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

REPLY 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

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

This Court recently reaffirmed that the "general rule [is] that judicial decisions apply retroactively," and that decisions should not be "restrict[ed]" when to do so "'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' and hence 'would exceed our appropriate judicial role.'" *Frlekin v. Apple, Inc.* (2020) 8 Cal.5th 1039, 1057 (quoting *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 573). Yet in its Answering Brief, Respondent Jan-Pro Franchising International, Inc. ("Jan-Pro") asks this Court to do just that: provide it with a "free pass as regards their past conduct" by restricting *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, to prospective-only application. This Court should decline the invitation.

In *Dynamex*, this Court affirmed and strengthened enforcement of California's remedial wage and hour laws, which already provided for civil penalties to protect against indpendent contractor misclassification. *Id.* ("in response to the continuing serious problem of worker misclassification as independent contractors, the California Legislature has acted to impose substantial civil penalties on those that willfully misclassify, or willfully aid in misclassifying, workers as independent contractors.) (citing Cal. Lab. Code § 226.8 added by Stats. 2011, ch. 706, § 1, 2753, added by Stats. 2011, ch. 706, § 2). This Court explained that the harms of independent contractor misclassification had been compounded by the (easily manipulated) multi-factor employee status set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341. *Dynamex*, 4 Cal. 5th at 952, 964. This Court therefore adopted the Massachusetts version of the "ABC" test, concluding it the most appropriate distillation of

the *Martinez v. Combs* (2010) 49 Cal.4th 35, "suffer or permit" test. *Dynamex*, 4 Cal.5th at 956 & n. 23. The California legislature has now endorsed this Court's decision to adopt the "ABC" test through the enactment of Assembly Bill No. 5 (enacting Cal. Lab. Code § 2750.3, effective Jan. 1, 2020). These developments have not created new law or added new penalties but merely sharpened existing law, to bring into focus unlawful conduct and heighten enforcement efforts.

Nevertheless, in its Answering Brief, Jan-Pro attempts to wholesale avoid application of the test and obtain a "free pass" for its unlawful conduct, on various grounds. First, it takes the unusual step of requesting that this Court decertify the question on review. Answering Brief, at 1. Curiously, Jan-Pro suggests that this request is appropriate because it intends to petition for rehearing or rehearing *en banc* at the Ninth Circuit, despite having already <u>*twice*</u> petitioned and been denied rehearing or rehearing *en banc*. *See Vazquez v. Jan-Pro Franchising Int'l* (9th Cir.) Case No. 17-16096, ECF 93, 121. The Ninth Circuit has rendered its opinion in this action and has not conveyed any intent to rehear or rescind its determinations. Furthermore, this Court made clear in its February 26, 2020, order denying the request to expand the certified question, that briefing and argument in this matter would be limited to the certified question certified. Thus, this Court need not reach the issues presented in support of Jan-Pro's request to de-certify the question; however, should the Court decide to address the issues, Petitioners briefly respond to each in Part II.

But Petitioners first address the question on review and submit that there is no reason to depart from the usual rule giving judicial decisions retroactive effect. Every California court to consider the question of whether *Dynamex* applies retroactively has followed the usual rule and

concluded *Dynamex* should be given retroactive effect. Opening Br. at 16-17.

Jan-Pro's argument that fairness dictates otherwise is flawed. Fairness counsels in *favor* of applying *Dynamex* retroactively, as this Court explained public interest is furthered by application of the test and the legislature has confirmed public interest is best served through application of the "ABC" test, in the form of A.B. 5. *See Dynamex*, 4 Cal.5th at 952-53 (discussing the need for California wage laws to "ensure" that workers are "accord[ed] a modicum of dignity and self-respect"); *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, (9th Cir. 2008) 512 F.3d 1112, 1116 ("public interest may be declared in the form of a statute"). Part I(A)(1). Any argument that Jan-Pro relied on prior law is a red herring. Jan-Pro never relied on *Borello*, as it argued that *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474 (not *Borello*), provided the correct standard. In any event, Jan-Pro's practice of misclassification was already being challenged under the previous law, so Jan-Pro had no assurance that its practices were lawful even prior to *Dynamex*. Part I(A)(2). This makes sense, given that *Dynamex* is merely a continuation of the development of the law in this area and was far from unforeseeable. Part I(A)(3). In short, Jan-Pro cannot meet its burden to prove an exception to the usual rule of retroactivity should apply based on fairness. Part I(A).

For similar reasons, retroactive application of the test does not offend due process. This Court's decision was in no way irrational or arbitrary, as confirmed by the legislature's enactment of A.B. 5 and its survival in the face of constitutional challenges. *Olson v. State of California* (C.D. Cal. Feb. 10, 2020) 2020 WL 905572, at *13, *appeal filed* Case No. 20-55267 (9th Cir.) (denying "gig economy" companies' request to enjoin enforcement of A.B. 5). Part I(B)(1). *Dynamex* simply strengthened pre-existing civil penalties. Part I(B)(2). In any event, due process guards

against retroactive application of judicial decisions that threaten life and liberty of the defendant in a criminal context; not against sham franchisors seeking to evade civil penalties for past conduct taking advantage of vulnerable workers. Part I(B)(3).

Jan-Pro attempts to entirely side-step the question of retroactivity by frontloading its brief with arguments that *Dynamex* should not have been applied at all in this case because the case presents a joint employment inquiry and Jan-Pro is a self-described franchisor (which it claims entitles it to a *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 732-3, "gloss"). This Court need not reach these questions. None are before the Court for review, the Ninth Circuit has already correctly held that the *Dynamex* test applies to the claims *in this case*, and the request to de-certify, which Jan-Pro requests in its Answering Brief, is improper. See California Rules of Court 8.548(e) (providing opportunity to submit letter in opposition to granting review of the certified question). Nevertheless, should the Court choose to consider Jan-Pro's arguments, each should be easily rejected. Part II. This Court should confirm that *Dynamex* applies retroactively and to the claims in this case.

DISCUSSION

I. THIS COURT SHOULD EXPLICITLY CONFIRM THAT DYNAMEX APPLIES RETROACTIVELY

All courts to consider the question of whether *Dynamex* applies retroactively, of which Petitioners are aware, have held the test *does* apply retroactively. Opening Br. at 16-17. These decisions are in keeping with the usual rule that judicial decisions are given retroactive effect. *Newman v. Emerson Radio Corp*. (1989) 48 Cal.3d 973, 979; *see also Frlekin* 8 Cal.5th at 1057. Jan-Pro has not met its burden to demonstrate that an exception to the usual rule applies. *Dardarian v. OfficeMax N. Am., Inc*., (N.D. Cal.

2012) 875 F. Supp. 2d 1084, 1090 (where a party "is arguing that the exception to the general rule applies to it, it has the burden of proof.").

The Court should decline to depart from the usual rule here and should refuse to retroactively exempt Jan-Pro from liability for its unlawful misclassification of its workers.

A. Neither Fairness Nor Public Policy Requires this Court to Limit Dynamex to Prospective Only Application

Although the usual rule is that a judicial decision applies retroactively, "considerations of fairness and public policy" at times preclude retroactive application. *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 152. The issue of retroactive application turns "primarily upon the extent of the public reliance upon the former rule, and upon the ability of litigants to foresee the coming change in the law." *Id.* at 153 (quoting *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 193) (internal citations omitted)). The analysis examines the reliance of <u>*both*</u> litigants and incorporates concerns about effectuating the purpose of the decision (in light of "public reliance"). *Id.* at 153 n. 3.

1. Public purpose is best served by retroactive application

This Court and the legislature have already confirmed that public purpose is best served by giving *Dynamex* retroactive effect. *Cf. Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 509 ("[A]ll things being equal, we deem it preferable to apply our decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action.").

First, *Dynamex* teaches that the selection of the correct test turns of the purpose of the remedial statute subject to interpretation. *See Dynamex*, 4 Cal.5th at 935; *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). Thus, in enunciating the "ABC" test as most appropriate test for forwarding the remedial purpose of California's wage and hour legislation, this Court decided that public purpose is best served through application of the "ABC" test. *Dynamex*, 4 Cal.5th at 953 (discussing remedial purpose of wage and hour legislation).

Next, the legislature confirmed that public purpose is best served by the "ABC" test through the enactment of A.B. 5, which considered the harms done by independent contractor misclassification and decided to adopt the reasoning of *Dynamex*, and the "ABC" test enunciated therein. See A.B. 5 § 1(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… By codifying [*Dynamex*], this act restores these important protections to potentially several million workers…"). Pursuant to *Golden Gate*, 512 F.3d at 1116, "public interest may be declared in the form of a statute". The legislature has thus declared the "ABC" test to be in the public's interest through the language of A.B. 5.

2. Jan-Pro never "relied" on *Borello* and, even if it had, the reliance could not assure it that the cleaning workers were properly classified as independent contractors

Jan-Pro's purported reliance on previous case law should not be allowed to undermine the public purpose of *Dynamex* (and now A.B. 5). As an initial matter, Jan-Pro never, as it attempts to now assert, relied on *Borello*. In defending itself against the California misclassification claims, Jan-Pro did not even attempt to argue that *Borello* applied but, rather, argued that the *Patterson* standard governed the wage and hour claims in this action. *Roman v. Jan-Pro Franchising Int'l, Inc*. (N.D. Cal. May 24,

2017) 2017 WL 2265447, at *2. Given its past positions, Jan-Pro is estopped from clinging to *Borello* to justify the extraordinary result of a prospective-only application of *Dynamex*. *See Claxton v. Waters* (2004) 34 Cal.4th 367, 379 n.3 ("The doctrine of judicial estoppel precludes a party from taking inconsistent positions in judicial [] proceedings.").

Further, Jan-Pro cannot claim that it relied on *Borello* in determining that the cleaning workers such as Plaintiffs were properly classified as independent contractors. *Solem v. Stumes* (1984) 465 U.S. 638, 646 ("Unjustified reliance is no bar to retroactivity."). Plaintiffs first contended they were misclassified more than 10 years ago, in 2008, under "a variety of state laws", including under California law. *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. The lone California Unemployment Insurance Appeals Board decision Jan-Pro cites holds no precedential value. Answering Br. at 48-49 (discussing *Connor-Nolan Inc. v. Employment Development Department* (Calif. Unemployment Ins. App. Bd., Nov. 17, 2014) Case No. 4764599 (T), *as reinstated* by Case Nos. AO-418191 and AO-418192 (July 23, 2018). Because of this case, Jan-Pro has been on notice for more than a decade that, under the system that it established, the classification of the cleaning workers as independent contractors risked liability being imposed on Jan-Pro for civil penalties under California law.

Even if Jan-Pro had a rational basis for relying on *Borello* (which it did not), its reliance would still not be enough to overcome the usual presumption of retroactivity. This narrow exception is rarely applied and requires more than glimmers of reliance. *Mendiola v. CPS Sec. Sols., Inc.* (2015) 64 Cal.4th 833, is instructive. There, this Court concluded that all on-call hours spent by security guards at their worksites was compensable

time. *Id*. 838. The employer argued that it had reasonably relied on appellate decisions (one of which was issued 15 years prior) holding that compensable on-call hours excluded sleep time from 24-hour shifts and urged the Court to apply its decision prospectively only. The Court "acknowledge[d defendant's] efforts to ascertain whether its policy complied with California's labor laws and recognize the difficulty it and other employers can face in this regard. Several factors may contribute to ongoing uncertainty, including the defunding of the IWC and the lack of adequate funding for DLSE enforcement. Such issues, however, must be addressed by the Legislature." The Court thus found "no reason to depart from the general rule" of retroactivity. *Id*. at 848, n.18.

This Court's decision in *Dardarian*, which addressed the retroactivity of the ruling announced in *Pineda v. Williams–Sonoma Stores, Inc.,* (2011) 51 Cal.4th 524, that requesting zip code information during credit card transactions violated California law, is also apt. There, the Court rejected the defendants' reliance argument, finding that *Pineda* "did not overrule a California Supreme Court precedent and thus, was not a clear break from a well-established prior rule." *Dardarian,* 875 F.Supp. at 1091; *see also Waller v. Truck Ins. Exchange, Inc*., (1995) 11 Cal.4th 1, 25 (rejecting reliance argument and finding that courts "routinely consider newly published case law that was not available until after entry of judgment in the trial court" and the new judicial decisions were not "unforeseeable," but were "a logical extension" of previously established legal principles.).

Other courts have also expressly rejected similar reliance arguments set forth by defendants in attempts to evade retroactive application of *Dynamex*. The California Superior Court in *Johnson* held that *Dynamex* would apply retroactively *Johnson v. VCG-IS, LLC* (Super Ct. Cal. July 18, 2018) Case No. 30-2015-00802813-CU-CR-CXC, Ruling on Motion in

Limine (Ex. A to Petitioners' Separate letter, submitted October 25, 2019), and then applied *Dynamex* to hold that exotic dancers were employees of the club at which they worked, notwithstanding the defendant's vociferous argument that it had "relied" on *Borello* for many years in deciding that the dancers could be classified as independent contractors. *Id*. Ruling on Summary Judgment. The court in *Valadez v. CSX Intermodal Terminals, Inc*. (N.D. Cal. Mar. 15, 2019) 2019 WL 1975460, at *5, concurred. *Id*. (following *Johnson* and further analyzing the reliance argument presented by defendant-employer in that case, and concluding that the argument was a non-starter) ("although Defendant assumed that the *Borello* test would be used to determine employment status, it has not identified specific actions that it took in reliance upon that belief. In short, Defendant has not shown that compelling reasons require a departure from the general rule.").

Jan-Pro has not identified specific actions it took in reliance on the *Borello* standard, but merely argues generally, that the emphasis placed on the "control" factor in *Ayala v. Antelope Valley Newspapers, Inc*. (2014) 59 Cal.4th 522, 531, and *Borello*, 48 Cal.3d at 353-54, means that Jan-Pro should now be excused for flouting the other factors in the multifaceted *Borello* test. Answering Br. at 47-48. This argument is unavailing and should be rejected by this Court.

3. Jan-Pro is wrong to call *Dynamex* an unforeseeable change in the law

Next, Jan-Pro argues that fairness considerations preclude retroactive application of *Dynamex* because the "ABC" test is not "preexisting law" in California. Answering Br. at 50. The legislature has already rejected this argument, by stating explicitly that the "ABC" test is a continuation of existing law. *See* Cal. Lab. Code § 2750.3(i).

Nothing in the *Dynamex* decision suggests that the Court overruled *Martinez* or *Borello*. Absent an explicit discussion of stare decisis it should be presumed that *Dynamex* is a continuation of the law and not an overruling or clear break from past precedent. *Contrast*, *e.g*. *People v*. *King* (1993) 5 Cal.4th 59, 78 (noting that "[b]ecause of the importance of the doctrine of stare decisis, we are reluctant to overturn prior opinions of this court," and explicitly declaring "we hereby overrule").

More importantly, *Dynamex* makes clear that it was a continuation of the *Martinez* "suffer or permit" test, moving the standard towards a bright line rule in the form of the "ABC" test. Jan-Pro nevertheless attempts to silo the *Martinez* and *Dynamex* decisions into "joint employment" and "independent contractor" camps that cannot be read in conjunction with each other. *see* Answering Br. at 29-31.[1] However, a close reading of the cases refutes this proposition.

In *Martinez*, plaintiffs were seasonal strawberry-pickers who worked the 2000 harvest. *Martinez*, 49 Cal.4th at 42-43. The strawberry market plummeted that year, and the strawberry farmer stopped paying his workers and blamed it on merchants withholding payments. *Id*. at 46-47. This Court was tasked with defining the test for adjudging whether the merchants were plaintiffs' employers who could be held liable under Cal. Lab. Code §§ 1194, 1194.2. *Id*. at 48. This Court concluded that the "suffer or permit" language of the Wage Orders, adopted to reach "irregular working arrangement the proprietor of a business might otherwise disavow with impunity" and prevent child labor, supplied one of the appropriate tests. *Id*.

---

[1] Notably, in the district court briefing, Jan-Pro argued <u>*against*</u> the application of the *Martinez* standard in this action. *Roman v. Jan-Pro Franchising Int'l, Inc.* (N.D. Cal. May 24, 2017) 2017 WL 2265447, at *2. In an about face, Jan-Pro now suggests the application of *Martinez* precludes the application of the *Dynamex* test, because it does not "supplant" the *Martinez* "suffer or permit" test. Answering Br. 29-30.

at 58. This language did not however *displace* the common law employer status test but was additive; there were therefore three alternative tests for defining "to employ": "(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." *Id*. at 64.

In *Dynamex*, this Court was again asked to define the test for determining whether a defendant could be held liable as an "employer" for wage and hour violations. However, in *Dynamex*, the defendant "disavow[ed]" an employment relationship via independent contractor misclassification (rather than joint employment). 4 Cal.5th at 926. The Court turned to *Martinez*. *Id*. at 935 ("the proper scope of the *Martinez* decision lies at the heart of the issue before our court in the present case."):

> [W]e take up the issue [of] whether in a wage and hour class action alleging that the plaintiffs have been misclassified as independent contractors when they should have been classified as employees, a class may be certified based on the wage order definitions of "employ" and "employer" as construed in *Martinez* or, instead, whether the test for distinguishing between employees and independent contractors discussed in *Borello* is the only standard that applies in this setting.

Id. at 941-42 (emphasis supplied). This Court decided the *Martinez* "suffer or permit" test supplied the correct test, *id*. at 953, and *then* "interpreted that standard" as requiring the defendant to carry its burden under the "ABC" test. *Id*. 957-58. This Court explicitly adopted the "ABC" test to streamline and simplify the test from *Martinez*:

> In our view, *this interpretation of the suffer or permit to work standard* ... will 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.

Id. at 964 (emphasis supplied). It is nonsensical for Jan-Pro to argue that *Dynamex* <u>*added*</u> another alternative test that applies only to independent contractor misclassification claims.

Jan-Pro is also wrong to argue that simply because this Court looked to other jurisdictions to discern the appropriate test that this necessarily limits the Court's decision to prospective application. Courts regularly look to one another to refine application of their respective employee status tests. *See, e.g., Dana's Housekeeping v. Butterfield* (Colo. App. 1990) 807 P.2d 1218, 1221 (looking to Illinois case law applying the employee status test of the Illinois Workmen's Compensation Act, in order to guide its application of the employee status test under the Colorado Workers' Compensation Act); *Howard v. City of Kan. City* (Mo. 2011) 332 S.W.3d 772, 784 (drawing on Texas, Tennessee, and Kentucky case law, to determine whether municipal judges are employees under Missouri state human rights law, ultimately finding the Kentucky precedent most on-point). This Court's refinement of the California test should not be impaired because it drew upon employee status analysis from other states.

Further, Jan-Pro misses the mark in arguing that simply because the "ABC" test does not exactly mirror *Borello*, it must constitute an unforeseeable change in the law. Answering Br. at 51. The analysis under each "ABC" prong is reflected in the multi-factor *Borello* test, which simply differently weighed all factors in conjunction with one another. Opening Br. at 23-34.[2] Jan-Pro's argument that this Court's distillation of the test was unforeseeable seems to suggest, at base, that employers in the

---

[2] At least one California court considering the question of applying *Dynamex* retroactively has even commented that the question is mooted, to an extent, when plaintiffs interchangeably satisfied the two standards. *See, e.g., Yeomans v. World Fin. Grp. Ins. Agency, Inc.* (N.D. Cal. Nov. 6, 2019) 2019 WL 5789273, at *4 n.1 (holding that Plaintiffs pled sufficient facts to allege misclassification under either *Dynamex* or *Borello*).

past fell into a practice of ignoring all but the control factor of *Borello* – a troubling stance and precisely why this Court tightened the strictures of the test. 4 Cal.5th at 964.

Jan-Pro must demonstrate more than a "surpris[ing]" development in the law. *See, e.g., Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 984 (finding that the Court's holding "represented no greater "surprise" than that in the numerous tort cases" and applying retroactively); *Scottsdale Ins. Co. v. MV Transportation*, (2005) 36 Cal.4th 643, 657–58 (noting that "subsequent case law can establish, in hindsight, that no duty to defend ever existed," even when, at the time, the case law could have been construed to establish a duty to defend); *Sierra Club v. San Joaquin Local Agency Formation Com.*, (1999) 21 Cal.4th 489 (court's decision overturning rule requiring administrative exhaustion that had been established "over a half-century ago," applied retroactively); *Garcia v. Border Transportation Group LLC* (2018) 28 Cal. App.5th 558, 572 n. 12 ("to the extent *Dynamex* merely extended principles stated in *Borello* and *Martinez*, it represented no greater surprise than tort decisions that routinely apply retroactively) (internal quotation omitted).

Even if *Dynamex* represents a "clear break with the past" (which it does not), that alone would not be enough to compel prospective only application. *Solem*, 465 U.S. at 646 & n. 6. Jan-Pro needs to establish that not only was *Dynamex* a "clear break" but that was in no way "distinctly foreshadowed." *Id.* As Jan-Pro points out, this Court's adoption of the "ABC" test <u>was</u> "distinctly foreshadowed," as twenty-two other states had adopted the standard for some purpose. Answering Br. at 52 (citing Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Contractor and Misclassification Statutes* (2015) 18 U. Pa. J. L. & Soc. Change 53, 58); *see also Brown v. Louisiana* (1980) 447 U.S. 323, 336 (applying the *Burch* rule that a conviction of a nonpetty

criminal offense by a nonunanimous six-person jury violates the accused's constitutional right to trial by jury, to *previous convictions*, because, in part only two states still allowed these convictions). And again, the *Borello* factors already cautioned that defendants should not misclassify their workers as independent contractors when those workers rendered services that formed "an integral part of the alleged employer's business," *Borello*, 48 Cal.3d at 355, or who had not "independently has made the decision to go into business for him or herself." *Dynamex*, 4 Cal.5th at 922, 962 (citing *Borello*, 48 Cal.3d at 341, 349). These cautions are embodied in the "ABC" test and should have been heeded by defendants long prior to its announcement.

Jan-Pro finally argues that the California legislature's later endorsement of the *Dynamex* test through enactment of Assembly Bill No. 5 necessarily means that the "ABC Test was new law." Answering Br. at 52. But as discussed above and further below, A.B. 5 only *confirms* that the Court correctly ascertained the Legislature's intent and is relevant insofar as it supports finding that public policy considerations weigh in favor of retroactive application and that the adoption of the "ABC" is not so irrational or arbitrary as to violate Jan-Pro's due process rights.

B. Jan-Pro's Due Process Rights Are Not Violated By Dynamex's Clarification of the Law

1. *Dynamex*'s enunciation of the "ABC" test is neither irrational nor arbitrary

Jan-Pro's argument that *Dynamex* violates its due process rights finds no support in case law or common sense. This Court should begin and end its inquiry by examining whether the enunciation of the "ABC" test in *Dynamex* was irrational and arbitrary. As Petitioners previously observed, such a contention is belied by the length and depth of the

decision itself. Opening Br. at 26. The Court may now also look to subsequent analysis of A.B. 5 to confirm that the "ABC" test is neither irrational nor arbitrary.

The test for determining whether retroactive application of a judicial decision offends due process mirrors that of "the prohibition against arbitrary and irrational legislation." *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."). *Pension* cites back to the standard announced in *Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 15, which establishes "that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."

In *Usery*, the Supreme Court affirmed legislation mandating coal mine operators (employers) provide "black lung benefits" to coal mine employees, including and even if an "employee had terminated his employment in the industry before the Act was passed." *Id.* at 19-20. The Court rejected the operators' due process argument against the "imposition of liability for the effects of disabilities bred in the past" because the legislation was "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor the operators and the coal consumers." *Id.* at 18-19.

So too here, both this Court and the legislature have rationally approached the problem of independent contractor misclassification. As in *Usery*, the legislature adopted the "ABC" test in part to correctly redistribute costs and to stop employers from shifting costs onto workers

and the State, which have heretofore been made to bear the burden of independent contractor misclassification:

> In its [*Dynamex*] decision, the Court cited the harm to misclassified workers who lose significant workplace protections, the unfairness to employers who must compete with companies that misclassify, and the *loss to the state of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for workers' compensation, Social Security, unemployment, and disability insurance.*

A.B. 5 § 1(b). Further, the legislature signaled its intent to apply the test retroactively by making clear that the "ABC" test adopted through the enactment of A.B. 5 "does not constitute a change in, but is declaratory of, existing law". Cal. Lab. Code § 2750.3(i); *see McClung v. Employment Development Dep't* (2004) 34 Cal.4th 467, 471 ("If an amendment merely clarified existing law, no question of retroactivity is presented" "because the true meaning of the statute remains the same") (quoting *Western Security Bank v. Superior Court* (1975) 15 Cal.4th 232, 243). That the statute was enacted in response to this Court's decision in *Dynamex* clarifying the law only confirms the legislature's intent to apply the statute retroactively. *See* A.B. 5 Preamble ("Existing law, as established in the case of *Dynamex*…"); *see In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 588 (weighing the constitutional infirmity of the prior law, "assum[ing] the Legislature was aware of judicial decisions" and "knew of the dubious constitutional statute of the sexually discriminating old law" when it amended the law, indicating the amendment was intended to apply retroactively as a correction of the law). In sum, A.B. 5's adoption of the "ABC" test mirrors that of *Dynamex* and analysis of this statute therefore provides a relevant roadmap for analyzing the rationality of this Court's decision in *Dynamex*.

At least one district court has already rejected a challenge to the "ABC" test as being arbitrary and irrational. In *Olson v. State of California*, 2020 WL 905572, the district court denied an Equal Protection challenge brought by Uber and Postmates, which argued that the A.B. 5 irrationally targeted gig economy companies. *Id.* at 13 ("The Court concludes that no serous question exists"). In doing so, the district court analyzed whether A.B. 5 rationally furthers a legitimate state interest and concluded that "[t]he State's asserted interest in protecting exploited workers to address the erosion of the middle class and income inequality [] appears to be based on a reasonably conceivable basis of facts that could provide a rational basis for any ostensible targeting of gig economy employers and workers." *Id.* at 8 (internal quotations omitted). The district court cited back to the bill's statement of purpose in adopting *Dynamex* to restore basic workplace protections. *Id.* In other words, the district court held the legislature's exact same adoption of the "ABC" test, as announced in *Dynamex*, to be rationally related to a legitimate state interest. So too, retroactive application of *Dynamex* should survive Jan-Pro's due process argument.

2. The "ABC" test enunciated in *Dynamex* simply strengthens enforcement of existing civil penalties and therefore should not be limited and does not violate Due Process

In *Frlekin*, this Court made clear that its decision imposing employer liability on wage and hour claims applied retroactively, because to restrict the decision to prospective-only application "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' and hence 'would exceed our appropriate judicial role.'" *Frlekin*, 8 Cal.5th at 1057 (quoting *Alvarado*, 4 Cal.5th at 573).

In *Frlekin*, this Court interpreted the language and history of Wage Order 7 and its "control clause" as requiring that Apple compensate employees for time spent waiting and undergoing exit searches. *Id*. at 1047-49. Apple argued that this holding contradicted *Morillion v. Royal Packing Co*. (2000) 22 Cal.4th 575, 578-88, which held that compulsory travel time was compensable, but not time employees spent commuting on their own from home to work, during which they may, e.g. "be able to run errands." *Id*. at 578-88; *Frlekin*, 8 Cal.5th at 1049. Apple argued that because an employee could avoid a search by choosing to not bring, e.g. his or her iPhone, that under *Morillion* the time was not compensable; this Court disagreed, further honing the holding from *Morillion* and explaining that the *Morrillion* test focused on control and incorporated considerations of whether the activity was for the employee or employer's benefit. *Frlekin*, 8 Cal.5th at 1051-52.

As in *Frlekin*, this Court further interpreted a standard set forth in previous case law applying relevant provisions of an IWC Wage Order. *Frlekin*, 8 Cal.5th at 1045-46 (citing back to *Dynamex*). And, as in *Frlekin*, civil penalties imposed as a result of the *Dynamex* decision are not created anew through the decision but were *already* provided for under the law. *Dynamex*, 4 Cal.5th at 935. Indeed, in this manner, *Dynamex* hardly raises the question of retroactivity because it did not create a new cause of action or impose new civil penalties; it arguably operates prospectively by supplying the correct test by which to implement existing law. *See Aetna Cas. & Sur. Co. v. Indus. Acc. Commission* (1947) 30 Cal.2d 388, 394 (discussing distinction in the context of whether a statue applied retroactively).

Jan-Pro's attempt to invoke civil penalties as evoking the same due process concerns as those raised in criminal cases are thus unavailing.

3. Due Process has ordinarily precluded retroactive application in the criminal context

Jan-Pro's attempt to analogize its current predicament to case law finding due process protections preclude retroactive application is unavailing. Answering Br. at 52-53. Due Process rights namely preclude application of the usual rule of retroactivity in the criminal context. Indeed, the footnote from *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 574 n. 22, that Jan-Pro cites illustrates this point, collecting the below cases:

> *Miller v. Florida,* 482 U.S. 423 [] (1987) (*Ex Post Facto* Clause violated by **retroactive imposition of revised sentencing guidelines that provided longer sentence for defendant's crime**); *Bouie v. City of Columbia,* 378 U.S. 347 [] (1964) (retroactive application of new construction of statute violated due process); *id.,* at 350–355 [] (citing cases); *Lankford v. Idaho,* 500 U.S. 110, 111 [] (1991) (due process violated because **defendant and his counsel did not have adequate notice that judge might impose death sentence**).

(emphasis supplied).[3]

---

[3] In *Bouie v. City of Columbia*, two Black college students had been arrested on criminal trespass charges for sitting at a lunch counter and refusing to leave upon request. 378 U.S. at 348. The Supreme Court reversed the students' conviction, holding that the Georgia Supreme Court affirmed the convictions under a new interpretation of the criminal trespass statute (construing it to criminalize the act of *remaining* on the premises after being asked to leave) and the students were thus without notice that their conduct was criminal. *Id.* at 350. Their conviction therefore violated their due process rights as being without fair warning. *Id.* at 350. Jan-Pro's intimation that it has suffered a similar "deprivation of the right of fair warning" by this Court's statutory interpretation in *Dynamex* does not land well. *See* Answering Br. at 53.

Likewise, Jan-Pro's citation to *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 281, is equally unavailing. There, the Court analyzed whether § 102 of the Civil Rights Act, which provided victims of discrimination with the ability to seek compensatory damages, should be applied retroactively. *Id.* at 280. The Court declined to hold the Act constituted <u>*an exception*</u> to the presumption against retroactive application

As another example, in *Moss v. Superior Court* (1998) 17 Cal. 4th 396, 429, this Court refused to give its decision retroactive effect (*in that* action) when the decision disapproved of precedent dating back a century, and held that contempt sanctions *can* be imposed on a parent whose inability to pay child support is the result of a willful failure to seek employment. *Id.* at 401. The Court held that it could not apply the decision retroactively because "the effect would be to make conduct that was not subject to criminal contempt sanctions at the time it was committed contemptuous." *Moss* is thus inapposite. Here, Jan-Pro has not reasonably relied upon well-established legal precedent construing the law in its favor; it has simply relied, and continues to rely, on its own flawed interpretation of the law. That does not implicate due process.

In *People v. Mendoza*, (2000) 23 Cal.4th 896, this Court rejected a similar due process argument, where the stakes were unquestionably higher. There, the Court overruled another case that had held a murder conviction, pursuant to statute, was deemed to be of the second degree when the jury had not explicitly made a finding of first degree. *Id.* at 913. The Court stated that "as is customary for judicial case law, we conclude that our holding may be applied to defendants [] and is otherwise fully retroactive." *Id.* at 924 (quotations omitted). The Court further found that due process principles "do not require a different conclusion" because the holding neither expanded liability nor enhanced punishment, and "[n]o other inequity arises from retroactive application," even though defendants, relying upon the earlier case, had an argument that they could not be convicted of first-degree murder. *Id.* at 925 (quotations omitted).

---

of a statute, namely because conferring a new right to money damages was analogous to creating a new cause of action. *Id.* at 283, 286. Here, in contrast, Jan-Pro is working against a presumption, and no new category of money damages has been created. In short, *Langraf* illustrates why retroactive application of *Dynamex* does not invoke due process concerns.

In sum, Jan-Pro's short, two-page assertion that application of the "ABC" test would violate its due process rights must fail as it finds no support it existing case law. As with the foregoing arguments, this Court should reject Jan-Pro's attempt to argue against retroactive application and confirm that *Dynamex* applies retroactively.

II. JAN-PRO's REQUEST TO DE-CERTIFY THE QUESTION ON REVIEW IS BASED ON FLAWED LEGAL ARGUMENTS

Though the Court need not reach the argument in support of Jan-Pro's request to de-certify the question on review, Petitioners briefly set forth their arguments in response below.

A. The *Dynamex* "ABC" Test Applies in the Joint Employment Context

The question presented here was whether the lack of a direct contractual relationship between Plaintiffs and Jan-Pro (which rendered Jan-Pro a "joint employer"), due to Jan-Pro's multi-tiered franchising scheme, precluded application of the "ABC" test. *Vazquez*, 923 F.3d at 595. The Ninth Circuit followed the Massachusetts Supreme Judicial Court decision in *Depianti v. Jan-Pro Franchising Int'l, Inc.* (2013) 465 Mass. 607 (which applied the Massachusetts version of the "ABC" test) and held that the test applies despite a lack of direct contract between the defendant and the workers, in a case where the defendant is the agent of misclassification. *Vazquez*, 923 F.3d at 595-96. To conclude otherwise would offer employers an "end run" around their obligations under wage and hour laws. *Depianti*, 465 Mass. at 623 (quoting *DiFiore v. American Airlines, Inc.* (2009) 454 Mass. 486, 496). The Ninth Circuit correctly rejected this argument and this Court (should it reach the question) should confirm.

As discussed at length above, Part I(A)(3), *Dynamex* explicitly stated that it was an interpretation of the "suffer or permit" test set forth in *Martinez* (which was used to analyze joint employment claims) and *extended* application of the test to independent contractor claims. The assertion that it carved out a new standard is illogical and contrary to the decision's stated purpose of offering a simplified test to cut down on confusion and unpredictability. Further, that this Court chose to adopt a version of the "ABC" test that "tracks the Massachusetts version" makes clear the test should apply to claims of joint employment brought in the wage and hour context. *Dynamex*, 4 Cal.5th at 956 n. 23. This Court adopted the Massachusetts "ABC" test because "Prong B" of the Massachusetts test *only* allows an employer to satisfy the prong by establishing that the plaintiff's work is outside its usual course of business and is thus stricter than that of other states and is thus "more consistent with the intended broad reach of the [*Martinez*] suffer or permit" test. *Id*.

Yet, Jan-Pro now attempts to argue that this Court intended to constrict application of the "ABC" test because this Court used the term "hiring entity" in elucidating the test. Answering Br. at 26-27; *Dynamex*, 4 Cal.5th at 916-17. There is simply no indication that this term was a deliberate choice. Indeed, the Court used the term "hiring entity" interchangeably in discussing the "suffer or permit" test in the joint employment *or* independent contractor context:

> [A]s our decision in *Martinez* recognized, the suffer or permit to work standard must be interpreted and applied broadly to include within the covered "employee" category *all* individual workers who can reasonably be viewed as *"working in the [hiring entity's] business*." ("A proprietor who knows that persons are *working in his or her business* without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so.")

Id. at 953 (quoting *Martinez*, 49 Cal.4th at 69) (internal citations omitted). This Court was explicit that lack of "formal hir[ing]" was not an end run around application of the "suffer or permit" test. *Id*. Reading into the test such a limitation directly contravenes the intended broad reach of California's wage and hour protections, as set forth in *Dynamex*.

Neither *Curry* nor *Henderson* undermine the Ninth Circuit's holding in this case. First, neither addressed situations involving alleged independent contractor misclassification – the specific practice which motivated *Dynamex* and led to Assembly Bill No. 5. While Petitioners submit that this is a distinction without a difference, it is the distinction that *Curry* and *Henderson* hang their hats on test. *Curry v. Equilon Enterprises, LLC*, (2018) 23 Cal.App.5th 289, 313-14 ("the Supreme Court's policy reasons for selecting the 'ABC' test are uniquely relevant to the issue of allegedly misclassified independent contractors…. Therefore, it does not appear that the Supreme Court intended for the "ABC" test to be applied in joint employment cases."); *Henderson v. Equilon Enterprises, LLC*, (2019) 40 Cal.App.5th 1111, 1127-28 (following *Curry*).

Further, Plaintiffs submit that the holdings of *Curry* and *Henderson* are incorrect and have only served to confuse the law in this area. These cases contradict *Dynamex*'s express purpose in adopting the "ABC" test, to tighten the strictures of California's employee status test and prevent disingenuous disavowal of an employment relationship in <u>*any context*</u>, *see* discussion p. 19. As the Ninth Circuit noted, *Curry*'s analysis of the "ABC" test is "somewhat slim on its own terms," *Vazquez*, 923 F.3d at 599, and the court in *Curry* did not even allow the parties to brief application of *Dynamex*. *Curry*, 23 Cal.App.5th at 314. *Henderson* merely followed *Curry*, believing it was bound by its precedent given the near total factual overlap. *Henderson*, 40 Cal.App.5th at 1121. These incorrect conclusions should not be cemented into California law. But the Court need not address

them here, as they are entirely reconcilable with application of the "ABC" test in the instant action.

B. As the Ninth Circuit Properly Recognized, there is No Exception to the Dynamex "ABC" Test for Alleged "Franchisors"

Jan-Pro then argues that it escapes application of the "ABC" test because relationships between "franchisors" and "franchisees" are inherently incompatible with the "ABC" test. Answering Br. at 40-41. This Court need only look to the business of franchising in Massachusetts, where the "ABC" test has been the law of the land since 2004 and has yet to portend the end of franchising. *See* St. 2004, c. 193, § 26.

In any event, Jan-Pro's contention that no franchise can satisfy Prong A (because franchisors exert control pursuant to California or federal franchise law), rests on a fundamental misunderstanding of Prong A. Answering Br. at 40. Courts have uniformly recognized that the "control" prong of the Massachusetts/*Dynamex* version of the "ABC" test is "not so narrow as to require that a worker be *entirely free* from direction and control from outside forces." *Ruggiero v. American United Life Insurance Co*. (D. Mass. 2015) 137 F. Supp. 3d 104, 115–16 (emphasis supplied); *Beck v. Massachusetts Bay Technologies, Inc*. (D. Mass. Sept. 6, 2017) 2017 WL 4898322 at *6 ("a contractor need not be completely free from control or direction."). Moreover, Jan-Pro does not identify any specific form of control either California or federal laws require it to exert over its franchisees. For example, the California franchise definition Jan-Pro cites to contains no control requirement. *See* Corp. Code, § 31005, subd. (a) and Bus & Prof. Code § 20001, subds (a)-(c). And the federal regulation, 16 C.F.R. § 436(h) *et seq*. (the "Franchise Rule"), has a "control *or assistance*" element (emphasis added). Similarly, the trademark law only requires control over the use of its trademarks – not over workers. *See* 15 U.S.C. §§

1064, 1115(b)(2); *see also* Bus. & Prof. Code, §§ 14230, subds. (c)(1), (d), 14272.

Most importantly though, Jan-Pro's use of California Franchise Investment Law (CFIL) flips the legislation on its head. CFIL was enacted in 1970 specifically to regulate franchising to *protect franchisees* from sham or predatory franchisors. Cal. Corp. Code § 31001. Jan-Pro should not be allowed to now take cover under the legislation. Rather, this case provides a prime example of why applying the "ABC" test to wage and hour claims against a self-described franchisor is necessary. Here, Jan-Pro disingenuously painted itself as a franchisor in order to evade its obligations as an employer and exact exorbitant fees from low-wage janitorial workers in the form of phony franchisee fees. Opening Br. at 32-33. "Various courts and arbitrators, however, have been skeptical" of self-described franchisors such as Jan-Pro, "especially in the cleaning franchise industry." *Vazquez*, 923 F.3d at 599 (also citing *Awuah v. Coverall N. Am., Inc*. (D. Mass. 2010) 707 F. Supp. 2d 80, 84, and *Da Costa v. Vanguard Cleaning Systems, Inc*., (Mass. Supp. Sept. 29, 2017) 2017 WL 4817349, at *6).

For good reason: an "ABC" analysis of Prong B makes clear Jan-Pro is, indeed, in the business of providing janitorial services. *Id*. at 596-99. While Jan-Pro may protest that literal application of Prong B would render all franchisees employees under the test, this Court has already rejected that argument. *See Dynamex*, 4 Cal.5th at 949 (explaining that "literal application of the suffer or permit standard" is not a threat, as the standard is always applied in light of its history and its purpose). Should the Court choose to address the question, this Court should affirm that there is no special exception that exempts from the "ABC" test "franchisors" who are alleged to have misclassified their "franchisees" as independent contractors. As noted in Plaintiffs' Opening Brief, a number of states have likewise

rejected the argument that there should be a special test for employee status when misclassification claims are brought against "franchisors". *See* Opening Brief, at 30-31.

C. There Is No "*Patterson* Gloss" to the "ABC" Test in Cases Against Franchisors Who are Alleged to Have Misclassified Franchisees in the Wage and Hour Context

Finally, the Ninth Circuit correctly refused to apply a "*Patterson* gloss" to the *Dynamex* test in this case because: (1) *Dynamex* makes no mention of *Patterson* (a conspicuous omission, given the opinion's lengthy section recounting the "relevant California judicial decisions," 4 Cal.5th at 927-43, as well as its citations to cases involving franchisors, *id*. at 963); and (2) *Patterson* is a vicarious tort liability case whose standard should not apply in a wage and hour case. *Vazquez*, 923 F. 3d at 594. As the briefing in *Patterson* makes clear, *Patterson* focused on the "instrumentality of the harm" standard for vicarious liability, which inquires whether the "franchisor [] control[s], or ha[s] the right to control, the daily conduct or operation of the particular 'instrumentality' or aspect of the franchisee's business that allegedly caused the harm." *Patterson*, 60 Cal.4th 474, Opening Br. at *3 (citing *Kerl v. Dennis Rasmussen, Inc*. (Wis. 2004) 682 N.W.2d 328, 340). The Court held that "[t]he imposition and enforcement of a uniform marketing and operational plan cannot *automatically* saddle the franchisor with responsibility for employees of the franchisee who injure each other on the job." *Id*. (emphasis in original). *Patterson* sought to prevent a franchisor's imposition of a uniform operating system from "*necessarily* establish[ing] the kind of employment relationship that concerns us here" (in the tort context). *Id*. at 499 (emphasis in original).[4]

---

[4] *Salazar v. McDonald's Corp.* (9th Cir. 2019) 939 F. 3d 1051, *as amended upon denial reh'g*, 944 F. 3d 1024, is inapplicable. As with *Curry*

Dynamex is motivated by the opposite concern: to prevent employers from automatically establishing ***immunity*** from wage and hour claims by using irregular workplace arrangements (like franchising). *Dynamex*, 4 Cal.5th at 963 (citing *Awuah*, 707 F.Supp.2d 80 at 82 and *Awuah v. Coverall N. America*, (2006) 447 Mass.852, 857, both franchise cases, in explaining the benefit of "clarity and consistency" that the "ABC" test provides). *Dynamex* did not contemplate or leave room for a special franchisor "ABC" test in the wage and hour context, and *Patterson* does not invite one. Unsurprisingly, a number of courts throughout the country have routinely applied their ordinary employment-status tests to franchisors and refused to grant franchisors a special exception to the law. *See* Opening Br. at 30-31 (collecting cases). This Court should similarly confirm the simplicity and singularity of the "ABC" test.

CONCLUSION

For the foregoing reasons, this Court should affirm the Ninth Circuit's conclusion here – as well as that of all courts to have addressed the issue - that *Dynamex* applies retroactively. Jan-Pro's arguments that the *Dynamex* test was otherwise incorrectly applied are also unconvincing and run counter to this Court's conclusions in *Dynamex* and, now, the legislature's affirmance of the "ABC" test in A.B. 5. To allow Jan-Pro to prevail on any of these arguments proffered would represent a serious undoing of the strength of the *Dynamex* decision and would impede enforcement of California's Labor Code. This Court should reject the

---

and *Henderson*, the Ninth Circuit panel's refusal to apply *Dynamex* hinged on its understanding that the *Dynamex* test was limited to independent contractor misclassification claims. 944 F. 3d 1032. For the reasons discussed *supra* Part II(A), Plaintiffs submit that this conclusion was incorrect but, in any event, is reconcilable with the decision to apply *Dynamex* here, where plaintiffs have brought independent contractor misclassification claims.

attempt and foreclose further evasion of the law by likewise affirming, should it reach these other issues, that Jan-Pro's arguments are incorrect.

Dated: July 16, 2020

Respectfully submitted,

*/s/ Shannon Liss-Riordan*_____

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

CERTIFICATE OF WORD COUNT COMPLIANCE

In accordance with California Rules of Court, rule 8.204(c), I hereby certify that this brief contains 8,398 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: July 16, 2020

/s/ Shannon Liss-Riordan_____
Shannon Liss-Riordan
(SBN 310719)
Attorney for Petitioners

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

PROOF OF SERVICE

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

PROOF OF SERVICE

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 July 16, 2020, I served the attached **PETITIONERS' REPLY BRIEF,** on:

Jan-Pro Franchising International, Inc. : Defendant and Respondent	Theodore J. Boutrous Gibson Dunn & Crutcher, LLP 333 South Grand Avenue Los Angeles, CA 90071-3197 Samuel Earl Eckman Gibson Dunn & Crutcher LLP 333 South Grand Avenue Los Angeles, CA 90071-3197 Theane Evangelis Gibson Dunn & Crutcher, LLP 333 South Grand Avenue Los Angeles, CA 90071-3197 Jeffrey Mark Rosin O'Hagan Meyer, PLLC 111 Huntington Avenue, Suite 2860 Boston, MA 02199
National Employment Law Project : Amicus curiae	Catherine Ruckelshaus National Employment Law Project 80 Maiden Lane, Suite 601 New York, NY 10038
Equal Rights Advocates : Amicus curiae	Catherine Ruckelshaus National Employment Law Project 80 Maiden Lane, Suite 601 New York, NY 10038
Dolores Street Community Services : Amicus curiae	Catherine Ruckelshaus National Employment Law Project

	80 Maiden Lane, Suite 601 New York, NY 10038
Legal Aid at Work : Amicus curiae	Catherine Ruckelshaus National Employment Law Project 80 Maiden Lane, Suite 601 New York, NY 10038
Worksafe, INC. : Amicus curiae	Catherine Ruckelshaus National Employment Law Project 80 Maiden Lane, Suite 601 New York, NY 10038
International Franchise Association : Amicus curiae	James F. Speyer Arnold & Porter Kaye Scholer, LLP 777 South Figueroa Street, 44th Floor Los Angeles, CA 90017
National Federation of Independent Business Small Business Legal Center : Amicus curiae	Bradley Alan Benbrook Benbrook Law Group, PC 400 Capitol Mall, Suite 2530 Sacramento, CA 95814
Chamber of Commerce of the United States of America : Amicus curiae	Adam G. Unikowsky Jenner & Block LLP 1099 New York Avenue, NW Suite 900 Washington, DC 20001-4412
California Chambers of Commerce : Amicus curiae	James F. Speyer Arnold & Porter Kaye Scholer, LLP 777 South Figueroa Street, 44th

	Floor Los Angeles, CA 90017
National Employment Law Project : Amicus curiae	Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004
California Employment Law Council : Amicus curiae	Paul Grossman Paul Hastings et al, LLP 515 South Flower Street, 25th Floor Los Angeles, CA 90071-2228
National Employment Law Project : Amicus curiae	Kevin F. Ruf Glancy Prongay & Murray 1925 Century Park East, Suite 2100 Los Angeles, CA 90067 Aaron D. Kaufmann Leonard Carder, LLP 1330 Broadway, Suite 1450 Oakland, CA 94612
California Employment Lawyers Association : Amicus curiae	Kevin F. Ruf Glancy Prongay & Murray 1925 Century Park East, Suite 2100 Los Angeles, CA 90067 Aaron D. Kaufmann Leonard Carder, LLP 1330 Broadway, Suite 1450 Oakland, CA 94612

Via True Filing.

And, via First-Class mail, on:

United States Court of Appeals for the Ninth Circuit	Office of the Clerk James R. Browning Courthouse 95 Seventh Street San Francisco, CA 94103-1526
Supreme Court of California	Office of the Clerk 350 McAllister Street San Francisco, CA 94102-4783

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on July 16, 2020, in Boston, Massachusetts.

By: _____
MARIA CEDENO

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 7/16/2020 by Florentino Jimenez, 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:

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

2. My email address used to e-serve: **mjcedeno@llrlaw.com**

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

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	1 - 2020.07.16 Jan-Pro SCt Reply-FINAL TO FILE
PROOF OF SERVICE	2 - 2020.07.16 POS

Service Recipients:

Person Served	Email Address	Type	Date / Time
George Howard Jones Day 076825	gshoward@jonesday.com	e-Serve	7/16/2020 3:41:35 PM
Theodore Boutrous Gibson, Dunn & Crutcher LLP 132099	tboutrous@gibsondunn.com	e-Serve	7/16/2020 3:41:35 PM
Connie Christopher Horvitz & Levy LLP	cchristopher@horvitzlevy.com	e-Serve	7/16/2020 3:41:35 PM
James Speyer Arnold & Porter, LLP 133114	james.speyer@arnoldporter.com	e-Serve	7/16/2020 3:41:35 PM
Jeffrey Rosin O'Hagan Meyer, PLLC 629216	jrosin@ohaganmeyer.com	e-Serve	7/16/2020 3:41:35 PM
Luke Wake NFIB Small Business Legal Center 264647	luke.wake@nfib.org	e-Serve	7/16/2020 3:41:35 PM
Paul Grossman Paul Hastings Janofsky & Walker 035959	paulgrossman@paulhastings.com	e-Serve	7/16/2020 3:41:35 PM
Jason Wilson Willenken LLP 140269	jwilson@willenken.com	e-Serve	7/16/2020 3:41:35 PM
Kevin Ruf Glancy Prongay & Murray	kruf@glancylaw.com	e-Serve	7/16/2020 3:41:35 PM
Kevin Ruf Glancy Prongay & Murray LLP 136901	kevinruf@gmail.com	e-Serve	7/16/2020 3:41:35 PM

Aaron Kaufmann Leonard Carder, LLP 148580	akaufmann@leonardcarder.com	e-Serve	7/16/2020 3:41:35 PM
Paul Cane Paul Hastings LLP 100458	paulcane@paulhastings.com	e-Serve	7/16/2020 3:41:35 PM
Kerry Bundy Faegre Baker Daniels LLP 0266917	kerry.bundy@faegrebd.com	e-Serve	7/16/2020 3:41:35 PM
Jeremy Rosen Horvitz & Levy LLP 192473	jrosen@horvitzlevy.com	e-Serve	7/16/2020 3:41:35 PM
Samuel Earl Eckman 308923	seckman@gibsondunn.com	e-Serve	7/16/2020 3:41:35 PM
Theane Evangelis 243570	tevangelis@gibsondunn.com	e-Serve	7/16/2020 3:41:35 PM
Catherine Ruckelshaus	cruckelshaus@nelp.org	e-Serve	7/16/2020 3:41:35 PM
Bradley Benbrook 177786	brad@benbrooklawgroup.com	e-Serve	7/16/2020 3:41:35 PM
Adam Unikowsky	aunikowsky@jenner.com	e-Serve	7/16/2020 3:41:35 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

7/16/2020

Date

/s/Shannon Liss-Riordan

Signature

Liss-Riordan, Shannon (310719)

Last Name, First Name (PNum)

Lichten & Liss-Riordan, PC

Law Firm