NO. S258191

IN THE SUPREME COURT OF CALIFORNIA

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

vs.

JAN-PRO FRANCHISING INTERNATIONAL, INC.
Respondent.

Review of Certified Question from the Ninth Circuit
(Ninth Circuit Case No. 17-16096)
On Appeal from N.D. Cal. Case No. 3:16-cv-05961
Before the Honorable William Alsup

PETITIONERS' RESPONSE TO JAN-PRO'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Pursuant to California Rule of Court 8.520(d)(1), Petitioners submit this brief response to the Supplemental Brief filed by Respondent on October 23, 2010. Notably, none of the decisions discussed in Respondent's supplemental brief bear upon the certified question in this case as to whether *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, applies retroactively.[1]

Petitioners note that, in its supplement, Respondent asks that the Court decertify the certified question in this case. Petitioners have no opposition to this request – but for a different reason. Following this Court's issuance of *Dynamex*, the California legislature codified the decision and the Court's adoption of the "ABC" test through its enactment of Assembly Bill 5 ("A.B. 5"). *See* Stats. 2019, c. 296 § 1. In doing so, the legislature made clear that it was "clarifying" existing law. The bill thus indicated that the statute would apply to matters predating its enactment. *See In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 255 (explaining "a clarification of existing law [by statute] … may be applied to transactions predating its enactment without being considered retroactive [Citation.] The clarified law is merely a statement of what the law has always been") (quoting *Riley v. Hilton Hotels Corp.* (2002) 100 Ca.App.4th 599, 603).

Thus, the question now of whether *Dynamex* itself was retroactive (which all courts to date have agreed that it was, *see* Petitioners' Brief at 16-17) is a moot point, since there is now a legislative clarification that the

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[1] Should the Court consider Respondent's supplemental brief, Petitioners respectfully request relief from the default pursuant to the deadlines set forth in 8.520(d)(2) and request that the Court consider this response prior to oral argument next week.

"ABC" test is, and has been, the law of California. Thus, there is no current need for this Court to weigh in on this question.[2]

ARGUMENT

I. *Patel et al. v. 7-Eleven, et al.* Was Incorrectly Decided Under Massachusetts Law

The recent decision *Patel et al. v. 7-Eleven, Inc., et al.* (D. Mass. Sept. 10, 2020) --- F.Supp.3d ---, 2020 WL 5440623, was based on Massachusetts law, and it is currently on appeal at the First Circuit. It has no bearing on whether *Dynamex* applies retroactively. In any event, Petitioners submit that was incorrectly decided for several reasons.

First, the district court ignored Massachusetts Supreme Judicial Court precedent explicitly confirming that the "ABC" test applies to cases addressing whether franchisees are actually employees. *See Coverall N. Am., Inc. v. Com'r of Div. of Unemployment Assistance*, (2006) 447 Mass. 852, 857 (cleaning franchisee was employee of franchisor for state unemployment purposes) (cited in *Dynamex*, 4 Cal.5th at 963). **Moreover, as the Ninth Circuit recognized in this case, "[v]arious courts and arbitrators . . . have been skeptical" and have rejected efforts to circumvent state employment statutes by labeling workers as franchisees**. *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 923 F.3d 575, 599 (9th Cir.), citing *Awuah v. Coverall N. Am., Inc.*, (D. Mass. 2010) 707 F.

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[2] Respondent had previously urged this Court to maintain certification of this question. Now that neither party is asking this Court to decide this question, the Court should withdraw the certification.

However, should the Court decide to address the additional questions that Petitioners requested, Petitioners would ask the Court to proceed to decide this case.

Supp. 2d 80, 84, and *Da Costa v. Vanguard Cleaning Systems, Inc.*, (Mass. Supp. Sept. 29, 2017) 2017 WL 4817349, at *6.[3]

Second, the district court misapplied Massachusetts law set forth in *Monell v. Boston Pads, LLC*, (2015) 471 Mass. 566, 31 N.E.3d 60. *Monell* held that real estate brokers could be classified as independent contractors under another state *statute* and so the "ABC" test would not apply in that particular industry in Massachusetts. *See id.* at 577 ("we underscore the limited nature of our holding"). The district court misinterpreted *Monell* and failed to include any analysis of how a federal *regulation*, not even a statute, (the FTC Franchise rule) could preempt a Massachusetts state statute requiring application of the "ABC" test.

Finally, the FTC Rule cannot preempt the "ABC" test here because it does not include any substantive guidance regarding the relationship between franchisors and franchisees. The rule is merely a pre-sale disclosure rule. See, e.g., FTC Letter from Joseph J. Simons, Chairman, dated Oct. 15, 2020, at *1 (attached hereto as Ex. A) (confirming that the

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[3] *See also Acosta v. Jani-King of Oklahoma*, (10th Cir. Oct. 3, 2018) Case No. 17-6179 at *6-7 (noting that "the fact that [cleaning workers] are franchisees or have formed corporations does not end the [misclassification] inquiry" under the FLSA); *Williams v. Jani-King of Philadelphia Inc.,* (3d Cir. 2016) 837 F.3d 314, 324 (holding that Pennsylvania law "does not distinguish between controls put in place to protect a franchise's goodwill and intellectual property and controls for other purposes" and applying ordinary test for employee classification); *Mujo v. Jani-King Int'l, Inc.,* (D. Conn. 2018) 307 F. Supp. 3d 38, 47 *reconsideration denied*, (D. Conn. Apr. 12, 2018) 2018 WL 1767847 ("Connecticut law does not foreclose the possibility of a franchisee also being an employee"); *DeGiovanni v. Jani-King International Inc., et al.*, (D.Mass. June 6, 2012) Civ. A. No. 1:07-cv-10066, ECF Dkt No. 209, at *100-102 (holding Jani-King franchisees to be employees, noting that "[t]he defendants ardently argue that this analysis of the statute would be fatal to franchising in Massachusetts…").

Rule "does not regulate the substantive terms of the franchisor-franchisee relationship").

II. *Mattei v. Corporate Management Solutions, Inc.* Does Not Preclude Application of the "ABC" test to the Question of Joint Employment

Mattei v. Corporate Management Solutions, Inc. (2020) 52 Cal. App. 5th 116, simply does not supply support for the position set forth by Jan-Pro – that because *Dynamex* did not overrule *Martinez v. Combs* (2010) 49 Cal. 4th 35, the "ABC" test is inapplicable to joint employment inquiries. Certainly, *Martinez* remains good law. Nothing in *Dynamex* or Petitioners' briefing countenances otherwise. The analysis in *Mattei* correctly understands *Martinez* as explicating the three alternative definitions for the term "employ", and *Dynamex* as clarifying the second prong, to "suffer or permit". *Id.* at 123-34 (listing three prongs and interspersing citations to *Dynamex* and *Martinez* in explaining the suffer or permit prong).

In *Mattei*, the Court of Appeal was tasked with reviewing a grant of summary judgment to the putative employer, Corporate Management Systems ("CMS"). The lower court held that CMS was not an employer, on the grounds that CMS was merely a signatory to a production agreement for a beauty industry commercial (CMS was hired to provide "signatory status" and enable the hiring of union crewmembers) and was thus not the production crew's joint employer and could not be held liable for the alleged Labor Code violations. *Id.* at 120.

The Court of Appeal reversed the grant of summary judgment, concluding that the production agreement "does not appear to [] relieve signatories of their responsibility to ensure compliance with the[] detailed provisions [of the agreement] when they 'lend' their signatory status to a

non-signatory company." *Id.* at 125. Because of its position to prevent the violations, "[a] trier of fact could [] find CMS was an employer under the suffer-or-permit prong of the IWC definition." *Id.* at 128. Jan-Pro's reading of this ruling, which relies on the expansive breadth of the suffer or permit prong, as *narrowing* the suffer or permit prong to exclude application of the ABC test is backwards. In *Mattei*, the Court of Appeal heeded *Dynamex's* call to liberally construe the suffer or permit prong and indeed *reversed* the grant of summary judgment finding CMS had not met its burden to disprove an employment relationship. To the extent that the Court of Appeal's failure to utilize the "ABC" test in analyzing CMS's employer status on this prong causes confusion amongst the courts, this Court could take the opportunity to clarify that the "ABC" test offers a streamlined version of the suffer or permit prong of the joint employer inquiry.

III. *People v. Uber Technologies, Inc.* Affirms the Importance of the "ABC" Test and Rejects Jan-Pro's Attempt to Import a Threshold "Hiring Entity" Requirement

Finally, the decision in *People of the State of California v. Uber Technologies, Inc. et al.* (Cal. App. Dist. 1 Oct. 22, 2020) Case No. A160701, A160706, --- Cal. Rptr. 3d ---, 2020 WL 6193994, does not support the argument that the "ABC" test set forth in *Dynamex* is undermined by the continuing vitality of *Martinez*.

Rather, the Court of Appeal decision in *People v. Uber* undermines Jan-Pro's argument, set forth in its Answering Brief at *23-24, that the "hiring entity" language of *Dynamex* imposes a threshold inquiry that requires a court to make a factual determination as to whether Respondent is a "hiring entity" before applying the "ABC" test. As the Court of Appeal explained:

> Uber and Lyft argue the threshold question in an ABC analysis is whether they are "hiring entities." Only if they are, they argue, does the court move on to consider whether the three ABC test factors are satisfied. They frame the "hiring entity" issue in this manner because, fundamentally, the case they make here rests on the theory that the drivers do not render services to them… [However, a]s codified in section 2775 [AB 5], we think the phrase "hiring entity," tracking the language of the Dynamex opinion, is ***intended to be expansive for reasons specific to California wage and hour laws and the longstanding social safety net objectives of those laws in this state***. … We reject defendants' invitation to import a threshold "hiring entity" inquiry into section 2775 by judicial construction.

Id. at *10 (emphasis supplied). This holding runs directly counter to Jan-Pro's argument in its Answering Brief that the "hiring entity" language used in *Dynamex* was intended to preclude application of the "ABC" test in the joint employment context. Contrary to Jan-Pro's contention, that the California Court of Appeal did not answer the question of whether the "ABC" test and *Dynamex* apply in the joint employer context and does not signal that California courts understand the "ABC" test as inapplicable in the joint employment context; the question simply was not before the Court in *People v. Uber*. Further, the Court read *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal. App. 5th 289, as questioning (not answering the question of) whether *Dynamex* applied in the joint employer context and distinguished *Curry* on factual grounds. *Id.* at *16. Jan-Pro also takes out of context footnote 5, in which the Court addresses the statutory carve-outs in AB 5, noting in *dicta*: "Notably, the statutory scheme also contemplates potential non-statutory exemptions". That the California state legislature left a carve-out in the statute to accommodate specific scenarios has ***no*** bearing on whether this Court in *Dynamex* intended the "ABC" test to apply in the joint employment context.

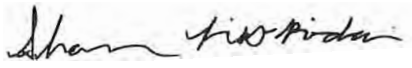
CONCLUSION

For the foregoing reasons, the *Patel*, *Mattei*, and *People v. Uber* cases should have no impact on this Court's consideration of the certified question on the retroactivity of *Dynamex*. Notably, *Mattei*, and *People v. Uber* affirm the importance, as explicated in *Dynamex*, of applying a broad definition of the "suffer or permit" prong of "to employ," in order to effectuate the vital protections of the California Labor Code and Wage Orders.

This Court should either withdraw the certification here (given the mootness of the issue presented, based upon the Legislature's enactment of A.B. 5), or the Court should take the opportunity to confirm that the "suffer or permit" test enunciated in *Dynamex*, the "ABC" test, applies retroactively.

Dated: October 30, 2020

Respectfully submitted,



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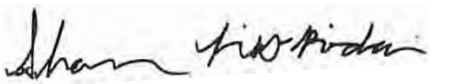
CERTIFICATE OF WORD COUNT COMPLIANCE

In accordance with California Rules of Court, rule 8.250(c), I hereby certify that this brief contains 1,923 words as established by the word count of the computer program (Microsoft Word) used for preparation of this brief.

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 13-point size Times New Roman font.

Dated: October 30, 2020



Shannon Liss-Riordan
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Attorney for Petitioners

EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chairman

October 15, 2020

The Honorable Jan Schakowsky
U.S. House of Representatives
Washington, DC 20515

Dear Representative Schakowsky:

Thank you for your letter requesting that the Federal Trade Commission ("FTC" or "Commission") investigate potential anticompetitive, unfair, or deceptive conduct by online food delivery service platforms and food industry franchisors, especially in the wake of the economic disruption caused by the ongoing COVID-19 pandemic emergency period. I appreciate hearing your views and agree that vigorous FTC enforcement within the food industry and beyond is essential to promoting the public interest, especially during the current pandemic period.

As you know, to avoid duplication and maximize the effectiveness of concurrent federal antitrust jurisdiction, the Commission and the Antitrust Division of the Department of Justice have long maintained a liaison arrangement through which we divide responsibility for antitrust review. Pursuant to that arrangement, the Commission will defer to the Antitrust Division with respect to your specific request for an investigation of the proposed merger of Uber Eats and Postmates Inc.

Regarding the Commission's antitrust enforcement efforts, as I discussed during my testimony at a recent hearing before the House Judiciary Committee,[1] challenging unlawful anticompetitive mergers and practices by online platforms, such as food delivery service platforms, remains a top FTC priority. The recently formed Technology Enforcement Division within our Bureau of Competition has strengthened our ongoing enforcement efforts in the technology sector. That office carefully monitors competition in U.S. technology markets, investigates any conduct in these markets that may harm competition, and, when warranted, recommends Commission enforcement actions to ensure that consumers benefit from free and fair competition.

In addition to the FTC Act, the Commission enforces several trade regulation rules, including the Franchise Rule.[2] The Franchise Rule is a pre-sale disclosure rule. While the Rule requires franchisors to provide a Financial Disclosure Document to prospective purchasers, it does not regulate the substantive terms of the franchisor-franchisee relationship. FTC staff continue to monitor all franchise complaints and investigate franchisors that may be in violation of Section 5 of the FTC Act or the Franchise Rule. In that regard, staff communicates regularly

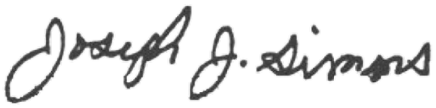
[1] Prepared Statement of Joseph J. Simons, Chairman, Fed. Trade Comm'n, Before the U.S. House Judiciary Committee Subcommittee on Antitrust, Commercial and Administrative Law, on "Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies" (Nov. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1553856/p180101_house_competition_oversight_testimony_-_platforms_part_4_11-13-2019.pdf.
[2] 16 C.F.R. Part 436.

with members of the Franchise and Business Opportunities Project Group of the North American Securities Administrators Association, which includes representatives from the offices of eight state Attorneys General.[3] Statutory and regulatory provisions prevent me from disclosing the existence or details of nonpublic Commission investigations or evaluations.

As part of the agency's systematic review of all current Commission rules and guides, the agency last month announced that it will host an online public workshop on the Franchise Rule on November 10.[4] The workshop will explore a number of issues related to the Rule, as well as comments received in response to the FTC's request for comment, including financial performance representations, the use of disclaimers, and the format of the disclosure document required by the Rule. The workshop is part of the Commission's ongoing effort to ensure that consumers who are considering buying a franchise have key information they need to weigh the risks and benefits of that potential investment.

Thank you again for raising this subject. If you have any questions or wish to submit a comment for consideration at the upcoming online public workshop on the Franchise Rule, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,



Joseph J. Simons
Chairman

cc: The Honorable Makan Delrahim
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

[3] *See generally* https://www.nasaa.org/about/.
[4] FTC Press Release, *FTC to Hold Virtual Workshop November 10 on Franchise Rule* (Sept. 4, 2020), https://www.ftc.gov/news-events/press-releases/2020/09/ftc-hold-virtual-workshop-november-10-franchise-rule.

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I am over the age of 18 and not a party to the within action; my business address is 729 Boylston Street, Suite 2000, Boston, Massachusetts 02116.

On October 30, 2020, I served the attached **PETITIONERS' RESPONSE TO JAN-PRO'S SUPPLEMENTAL BRIEF,** on:

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Via True Filing.

And, will be served via First-Class mail, on:

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Supreme Court of California

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 30, 2020, in Boston, Massachusetts.

By: 

MARIA CEDENO

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 10/30/2020 by Regine Ho, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **VAZQUEZ v. JAN-PRO FRANCHISING INTERNATIONAL**
Case Number: **S258191**
Lower Court Case Number:

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3. I served by email a copy of the following document(s) indicated below:

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

10/30/2020

Date

/s/Shannon Liss-Riordan

Signature

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