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

OPENING BRIEF OF PETITIONERS

SHANNON LISS-RIORDAN
(SBN 310719)
Lichten & Liss-Riordan, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
Telephone: (617) 994-5800
Facsimile: (617) 994-5801
sliss@llrlaw.com

Attorney for Petitioners

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729 Boylston Street, Suite 2000
Boston, MA 02116
Telephone: (617) 994-5800
Facsimile: (617) 994-5801
sliss@llrlaw.com

Attorney for Petitioners

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QUESTIONS PRESENTED FOR REVIEW

On September 24, 2019, pursuant to California Rule of Court 8.548, the Ninth Circuit certified for review to this Court in *Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2019) 939 F.3d 1045, 1046, the following issue:

1. Does the Court's decision in *Dynamex Operations West Inc. v. Superior Court* (2018) 4 Cal.5th 903, apply retroactively?

In addition to this certified question, this case raises several other extremely important and pressing issues of law concerning the correct application of the *Dynamex* decision. These issues have each resulted in conflicting decisions among the state and federal courts, and so Petitioners urge the Court to address these questions as well:

2. Does *Dynamex* apply in determining whether a franchisee has been misclassified as an independent contractor and thereby suffered alleged wage-and-hour violations?[1]
3. Does *Dynamex* apply in determining whether an entity is a joint employer?[2]
4. Does *Dynamex* apply to claims brought under Cal. Lab. Code. § 2802?[3]

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[1] The parties have jointly requested that the Court take up this question. *See* Joint letter submitted by the parties October 25, 2019, pursuant to Cal. Rule of Court 8.548(f)(1).

[2] Plaintiffs have separately requested that the Court take up this question. *See* Petitioners' separate letter submitted October 25, 2019.

[3] Plaintiffs have separately requested that the Court take up this question. *See* Petitioners' separate letter submitted October 25, 2019.

INTRODUCTION

In April 2018, this Court issued a unanimous, 82-page decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, announcing the adoption of the Massachusetts ABC test as clarification of the "suffer or permit" employment test previously set forth by this Court in *Martinez v. Combs* (2010) 49 Cal.4th 35. Since then, employers across California have sought to cabin the impact of the decision, for example by arguing it should not be given retroactive effect and that it should not apply in various employment contexts (such as, when workers are classified as "franchisees" or when workers are directly contracted by intermediary entities) or to claims brought forth under the Labor Code (particularly § 2802) – results that clearly run counter to, and threaten to undermine, this Court's analysis in *Dynamex.*

In *Dynamex*, this Court emphasized, repeatedly, the high stakes of selecting the correct standard in order to forward the remedial purpose of California wage law and effectuate basic legal rights and protections afforded to workers under the law. *Dynamex*, 4 Cal.5th at 954-58. The California state legislature has now doubled down on the importance of this Court's decision in *Dynamex*, with the passage of 2019 California Assembly Bill No. 5, California 2019-2020 Regular Session, ("A.B. 5"), which codifies the ABC test to the maximum extent permitted by law in order to further protect workers, competing businesses, and the public at large, as *Dynamex* intended. *See* A.B. 5, Section 1.

At the core of this Court's decision in *Dynamex* is the need to forward the remedial purpose of California wage legislation. Misclassification, franchising, and other forms of fissured employment are all recognized threats to this aim, as this Court acknowledged in *Dynamex*. *See Dynamex*, 4 Cal. App. 5th at 957-58 (citing DAVID WEIL, THE

FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) pp. 204-05). Nowhere in the decision are the suggestions that employers now conjure, that the test should only be applied narrowly, that it does not apply to various Labor Code claims, that it does not apply in a fissured workplace context (including in the franchise and joint employment contexts), and that it created such a huge break with prior law that it should not apply retroactively.

This case typifies the exact scenario the Court's decision in *Dynamex* intended to address. Petitioners here are low-wage cleaning workers, laboring in an industry in which the fissured employment model is prevalent and workplace violations are rampant. *See* discussion *infra* Argument, Part II.C. Jan-Pro has deployed a "franchise" model, and has divided it into three tiers, as a subterfuge in order to evade employer liability, ensure that workers do not receive the protections of the Labor Code, and require that workers actually have pay for their jobs (something that the Massachusetts Supreme Judicial Court, in a case where cleaning franchise workers who were determined to be misclassified under the ABC test, held violates public policy, *see Awuah v. Coverall North America, Inc.* (2011) 460 Mass. 484, 498). As a result, this case (like many cases now analyzed under *Dynamex*, particularly in the hotly litigated area of whether "gig economy" workers have been misclassified) centers on reimbursement claims brought forth pursuant to Cal. Lab. Code § 2802. This denial of Labor Code protections (and charging workers for their jobs) enables Jan-Pro (like so many employers across California) to set bottom-of-the barrel prices that its law-abiding competitors cannot afford to compete with, thereby depressing labor standards generally. These are the exact concerns that animated this Court's decision in *Dynamex*, 4 Cal.5th at 952-53.

The questions raised in this case reflect the unsettled case law spawned by employer attempts to defend against *Dynamex* in the nearly two years since it was issued. But the *Dynamex* decision, and now its sweeping codification in the form of A.B. 5, counsels against such confinement of its impact. In keeping with the Court's declarations and underlying policy rationale set forth in the *Dynamex* opinion, this Court should clarify that: (1) *Dynamex* applies retroactively, in accordance with the usual rule that judicial decisions clarifying existing law are given retroactive effect, *see Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978 (*see* Part I); (2) no special or different test should apply for franchisors facing wage violation claims, as courts in a number of states across the country have held (*see* Part II); (3) the ABC test, which clarified the "suffer or permit" employment test in a joint employment case, should be applied in the joint employment context (*see* Part III); and (4) *Dynamex* teaches that the remedial purpose of the legislation at issue determines the applicable standard to apply to the question of employment status, which for purposes of the Cal. Lab. Code § 2802 is the ABC test (*see* Part IV).

These questions are interrelated. Not only are they all central to the resolution of this case but resolving one while leaving the others unaddressed leaves open escape hatches that employers will continue to exploit in the face of unsettled law. California workers, competitors, and the public at large, will continue to suffer as long as employers are able to evade their obligations under the wage law, and *Dynamex*'s purpose will be undercut and its analysis weakened. It is therefore vital for this Court to settle these (unsettled) questions of state law in the wake of *Dynamex*, in order to enforce the California labor standards and thus "enable [workers] to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect," as this Court intended. *Dynamex*, 4 Cal.5th at 952.

FACTUAL BACKGROUND

Petitioners Gerardo Vazquez, Gloria Roman, and Juan Aguilar claim that Jan-Pro Franchising International, Inc. ("Jan-Pro") misclassified them as independent contractor "franchisees" and, as a result, Petitioners suffered wage and hour violations. *Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir.) No. 17-16096, ECF Dkt. No. 13 (Appellant's Opening Br.) at 5.[4] Petitioners were required to pay thousands of dollars in "franchise fees" in order to obtain cleaning jobs[5]; had unlawful deductions taken from their pay; were not paid overtime for hours worked in excess of 40 hours a week or 8 hour a day; and were not guaranteed minimum wage for their cleaning work. *Id.* at 5-6.

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[4] As the Ninth Circuit's opinion acknowledges, this litigation is borne out of *Depianti v. Jan-Pro Franchising Int'l, Inc.* (1st Cir. 2017) 873 F. 3d 21, which began in Massachusetts back in 2008. *Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2019) 923 F.3d 575, 579, *reh'g granted opinion withdrawn*, 930 F.3d 1107, and *on reh'g*, 939 F.3d 1045, and *opinion reinstated in part on reh'g*, 939 F.3d 1050. Because the issues certified do not involve those related to the *Depianti* litigation in either Massachusetts or Georgia (and therefore do not implicate Jan-Pro's res judicata and law of the case arguments), s*ee Jan-Pro*, 923 F. 3d at 586-88, this brief limits the factual and procedural background to that before this Court.

[5] Having been determined to be employees under the Massachusetts ABC test that was adopted by this Court in *Dynamex*, the Massachusetts Supreme Judicial Court held that requiring cleaning workers to pay for their jobs, under the guise of being independent contractor franchisees, violates Massachusetts wage law. *Awuah v. Coverall North America, Inc.* (2011) 460 Mass. 484, 497-98 ("paying for the privilege of going to work, and paying more the more urgently the job is needed, not only keeps people unnecessarily unemployed, but seems foreign to the spirit of American freedom and opportunity") (quoting *Adam v. Tanner* (1917) 244 U.S. 590, 604 (Brandeis, J., dissenting)). Petitioners seek the same result in this case under California law.

In order to justify the classification of cleaning workers as independent contractors, Jan-Pro describes itself as being in "the business of franchising." *Jan-Pro*, 923 F. 3d at 581. It has also structured itself in a multi-tiered model, through which it does not contract directly with the cleaners, but instead contracts through intermediaries that it calls "master franchisees". *Id.*

However, it is Jan-Pro that established the entire system under which the cleaning workers must be classified as independent contractors and pay thousands of dollars to obtain their cleaning work (and not receive the protections of the California Labor Code). *Jan-Pro*, No. 17-16096, ECF Dkt. No. 13 (Appellant's Opening Br.) at 6. Jan-Pro drafted the model franchise agreement that the intermediary master franchisees have the cleaning workers (referred to by Jan-Pro as "unit franchisees") sign, which classifies the workers as independent contractors. *Id.* at 7. Under this model agreement, the workers are required to provide cleaning services and, while doing so, to hold themselves out to the public as being part of Jan-Pro, including by wearing "Jan-Pro Cleaning Systems" branded clothing. *Id.* at 7. The workers are barred, under the terms of the agreement, from performing janitorial work other than through Jan-Pro, or risk termination. *Id.* at 8.

Petitioners Juan Aguilar and Gloria Roman each paid $2,800 for their cleaning "franchises," while Petitioner Gerardo Vazquez paid $9,000. *See Id.* at 8.[6] In addition to paying these fees to obtain the cleaning work, they were also required to pay all expenses necessary to provide cleaning services and had numerous deductions taken from their pay (such as

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[6] The cleaning workers typically make a down payment up front to pay for their franchise and then pay off the remainder through having additional payments taken out of their monthly checks. *Jan-Pro*, No. 17-16096, ECF Dkt. No. 13 (Appellant's Opening Br.) at 7-9.

insurance fees, "royalty fees", and "management" fees). These deductions cut Petitioners' earning to as little as $6 or less per hour. *Id.* at 8-9.

PROCEDURAL BACKGROUND

In May 2017, the United States District Court for the Northern District of California granted Jan-Pro's motion for summary judgment, ruling that Jan-Pro could not be Petitioners' employer and thus could not be liable for the alleged wage and hour violations. *See Roman v. Jan-Pro Franchising International, Inc.* (N.D. Cal. May 24, 2017) 2017 WL 2265447. In so ruling, the District Court considered the California wage test "with a gloss of" *Patterson v. Domino's Pizza* (2014) 60 Cal.4th 474. *Roman*, 2017 WL 2265447, at *3. Petitioners appealed the decision to the Ninth Circuit. *See Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir.) No. 17-16096 (docketed May 26, 2017).

Shortly after the parties completed briefing in the appeal, this Court issued its landmark decision in *Dynamex*. The Ninth Circuit ordered supplemental briefing addressing the effect of the decision on this case. *Jan-Pro*, 923 F. 3d at 579. Jan-Pro only devoted two pages of its sixteen-page supplemental brief to the effect of *Dynamex* and "principally" argued that *Dynamex* should not be applied retroactively, while Petitioners devoted their briefing to explaining why the Court's decision in *Dynamex* applied and compelled reversal of the District Court's ruling. *Id.*; *see generally Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir.) No. 17-16096, ECF Dkt. No. 54-1 (Appellant's Supp. Br.).

The Ninth Circuit agreed with Petitioners that *Dynamex* applies retroactively and to the claims in this case. The Court reversed the summary judgment decision based upon the application of the ABC test announced in *Dynamex*. *Jan-Pro*, 923 F. 3d at 580 ("there can be no question that the District Court's order granting summary judgment to Jan-

Pro must be reversed"). The Ninth Circuit held that, in accordance with the basic legal tenet that judicial decisions be given retroactive effect absent an exception, this Court's decision in *Dynamex* should be applied retroactively and rejected Jan-Pro's argument that to apply *Dynamex* retroactively would violate Jan-Pro's due process rights. *Id.* at 586-89. The Ninth Circuit also reversed the District Court's determination that a *Patterson* "gloss" should be applied to the wage claims in this case, *id.* at 594-96 and held that the ABC test enunciated in *Dynamex* should be applied to determine whether Petitioners were employees of Jan-Pro, despite the fact that Jan-Pro describes itself as a "franchisor" and despite the fact that Jan-Pro does not contract directly with Petitioners. *Id.* at 595-96 (citing *Depianti v. Jan-Pro Franchising International, Inc.* (2013) 465 Mass. 607). Jan-Pro petitioned for rehearing.

On September 24, 2019, upon Respondent's petition for rehearing, the Ninth Circuit withdrew its opinion, only to the extent it held that *Dynamex* applies retroactively. *Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2019) 939 F.3d 1045, 1046. Pursuant to California Rule of Court 8.548, the Ninth Circuit certified this question for review to this Court.

In a subsequent order, the Ninth Circuit reinstated "the remaining holdings from [its] now withdrawn opinion." *Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2019) 939 F. 3d 1050, 1051. Jan-Pro petitioned for rehearing *en banc* with respect to the reinstated portions of the decision, and the Ninth Circuit denied that petition. *Jan-Pro*, No. 17-16096, ECF Dkt. 126 (denying petition for rehearing en banc on Nov. 7, 2019).

Thereafter, the parties requested that this Court take up issues in addition to the retroactivity issue certified to this Court. The parties jointly requested that the Court address whether *Dynamex* applies to franchisees

claiming misclassification. *See* Joint letter (submitted Oct. 25, 2019). Petitioners separately requested that the Court also address whether *Dynamex* applies to the question of joint employment and whether *Dynamex* applies to claims brought under Cal. Lab. Code § 2802 (the primary claim in this case). *See* Petitioners' letter (submitted Oct. 25, 2019).

On November 20, 2019, this Court granted review of the Ninth Circuit's Certification Order and agreed to "decide the questions of California law presented in [the] matter." Order granting review (Nov. 20, 2019) (emphasis supplied). The Court did not clarify further the exact scope of the certified questions. Petitioners therefore urge the Court to address the additional important issues of California law they have suggested and have included them in this brief.

LEGAL BACKGROUND

While the Ninth Circuit's Certification Order notes that the Court has not yet expressly spoken on whether *Dynamex* applies retroactively, louder still are the myriad of other "issues involved" in this case on which this Court has not yet spoken. These issues have spawned unsettled law and have injected serious unpredictability in wage and hour litigation in California in the aftermath of *Dynamex*.

With respect to the question of whether *Dynamex* applies retroactively, all courts to consider the question to date have concluded that it does. *See Gonzales v. San Gabriel Transit, Inc.* (2019) 40 Cal. 5th 1131, 1156[7]; *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal. App. 5th 558, 572 n. 12; *Yeomans v. World Fin. Grp. Ins. Agency, Inc.*, (N.D.

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[7] This Court has granted review of the decision in *Gonzales*, though the case has been stayed pending the Court's resolution of this case. *See Gonzales v. San Gabriel Transit* (Cal.) S259027.

Cal. Nov. 6, 2019) 2019 WL 5789273, at *4 n.1; *Valadez v. CSX Intermodal Terminals, Inc.* (N.D. Cal. Mar. 15, 2019) 2019 WL 1975460, at *5; *Henry v. Central Freight Lines* (E.D. Cal. June 13, 2019) 2019 WL 2465330; *Juarez v. Jani-King of California Inc.* (N.D. Cal. Dec. 14, 2018) Civ. A. No. 09-3495, Dkt. 240; *Johnson v. VCG-IS, LLC* (Super Ct. Cal. July 18, 2018) Case No. 30-2015-00802813-CU-CR-CXC, Ruling on Motion in Limine, at *1–2 (Ex. A to Petitioners' Separate letter, submitted October 25, 2019).

In contrast, courts considering the questions of *Dynamex*'s applicability to varying wage and hour claims in irregular employment contexts have charted a more complicated path. In the wake of *Dynamex*, California state and federal courts, California state legislators, and California workers and employers have debated whether *Dynamex* and the ABC test adopted therein applies to wage and hour disputes brought forth under varying law and in varying workplace structures. These questions include several questions that lie at the heart of this case: whether *Dynamex* applies to "franchisors"; whether *Dynamex* applies to "joint employment" claims (where the worker does not contract directly with the alleged employer); and whether *Dynamex* applies to claims brought under Labor Code § 2802 (which this Court did not address in *Dynamex* itself because the parties there did not address it). This case thus raises an ideal opportunity to address these significant unsettled issues.

Moreover, the questions are of urgent importance to the State of California, as evidenced by public debate and the rapid development of the law. While courts have whittled away at application of the ABC test as set forth in *Dynamex*, the California state legislature endorsed the test as a central tool in combatting labor standard violations, in sweeping legislation that codified and expanded the application of *Dynamex*.

On September 10, 2019, the California state legislature passed 2019 California Assembly Bill No. 5 California 2019-2020 Regular Session, ("A.B. 5"), which explicitly codifies *Dynamex* with the intent to broaden the definition of "employee" to a wider pool of workers, so that more workers may be extended the benefits and protections of California employment law.[8] Both "gig economy" companies and franchisors campaigned for, and were denied, legislative carve-outs to A.B. 5. *See, e.g.*, Coalition Letter to California State Legislature, International Franchise Association ("IFA"), Aug. 27, 2019 ("We are writing to request . . . [an amendment that] will provide an exception for legitimate franchisors and franchisees"); Josh Eidelson, *Gig Firms Ask California To Rescue Them From Court Ruling*, BLOOMBERG, Aug. 6, 2018. (recounting gig economy lobbying the legislature for an exemption from the "ABC" test); Alicia Fernández Campbell, *Uber and Lyft Just Lost Another Battle in California*, VOX, Aug. 30, 2019. (lobbying efforts of gig economy companies rejected).

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[8] Section 1 of the bill states:

> (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.
>
> (e) It is also the intent of the Legislature in enacting this act to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. **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.**

(emphasis supplied.)

That the bill passed without an exemption for franchises also confirms that under A.B. 5, the *Dynamex* ABC test applies to misclassification claims brought in the franchise context. While A.B. 5 may make clear the legislative intent to apply the ABC test in the franchise context, existing case law and the Ninth Circuit intra-circuit split created by the decision in this case and in *Salazar v. McDonald's Corp.*, (9th Cir. 2019) 939 F. 3d 1051, *as amended upon denial reh'g*, 944 F. 3d 1024, continues to throw the issue into question and undermine the impact of *Dynamex*. Likewise, conflicting rulings on whether *Dynamex* applies to joint employment claims and whether it applies to Labor Code claims, particularly under § 2802, have undermined this Court's strong statement in issuing this landmark decision and are in urgent need of attention from this Court.

DISCUSSION

This Court's decision in *Dynamex* intended to supply a simplified definition of the "suffer or permit" test as set forth in *Martinez*, in order to effectuate the protections afforded to workers under California state employment law, and thus "enable [workers] to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect"; prevent unfair competition; prevent of substandard labor conditions; and protect the public at large from being made to "assume responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions." *Dynamex*, 4 Cal.5th at 952-53. The multi-factor test under *Borello* allowed ample room for employers to manipulate the employee status analysis and thus evade their obligations under California employment law. *Dynamex*, 4 Cal. 5th at 964. The purpose of enunciating the ABC test in *Dynamex*, as explained by this Court, was to strengthen enforcement of California labor standards by simplifying the applicable test and its application.

As outlined above, divergent case law and cursory analysis of *Dynamex* have frustrated that intent. Despite a clear endorsement of the ABC by the legislature, employers continue to resist application of the ABC test through direct lobbying – and by attempting to narrow the application of *Dynamex* to **only** Wage Order claims (and not claims brought under the Labor Code, or in particular § 2802), **only** predicated on independent contractor misclassification claims (and not claims involving joint employer liability), and **only** to conduct post-dating this Court's April 30, 2018, decisions. Such a narrow reading is at odds with the Court's stated intent to simplify the test and increase predictability; countless variations in the standard on nearly a case-by-case basis cuts against this goal. Arguments thus limiting the reach of *Dynamex* are nothing more than transparent attempts to cabin this Court's holding in *Dynamex* and should be put to rest before further divisions among state and federal courts further complicate the morass that has been created after this Court's landmark ruling. Nothing in the Court's language in *Dynamex* supports these arguments, and, for the reasons set forth below, these arguments should be rejected. Absent explicit rejection of these arguments from this Court, disagreement on the correct standard will fester and unpredictability will continue to reign and undermine workers' ability to effectuate their rights.

I. THIS COURT SHOULD CLARIFY, CONSISTENT WITH BASIC LEGAL PRINCIPLES, THE PURPOSE OF *DYNAMEX* AND COURTS' ANALYSIS TO DATE, THAT *DYNAMEX* APPLIES RETROACTIVELY.

A common argument that employers have raised since this Court's decision in *Dynamex* is that the decision does not apply retroactively. Indeed, in this case, Jan-Pro primarily relied on this argument in its supplemental briefing in the hopes of sidestepping application of the ABC test to the claims in this case. The Ninth Circuit, as has every other court to

encounter the question, correctly rejected that argument and held that *Dynamex* applies retroactively, as signaled by the fact that this Court did not limit the decision to prospective effect only and then declined to modify the decision to so state, even after expressly being asked to do so. *See* Dynamex, 4 Cal. 5th 903, *denying modification* June 20, 2018.[9] There is no reason that this Court should deviate from the general rule that judicial decisions interpreting existing law be given retroactive effect.

A. THERE IS NO REASON TO DEPART FROM THE USUAL RULE GIVING JUDICIAL DECISIONS RETROACTIVE EFFECT

As the Ninth Circuit stated, "it 'is basic in our legal tradition' that 'judicial decisions are given retroactive effect.' " *Jan-Pro*, 923 F. 3d 575, 586 (quoting *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978); *see also Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal. 4th 489, 509; *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1207; *People v. Guerra* (1984) 37 Cal.3d 385, 399 ("even a non-retroactive decision . . . ordinarily governs all cases still pending on direct review when the decision is rendered."); *Mendiola v. CPS Sec. Sols., Inc.*

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[9] Several courts have noted this point in holding that *Dynamex* applies retroactively. *See Jan-Pro*, 923 F. 3d at 586 ("actions sometimes speak louder than words"); *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal. App. 5th 558, 572 n. 12 ("As an academic point, we observe that *Dynamex* applied the ABC test to the class certification question before it, and the Supreme Court denied later requests to modify the opinion to apply the ABC test only prospectively."); *Johnson*, Case No. 30-2015-00802813-CU-CR-CXC at *2 ("Given the age of the claims in the *Dynamex* case, and the Court's longstanding acknowledgment of its authority to make such a statement [declaring only prospective application], the lack of such a pronouncement suggests that the decision should apply retroactively") (internal citation omitted).

(2015) 60 Cal.4th 833, 848[10]; *see also Gonzales*, 40 Cal.App.5th at 1156 (collecting cases). Judicial decisions that do not materially change the law, but merely "refine" existing law, are given retroactive effect.[11]

The ABC test this Court adopted in *Dynamex* did not create new law, as it did not create new factors for determining employee status but, rather, was a distillation of the factors considered under the "*Borello* standard." *See S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341. The adoption of the ABC test, as this Court explained, was a clarification of the "suffer or permit" test from *Martinez*, which was meant to "provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis." *Dynamex*, 4 Cal. 5th at 964.

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10 Only "*narrow* exceptions to the general rule" exist. *Mendiola*, 60 Cal. 4th at 848, n.18 (emphasis in original).

11 As this Court has made clear:

> To determine whether a decision should be given retroactive effect, the California courts first undertake a threshold inquiry [regarding whether] the decision establish[es] a new rule of law[.] If it does, the new rule may or may not be retroactive, as we discuss below; but if it does not, "no question of retroactivity arises" because there is no material change in the law... The most common examples of decisions that do not establish a new rule of law in this sense are those which explain or refine the holding of a prior case...

People v. Guerra, (1984) 37 Cal. 3d 385, 399. Narrow exceptions to this usual rule apply only "when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule" or where the new decision would "raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law." *Sierra Club v. San Joaquin Local Agency Formation Com.*, (1999) 21 Cal. 4th 489, 508.

Dynamex can be understood as a continuation of the development of the law in this area and a development specifically intended by this Court to create brighter lines and create a more predictable standard for providing employment protections to workers. *See Johnson*, Case No. 30-2015-00802813-CU-CR-CXC at *1-2. "[T]o the extent *Dynamex* merely extended principles stated in *Borello* and *Martinez*, the new standard represented no greater surprise than tort decisions that routinely apply retroactively," *Garcia*, 28 Cal. App. 5th at 572 n. 12,[12] and thus should be given retroactive effect. *See Jan-Pro*, 923 F. 3d at 588.

The ABC test did not dispose of the factors considered under the *Borello* analysis; rather the *Borello* factors are now embodied, albeit in a re-organized manner, in the ABC test. *See Dynamex*, 4 Cal.5th at 958-62. For example, Prong A addresses the hiring entity's right to control the manner and means by which the plaintiff's work is accomplished, mirroring the analysis in *Borello*. *See Dynamex*, 4 Cal.5th at 958 ("as under *Borello* . . . a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control"). As under *Borello*, an important factor "in assessing whether a plaintiff is an employee or independent contractor" remains the right to control. *See Borello*, 48 Cal.3d at 350; *Dynamex*, 4 Cal.5th at 932-33. Prong B incorporates the inquiry under Borello as to "whether the service rendered is an integral part of the alleged employer's business," *Borello*, 48 Cal.3d at 355, as Prong B similarly focuses on whether the "services are provided within the usual course of the hiring entity's business." *Dynamex*, 4 Cal.5th at 959-60. Likewise, Prong C, now embodies *Borello*'s concern that the independent

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[12] *Garcia*, 28 Cal. App. 5th at 572 n. 12 (citing *Newman*, 48 Cal.3d at 984; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 25 (giving decision retroactive effect when the decision "was a clarification of the law as it existed," merely "but a logical extension" or established principles).

contractor classification be reserved for an "individual who independently has made the decision to go into business for him or herself," by requiring that the employer now prove the worker is engaged in a distinct occupation or business. *Dynamex*, 4 Cal.5th at 922, 962 (citing *Borello*, 48 Cal.3d at 341, 349).

Furthermore, the ABC test need not fully subsume the *Borello* factors, or apply them the same way, in order to constitute a continued development of the case law. As *Borello* itself acknowledged, and this Court opined, "the *Borello* court concluded that in determining whether a worker should properly be classified as a covered employee or an excluded independent contractor with deference to the purposes and intended reach of the remedial statute at issue, it is permissible to consider all of the various factors set forth in prior California cases, in [the Labor Code] and in the out-of-state cases adopting the six-factor test." *Dynamex*, 4 Cal.5th at 932. *Borello* teaches (as does *Dynamex*) that the scope of the definition must be determined by the "intended scope and purposes of the particular statutory provision or provisions at issue. . . *Borello* calls for application of the *statutory purpose* standard." *See Dynamex* 4 Cal.5th at 934.

Following this statutory purpose analysis and the history of the case law interpreting this purpose, the Court found that in order to fulfill the important public policy goals of the wage laws and to prohibit abuse of the wage laws, a simple and broad "employee" definition must be applied that ensures that any worker performing work in the usual course of the hiring entity's business receives the protections of the relevant wage laws. *See Dynamex*, 4 Cal. 5th at 964 (the "ABC" test "interpretation of the suffer or permit to work standard is **faithful to its history** and to the **fundamental purpose** of the wage orders") (emphasis supplied); *see also Jan-Pro*, 923 F. 3d at 588; *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. 5th at 1156 ("*Dynamex* expressly articulates its purpose was to streamline the existing,

complex, multifactor wage order analysis"); *Johnson*, Case No. 30-2015-008028120-CU-CR-CXC, at *2 (holding that Court adopted the "ABC" test to "satisfy these aims"). The Court extensively recounted existing case law and charted its development, *see Dynamex*, 4 Cal.5th at 927-42; the Court did not upend (or dispose of) the existing standard or subvert the law. Rather, the Court followed previous case law and the remedial purpose of the law. That A.B. 5 confirms this Court's analysis in ascertaining the remedial purpose of California labor law now requires the ABC test merely puts a fine point on this Court's conclusion in *Dynamex* that clear enunciation of the standard is necessary to forward the purpose of California wage and hour law and protect workers.

All courts to date that have considered the question agree that there is no reason to depart from the usual rule and that *Dynamex* applies retroactively. *See, e.g., Gonzales v. San Gabriel Transit, Inc.* (2019) 40 Cal. 5th 1131, 1156 ("there is no reason to conclude that *Dynamex* departs from the usual rule or retroactive application. Judicial decisions in civil litigation almost uniformly are given retroactive effect and applied to pending litigation"); *see also Garcia v. Border Transportation Group, LLC* (2018) 28 Cal. App. 5th 558, 572 n. 12; *see also Yeomans v. World Fin. Grp. Ins. Agency, Inc.*, 2019 WL 5789273, at *4 n.1 (N.D. Cal. Nov. 6, 2019); *Valadez v. CSX Intermodal Terminals, Inc.* (N.D. Cal. Mar. 15, 2019) 2019 WL 1975460, at *4-5 (rejecting defendant's argument that defendant should be afforded shelter under the "fairness and public policy" exception to the usual rule); *Johnson v. VCG-IS, LLC* (Super Ct. Cal. July 18, 2018) Case No. 30-2015-00802813-CU-CR-CXC, Ruling on Motion in Limine, at *1–2.

B. THERE ARE NO FEDERAL DUE PROCESS CONCERNS THAT BLOCK RETROACTIVE APPLICATION OF *DYNAMEX*

Jan-Pro has argued that retroactive application of the ABC test violates Jan-Pro's federal due process rights.[13] This argument should be rejected because *Dynamex* did not announce an "arbitrary and irrational" rule of law, nor does it unfairly expand civil penalties, particularly in light of the fact that Jan-Pro was already on notice that its practice of misclassification was being challenged for violating the Labor Code. In short, Jan-Pro could take no comfort in knowing that its treatment of the cleaning workers was legally sound under the law prior to *Dynamex*, given that its conduct has been challenged in this case since 2008.

Under *Pension Ben. Guar. Corp. v. R.A. Gray & Co.* (1918) 467 U.S. 717, 733, "retrospective civil legislation may offend due process if it is particularly 'harsh and oppressive,'" and "that standard does not differ from the prohibition against arbitrary and irrational legislation." As the Ninth Circuit held in *Jan-Pro*, "[a]pplying *Dynamex* retroactive is neither arbitrary nor irrational," as this Court's decision dutifully traced the history of the remedial legislation at hand and remained fundamentally "faithful" to the legislation's purpose and history. *Jan-Pro*, 923 F. 3d at 589. To call the Court's 82-page decision in *Dynamex* "arbitrary [or] irrational" is belied by the length and depth of the analysis in the decision itself.

Jan-Pro also argued in its petition for rehearing that such broadening and strengthening of the California wage laws violates due process because it expands the scope of civil penalties available under California state employment law. This argument fails because it, at bottom, is an attempt to

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[13] This question is not actually before the Court, per the Ninth Circuit's order reinstating the portion of its decision addressing (and rejecting) this argument. *Jan-Pro*, 939 F. 3d at 1051 ("We [] rejected [Jan-Pro's] contention that a retroactive application [of *Dynamex*] would violate its federal due process rights. . . We continue to adhere to those conclusions and incorporate them here by reference.") (citing *Jan-Pro*, 923 F. 3d at 575). Petitioners nevertheless address it here, should the Court choose to address it.

reject any strengthening of labor standards through judicial decisions and flies in the face of this Court's precedents that have applied other decisions expanding civil penalties retroactively. *See, e.g., Alvarado v. Dart Container Corp. of California* (2018) 4 Cal. 5th 542, 573, as modified (Apr. 25, 2018) ("Defendant's counsel argued that, if applied retroactively, a holding in plaintiff's favor will force employers all over the state to pay costly civil penalties....[However,] if we were to restrict our holding to prospective application, we would, in effect, negate the civil penalties, if any, that the Legislature has determined to be appropriate in this context, giving employers a free pass as regards their past conduct."); *Mendiola v. CPS Sec. Solutions, Inc.* (Jan. 8, 2015) 60 Cal. 4th 833, 848 n.18 (endorsing broad view of Wage Order's "sleeping period" exception and declining to apply it prospectively).

Jan-Pro may also argue that it "relied" on *Borello* (or other prior caselaw) in deciding that the cleaning workers were properly classified as independent contractor franchisees. Such an argument is futile, as the question of whether Jan-Pro franchisees have been properly classified as independent contractors was highly uncertain even prior to *Dynamex*; indeed these claims were originally brought forth more than a decade age, and the partied were litigating this ongoing appeal when *Dynamex* was decided. Thus, this is not a situation in which a party chose to engage in specified conduct by relying on a longstanding clear statement of the law that it was complying with the law.[14] Jan-Pro cannot claim that it took comfort under the *Borello* standard (or the pre-*Dynamex* caselaw generally) knowing its cleaning workers were properly classified as independent

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[14] *See Dardarian v. OfficeMax N. Am., Inc.* (N.D. Cal. 2012) 875 F. Supp. 2d 1084, 1091 (rejecting reliance argument when the judicial decision "did not overrule a California Supreme Court precedent and thus, was not a clear break from a well-established prior 'rule'").

contractor franchisees. Rather than relying upon well-established legal precedent construing the law in its favor, Jan-Pro simply relied upon its own flawed interpretation of the law.

As the Ninth Circuit held, far from barring retroactive application or violating due process, the concerns in *Dynamex* necessitate retroactive application:

> By applying *Dynamex* retroactively, we ensure that the California Supreme Court's concerns are respected. Besides ensuring that Plaintiffs can provide for themselves and their families, retroactivity protects the janitorial industry as a whole, putting Jan-Pro on equal footing with other industry participants who treated those providing services for them as employees for purposes of California's wage order laws prior to *Dynamex*. And retroactive application ensures that California will not be burdened with supporting Plaintiffs because of the "ill effects" that "result[ ] from substandard wages." Moreover, liability is placed on the entity that created the business structure at issue.

Jan-Pro, 923 F. 3d at 589 (internal citations omitted). This Court's opinion in *Dynamex* was clear, as evidenced by the acuity of the Ninth Circuit's analysis (and the consensus amongst California courts on the question of retroactivity), yet employers continue to devise and push various arguments that *Dynamex* should not be applied retroactively, in order to lessen the impact of the decision and avoid liability under the law.

In certifying the question, the Ninth Circuit did not emphasize lack of clarity in the law, but rather highlighted that this Court had not yet expressly spoken on the question and that its answer will be of outsized importance to the State of California and its workers. *Jan-Pro*, 939 F. 3d at 1048-49 (describing the impact of retroactive application of *Dynamex* on the State of California). Accordingly, having granted review, this Court should clarify its opinion in *Dynamex* and announce expressly that the ABC test adopted therein be given retroactive effect.

II. THE ABC TEST SET FORTH IN *DYNAMEX* APPLIES TO DETERMINE WHETHER WORKERS WHO HAVE SUFFERED WAGE AND HOUR VIOLATIONS, SUCH AS PETITIONERS HERE, CAN BRING WAGE CLAIMS AGAINST FRANCHISORS

The argument that the *Dynamex* ABC test does not apply in the franchise context flies in the face of this Court's opinion in *Dynamex*, the principles undergirding the decision, and sheer logic. To start, this Court not only expressly stated that it was adopting the Massachusetts version of the ABC test, it also cited to two Massachusetts decisions in illustrating application of the test, which had applied the ABC test to misclassification claims brought against franchisors (and which had both held the workers to have been misclassified). *See Dynamex*, 4 Cal.5th at 963 (citing *Awuah v. Coverall North America, Inc.* (D.Mass. 2010) 707 F.Supp.2d 80, 82 (concluding that workers were employees of franchisor under Prong B); *Coverall N. America v. Div. of Unemployment* (2006) 447 Mass. 852, 856-58 (concluding that worker was employee of franchisor under Prong C)). It is illogical to read this Court's opinion, and its specific citation to two cases challenging franchisors for wage and hour violations, as intending to not apply to wage claims brought forth in the franchise context. Moreover, such a reading does not accord with the underlying principles of and the clear message contained in *Dynamex*.

A. DESPITE THE CLEAR MESSAGE OF *DYNAMEX*, AND THE PANEL'S DECISION IN THIS CASE, THE NINTH CIRCUIT REFUSED TO APPLY THE ABC TEST IN THE FRANCHISE CONTEXT AND THUS CREATED AN INTRACIRCUIT SPLIT WITH *SALAZAR*

Employers have attempted to seek refuge in the "franchise" business model in order to avoid application of the ABC test. However, this project

is a misadventure. This Court adopted the ABC test for purposes of "increased clarity and consistency" and, in describing the test, cited two Massachusetts cases where the ABC test was applied and resulted in the franchisee cleaning workers being held to be employees under Massachusetts law. *Id.* (citing *Awuah*, 707 F.Supp.2d 80 at 82; *Coverall N. America*, 447 Mass. at 857). Nothing in *Dynamex* counsels in favor of the adoption of a special employment test for franchisors in the context of wage and hour claims.

In this case, the Ninth Circuit correctly read the *Dynamex* decision as applying in the franchise context. The Ninth Circuit recognized that despite the "special features of the franchise relationship," *see Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 732-34, there is no reason – as this Court in *Dynamex* indicated – to apply a special test (or to differently apply the ABC test) in the franchise context for purposes of determining employee status in wage and hour litigation. *Jan-Pro*, 923 F. 3d at 594.[15] This conclusion is in keeping with courts across the country that have resisted attempts by franchisors to carve a "franchise exception" into state and federal tests for distinguishing employees from independent contractors. *See, e.g., 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

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15 "*Dynamex*, which did not mention *Patterson*, is about wage orders. There is no reason that the tests for employee status must necessarily be the same in wage order cases as in vicarious liability tort cases." *Vazquez*, 923 F. 3d at 594.

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.) Civ. A. No. 1:07-cv-10066, ECF Dkt No. 230-6, 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... The clients of the franchisees are the clients of Jani-King, Boston...[W]hen a franchisee provides a cleaning, it is acting in the course of the business of Jani-King, Boston.").[16]

Despite the apparent clarity that *Dynamex* applies in the "franchise" context, recently, a different panel of the Ninth Circuit held in *Salazar v. McDonald's Corp.* (9th Cir. 2019) 939 F. 3d 1051, *as amended upon denial reh'g*, 944 F. 3d 1024, that *Dynamex* did **not** apply in a wage and hour dispute brought against a franchisor. *Id.* at 939 F. 3d at 1052.[17] The *Salazar* opinion, which relied on *Patterson* and acknowledged the interim decision in *Jan-Pro* only cursorily, has created confusion throughout

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16 *See also Depianti*, 465 Mass. at 623-24 ("Jan-Pro's contractual arrangement with [the intermediary franchise], if enforceable, would provide a means for Jan-Pro to escape its obligation, as an employer, to pay lawful wages under the wage statute. G.L. c. 149, § 148. To allow such an "end run" around [the statute] would contravene the express purpose of the statute"); *Hayes v. Enmon Enterprises, LLC*, (S.D. Miss. June 22, 2011) No. 3:10-CV-00382-CWR, 2011 WL 2491375, at *5-7 (holding that Jani-King franchisees could be employees).

17 As detailed in Petitioners' letter to the Court, the Ninth Circuit denied Plaintiff-Appellant's petition for rehearing and request for certification in *Salazar*, meaning that the intra-circuit split cannot be addressed now through *Salazar*. *See Salazar v. McDonald's Corp.* (9th Cir. 2019) 944 F. 3d 1024, *denying reh'g* (Dec. 11, 2019).

California from what is now perceived to be a significant split of authority on the question of whether *Dynamex* applies in the franchise context.[18]

Dynamex emphatically states the importance of enforcing the labor standards in all contexts – including (and perhaps especially) in the franchise context. Allowing the confusion wrought by *Salazar* to stand would undermine this goal and injure workers across the State of California.

Low-wage labor in California (and the United State more broadly) has shifted towards what labor scholars have termed "fissured employment," wherein large hiring entities shift labor costs and liabilities to smaller, intermediate employers.[19] Franchising typifies fissured employment and its consequences.[20] The franchise structure insulates the

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[18] Beth Ewen, *"Wacky Tobacky," Plus More Hot Topics from Lawyers At ABA Forum*, FRANCHISE TIMES, Dec. 19, 2019 ('In Salazar v. McDonald's [sic] the Ninth Circuit struck again and **went in a completely opposition direction'** from Vazquez v. Jan Pro [sic], said [Heather Carlson] Perkins [of Faegre Baker Daniels] . . . '**So, where does this leave us? There is a lot we don't know yet.**'") (emphasis supplied); Jonathan Solish, *A Week After One Ninth Circuit Panel Threatens the Franchising Model, Another Redeems It*, THE RECORDER, Oct. 4, 2019 ("[T]he *Salazar* court was mindful of the holding of the *Vazquez* panel" that *Dynamex* (and not *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474,) applied to determine whether an entity was plaintiffs' employer, but "[t]he *Salazar* court nonetheless [] chose to follow **a completely contrary approach**.") (emphasis supplied).

[19] David Weil, *Enforcing Labor Standards in Fissured Workplaces: The US Experience*, THE ECONOMIC AND LABOR RELATIONS REVIEW V. 22, NO.2, pp. 36–37 (July 2011), *available at* http://www.fissuredworkplace.net/assets/Weil.Enforcing-Labour-Standards.ELRR-2011.pdf.

[20] By outsourcing labor responsibilities to intermediate entities that directly hire workers, franchisors can exercise authority over how a business is run while attempting to shield themselves from accountability. As a consequence, low-wage workers who experience wage-and-hour violations are unable to enforce their rights against the franchisor, and

top-tier company by outsourcing labor costs to intermediaries, while often maintaining control, and make violations of the labor law all but inevitable.[21] Further, as here, the franchise model has been used to justify charging workers in order to obtain work: first through franchise fees and subsequently through a variety of deductions for purported benefits such as "marketing" or "insurance" (typically costs borne by the employer, *see Awuah*, 460 Mass. at 497-98 & n. 22). These ill-disguised franchise businesses fuel a race to the bottom, as law-abiding competitors are unable to compete with basement-bargain prices, and "local economies are strained by the cumulative effect of lower wages on consumer spending and reliance on safety-net programs [and] local, state, and federal tax revenues suffer."[22]

As the Ninth Circuit's Certification Order makes clear, whether hiring entities can successfully evade their obligation under California state employment law through manipulation of the franchise model – or will be held to answer under the ABC test – has profound consequences for the California economy and its workers and employers:

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liability is abdicated to a smaller entity who is often judgment proof. This abdication occurs even where the franchisor has operational control over the working conditions that may have led to those labor violations in the first place. *Id.*

[21] Noncompliance with wage and hour laws is nearly 25% higher among franchisee-owned outlets than their company-owned equivalents. *See* David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It*, 131-2 Harv. Univ. Press (2014).

[22] *See* Catherine Ruckelshaus, Rebecca Smith, Sarah Leberstein & Eunice Cho, WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK, NATIONAL EMPLOYMENT LAW PROJECT 27 (2014), available at https:// www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-StandardsOutsourced-Work-Report.pdf.

> [T]he decision could lead to greater liability in economic sectors that rely more heavily on independent contractors. Franchising is one such sector, and it is large. There are more than 77,000 franchise establishments employing over 755,000 people in California. Others potentially affected are small businesses and their employees, as well as workers in the gig economy.

Jan-Pro, 939 F. 3d at 1049 (internal citations omitted).

Here, Jan-Pro has attempted to shield itself from liability under the ABC test by claiming to be in the business of franchising. Amicus briefs submitted by the International Franchise Association ("IFA") before the Ninth Circuit panel in this case and in support of Jan-Pro's subsequent petitions for rehearing underscore the importance of clarifying application of the ABC test to wage and hour claims in this case and, more broadly, against franchisors who plaintiffs allege are their "employers" under California state law. *See Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir.) Case No. 17-16096, ECF Dkt. No. 68.02 (*Amicus Curiae* Brief On Behalf of the International Franchise Association) ("This case is of profound importance to franchising."); *id.* ECF Dkt. No. 122 (*Amicus Curiae* Brief on Behalf of the International Franchise Association In Support of Petition for Rehearing). As parties in a joint letter submitted to this Court both agree, given the pivotal importance of the question to the claims in this case and the answer's broader impact, the Court should take up the question for review.

B. *DYNAMEX* MEANT TO CLARIFY, NOT CONFUSE, THE APPLICABLE STANDARD FOR DETERMINING EMPLOYER STATUS IN WAGE-AND-HOUR LITIGATION

This Court in *Dynamex* appeared driven by concerns regarding fissured employment: in adopting the ABC test, the Court cited the work of David Weil on "fissured employment" (who has written extensively on how fissured employment undermines worker rights in the janitorial cleaning

industry at issue in this case[23]), and his recommendations to counterbalance franchisors' efforts to outsource wage-and-hour liability to intermediaries. *Dynamex*, 4 Cal. App. 5th at 957-58 (citing DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) pp. 204-205). The Court also specifically cited work that recognized that franchising has been used as a subterfuge and which urged courts to adopt the ABC test to look beyond employer labels and stop employers' evasion of wage, tax, and other obligations. *Id.* at 958 n. 26 (citing Anna Deknatel & Laurne Hoff-Downing, *ABC On the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J.L. & Soc. Change 53, 84 ("the ABC test allows courts to look beyond labels and evaluate whether workers are truly engaged in a separate business or whether the business is being used by the employer to evade wage, tax, and other obligations."). The aims of the remedial wage legislation the Court analyzed were to prevent exactly those harms wrought by the franchise model. *Dynamex*, 4 Cal.5th at 952-53 (citing low-wages, unfair competition, and "the benefit of the public at large").

The Court held that the *Borello* factors were unworkable and impeded the enforcement of California labor standards, and (following the remedial purpose of the wage legislation) simplification was required. To now argue that this test applies to some wage and hour claims, and only in some contexts, runs counter to the core goal of *Dynamex*; it would be unreasonable for the Court to announce the ABC test in *Dynamex* only to

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[23] The janitorial cleaning industry is notorious for entities evading their employer obligations through outsourcing liability under the franchise business model: "'nonemployers'—those classified as independent contractors and franchises—account for 93 percent of all janitorial service companies." Basic labor law violations have increased as a result of fissured employment in the industry and is now rampant. *Id.* at 10.

further confusion by creating a separate test for franchisors accused of wage violations. Such an end-result would provide too much room for manipulation and too little room for predictability, the opposite of this Court's aim in *Dynamex*.

Moreover, there is no reason to modify the ABC test for franchisors in the wage and hour context. As this Supreme Court explained in *Dynamex*, in the vicarious liability context, where the question is whether the hirer of a worker should be held liable for the worker's torts, it makes sense to look at whether the hirer controls the details of the worker's activities. *See Dynamex*, 4 Cal. 5th at 927; *Patterson*, 60 Cal. 4th at 478 ("potential liability *on the theories pled here* requires that the franchisor exhibit the traditionally understood characteristics of an "employer" or "principal") (emphasis added). By contrast, in the wage and hour context, the remedial purposes of the social welfare legislation dictate that a broader definition of employee status must apply. *Dynamex,* 4 Cal. 5th at 952-53. The *Patterson* decision thus has no application to this wage and hour case, and the Ninth Circuit's cursory analysis in *Salazar*, dismissing the applicability of *Dynamex* to wage and hour claims brought forth against a franchisor, thus misses the aim of this Court's decision in *Dynamex* to clarify and simplify the standard, and underlines the need for clarification from this Court.

Franchisors should not be permitted to reap the profits of a franchise arrangement—while abdicating responsibility for the suffering of low-income workers—where their own policies or systems lead to wage violations. The ABC test in the franchise context is necessary to effectuate *Dynamex*'s goal of emboldening enforcement state employment law through the use of a simplified and clarified test. California state legislature has only further made clear that this is the correct approach, by

codifying *Dynamex* and refusing to carve out franchisors from application of the ABC test.

III. THE ABC TEST SET FORTH IN *DYNAMEX* CLARIFIED THE "SUFFER OR PERMIT" TEST FROM *MARTINEZ*, A JOINT EMPLOYER CASE, AND THEREFORE APPLIES TO DETERMINE WHETHER AN ENTITY IS A JOINT EMPLOYER.

In *Dynamex*, this Court interpreted the "suffer or permit" test as set forth in *Martinez*, which was itself a joint employer case. *Martinez* adopted the "suffer or permit" test in order to "reach irregular working arrangements" and guard against potential "impunity" of removed employers. *Martinez*, 49 Cal.4th at 58.

Dynamex establishes itself, and the ABC test set forth therein, as a continuation of this case law and the "suffer or permit" test from *Martinez*, and highlighted the same concerns: that the applicable employment test must guard against removed employers evading their obligations under state wage law. *Dynamex*, 4. Cal.5th at 944-45.[24] Accordingly, it logically follows, and the policy rationale confirms, that *Dynamex* supplies the correct standard for determining whether an entity is a joint employer for the purposes of wage and hour litigation.[25] However, employers have resisted

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[24] "*Martinez* demonstrates that the suffer or permit to work standard . . . can apply to the question whether, for purposes of the obligations imposed by a wage order, a worker *who is not an 'admitted employee'* of a distinct primary employer should nonetheless be considered an employee of an entity that has "suffered or permitted" the worker to work in its business." *Dynamex*, 4. Cal.5th at 944-45 (emphasis supplied).

[25] Arguments that the *Dynamex* ABC test does not apply to the joint employment question inverts the arguments presented to this Court in *Dynamex*, where the defendant argued that applying the "suffer or permit" language from *Martinez* to the claims in *Dynamex*, would constitute an extension of the test from joint employment questions. *Dynamex*, 4 Cal.5th

application of the test by arguing it should not apply in the joint employment context. The Ninth Circuit's decision in this case confirms otherwise, as it applied the ABC test to the plaintiffs' claims in this case, notwithstanding the fact that the workers did not directly contract with Jan-Pro (but instead with intermediate entities), and a significant portion of Jan-Pro's defense rested on the fact that it did not have a direct relationship with the workers.

Indeed, the Ninth Circuit's decision in this case comported with the decision of the Massachusetts Supreme Judicial Court in another case against Jan-Pro, which held that the ABC test would apply notwithstanding the fact that Jan-Pro did not directly contract with the workers. *See Depianti*, 465 Mass. at 625. The Court's decision makes clear that the ABC test applies to each tier of a multi-tier structure, against whom workers claim liability for misclassification. Given that this Court has adopted the ABC test from Massachusetts, as the Ninth Circuit recognized in its decision in this case, there is no reason that test should not also apply to the multiple tiers of alleged employers in California, particularly where this Court adopted the ABC test (in *Dynamex*) in interpreting the proper legal standard that had been enunciated in a case raising the question of who is a joint employer (*Martinez*).

A. CALIFORNIA APPELLATE COURT DECISIONS HAVE INCORRECTLY REFUSED TO APPLY THE ABC TEST TO THE QUESTION OF JOINT EMPLOYMENT

Two recent California Court of Appeal decisions have undercut this Court's strong statement on the importance of enforcing labor California

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at 944. This Court chose to interpret and apply the "suffer or permit" test to the misclassification claims in *Dynamex*, because the standard "provide[s] broader protection than that accorded workers under the federal standard." *Dynamex* 4 Cal.5th at 956-58.

labor standards through the application of a simplified test and have conflicted with the Ninth Circuit's decision in *Jan-Pro*, by refusing to apply the test in the joint employment context: *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, *as modified on denial of reh'g* (May 18, 2018), *review denied* (July 11, 2018), and *Henderson v. Equilon Enterprises, LLC* (2018) 40 Cal. App. 5th 1111. In both cases, workers employed by Equilon Enterprises, Inc. ("Shell"), through intermediaries,[26] sought to hold Shell liable for wage and hour violations at Shell-branded stations.[27]

In *Curry*, [28] the Fourth District Court of Appeal granted summary judgment to Shell, holding that Plaintiff could not establish that Shell could

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[26] While these intermediaries did not call themselves franchises, they operated akin to franchises. *Henderson*, 40 Cal. App. 5th at 1124 n. 5 (acknowledging that the MSO agreement at issue "retained many of the attributes of the franchise agreement").

[27] In *Curry*, the Plaintiff a gas station manager at Shell-branded gas stations, alleged that Equilon Enterprises, Inc. ("Shell") was responsible for wage law violations as a joint employer of the workers employed by intermediary entities. *Id.* at 292. Under its new multi-site contractor model, Shell contracted with an intermediary "operators," who in turn contracted with workers like Curry to staff the Shell-branded stations. *Curry*, 23 Cal.App. 5th at 293. Shell's agreements with intermediaries were executed using a standardized "Multi-Site Contractor Retail Outlet Agreement" ("MSO") and Shell provided detailed manuals for the performance of such tasks. *Id.* As in *Curry*, Plaintiff in *Henderson* alleged wage and hour violations against Shell and did not directly contract with Shell but, rather, with a Shell intermediary "operator" (Danville). *Id.* at 1114-16.

[28] This Court denied Plaintiff-Appellant's petition for review in *Curry* on July 11, 2018, but the petition for review submitted by Plaintiff-Appellant Henderson (represented by the undersigned counsel) in *Henderson*, is currently pending. *See Henderson v. Equilon Enterprises, Inc.* (Cal.) S259202. Henderson noted in his petition the fact that this issue has been raised in this case and suggested that the Court grant the petition in his case but stay the case pending the Court's decision on the questions presented for review here. *Id.* Petition for Review at 9-10.

be her employer under the pre-*Dynamex* "suffer or permit" *Martinez* joint employer test. *Curry*, 23 Cal.App.5th at 310-12. Four days after the decision, this Court decided *Dynamex*. Plaintiff promptly petitioned for rehearing. The court denied the petition, not even allowing the parties to brief the impact of *Dynamex*. The Court issued a modified opinion, which added a brief section containing only a cursory mention of *Dynamex*, saying simply that it did not apply to questions of joint employment. *Id.* at 314.[29] The Court refused to acknowledge the obvious holding of *Dynamex*, that clarification of the "suffer or permit" joint employer test as set forth in *Martinez* (itself a joint employer case) would apply to joint employment claims. Instead, based on imagined policy opinions, the Court concluded that this Court had limited the test in *Dynamex* to independent contractor misclassification claims.

The First District Court of Appeal followed suit in the factually similar *Henderson*, 40 Cal. App. 5th 1111, thus compounding the error in the *Curry* analysis. Given the factual similarities between the cases, *see supra* note 27, the Court of Appeal in *Henderson* held that it was bound to follow the precedent in *Curry*. *Id.* at 1121. Although *Henderson* was briefed and decided after *Dynamex*, the court relied on *Curry*, despite the fact that the *Curry* court had given only minimal attention to *Dynamex* and had not taken any additional briefing from the parties on its impact to the case.

B. *DYNAMEX* CLARIFIED THE JOINT EMPLOYER TEST FROM *MARTINEZ* AND THE ABC TEST ANNOUNCED THEREIN APPLIES TO THE JOINT EMPLOYMENT QUESTION

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29 "The issue we confront is whether the high court intended the 'ABC' test to apply beyond the independent contractor context." *Curry*, 23 Cal.App. 5th at 314.

Dynamex plainly provides the correct standard for determining whether an entity is a joint employer. In *Dynamex*, the Court meant the ABC test to hone the *Martinez* "suffer or permit" language – not to devise a new test. The decision was driven by the need to enunciate a sharper test, and the Court adopted the ABC test in order to create brighter lines and a more predictable standard for providing employment protections for workers and so that both workers and employers may have more reliable standards for determining whether an entity will constitute an employer for purposes of alleged wage and hour violations. In order to effectuate that goal, the test should be applied to each alleged employment relationship, even if the hiring entity does not directly contract with the workers, as in this case.

As the Ninth Circuit reasoned, although Petitioners in this case did not directly contract with Jan-Pro, "as a doctrinal matter" the ABC test must apply in order to prevent the otherwise erroneous result of a putative employee providing services to (and thus benefitting) the larger entity, whilst the larger entity evaded its employer obligation under state wage laws to ensure the payment of lawful wages. *Jan-Pro*, 923 F. 3d at 595-96. This rationale applies in the joint employment context as well as the misclassification context. Both structures frustrate enforcement of the state labor standards, and in turn demand a simplified test to forward the remedial purpose of California's wage and hour law.

The joint employer question evokes many of the same concerns evoked in the franchise context, namely that enunciation of the ABC test was meant to bolster enforcement of labor standards in the context of irregular workplace structures, where the top-tier company seeks to outsource wage and hour liability. The same economic incentives exist for entities to outsource liability to intermediaries as exist for entities to

misclassify their workers, David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 ECON. & LAB. REL. REV. 2, 33-54 (2011) ("shifting employment to other parties allows an employer to avoid mandatory social payments"), and joint employment leads to increased violation of workplace protections.[30] The Court should thus resolve both questions together.

Dynamex adopted the ABC test to ensure an "exceptionally broad" definition of "employer" for the purposes of the California labor standards, because standards such as those in the "wage orders are the type of remedial legislation that must be liberally construed in a manner that serves [their] remedial purposes." *Dynamex*, 4 Cal.5th at 953. In order to forward the remedial purpose of the wage legislation, this Court found it necessary to distill the standard into the ABC test. As the Court explained, it adopted this simplified ABC test (to bolster enforcement) for two reasons:

> First . . . a multifactor, "all the circumstances" standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified . . . Second . . . the use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its workforce into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard.

Id. 4 Cal.5th at 954-55. At bottom, *Dynamex* was concerned with frustrated enforcement of labor standards, as a result of (increased) irregular

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[30] David Weil, *How to Make Employment Fair in an Age of Contracting and Temp Work*, HARVARD BUSINESS REVIEW (Mar. 24, 2017), https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work (violations directly related to "fissured workplace" schemes involving joint employers led to wage theft losses for a typical worker of about three to four weeks of earnings per year).

workplace structures colliding with an easily manipulated multi-factor test. Both on its face and in its underlying policy, *Dynamex* makes clear that the ABC test applies to joint employer questions.

The Court of Appeal decisions in *Henderson* and *Curry*, misconceive this Court's purpose in adopting the ABC test, and myopically focus on misclassification as the grounds for adopting the ABC test. *See Henderson* ("At bottom, Dynamex was concerned with the problem of businesses misclassifying workers as independent contractors"). *Curry* was decided only shortly after *Dynamex*, and *Henderson*, bound by *Curry*, compounded the erroneous analysis. This perspective ignores that the problems that result from misclassification, namely the frustration of enforcing worker protections under California state employment law when larger employers seek to avoid liability by outsourcing the burdens of compliance to intermediaries, who are often judgment proof.

IV. THE ABC TEST ENUNCIATED IN *DYNAMEX* WAS ADOPTED TO FORWARD THE REMEDIAL PURPOSE OF CALIFORNIA STATE EMPLOYMENT LAW AND THEREFORE APPLIES TO CLAIMS BROUGHT UNDER THE LABOR CODE, INCLUDING CLAIMS FOR REIMBURSEMENT PURSUANT TO CAL. LAB. CODE. § 2802.

Cal. Lab. Code § 2802 claims lie at the heart of this case. Under Jan-Pro's scheme[31], cleaning workers are made to pay thousands of dollars

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[31] Under the new model of "fissured employment," large entities are foisting onto their workers the expenses of running a business. *See Awuah*, 460 Mass. at 497-98 (holding that franchise fees, "in substance [] operate to require employees to buy their jobs from employers."); *see also Adam v. Tanner* (1917) 244 U.S. 590, 602 (quoted in *Awuah*) ("the whole system of

in order to obtain cleaning work. The goal of *Dynamex* was prevent the exploitation of workers and the degradation of entire industries through emboldened enforcement of the state wage law. *Dynamex*, 4 Cal. 5th at 952. *Dynamex* did not limit application of the ABC test to claims brought under the Wage Orders; indeed, such a result would be absurd. In *Dynamex*, the claims in the case were brought under the Labor Code (not directly under the Wage Orders), and the Court did not address § 2802 only because the parties had not addressed it in their briefing. *Dynamex*, 4 Cal. 5th at 916 n. 5.

Notwithstanding the clear goals of *Dynamex*, employers have harped on the language in *Dynamex* that focused on the purpose of the Wage Orders and have attempted to manipulate this language to mean that *Dynamex* is limited to Wage Order claims and does not apply to claims brought forth under the Labor Code. Such an argument strains credulity.

Dynamex itself was a Labor Code case, *Dynamex*, 4 Cal.5th at 914, and was motivated by the remedial purpose of California's state wage laws, which are contained in both Wage Orders and the Labor Code. Simply put, there is no reason not to apply the *Dynamex* ABC test to the protections of the Wage Orders but not to the important protections of the Labor Code – and in particular to Labor Code § 2802 claims, which are of increased importance in the franchise, as well as ever-expanding gig economy, context where employers attempt to shift to workers the cost of doing business in the form of fees and other expenses the workers are required to shoulder. Allowing this shift, in violation of the Labor Code, and making it harder for workers to challenging this practice than other wage-related practices, would not only be arbitrary, but it would frustrate the simplified

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paying fees for jobs is unjust; and if they must pay in order to get work, then any attempt to get the fee back is justifiable") (Brandeis, J., dissenting).

and streamlined administration of an employment standard that this Court aimed to devise in *Dynamex*. There is no logical reason to introduce various iterations of the employment standard depending on the particular wage claim brought.

Without express guidance from this Court, this question has also resulted in a split of authority in California and raises a significant issue in California wage and hour law which needs prompt resolution.[32]

A. EMPLOYERS RESIST APPLICATION OF *DYNAMEX* APPLIES TO LABOR CODE VIOLATION CLAIMS, AND SPECIFICALLY SECTION 2802

Despite the clear import of *Dynamex*, multiple courts have opined (usually without the benefit of briefing on the question) that *Dynamex* would not cover such claims. *See Garcia v. Border Transportation Group, LLC* (2018) 28 Cal. App. 5th 558, 561 (addressing the question in dicta); *Karl v. Zimmer Biomet Holdings, Inc.*, (N.D. Cal. Nov. 6, 2018) 2018 WL 5809428; *Henry,* 2019 WL 2465330, at *8. As a result, employers continue to argue that *Dynamex* does not apply to claims brought under Lab. Code § 2802, and numerous cases in California court are posed to repeatedly play out the question.

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32 Claims brought under Labor Code§ 2802 are often the most significant claims in independent contractor misclassification cases because employers often misclassify workers so that they may require workers to pay for their jobs. Here, the cleaning workers were expressly required to pay for their jobs in the form of "franchisee fees." In the gig economy, workers are typically required to pay for their job in the form of shouldering the most significant necessary expense, namely paying for their vehicle and its associated costs. A vast amount of litigation has been spawned by this issue, and thus the question of whether the ABC test will apply in determining whether workers may challenge their being required to shoulder these expenses in order to work urgently needs to be addressed. *See, e.g., Lawson v. GrubHub* (9th Cir.) No. 18-15386.

At least one court has held that the ABC test as adopted in *Dynamex* applies to § 2802 claims. *See Johnson*, Case No. 30-2015-00802813-CU-CR-CXC, at *5. In a recent Second District Court of Appeal decision, *Gonzales v. San Gabriel Transit, Inc.* (2019) 40 Cal. App. 5th 1131, the Court of Appeal, in reasoning that dovetailed with *Johnson* but only added to the confusion, held that "the ABC test applies to Labor Code claims which are either rooted in one or more wage orders, or predicated on conduct alleged to have violated a wage order. As to Labor Code claims that are not either rooted in one or more wage orders, or predicated on conduct alleged to have violated a wage order, the *Borello* test remains appropriate." *Id.* at 1157.

B. THE *DYNAMEX* ABC TEST APPLIES TO LABOR CODE CLAIMS, IN ACCORDANCE WITH THE STATUTORY PURPOSE ANALYSIS AND GOAL OF SIMPLIFYING THE EMPLOYMENT STANDARD

Dynamex teaches that any determination of employment status looks first to the remedial purpose of the statute being invoked. *See Dynamex*, 4 Cal. 5th at 935 ("[S]tatutory purpose [i]s the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation"); *see also Duffey v. Tender Heart Home Care Agency, LLC* (Ct. App. 2019) 31 Cal. App. 5th 232, 248-250, *review denied* (Apr. 24, 2019).

In *Duffey*, the Court of Appeal followed the framework set forth in *Dynamex* for analyzing the definition of employer under the Domestic Worker Bill of Rights ("DWBR"). *Duffey*, 31 Cal. App. 5th at 245. The court examined the language and purpose DWBR, utilizing a statutory-purpose analysis in order to interpret the applicable definition of employer. *Id.* at 248-50. Because the Court found the purposes of the wage and hour statutes and wage orders, as outlined in *Dynamex* (to afford basic

protections to workers, guard against degradation of labor standards from unfair competition, and prevent the public from being forced to subsidized employers' wage violations) "echoed in the legislative history" of the DWBR, the Court determined that the employee definition for DWBR should also be liberally construed, thus counseling in favor of adopting a broad employee definition that reaches many workers and forwards the remedial purpose of the DWBR. *Id.* at 249.[33]

As the Court's language in *Dynamex* and the analysis in *Duffey* make clear, there is no reason to limit the holding of *Dynamex* so that it would not apply to expense reimbursement claims. Rather, the decision sets forth a framework for determining the applicable employment standard based on a statutory purpose analysis.

Following the framework set forth in *Dynamex*, as the court in *Duffey* did, easily answers the question of whether the *Dynamex* ABC test applies to wage claims outside the strictures of the Wage Orders: yes.[34]

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[33] Indeed, the same logic that the Ninth Circuit applied in this case, rejecting *Patterson* in the context of wage claims, dictates that *Dynamex* applies to the expense reimbursement claims. *See Jan-Pro*, 923 F.3d at 594 (noting that *Patterson* "was a case about vicarious liability in the tort context" whereas *Dynamex* "is about wage orders" and finding that because of the different purposes underlying these statutory schemes, it is appropriate to apply the broader and more expansive ABC test for employee-status to franchisees when wage claims are at stake).

[34] In arguing that *Dynamex* does not apply to claims brought under Cal. Lab. Code § 2802, employers have frequently cited cases that suggested that it would not apply, but the issue had not actually been argued in those cases. This growing, and widely cited dicta, is now leading the conversation that *Dynamex* does not apply to these claims. *See California Trucking Ass'n v. Su* (9th Cir. 2018) 903 F.3d 953, 959 n.4 (no parties argued that *Dynamex* had any impact); *Garcia*, 28 Cal. App. 5th at 571

The preamble of the Labor Code declares its remedial purpose: "It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." Labor Code § 90.5 (a). The Labor Code provisions preventing unreimbursed expenses were "adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business[,]" and they have the same remedial purpose: to protect the wage earner, to protect the law-abiding business by ensuring it is "not hurt by unfair competition from competitor businesses that utilize substandard employment practices," and to benefit the public at large by preventing the public from shouldering the burden of the "ill effects to workers and their families resulting from the substandard wages or unhealthy and unsafe working conditions." *Dynamex*, 4 Cal. 5th at 953. Following this analysis, the remedial purpose of the Labor Code and § 2802 specifically counsels in favor of adopting a broad employer definition, leading to the inevitable conclusion that the ABC test should apply to these claims.

Not only would applying different standards to Labor Code claims versus Wage Order claims fly in the face of the statutory purpose analysis this Court set forth in *Dynamex*, the application would make no practical sense, as the purpose of *Dynamex* was to simplify the standard and increase reliability and predictability.

As the court in *Johnson* held, the argument that different standards should be applied to failure to pay minimum wage, or failure to reimburse

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("neither [party] identifies a basis to use the ABC test in evaluating the non-wage-order claims").

claims, based on whether those claims were brought under the applicable Labor Code provisions or Wage orders, "misses the mark," *id.* at *4:

> For one thing, there is a huge practical problem. Considering wage and hour claims base on state laws, how is a trial court supposed to apply one standard to a claim grounded in the Labor Code and a different test for essentially the same claim premised on a wage order? More significantly, how are employers and employees/independent contractors supposed to determine their rights if they are unable to figure out what test applies? Indeed, the suggestion that multiple tests should apply to state wage claims runs counter to the purpose of *Dyanmex* – providing greater clarity and consistency in analyzing the issue.

Id. at *4. Permitting differing definitions of "employee" under the applicable Labor Code and Wage Order provisions would be nonsensical and at odds with the Court's statutory purpose framework in *Dynamex* and its goal to simplify the applicable employee test for wage and hour claims.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court grant review of the Questions Presented, as articulated herein, and hold that: *Dynamex* applies retroactively, including to wage and hour claims brought against franchisors, to questions of joint employment, and to claims brought under both the Wage Orders and the Labor Code, including claims for reimbursement brought under Labor Code § 2802.

Dated: January 21, 2020

Respectfully submitted,

SHANNON LISS-RIORDAN
(SBN 310719)
Lichten & Liss-Riordan, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
Telephone: (617) 994-5800
Facsimile: (617) 994-5801
sliss@llrlaw.com

Attorney for Petitioners

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In accordance with California Rules of Court, rule 8.204(c), I hereby certify that this brief contains 13,023 words as established by the word count of the computer program (Microsoft Word) used for preparation of this brief.

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Dated: January 21, 2020

Shannon Liss-Riordan
(SBN 310719)

Attorney for Petitioners