S258191

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GERARDO VAZQUEZ et al.,

Petitioners,

v.

JAN-PRO FRANCHISING INTERNATIONAL, INC.

RESPONDENT.

Review of Certified Question from the
U.S. Court of Appeals for the Ninth Circuit
Case No. 17-16096

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE INTERNATIONAL FRANCHISE ASSOCIATION IN SUPPORT OF RESPONDENT

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f)(1) of the California Rules of Court, the California Chamber of Commerce (CalChamber) and the International Franchise Association (IFA) respectfully request permission to file the attached amici curiae brief in support of respondent Jan-Pro Franchising International, Inc.[1]

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber participates as amicus curiae only in cases that have a significant impact on California businesses.

Founded in 1960, the IFA is the oldest and largest trade association in the world devoted to representing the interests of franchising. IFA's ultimate mission is to protect, enhance, and promote franchising through government relations, public relations, and educational programs. IFA's membership spans over 300 different industries that comprise the franchise industry, including franchise companies in more than 100 business formats, individual franchisees, and companies that support the industry in the areas

[1] No party or counsel for a party in the pending appeal authored the proposed amici curiae brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution to fund the preparation or submission of the brief other than amici curiae, their members, or their counsel. (See Cal. Rules of Court, rule 8.520(f)(4).)

of marketing, law, and business development. IFA represents more than 13,000 franchisee, 1,300 franchisor, and 650 supplier members nationwide. Because IFA's members are franchisors, franchisees, and suppliers to the franchising industry, IFA's goals are to promote franchise growth within the economy and advance the interests of its members and all franchisees, franchisors, and suppliers to the franchise industry. The IFA often advocates before courts by filing amicus curiae briefs in cases involving issues of importance to franchising generally and to businesses engaged in and affected by franchising.

Amici and their members are vitally interested in the question of the retroactivity of this Court's decision in *Dynamex Operations West, Inc v. Superior Court,* 4 Cal. 5th 903 (2018). The Ninth Circuit noted in its certification order that "[t]he question of *Dynamex*'s retroactive application has potentially broad ramifications for those who have been doing business in California…and could lead to greater liability in economic sectors that rely more heavily on independent contractors." *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1045, 1049 (2019). That understates things. Retroactive application of the expansive new rule announced in *Dynamex* will expose businesses throughout California to massive if not crushing liability for conduct that was lawful when it occurred.

In their brief, CalChamber and the IFA show that the usual rule of retroactivity for judicial decisions does not apply to this highly unusual decision, which took the California business community by surprise by importing into California law another state's misclassification statute that differs in consequential ways from the misclassification standard upon which California businesses had relied for decades. Amici also show that the California Legislature's subsequent codification of *Dynamex*, along with its decision not to apply the codification retroactively, further supports prospective-only application because (1) the Legislature's act occupies the

field and thereby supplants *Dynamex*, and (2) the Court must defer to the Legislature's decision against retroactivity.

Respectfully submitted,

Dated: August 17, 2020

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AMICI CURIAE BRIEF

Introduction

Imposing liability for conduct that was lawful when it occurred offends our most deeply-held notions of justice. Yet that will be the lot of countless California businesses if *Dynamex Operations West, Inc v. Superior Court,* 4 Cal. 5th 903 (2018) (*Dynamex*) applies retroactively. Blameless businesses that conscientiously followed pre-*Dynamex* law, and as a result operated with confidence in the knowledge that they could not be subject to misclassification claims, will suddenly be exposed to massive liability for misclassification, including civil penalties, extending back years.

Nothing in California law requires an outcome so contrary to our collective sense of fair play. In fact, California law forbids such an outcome. While the standard rule of retroactivity for judicial decisions applies to standard cases, it does not apply to this most extraordinary case, in which the Court adopted by "judicial fiat" a statute from another state and incorporated it into California's labor laws. *Vazquez v. Jan-Pro Franchising International, Inc.*, 923 F.3d 575, 593 (9th Cir. 2019) (withdrawn on other grounds and rehearing granted by *Vazquez v. Jan-Pro Franchising International, Inc.*, 930 F.3d 1107 (9th Cir. 2019)). That unusual and unforeseeable act dramatically altered, in a single stroke, over 70 years of settled labor law on which California businesses had relied. Judicial decisions do not and should not operate retroactively in these circumstances.

The California Legislature's subsequent codification of *Dynamex* in Assembly Bill 5 in 2019[2] (AB5), albeit with exemptions for dozens of industries that will continue to be governed by pre-*Dynamex* law, provides two additional reasons why *Dynamex* may not apply retroactively. First, the Legislature's enactment of AB5 was manifestly intended to occupy the field in this area of the law. It thereby supplants *Dynamex*, rendering it of no force or effect. Second, the Legislature's decision not to make its codification of *Dynamex* apply retroactively must be honored by not applying *Dynamex* itself retroactively. Any other outcome would impermissibly frustrate the Legislature's intent.

Argument

I. THIS COURT'S PRECEDENTS PRECLUDE THE RETROACTIVE APPLICATION OF *DYNAMEX*

A. The Standard Rule Of Retroactivity Of Judicial Decisions Does Not Apply When the Decision Falls Outside The Usual Run Of Cases

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly…For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 1570 (Scalia, J., concurring)). This Court has repeatedly approved of this bedrock precept of Anglo-American law, including in *Dynamex* itself. *Dynamex*, 4 Cal. 5th at 954-55 ("People are

[2] AB5 amended section 3351 of the Labor Code, added new section 2750.3 to the Labor Code, and amended sections 606.5 and section 621 of the Unemployment Insurance Code.

entitled to know the legal rules before they act.") (quotations omitted); *see also McClung v. Employment Dev. Dept.*, 34 Cal. 4th 467, 475 (2004) (noting the "unfairness of imposing new burdens on persons after the fact").

The "elementary considerations of fairness" that underlie this principle explain why the "presumption against retroactive legislation is deeply rooted in [our] jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265-66. They also explain why the rule of retroactivity for judicial decisions "has not been an absolute one." *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 979 (1989). After all, a judicial decision applied retroactively may be just as unfair, and impose hardships equally as great, as a statute applied retroactively. *Id.* at 981 (noting that retroactive judicial decisions have a "recurring association with injustice" and can "entail substantial hardship"). And in that scenario, "[a] court may decline to follow the standard rule [of retroactivity]." *Id.* at 983; *see also Kreisher v. Mobil Oil Corp.*, 198 Cal. App. 3d 389, 402 (1988) ("[T]he disinclination to penalize action 'innocent when it was done' has reached the civil sector and is not limited to legislation.").

In light of these considerations, this Court has held that judicial decisions should not be applied retroactively when "the circumstances of a case draw it apart from the usual run of cases." *Newman*, 48 Cal. 3d at 983; *see also Williams & Fickett v. County of Fresno*, 2 Cal. 5th 1258, 1283 (2017) (refusing to apply Court's holding retroactively because the facts of the case "draw [this case] apart from the usual run of cases" (quoting *Newman*, 48 Cal. 3d at 983, alteration in original)). If ever there was a decision that stands out from the "usual run of cases" that apply retroactively, it is *Dynamex*.

B. *Dynamex* Stands Apart From The Usual Run Of Cases And Should Not Apply Retroactively For Two Reasons

For purposes of making a retroactivity determination, *Dynamex* departs from the "usual run of cases" in two respects. *First*, it was the functional equivalent of a legislative act, and is entitled to the same presumption of non-retroactivity that applies to such acts. *Second*, it falls within the "recognized exception" to retroactivity for judicial decisions because it unforeseeably "change[d] a settled rule on which the parties below have relied." *Williams & Fickett*, 2 Cal. 5th at 1282.

1. *Dynamex* Is Indistinguishable From A Legislative Act And Should Be Subject To The Presumption Of Non-Retroactivity That Applies To Such Acts

Dynamex "adopted" the "Massachusetts version of the ABC test," as that test appears in Chapter 149, section 148B of the Massachusetts General Laws. *Dynamex*, 4 Cal. 5th at 956 n. 23. As the Ninth Circuit has noted, in so doing the Court "incorporated" into California labor law a statute of another state by "judicial fiat." *Vazquez*, 923 F.3d at 593. The extraordinary nature of this action is hard to overstate. In the annals of this Court's decisions, amici have been unable to locate a single other instance in which this Court adopted wholesale another state's statute.

Dynamex, however, was unprecedented not only in the extent of its departure from the "incremental . . . development of precedent" that typically characterizes judicial decisionmaking. *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001). It was also unprecedented in that although a number of states have adopted versions of the ABC test for distinguishing between employees and independent contractors, California stands alone as the only state that has done so via a judicial decision. The other states did so

through legislation or administrative regulation.[3] Accordingly, in all states other than California, the adoption of the test was subject to the presumption *against* retroactivity that applies to legislation and administrative rulemaking.

The singular nature of *Dynamex* places it well outside the "usual run of cases" to which the "general rule" of retroactivity applies. *Newman*, 48 Cal. 3d at 983. It is, instead, indistinguishable from a legislative act. There is no meaningful difference between the Court's "adopt[ion]" of the Massachusetts statute and the California Legislature's adoption (through AB5) of an identical statute. Therefore, for all of the "deeply rooted" reasons that support the presumption against retroactive legislation (*Landgraf*, 511 U.S. at 265), the same presumption should apply to the "unusual" decision (*Vazquez*, 923 F.3d at 587) in *Dynamex*. No principled basis can support applying a presumption against retroactivity to a legislative act while applying a presumption in favor of retroactivity to an identical act simply because it was done by a court rather than a legislature. Rigid application of the rule of retroactivity in these circumstances would elevate form over substance and denigrate the "elementary considerations of fairness" that ought to govern the analysis. *Landgraf*, 511 U.S. at 265.

2. *Dynamex* Changed A Settled Rule Upon Which California Businesses Relied

Under this Court's retroactivity precedents, there is a "recognized exception" to the rule of retroactivity for a judicial decision when the

[3] These states include New Jersey (N.J. Admin. Code, section 12:56-16.1 & N.J. Stat. Ann. § 43:21-19); Vermont (V.S. 1947 § 5343(VI)(b) & Vt. Stat. Ann, tit. 21, §1301(6)(B)); Massachusetts (Mass. Gen. Laws, ch. 151A, § 2); Connecticut (Conn. Gen. Stat. Ann., § 31-222); Maryland (Md. Code Ann., Lab. & Empl., § 3-903(c)(1)); Delaware (Del. Code Ann., tit. 19, §§ 3501(a)(7) & 3503(c)); and Nebraska (Neb. Rev. Stat. Ann., § 48-604(5)).

decision changes a settled rule on which the parties or others similarly situated have relied. *Claxton v. Waters*, 34 Cal. 4th 367, 378 (2004) (internal quotations omitted); *Williams & Fickett*, 2 Cal. 5th 1258 (same). The applicability of this exception focuses on "considerations of fairness" (*Williams & Fickett*, 2 Cal. 5th at 1283 (internal quotations omitted)), which "encompass the extent of reliance on the old standards by the parties or others similarly situated, and the ability of litigants to foresee a change in the law." *Estate of Propst*, 50 Cal. 3d 448, 463 (1990)*; see also Newman*, 48 Cal. 3d at 983 ("standard rule" should not be followed when it "would unfairly undermine the reasonable reliance of parties on the previously existing state of the law.").[4]

Dynamex changed a settled rule. California businesses could not have reasonably foreseen the change. Those businesses had relied on the pre-existing, settled rule for decades. Applying *Dynamex* retroactively will result in the imposition of substantial liability on businesses throughout California for conduct that was lawful when it occurred. If *Dynamex* does not qualify for the "recognized exception" to retroactivity, it is difficult to imagine a decision that would qualify.

[4] While some of this Court's retroactivity decisions have considered the foreseeability of a change in the law and retroactivity's effect on the administration of justice, this Court has made clear that neither factor must be established for the exception to apply. *See, e.g.*, *Claxton*, 34 Cal. 4th at 379 (holding that decision should apply only prospectively without any discussion of its foreseeability); *Camper v. Workers' Comp. Appeal Bd.*, 3 Cal. 4th 679 (1992) (same); *Newman*, 48 Cal. 3d at 983 (concerns about the administration of justice *or* reliance on the previous law will justify application of the exception).

a. *Dynamex* Dramatically And Fundamentally Changed A Rule That Had Been Settled For Decades

For over 70 years before *Dynamex*, the guiding principle in California for determining whether an individual was an employee or an independent contractor was the extent of control the putative employer exercised over the individual. In its 1946 decision in *Empire Star Mines v. California Employment Commission*, the Court stated that "in determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired." 28 Cal. 2d 33, 43 (1946) (overruled on other grounds by *People v. Sims*, 32 Cal. 3d 468, 479 n. 8 (1982). In 1989, the Court reaffirmed this tenet, holding that "the right to control work details is the most important or most significant consideration" in the analysis, while listing ten other factors as "secondary" in importance. *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 350 (1989) (internal quotations omitted) (*Borello*). *Dynamex* itself recognized that the "primary common-law standard" was "whether the hirer controlled the details of the worker's activities." *Dynamex*, 4 Cal. 5th at 927. Absent such control, no employment relationship existed. *Borello*, 48 Cal. 3d at 353 (California statutes "emphasize 'control' of the work as *the governing distinction* between employees and independent contractors.") (emphasis added).

Dynamex abandoned this foundational principle of California labor law. In its place, the court adopted the Massachusetts version of the ABC test. As the Ninth Circuit has noted, that test "*eschew[s] reliance on control* over the performance of the worker as a necessary condition for an employment relationship." *Vazquez*, 923 F.3d at 595 (emphasis added).

Under the ABC test, an individual will be deemed an independent contractor only if the hirer satisfies all three prongs of the test. Thus, the hirer's "failure to prove *any one* of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order." *Dynamex*, 4 Cal. 5th at 964 (emphasis added). Prongs B and C of the test have nothing to do with control—instead, they embody two of the ten "secondary" factors listed in *Borello*. *See id.* at 923 (prong B concerns whether the "worker performs work that is outside the usual course of the hiring entity's business," and prong C concerns whether the worker is "customarily engaged in an independently established trade . . . of the same nature as the work performed."). Because the failure to satisfy prong B or prong C mandates a finding of an employment relationship, under *Dynamex* an employment relationship can now exist even if the hirer exercises no control whatsoever over the individual. *Dynamex*, 4 Cal. 5th at 963 (under the ABC test, courts can make employment determination without even considering the issue of control).

Dynamex thus jettisoned a long-standing and uniform body of law holding that control was the "most important factor" in determining whether a worker is an employee or an independent contractor and replaced it with a standard that requires *no* showing of control to determine that a worker is an employee rather than an independent contractor. Moreover, it elevated what had been two (out of ten) "secondary" considerations (considerations that this Court said in *Borello* were *not* to be "applied mechanically as separate tests" (48 Cal. 3d at 351)) into separate case-determinative tests to be applied mechanically. In so doing, *Dynamex* turned California misclassification law on its head.

Petitioners contend, and several courts have stated, that *Dynamex* did not change the law. *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. App. 5th

1131 (2020); *Vazquez*, 923 F.3d 575. According to this argument, *Dynamex* merely "clarified," "sharpened," "distill[ed]" and "refine[d]" existing misclassification law—but "did not upend" that law. Pet. Opening Brief at pp. 22, 37; Pet. Reply Brief at pp. 10, 24. Under this argument, *Dynamex* varies from the *Borello* test only in that it "differently weighed" and "re-organized" the *Borello* factors. Pet. Opening Brief at 23; Pet. Reply at 20.

The argument that *Dynamex* did not meaningfully change the law does not withstand the most cursory scrutiny. *Dynamex* eliminated control as the "most important factor" in the employee/independent contractor determination and replaced it with a standard in which proof of control is not even required to establish an employment relationship. If misrepresentation were eliminated as the key element of a fraud claim, no one would argue that fraud law had not radically changed. Eliminating control as the key element of a misclassification claim is no different.

The claim that the ABC test simply "differently weighed" or "re-organized" the *Borello* factors ignores reality. The ABC test not only discarded eight of the ten "secondary" indicia listed in *Borello* but, more importantly, it does not involve any "weighing" at all: if the putative employer fails to satisfy any one prong of the test, the inquiry ends and a finding of an employment relationship is mandated. *Dynamex*, 4 Cal. 5th at 964.

Petitioners' contention that *Dynamex* "did not upend" the law not only ignores the actual effect of *Dynamex*, but their own prior characterizations of its effect. In this very case, petitioners previously represented to the Ninth Circuit that *Dynamex* "entirely upended" the previous legal regime. Plaintiff-Appellant's Motion to Remand, *Vazquez v. Jan-Pro Franchising International, Inc.*, No. 17-16096, Dkt. 37 at 4. Petitioners' counsel has also represented to the Ninth Circuit that *Dynamex* was a "sea change" in misclassification law that "drastically altered" the

legal landscape. Opening Brief of Plaintiff-Appellants, *Haitayan v. 7-Eleven, Inc.*, 9th Cir., No. 18-55462, Dkt. 10 at 3, 28. These statements belie petitioners' current position, as respondents have noted. Respondents' Answering Br. at 51. Yet petitioners' reply brief makes no attempt to account for them.

In *Gonzales*, the California Court of Appeal purported to justify its holding that *Dynamex* "did not establish a new standard" by relying on *Dynamex* itself. *Gonzales*, 40 Cal. App. 5th at 1156. *Gonzales* stated "[w]e take the Supreme Court [in *Dynamex*] at its word: *Dynamex* merely clarified and streamlined" prior law. *Id.* at 1156 n. 13. In *Vazquez*, the Ninth Circuit similarly opined that *Dynamex* "emphasi[zed]" that its holding was "a clarification rather than . . . a departure from established law," because the court "explained how the [ABC] test remains 'faithful to the fundamental purpose of [California's] wage orders.'" *Vazquez*, 923 F. 3d at 588 (second alteration in original). But this is a non sequitur. Even assuming that the ABC test is "faithful" to the purpose of California's wage orders, that hardly proves that the ABC test did not change the law. Multiple standards may be faithful to a law's purpose, yet materially different from each other. Indeed, this Court has made clear that *Borello* is also faithful to the purpose of the wage orders, yet as we have seen, the *Borello* standard is fundamentally different than the *Dynamex* test. *Dynamex*, 4 Cal. 5th at 935 (statutory purpose is the "touchstone" of the *Borello* standard).

There is no indication whatsoever in *Dynamex* that this Court believed it was simply "clarifying" or "streamlining" pre-existing California law. Indeed, if that was all the Court did in *Dynamex*, there would have been no need to incorporate into California's labor law an entire statute from another state.

The Legislature's statement in AB5 that the ABC test "does not constitute a change in, but is declaratory of, existing law" (section 2(i)(1)) does not move the needle for two reasons. First, AB5 makes clear that its reference to "existing law" means the law as announced in *Dynamex*. *See* AB5, Legislative Counsel's Digest ("Existing law, as established in the case of Dynamex…."); *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158, 1169-70 (2008) (presuming the Legislature acted with the "intent and meaning expressed in the Legislative Counsel's Digest" (internal quotations omitted)). There is no indication that the Legislature intended to refer to pre-*Dynamex* law in this statement. But even if it did, this Court has made clear that the Legislature ventures "beyond its power" when it purports to opine on "what the law . . . was." *McClung v. Employment Dev. Dept.*, 34 Cal. 4th 467, 473 (2004) (the "Legislature has no authority to interpret a statute. That is a judicial task." (quotations omitted)). *McClung* expressly rejected the argument that a legislative statement that a new statute does not change the law has any force or effect where, as a matter of fact, the new law plainly changed prior law: the "declaration that a statutory amendment merely clarified the law 'cannot be given an obviously absurd effect, and the Court cannot accept the legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms.'" *Id.* at 473.

If anything, the Legislature believed that AB5 *would* change pre-*Dynamex* law. The Legislative Counsel's Digest states that AB5 will "expand[] the definition of an employee." AB5, Legislative Counsel's Digest. Moreover, in its "findings," the Legislature explained that its intent was to significantly increase the number of California workers considered employees, and therefore entitled to the protections of the Labor Code: "By codifying the California Supreme Court's landmark, unanimous *Dynamex* decision, this act restores these important protections to potentially *several*

million workers who have been denied these basic workplace rights that all employees are entitled to under the law." AB5 § (1)(e). A law that seeks to transform "several million workers" from independent contractors into employees is not a "clarification" of prior law. It is, as petitioners concede, a "sea change."

In the end, it is indisputable that *Dynamex* will create liability where none previously existed. Before *Dynamex*, a company that structured its relationships with workers so as not to exercise any control over the manner and means of accomplishing the result desired had little to no exposure to misclassification claims. After *Dynamex*, that same company will face massive liability unless it can prove that the putative employee performs work "that is outside the usual course" of the company's business (prong B) and that the worker was "customarily engaged in an independently established trade . . . of the same nature as the work performed" (prong C). *Dynamex*, 4 Cal. 5th at 957. By definition, a judicial decision that creates liability where no liability previously existed constitutes a change in the law.

b. The Change In Law Was Not Reasonably Foreseeable

Although the unforeseeability of a change in the law is not a prerequisite to a determination that a judicial decision should not apply retroactively (*see supra* at B.2), it is nonetheless an important factor to be considered, because lack of notice of a change in law exacerbates the unfairness of applying that change on a retroactive basis. *Estate of Propst,* 50 Cal. 3d 448, 463 (1990) ("the issue of fairness encompasses … the ability of litigants to foresee a change in the law….[t]he circumstance most strongly militating against full retroactivity of our present holding is its unforeseeability to counsel."). Here, no one could reasonably have foreseen

the change in law wrought by *Dynamex*. Before *Dynamex*, no California court had ever employed the ABC test, or even suggested that it should be employed. The notion that what had been the single most important factor in the misclassification analysis for over 70 years would be summarily discarded as a prerequisite for a misclassification claim would not reasonably have occurred to any practitioner—as shown by the fact that, in *Dynamex* itself, it did not occur to the litigants, or the trial court, or the Court of Appeal.

Petitioners argue that litigants should have been on notice that this Court would adopt the ABC test because versions of the test have been adopted in a number of other states. Pet. Reply Br. at 21. But this just highlights the extraordinary and unforeseeable nature of the Court's decision, given that none of those other states adopted the test via a judicial decision. *See supra* at 6. No legal counselor could reasonably expect that this Court would take such a novel action. The fact that the Court had never before incorporated into California law an entire statute from another state further underscores the unpredictability of the Court's decision.

c. California Companies Relied On Pre-*Dynamex* Law

The "most relevant" factor in determining whether a judicial decision should apply retroactively is the "reliance of parties on the previously existing state of the law." *Newman*, 48 Cal. 3d at 983. Under this Court's retroactivity decisions, the "parties" whose reliance should be considered are not limited to the litigants currently before the Court. Because decisions about retroactivity by this Court generally apply across the board to all California companies and individuals, this Court considers the extent of the "public" reliance on the former rule. *Peterson v. Sup. Ct.*, 31 Cal. 3d 147, 153 (1982). In other words, the Court looks to reliance by

"the parties *or others similarly affected*." *Id.*(emphasis added); *see also, e.g.*, *Williams & Fickett*, 2 Cal. 5th at 1265 (considering reliance "by plaintiff *and others in its position*")(emphasis added). Therefore, focusing only on the reliance of the litigants presently before the Court, as petitioners have done (see Petitioners' Opening Brief at 27; Petitioners' Reply Brief at 14), is the wrong analysis.

Because "others similarly affected" are not before the court making the retroactivity decision, they are unable to submit any sort of record showing their reliance on the former rule. It accordingly makes sense that this Court has not required evidentiary proof of reliance before deciding that a decision should not be applied retroactively. Instead, this Court has consistently held that decisions should not be applied retroactively because litigants "*might* have reasonably relied," or "*may* have relied," or "*could reasonably* have relied" on the prior law. *Claxton*, 34 Cal. 4th at 379; *Camper*, 3 Cal. 4th at 689; *Moss v. Sup. Ct.*, 17 Cal. 4th 396, 434 (1998); *Williams & Fickett*, 2 Cal. 5th at 1265.

This Court has held that "the most compelling example of…reliance occurs when a party has acquired a vested right or entered into a contract based on the former rule." *Newman*, 48 Cal. 3d at 989. In these circumstances, the decision will not be applied retroactively, regardless of any potentially countervailing considerations. In *Peterson*, the Court flatly held that "where contracts have been made or property rights acquired in accordance with the prior decision, neither will the contracts be invalidated nor will vested rights be impaired by applying the new rule retroactively." *Peterson*, 31 Cal. 3d at 152. In *Estate of Propst*, the Court similarly stated that the new decision would not be "applied to impair contracts made or property rights acquired in accordance with the prior rule." *Estate of Propst*, 50 Cal. 3d at 463 (characterizing this as a "universal exception" to the rule of retroactivity for judicial decisions).

Amici respectfully submit that companies large and small throughout California relied on pre-*Dynamex* law in entering into contracts and otherwise structuring their relationships with workers. Those contracts will be impaired by retroactive application of *Dynamex*. The new rule announced in *Dynamex* accordingly represents the "most compelling example" of a rule that should not be applied retroactively.

California employment lawyers regularly counsel their clients on how to lawfully create an independent contractor relationship rather than an employment relationship. Before *Dynamex*, these lawyers advised their clients that their risks of exposure to misclassification liability would be lowered substantially if they minimized the "most important factor" in the misclassification analysis: control over the "manner and means of accomplishing the result desired." *Star Mines*, 28 Cal. 2d at 43. It is reasonable to infer that countless California companies entered into contractual relationships with workers on the strength of that advice.

Employment law—and particularly the legal standard regarding misclassification—is one of those fields where "individuals may have actually paid attention to existing rules of law, perhaps even consulted legal advisers, before engaging in a given transaction." Richard Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 61 Am. J. Comp. L. 37, 41 (2014). As a result, this area of law is "especially likely to induce . . . reliance." *Id.* A party is far more likely to rely on the standard for a misclassification claim in ordering its affairs than, say, any particular tort law. *See* Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977) (reliance on judicial decisions in the tort field is rare because "neither the tortfeasor nor the victim normally takes account of expanding or contracting rules of tort liability"); *Newman*, 48 Cal. 3d at 989 ("it is most unlikely that any employee in a pending wrongful termination case entered into his or her

employment in reliance on the existence of a tort cause of action for breach of the covenant"). This explains why this Court often applies decisions changing tort rules on a retroactive basis (*id.* at 979, 986), and why such decisions are not helpful in deciding the present issue.

The California Court of Appeal's decision in *Cislaw* provides a good example of a litigant's reliance on pre-*Dynamex* law in entering into contracts. *Cislaw v. Southland Corp.*, 4 Cal. App. 4th 1284 (1992). In *Cislaw*, the family of a young man who had bought clove cigarettes from a 7-Eleven franchisee and allegedly died from them brought a wrongful death action against the franchisor (the Southland Corporation, as 7-Eleven, Inc. was then known). *Id.* Southland defended on the ground that the franchisee was an independent contractor and Southland could not be vicariously liable for the sale of the clove cigarettes. *Id.* Among other things, Southland pointed to the franchise agreement, which stated that the franchisee "shall be [an] independent contractor[] and *shall control the manner and means of…[o]peration*." *Id.* at 1294 (emphasis added). The Fourth District Court of Appeal held that this agreement, along with declarations from the franchisees and a Southland employee, "leads to the compelling conclusion that Southland did not" have the "all-important right to control the manner and means in which the [franchisees] achieved the result" and accordingly affirmed the trial court's grant of summary judgment to Southland. *Id.* at 1295.

In entering into the franchise agreement, and by expressly incorporating the "manner and means" language into the agreement, Southland obviously relied on the pre-*Dynamex* law that not having the "all-important right to control the manner and means in which the [worker] achieved the result" would create an independent contractor relationship that would protect it from liability in these scenarios. Southland's reliance on this standard was given the stamp of approval not only by the Court of

Appeal, but by this Court just four years before it decided *Dynamex*. In *Patterson v. Domino's Pizza, LLC*, this Court approved the outcome in *Cislaw*, and as one of the reasons for its approval noted the "manner and means" language of the agreement. *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474, 496-97 (2014).

Southland, along with many other similarly situated franchisors, accordingly relied on pre-*Dynamex* law in entering into franchise agreements. Those agreements will be impaired if not eviscerated by applying *Dynamex* on a retroactive basis. The independent contractor relationship between franchisor and franchisee is central and indispensable to the franchise business model—indeed, franchising would not exist without the independent contractor relationship. As the Ninth Circuit has noted, "the franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from *small independent contractors, rather than from employees of a vast chain*." *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F. 2d 980, 999 (9th Cir. 1976) (internal quotation omitted, emphasis added).

Applying the ABC test to franchise agreements will, according to petitioners, result in a determination that franchisees are actually employees rather than independent contractors, because the franchisor and franchisee are engaged in the same "usual course of… business" under prong B of the test. Pet. Opening Brief at 23; *see also Vazquez*, 923 F.3d at 598 (noting that Jan-Pro may be deemed an employer under prong B because Jan-Pro's "websites and advertisements . . . promote Jan-Pro as being in the business of cleaning," like its franchisees). Transforming franchisees from independent contractors into employees on a retroactive basis will thereby frustrate one of the main purposes of franchise agreements, wreak havoc

with the entire franchise business model, and expose franchisors to massive after-the-fact liability for misclassification.

C. Applying *Dynamex* Retroactively Will Unfairly Expose California Businesses To Massive Liability For Conduct That Was Lawful When It Occurred

Imagine a driver travelling on the I-5 at 68 miles per hour, two miles under the posted 70 MPH speed limit. A week later, with no notice, the speed limit is lowered to 65 MPH. The new speed limit is then applied retroactively, and a CHP officer who observed the driver going 68 serves her with a speeding ticket.

This scenario is utterly absurd and wildly unfair. But it is exactly like what will happen to thousands of California businesses if *Dynamex* is applied retroactively—only these businesses will face far greater financial consequences than the cost of a speeding ticket. They will face, and are currently facing, claims for billions of dollars in damages, civil penalties and attorney's fees. *See Kreisher v. Mobil Oil Corp.*, 198 Cal. App. 3d 389, 404 (1988) ("it is patently unfair to penalize Mobil for its nonconformity with standards which took effect only after it conscientiously determined the state of the law and relied on it in reasonable good faith.").

The principle at stake here is ancient and should not be discarded. In the 1700's, Blackstone denounced the retroactive application of law because "it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust." 1 Blackstone, Commentaries 46. This Court should not sanction the imposition of liability for conduct "innocent when it was done." Changing the rules of the game to produce a different outcome after the game has been played is repugnant to our collective sense of justice and fair play.

II. AB5 PRECLUDES THE RETROACTIVE APPLICATION OF *DYNAMEX*

A little more than a year after this Court decided *Dynamex*, the California Legislature codified the ABC test adopted in *Dynamex* in AB5. The Legislature chose not to make AB5 retroactive. Its enactment of comprehensive legislation concerning the exact same subject matter as *Dynamex*, and its decision not to make that legislation apply retroactively, gives rise to two additional reasons why *Dynamex* cannot apply retroactively. First, AB5 now "occup[ies] the field" and accordingly supplants *Dynamex*. *I. E. Associates v. Safeco*, 39 Cal. 3d 281, 285 (1985). Second, the Legislature's decision not to apply its codification of *Dynamex* on a retroactive basis must be honored, and applying *Dynamex* on a retroactive basis would impermissibly frustrate that legislative intent.

A. AB5 Supplants *Dynamex*

When the legislature "intend[s] to cover the entire subject or, in other words, to 'occupy the field,'" the statute it has enacted will "supplant the common law." *I. E. Associates*, 39 Cal. 3d at 285. The Court in *I.E. Associates* quoted with approval Sutherland's "Statutory Construction" treatise to the effect that "general and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter." *Id.* Because the terms of AB5 show that it was intended to "occupy the field," it "totally supersede[s]" *Dynamex*, rendering it without force or effect. *See id.*

AB5 is a lengthy and extensive piece of legislation that states its purpose in section 1(d): "It is the intent of the Legislature in enacting this act to include provisions that would codify the decision of the California

Supreme Court in Dynamex and would clarify the decision's application in state law." Section 2(a) adopts verbatim the ABC test that this Court adopted in *Dynamex*. AB5 then lists dozens of occupations, comprising an enormous swath of the California economy, that the Legislature has decided should *not* be governed by the *Dynamex* standard and are more appropriately governed by pre-*Dynamex* law. Section 2(b) states that "Subdivision (a) [of Section 2] and the holding in Dynamex . . . *do not apply* to the following occupations as defined in the paragraphs below, and instead, the determination of employee or independent contractor status for individuals in those occupations shall be governed by Borello."

A partial list of the occupations that under the statute are not governed by *Dynamex* includes manicurists, physicians, commercial fishermen, real estate brokers, barbers, construction subcontractors, editors, dentists, accountants, cosmetologists, photographers, engineers, podiatrists, freelance writers, private investigators, securities brokers, certain types of salespeople, travel agents, human resources administrators, fine artists, lawyers, veterinarians, graphic designers, architects, grant writers, surgeons, and photojournalists. The exempted occupations are subject to detailed conditions and restrictions on eligibility for the exemption. For example, a cosmetologist will be subject to the *Borello* test rather than *Dynamex* only if he or she satisfies five separate conditions related to the work performed. *See* subdivision (c)(2)(B)(xi)(I-V). Thus, in the words of *I.E. Associates*, "limitations and exceptions are minutely described" in the statute. *I.E. Associates*, 39 Cal. 3d at 285.

Moreover, while *Dynamex* adopted the ABC test only for purposes of California's wage orders (4 Cal. 5th at 914-15), AB5 expanded the application of the ABC test to the Labor Code and the Unemployment Insurance Code. AB5, section 2(a)(1); section 3. The Legislature plainly intended AB5 to cover the waterfront with respect to the

employee/independent contractor determination. AB5 accordingly encompasses, in a comprehensive fashion, the exact same ground covered by *Dynamex*. As a result, it "replaces" *Dynamex*, which no longer has any independent vitality. *I.E. Associates*, 39 Cal. 3d at 285.[5]

Because AB5 "totally supersedes" (*id*. at 285) *Dynamex*, the question of the retroactivity of *Dynamex* is a dead letter. Instead, the relevant question, for purposes of determining whether the ABC test applies retroactively (to the occupations that remain covered by it in accordance with AB5), is whether AB5 operates retroactively. The answer to that question is *No*.

Unless a statute contains an "express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature … must have intended a retroactive application." *Evangelatos v. Sup. Ct.*, 44 Cal. 3d 1188, 1209 (1988); *see also McClung*, 34 Cal. 4th at 475 (statute that "interferes with antecedent rights will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"). A "statute that is ambiguous with respect to retroactive application is construed…to be unambiguously prospective." *Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 841 (2002).

There is no "express retroactivity provision" in AB5. *See generally* AB5; *see also Myers*, 28 Cal. 4th at 842 (express retroactivity provision usually includes the word "retroactive"). Nor do any extrinsic sources provide the requisite "clear and unavoidable implication" that the

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[5] Although *I.E. Associates* held that the statute in issue superseded the common law, there is no reason why the "occupy the field" rule of *I.E. Associates* should not apply with as much or greater force here, where a statute covers the same subject as the Court's interpretation of California wage orders.

Legislature intended retroactive application. *Myers*, 28 Cal. 4th at 842. And, AB5 expressly states that its provisions "shall apply to work performed on or after January 1, 2020." Cal. Lab. Code §2750.3(i)(3). AB5 accordingly does not apply on a retroactive basis.

The statement in AB5 that "the addition of subdivision (a) to this section of the Labor Code does not constitute a change in, but is declaratory of, existing law" is not the required "express retroactivity provision." *See* Labor Code § 2750.3(h). As we have seen, this section refers to "existing law," which necessarily means the law *after Dynamex*. *See supra* at pp. 12-13. It accordingly expresses no intent to apply AB5 to pre-*Dynamex* conduct. And even if it did refer to pre-*Dynamex* law, AB5 undeniably changed that law. *Id.* In *McClung*, this Court rejected the argument that the Legislature's incorrect statement that a statute did not change the law requires retroactive application of the statute. 34 Cal. 4th at 471-72. Because the Legislature "has no authority to interpret a statute," courts will not accept an incorrect legislative statement that a statute "merely declared existing law." *Id.* at 473. *McClung* held that such a statement does not constitute the requisite "clear and unavoidable intent to have the statute retroactively impose liability for actions not subject to liability when taken." *Id.* at 476. It further noted that "requiring clear intent assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* (internal quotations omitted, alteration in original) Neither the language of AB5 nor its legislative history provides that assurance.

B. The Court Must Defer To The Legislature's Decision Not To Apply Its Codification Of *Dynamex* Retroactively

The Legislature has the unquestioned authority to limit the scope of decisions of this Court. *E.g.*, *People v. King*, 5 Cal. 4th 59, 69 (1993) (discussing Legislature's decision to limit applicability of California Supreme Court ruling regarding eligibility for California Youth Authority commitment and noting that "we may not now overturn that legislative action"). The Legislature's decision to limit the application of *Dynamex* by exempting numerous industries from the ABC test is an example of its proper exercise of that authority, and shows that the Legislature's policy choices control. Similarly, had AB5 expressly stated that its codification of *Dynamex* does not apply retroactively, there would be no question that *Dynamex* itself would not apply on a retroactive basis, since the Legislature's statement of non-retroactivity would control. Any other outcome would impermissibly frustrate the Legislature's intent.

In terms of legislative intent, there is no meaningful difference between an express statement of non-retroactivity by the Legislature and the Legislature's decision here not to include an express statement of retroactivity. Due to the "strong presumption" against statutory retroactivity, the Legislature knew that its silence on retroactivity would result in prospective-only application. *See McClung*, 34 Cal. 4th at 475*; see also supra* at Section II.A. It further knew exactly what it had to do to make AB5 retroactive: include language stating that "this section shall have retroactive application" or "this section…shall be fully retroactive." *See, e.g.*, Cal. Gov't Code § 9355.8; Cal. Civ. Code § 1646.5. It chose not to include such language. The only conclusion that may reasonably be drawn from this decision is that the Legislature intended the usual rule of prospective-only application of statutes to apply to its codification of *Dynamex*. This Court must defer to that intent. *Myers*, 28 Cal. 4th at 841

("a statute's retroactivity is, in the first instance, a policy determination by the legislature and one to which courts defer….").

There is no basis to conclude that the Legislature actually desired retroactive application but remained silent on the issue because it believed an express retroactivity statement was unnecessary in light of the standard rule of retroactivity for judicial decisions. In the first place, nothing in the record supports such speculation. Moreover, when the Legislature enacted AB5 in September 2019, the Ninth Circuit had already, in July 2019, taken the unusual step of *withdrawing* its opinion holding that *Dynamex* applies retroactively, and stating that it would refer the issue to this Court for decision. *Vazquez v. Jan-Pro Franchising International, Inc.*, 930 F.3d 1107 (2019) (Mem.). The Legislature accordingly was on notice that this was an important open issue and that the standard rule might not apply.

Conclusion

This Court should hold that *Dynamex* does not apply retroactively.

Respectfully submitted,

Dated: August 17, 2020

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ James F. Speyer
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CERTIFICATE OF COMPLIANCE

In accordance with California Rule of Court 8.520(c)(1), counsel for *Amicus Curiae* The California Chamber of Commerce hereby certifies that this BRIEF AMICUS CURIAE is proportionately spaced, uses Times New Roman 13-point typeface, and contains 7641 words, including footnotes, but excluding the Table of Contents, Table of Authorities, and this Certificate as determined by our law firm's word processing system used to prepare this brief.

Dated: August 17, 2020

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

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Supreme Court of California

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Lower Court Case Number:

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8/17/2020

Date

/s/James Speyer

Signature

Speyer, James (133114)

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