compensation statute for determining independent contractor status, the first factor of the ABC test is " 'right to control,' " under which an employer must "show that it neither exercised *control* over the worker, nor had the ability to exercise control in terms of the completion of the work." (*Hargrove*, *supra*, 106 A.3d at p. 459, emphasis added.) "Right to control" is the focus of the *Borello* expanded common law test, as are the other two factors in the ABC test. Those remaining factors—which address whether the service rendered is an integral part of the alleged employer's business, and whether the worker is customarily engaged in an independently established trade, occupation, profession or business—were applied in *Borello* when determining that the workers in question were employees rather than independent contractors. Thus, if this Court construes the "suffer-or-permit-to-work" definition of "employ" in California wage orders as embodying factors similar to New Jersey's statutory ABC test, the Court would merely be doing what the Chambers have urged all along—harmonizing the *Borello* and wage order tests by interpreting them as applying the same set of factors.

What this Court should *not* do, however, is adopt New Jersey's inflexible quantitative mechanism for applying its statutory ABC test—under which an

employer's failure to establish any one of the three ABC test factors results in a worker being classified as an employee. As will be shown, that approach is based on New Jersey's particular statutory scheme, and on the manner in which the test has been adopted and applied by the New Jersey state agency charged with interpreting and enforcing New Jersey's labor laws. By contrast, this Court has held that the individual factors comprising the common law test as construed in *Borello*—including the "B" and "C" factors from the ABC test—" 'cannot be applied mechanically as separate tests; they are intertwined and their weight depends on particular combinations.' " (*Borello, supra*, 48 Cal.3d at p. 351.) And unlike in New Jersey, the state agency charged with enforcing *California*'s labor laws—the DLSE—has adopted the *Borello* methodology of weighing the relevant factors when deciding who is an independent contractor.

In short, as explained below, the three factors in the ABC test are already included among the *Borello* factors associated with the right of control. The ABC test therefore stands as no obstacle in harmonizing the "suffer-or-permit-to-work" definition of "employ" in California wage orders with the *Borello* test for determining independent contractor status.

II. ARGUMENT

A. The *Borello* test, which already includes all the ABC test factors, can and should be harmonized with an interpretation of the wage order "suffer-or-permit-to-work" test.

Although the criteria that make up so-called "ABC" tests are derived from the common law (*Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor* (N.J. 1991) 593 A.2d 1177, 1184 (*Carpet Remnant*)), ABC tests trace their statutory roots to unemployment compensation laws. (See Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry* (2013) 39 J. Legis. 295, 311, fn. 134; see also Asia, *Employment Relation: Common-Law Concept and Legislative Definition* (1945) 55 Yale L.J. 76, 83 (hereafter *Employment Relation*).)

"Unemployment legislation was first enacted in this country in the 1930s in response to the overwhelming amount of unemployment resulting from the Depression." (*Carpet Remnant, supra*, 593 A.2d at p. 1183.) "Although a number of states had proposed such legislation, and a few had adopted unemployment statutes, [citation], the federal government's enactment of the Social Security Act in 1935

provided the impetus for widespread unemployment-compensation legislation" by the states. (*Ibid.*) 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 *ibid.*) To address this issue, a variety of states adopted ABC tests as their statutory definition of "employment" for unemployment compensation laws. (See *ibid.*; *Employment Relation*, *supra*, 55 Yale L.J. at pp. 83-85.) Not all states did so. (See *Employment Relation*, at p. 84 & fn. 28.) Moreover, even in those states where ABC factors were codified into formal statutory tests, these ABC tests themselves differed from state to state. (See *id.* at pp. 83-84 & fns. 24-32.)

California was *not* among the states who adopted an 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 (hereafter *Franchisors*); *Employment Relation*, *supra*, 55 Yale L.J. at p. 84, fn. 28.) In contrast, New Jersey did adopt a version of the ABC test, which was codified by statute in New Jersey's Unemployment Compensation Law. (See *Carpet Remnant*, *supra*, 593 A.2d at p. 1184.)

Under the statutory ABC test adopted in New Jersey, an individual is presumed to be an employee unless the employer can establish the following:

> "(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
>
> "(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which service is performed; and
>
> "(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business."

(*Hargrove, supra*, 106 A.3d at p. 458.)

Part A of this ABC test mirrors what *Borello* describes as " '[t]he principal test of an employment relationship,' " which is " 'whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . .' " (*Borello*, *supra*, 48 Cal.3d at p. 350.) As *Hargrove* explains, to "satisfy part A of the 'ABC' test, the employer must show that it neither exercised control over

the worker, nor had the ability to exercise control in terms of completion of the work." (*Hargrove, supra*, 106 A.3d at p. 459; see *id.* at p. 464 ["The first inquiry concerns the control exercised by the individual or business of the person retained to perform a remunerated task"]; *Carpet Remnant, supra*, 593 A.2d at p. 1185 [part A of the ABC test "is 'no more than an adoption of the common-law control test' "].)

Part B of this ABC test "requires the employer to show that the services provided were 'either outside the usual course of the business . . . or that such service is performed outside of all the places of business of the enterprise.' " (*Hargrove, supra*, 106 A.3d at p. 459; see *id.* at p. 464 ["the inquiry identifies the usual course of the business for which the individual has been retained to provide services or the usual place or places at which the employer performs its business"].) Part B is likewise drawn from the common law. (See *Carpet Remnant, supra*, 593 A.2d at p. 1186 [common law part B's standard is "pertinent, but not decisive, in distinguishing between employees and independent contractors"].)

The *Borello* test includes the B factor as well. As *Borello* explains, "[b]esides the 'right to control the work,' " the factors for determining "independent contractorship" include "whether the service rendered is an integral part of the alleged employer's business." (*Borello, supra*, 48 Cal.3d at pp. 354-355; see *id.* at p. 351 [additional factors "derived principally from the Restatement Second of Agency" include "whether or not the work is a part of the regular business of the principal"]; see also *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 656-657 (*Sotelo*) ["secondary factors usually considered by courts" in determining independent contractor status include "whether or not the work is a part of the regular business of the principal" and "whether the service rendered is an integral part of the alleged employer's business"].) Indeed, this Court applied part B of the ABC test in *Borello* when it found significant to determining employment status that "Borello owns and cultivates the land for its own account," the "harvest takes place on Borello's premises," and "harvesters form a regular and integrated portion of Borello's business operation." (*Borello*, at pp. 356-357.)

Part C of the ABC test "focuses on the usual or customary trade, occupation, profession, or business of the person retained to perform services for the employer." (*Hargrove, supra*, 106 A.3d at p. 464; see *id.* at p. 459 ["part C . . . is satisfied when an individual has a profession that will plainly persist despite the termination of the challenged relationship"].) "Part C of the ABC test is also inherited from the common law." (*Carpet Remnant, supra*, 593 A.2d at p. 1187.)

Likewise, the comparable factor under the *Borello* test is "whether the one performing services is engaged in a distinct occupation or business" and "the degree of permanence of the working relationship." (*Borello*, *supra*, 48 Cal.3d at pp. 351, 355; see also *Sotelo*, *supra*, 207 Cal.App.4th at p. 657 [summarizing *Borello* test as including "whether the one performing services is engaged in a distinct occupation or business" and "the hiree's degree of investment other than personal service in his or her own business and whether the hiree holds himself or herself out to be in business with an independent business license"].) Indeed, regarding this factor, *Borello* quoted Labor Code section 2750.5, subdivision (b), which provides that whether a licensee " 'is customarily engaged in an independently established business' " is relevant to determining independent contractor status. (*Borello*, at p. 351, fn. 5; see *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 544 (*Ayala*) (conc. opn. of Corrigan, J.) [confirming that the *Borello* test included "factors the Legislature had identified in Labor Code section 2750.5"].) That statutory language tracks almost verbatim part C of the ABC test as stated in the New Jersey statute. (See *Hargrove*, *supra*, 106 A.3d at p. 458 [part C addresses whether "[s]uch individual is customarily engaged in an independently established . . . business"].)

In *Borello*, this Court applied the part C factor when it found significant that the workers' "service, though seasonal, was rendered regularly and as an integrated part of the grower's business." (*Borello*, *supra*, 48 Cal.3d at p. 355.) Additional facts relevant to the same factor were that the workers "were dependent for subsistence on whatever farm work they could obtain" from the grower; that Borello had "a permanent relationship with the individual harvesters," who "return year after year" and whose "permanent integration . . . into the heart of Borello's business is a strong indicator that Borello functions as an employer"; and that the workers "engage[d] in no distinct trade or calling" and did "not hold themselves out in business." (*Id.* at p. 357.)

In *Hargrove*, the New Jersey Supreme Court stressed that New Jersey's " 'ABC' test presumes an individual is an employee unless the employer can make certain showings regarding the individual employed . . . ." (*Hargrove*, *supra*, 106 A.3d . at p. 458). In wage-and-hour cases California courts have employed the same presumption, which stems from workers' compensation laws. (See, e.g., *Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1220-1221 [collecting cases].) Yet even with that presumption in place, California courts have repeatedly treated the *Borello* test and the IWC's three wage order tests—including the "suffer-or-permit-to-work" test—as if they were no different in practice, and have focused on control in applying them. (Amici Curiae Brief of Chamber of Commerce of the United States of America and California Chamber of Commerce in Support of Petitioner Dynamex (Chambers ACB) 30-34.)

Thus, construing the IWC's "suffer-or-permit-to-work" definition of "employ" in California wage orders as embodying factors identical or similar to the factors reflected in the ABC test would merely affirm that there is no legal or practical distinction between *Borello*'s test and the IWC's wage order tests. As the Chambers have previously urged, the critical requirement under *Borello*'s common law test and the alternative wage order tests is the right to control, and to the extent this Court concludes that the wage order tests apply, it should confirm that they are not meaningfully different in application from *Borello*'s test.

B. California should not adopt New Jersey's quantitative method of applying the ABC test, which would upset decades of settled law and lead to misclassification of workers.

1. The *Hargrove* decision is based on the text of New Jersey statutory and regulatory law, which differs considerably from California law.

As explained above, the factors comprising New Jersey's statutory ABC test have long been used to determine independent contractor status under California law via *Borello*'s common law methodology, so holding that they are relevant to the "suffer-or-permit-to-work" definition of "employ" in California wage orders would be consistent with California law. But this Court should *not* adopt New Jersey's *quantitative* approach for applying its ABC test, under which an employer's failure to establish any one of the three ABC factors results in a worker being classified as an employee. (See *Hargrove*, *supra*, 106 A.3d at p. 458.) As we will explain, New Jersey adopted the quantitative approach based on the specifics of the statutory and regulatory scheme governing New Jersey law, whereas California law uses a *qualitative* approach, under which right to control is the primary factor and no one other single factor is determinative in assessing whether a worker is an employee or independent contractor.

New Jersey's quantitative approach is based on the "plain language" of New Jersey's particular statutory scheme and on the regulations implementing that scheme. (*Hargrove*, *supra*, 106 A.3d at p. 463.) As noted earlier, New Jersey's ABC test was codified by statute in New Jersey's Unemployment Compensation Law in the 1930s. (See *id.* at p. 456; *Carpet Remnant*, *supra*, 593 A.2d at p. 1184.) Whereas the factors comprising the ABC test are "pertinent, but not decisive" under the common law "in distinguishing between employees and independent contractors," the specific language of the New Jersey statute codifying the ABC test as part of the Unemployment

Compensation Law requires employers to satisfy *all* the factors to "avoid[ ] designati[ng] [a worker] as an employee." (*Carpet Remnant*, at p. 1186, citing N.J. Stat. Ann. § 43:21-19, subd. (i)(6)(B).) Following the enactment of this law, the New Jersey Department of Labor—the New Jersey agency charged with implementation and enforcement of New Jersey's wage-and-hour laws—implemented a regulation adopting that specific statutory ABC standard "to determine whether an individual is an employee or independent contractor for purposes" of New Jersey law. (N.J. Admin. Code, § 12:56-16.1; *Hargrove*, at pp. 455-456, 457-459, 465.) Thus, the fact a worker is classified as an employee under New Jersey law unless all of that ABC test's factors are satisfied is entirely the consequence of New Jersey's specific statutory and regulatory scheme for making employment classifications.

In *Hargrove*, the New Jersey Supreme Court "conclude[d] that the 'ABC' test derived from the New Jersey Unemployment Compensation Act, N.J.S.A. 43:21-19, subdivision (i)(6), governs whether a plaintiff is an employee or independent contractor for purposes of resolving a wage-payment or wage-and-hour claim." (*Hargrove, supra*, 106 A.3d at p. 453.) The New Jersey Department of Labor had declared that this specific statutory test "should govern employment-status disputes" under New Jersey's wage-and-hour law and this regulatory rule had been applied without challenge for decades. (*Id.* at pp. 457, 465.) The New Jersey Supreme Court "discern[ed] no reason to depart from the test adopted by the DOL . . . ." (*Id.* at p. 463.)

The defendant and various amici in *Hargrove* urged the New Jersey Supreme Court, on policy grounds, to adopt various different approaches for determining independent contractor status. But throughout its opinion, the court emphasized that the question before it was one of statutory interpretation rather than policy making. Indeed, at the outset of its analysis, the court stated that "the task presented" to it "involves interpretation" of New Jersey's statutory scheme "to determine and effectuate the intent of the Legislature," which requires examination of "the plain [statutory] language" in order to "accord to it the ordinary meaning of the words selected by the Legislature." (*Hargrove, supra*, 106 A.3d at p. 456.)

In addition, the court "acknowledge[d] the deference that should be afforded to the interpretation of the agency charged with applying and enforcing a statutory scheme" (*Hargrove, supra*, 106 A.3d at p. 456), while noting that the approaches urged by the parties would "depart from the standard adopted by [that] agency" (*id.*, at p. 459). In adopting the ABC test's quantitative approach, the court found "no good reason . . . to depart from the standard adopted by the [New Jersey Department of Labor] to guide employment status determinations." (*Id.* at p. 463; see *id.* at p. 464

["we must show deference to the agency charged with interpreting and implementing this basic legislative initiative to achieve and maintain wage security for workers in this State"].)

There is no comparative legislative, regulatory, or precedential support in California for a quantitative application of the factors in the ABC test. In fact, the law is decidedly to the contrary.

Unlike New Jersey, California did not adopt a statutory ABC test (see *Franchisors, supra*, 34 L.A. Law. at p. 21), much less enact the specific version of the ABC test passed by New Jersey's Legislature, which statutorily requires that employers satisfy all three factors comprising New Jersey's ABC test. Rather, in *Borello*, this Court held that the individual factors comprising the common law test—including factors similar to or identical with the "A," "B," and "C" factors from the ABC test—" '*cannot* be applied mechanically as separate tests,' " but rather " 'are intertwined and their weight depends often on particular combinations.' " (*Borello, supra*, 48 Cal.3d at p. 351, emphasis added.)

As the Chambers explained in their prior supplemental amicus brief, the California state agency charged with enforcing *California* labor laws—the DLSE—has indicated that the *Borello* test, with its emphasis on the right to control test and its balancing of other relevant factors, governs in California. (Supplemental Brief of Chamber of Commerce of the United States of America and California Chamber of Commerce (Chambers Supp. ACB) 12-17.) Applying *Hargrove*'s deferential logic to follow its state agency's approach, this Court should likewise follow the DLSE's approach, which focuses on right to control and a balancing of additional factors, not on the mechanistic approach adopted in *Hargrove*.

"[G]enerally, ' "courts defer to the agency charged with enforcing a regulation when interpreting a regulation because the agency possesses expertise in the subject area." ' " (*Zavala v. Scott Brothers Dairy, Inc.* (2006) 143 Cal.App.4th 585, 591, fn. 5.) As the DLSE emphasized in an opinion letter applying the IWC's definition of an " 'employer' " nearly two decades ago, 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." (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> [as of Jan. 13, 2018].) Although *Borello*'s factors include the criteria that likewise make up the ABC test, the DLSE stresses that those factors "are not separate individual tests; but rather, are interrelated with their weight

dependent upon the particular combination of factors." (*Id.* at p. 2; see also *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn. 11 [DLSE opinion letters "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" (internal quotation marks omitted)].)[1] Likewise, as the Chambers explained in their initial amicus brief, no California Court of Appeal has ever found that the IWC tests (including the suffer-or-permit test) and *Borello* could lead to different outcomes, such that a worker might be an independent contractor under *Borello* while still somehow qualifying as an employee under the IWC's suffer-or-permit test even where the alleged employer had no right of control. (Chambers ACB 30-34.)

This Court's analysis in *Martinez* further demonstrates why a quantitative application of the ABC test would be contrary to, rather than consistent with, California law. In that case, this Court found that the merchants who benefitted from plaintiffs' work were not their employers even under the "suffer-or-permit-to-work" definition of "employ," because "*neither had the power to prevent plaintiffs from working.*" (*Martinez, supra*, 49 Cal.4th at p. 70, emphasis added.) In the absence of such power, the Court saw no need to examine any of the other potentially relevant factors—including the California counterparts to parts B and C of the ABC test.

---

[1] The DLSE's decision to follow *Borello*'s methodology for distinguishing between employees and independent contractors is especially notable given the long-standing history of ABC tests. States who adopted statutory ABC tests, including New Jersey, did so *decades ago*. (See, e.g., *Carpet Remnant, supra*, 593 A.2d at p. 1183.) It is telling that, in the decades since, the DLSE has elected to use a qualitative approach involving the weighing of *Borello*'s factors to make that same determination, rather than embracing the quantitative ABC test that has governed for decades in some other states. (See Chambers Supp. ACB 12-17.) It is equally telling that, in the face of this settled administrative practice, California's Legislature has never modified the statutes governing wage-and-hour laws to replace this qualitative methodology with the mechanistic, quantitative ABC test that legislatures in other states have adopted by statute. (See *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 207 ["Because the Legislature is presumed to be aware of a long-standing administrative practice, the [Legislature's] failure to substantially modify a statutory scheme is a strong indication that the administrative practice is consistent with the Legislature's intent"].)

But a mechanistic, quantitative application of the factors comprising the ABC test would have required a contrary result, because it is apparent from the facts in *Martinez* that part C of the ABC test could not have been met. Part C requires showing that the purported independent contractor is " 'an enterprise that exists and can continue to exist independently of and apart from the particular service relationship,' " and would " 'survive the termination of the relationship.' " (*Hargrove*, *supra*, 106 A.3d at p. 459.) But in *Martinez*, the case arose only because Munoz & Sons was *not* able to survive independent of its relationship with Apio, Inc. and Combs Distribution Co. When Munoz & Sons went bankrupt and was unable to pay its workers, the workers sued claiming Apio and Combs should be deemed their employers. (*Martinez*, *supra*, 49 Cal.4th at pp. 46-48.) Applying the ABC test quantitatively—so that the " 'failure to satisfy any one of the three criteria results in an "employment" classification,' " as *Hargrove* seemingly requires (*Hargrove*, at p. 464)—would have resulted in a determination that part C could not be established by Apio and Combs. They would then automatically be deemed the workers' employer—even though this Court held that under a proper application of the "suffer-or-permit-to-work" test, "neither Apio nor Combs suffered or permitted plaintiffs to work because neither had the power to prevent plaintiffs from working." (*Martinez*, at p. 70.)

Right to control is and always has been the preeminent factor under California law. In applying that factor to determine independent contractor status, the DLSE Manual and opinion letters use *Borello* and its totality of circumstances standard, rather than defaulting to an "employment classification" when any single secondary factor cannot be met. (Chambers Supp. ACB 12-17; see also *Ayala*, *supra*, 59 Cal.4th at p. 539 ["the considerations in the multifactor [*Borello*] test are not of uniform significance"].) Applying the ABC test quantitatively as in New Jersey would permit a worker to be deemed an employee even where there is *no* right of control—e.g., where the independent contractor's business could not continue without a major client—and would be contrary to decades of California law. In the absence of right to control, it makes no sense to consider a worker an employee even if factors B and C of the ABC test are met.

2. Adopting the rule in *Hargrove* would cause serious problems in California that ought to be avoided.

Indeed, adopting New Jersey's mechanistic approach would likely prove vastly overinclusive, resulting in the misclassification of workers. For example, quantitative ABC tests threaten to transform franchisors into the employers of their franchisee's employees because franchisors would struggle to satisfy factors B or C even where

there is no suggestion they have a right to control the franchisee's employees. (See, e.g., *Awuah v. Coverall North America, Inc.* (D.Mass. 2010) 707 F.Supp.2d 80, 82-84 [applying Massachusetts' statutorily-mandated quantitative ABC test—which, like New Jersey's law, requires the alleged employer to satisfy all three elements of the test—to find that franchisor misclassified franchisee's employees as independent contractors because the franchisees did not perform services outside the usual course of the franchisor's business and therefore the franchisor was unable to satisfy part B of the ABC test—even though there was no suggestion the franchisor had a right of control over the franchisee's employees]; see also Brady et al., *Can a Franchisor Be Deemed the Employer of a Franchisee's Employee? The Unsettled Landscape of Joint Employer Status* (Feb. 2016) 298 N.J. Law. 57, 59-60 [*Hargrove* threatens to spark claims against franchisors by the employees of the franchisees, "add[ing] new layers of uncertainty to an already fraught legal landscape of franchisor employment liability"].) Such an approach would be contrary to this Court's decision in *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 478, which decided that franchisors may be held liable for a franchisee's alleged employment misconduct towards its own employees only if the franchisor "has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees."

Consequently, the quantitative version of the ABC test has been criticized on precisely this overbreadth ground: "The test involves such a broad scope that it may reach workers in areas that are traditionally independent contractors, while at the same time, preventing the growth of the employment market." (Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment* (2013) 34 N. Ill. U. L.Rev. 67, 85.) As another commentator has observed:

> The disadvantage of the [ABC] test . . . is that it classifies nearly all workers as employees. The test can be particularly burdensome for large corporations, where almost any task can reasonably be considered within the employer's "usual course of business" and thereby result in employee status for the worker assigned to the task.

(Kinzer, *Employee Misclassification in Texas: Why the New Law Won't Work* (2014) 55 S. Tex. L.Rev. 435, 454-455, fns. omitted.)

Indeed, the practical effect of the quantitative version of the ABC test has been "to eliminate subcontracting or any type of joint venture," even where a company "may desire to have a third party do part of the work it initially performed or held itself out

to do." (Hardman, *Unemployment Compensation and Independent Contractors: The Motor Carrier Industry as a Case Study* (1994) 22 Transp. L.J. 15, 25-27.) As just one example,

> In the construction area . . . the general contractor assumes responsibility for constructing a building. Essential to the construction of that building is the laying of a foundation, steelwork, masonry, plumbing, and electrical work. Subcontractors are engaged for specific parts of the projects. The relationship with such subcontractors is normally one of an independent contractor.

(*Id.* at p. 27.) Yet under the ABC test, the primary contractor would be unable to meet part B's requirement that the subcontractor services either be performed "outside the usual course of the business" or "outside of all the places of business of the enterprise," rendering the primary contractor the employer of the subcontractor's employees regardless of the extent of control exercised by the contractor over the subcontractor's employees. (*See id.* at pp. 26, 37-38.)

In sum, *Hargrove* applies the factors comprising New Jersey's ABC test in a quantitative, mechanistic manner under which employment status is presumed unless all three of the ABC test factors are established because that is the approach embraced by the specific statutory and regulatory scheme governing the ABC factors in New Jersey. (See *Hargrove*, *supra*, 106 A.3d at pp. 463-464 ["we discern no reason to depart from the test adopted by the [New Jersey] DOL"; declining to "jettison now a standard adopted by the agency to distinguish between an employee and independent contractor" under New Jersey law; "we must show deference to the agency charged with interpreting and implementing the basic legislative initiative to achieve and maintain wage security for workers in this State"].) By contrast, the DLSE, California's state agency charged with enforcing *California*'s labor laws, has determined that a qualitative approach, under which multiple factors (and in particular the right of control) are balanced, is the one that governs in California. Applying *Hargrove*'s deference to its own state agency, this Court should likewise follow the DLSE's approach, which focuses on right to control, and not on the quantitative application of the factors making up the statutory and regulatory ABC standard at issue in *Hargrove*.

III. CONCLUSION

Rather than uncritically importing New Jersey law the Court should interpret and apply *California* law, which for decades has determined independent contractor status under a qualitative approach that balances "right to control" with various secondary factors. The two factors comprising New Jersey's ABC test other than right to control may be relevant to that determination under the "suffer-or-permit-to-work" definition of "employ" in California wage orders in that they are part of *Borello*'s common law factors, but the failure to establish either secondary factor should not automatically result in an employment classification.

Respectfully submitted,

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

By: _____
John A. Taylor, Jr.

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

cc: See attached Proof of Service

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.

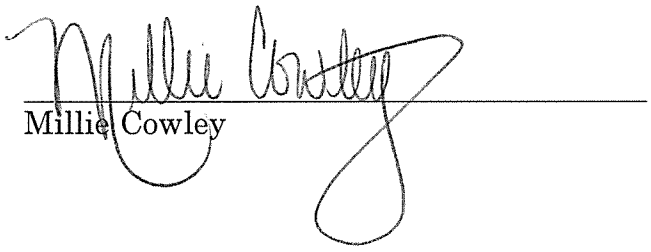
On January 17, 2018, I served true copies of the following document(s) described as **SUPPLEMENTAL LETTER BRIEF OF CHAMBER OF COMMERCE FOR THE UNITED STATES OF AMERICA; CALIFORNIA CHAMBER OF COMMERCE** on the interested parties in this action as follows:

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 January 17, 2018, at Burbank, California.



Millie Cowley

SERVICE LIST

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

Case No. S222732

Robert G. Hulteng Damon M. Ott Littler Mendelson PC 333 Bush Street, 34th Floor San Francisco, CA 94104	Attorneys for Petitioner ***DYNAMEX OPERATIONS WEST, INC.***
Ellen M. Bronchetti Paul S. Cowie Sheppard Mullin Richter & Hampton LLP Four Embarcadero Center, 17th Floor San Francisco, CA 94111	Attorneys for Petitioner ***DYNAMEX OPERATIONS WEST, INC.***
A. Mark Pope Pope, Berger, Williams & Reynold LLP 401 West B Street, Suite 2000 San Diego, CA 92101	Attorneys for Real Parties in Interest **CHARLES LEE and PEDRO CHEVEZ**
Kevin Ruf Glancy, Prongay & Murray 1925 Century Park East, Suite 2100 Los Angeles, CA 90067	Attorneys for Real Parties in Interest **CHARLES LEE and PEDRO CHEVEZ**
Jon R. Williams Boudreau Williams LLP 666 State Street San Diego, CA 92101	Attorneys for Real Parties in Interest **CHARLES LEE and PEDRO CHEVEZ**

Della Burnett Impact Fund 2210 K Street, Suite 201 Sacramento, CA 95816 Anthony Mischel National Employment Law Project 405 14th Street, Suite 401 Oakland, CA 94612 Jean H. Choi Los Angeles Alliance For A New Economy 464 Lucas Avenue, Suite 202 Los Angeles, CA 90017 Rosa E. Zamora California Rural Legal Assistance Foundation 2210 K Street, Suite 201 Sacramento, CA 95816	Attorneys for Amicus Curiae **CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION; NATIONAL EMPLOYMENT LAW PROJECT; LOS ANGELES ALLIANCE FOR A NEW ECONOMY; LA RAZA CENTRO LEGAL; LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER; ASIAN AMERICANS ADVANCING JUSTICE-LA; IMPACT FUND; ALEXANDER COMMUNITY LAW CENTER; UCLA CENTER FOR LABOR RESEARCH; WOMEN'S EMPLOYMENT RIGHTS CLINIC; WORKSAFE**
Monique Olivier Duckworth Peters Lebowitz Olivier LLP 100 Bush Street, Suite 1800 San Francisco, CA 94104	Attorneys for Amicus Curiae **CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION**
Michael Rubin Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108	Attorneys for Amicus Curiae **SERVICE EMPLOYEES INTERNATIONAL UNION; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; INTERNATIONAL BROTHERHOOD OF TEAMSTERS**
Andrew R. Livingston Orrick Herrington & Sutcliffe 405 Howard Street San Francisco, CA 94105 Lauri A. Damrell Orrick Herrington & Sutcliffe 400 Capitol Mall, Suite 3000 Sacramento, CA 95814	Attorneys for Amicus Curiae **CALIFORNIA EMPLOYMENT LAW COUNCIL; EMPLOYERS GROUP**

David M. Balter Division of Labor Standards Enforcement 455 Golden Gate Avenue, 9th Floor San Francisco, CA 94102 Susan A. Dovi Division of Labor Standards Enforcement 1515 Clay Street, Suite 801 Oakland, CA 94612-1463	Attorneys for Amicus Curiae **DIVISION OF LABOR STANDARDS ENFORCEMENT**
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)