Case 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

AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND PARTNERSHIP FOR WORKING FAMILIES IN SUPPORT OF PETITIONERS

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I. INTRODUCTION

The unanimous decision in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903 has brought great clarity to the standard regarding employee classification in California. Yet, despite this clarity, employers continue to obscure their obligations under the law and attempt to sow doubts about the application of this new standard. In particular, Respondent in this case, and employers throughout the state, have resisted the retroactive application of the *Dynamex* standard.

This brief will assist this Court in coming to the correct solution: the holding in *Dynamex* applies retroactively to Respondent and all employers. While the Court has had the benefit of the Petitioners and Respondent briefing, this brief provides critical detail that will be valuable to the Court's reasoning. For instance, a detailed review of *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 and its progeny demonstrates that not only was the outcome in *Dynamex* in keeping with prior California Supreme Court precedent (a critical threshold factor when considering retroactive application of judicial decisions), but was foreshadowed by these earlier decisions, making the interpretation of the law announced in *Dynamex* one that employers could and should have foreseen. For example, the Court in *Borello* declared the Restatement of Agency (the authority from which it derived most of the factors to establish independent contractor status), as merely "a useful reference" for identifying employees, not the beginning and end of any analysis. *Id.* at 354. In addition, the *Borello* Court explicitly called on future courts to look to sister jurisdictions when evaluating disputed claims regarding a worker's classification. *Id.*

Moreover, the retroactive application of *Dynamex* fits neatly within prior precedent from this Court and helps ensure the consistent application of the law. Indeed, as we detail in this brief, Respondent's assertions that they fit within the narrow exceptions to the rule of retroactivity are without merit.

Respondent was aware for more than a decade that its business model was highly suspect. Other employers in the state can hardly argue that they relied on the prior *Borello* standard when employers, courts, and researchers have for years claimed the

opinion to be opaque and unworkable. In addition, the retroactive application of the *Dynamex* standard does not offend Respondent's due process rights given that the decision is neither arbitrary nor would unfairly expand civil liability.

Every court to review this issue has agreed that the holding in *Dynamex* applies retroactively. Opening Br. at 16- 17. Any fair analysis of the general rule in this context leads to this conclusion. To hold otherwise would allow the Court's watershed decision clarifying the standard that applies to employee misclassification – an acknowledged rampant problem in California and throughout the United States –to be "encased in a self-defeating prospectivity." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 194. This is a result Respondent invites, and it is an invitation this Court should decline.

II. INTEREST OF THE *AMICI*

Amicus California Employment Lawyers Association ("CELA") is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus curiae briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc*. (2007) 40 Cal.4th 1094, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, and *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, as well as in cases before the Ninth Circuit.

Amicus Partnership for Working Families ("Partnership") is a national federation of regional power building organizations. Together with our 20 affiliates and one emerging coalition, we drive a broad progressive agenda to reshape our built environment to create healthy communities, remake our democracy by building power through civic

engagement, and restructure our economy to reduce racial and wealth inequality. All too often workers face abuse and exploitation on the job, experiences that are compounded when employers seek to evade their responsibilities with subterfuges like independent contractor misclassification. Our affiliates see the direct and daily harms this type of misclassification represents, which encompasses loss of wages, but other vital employee protections that protect the dignity of individuals at work. The Partnership engages at the nexus of worker organizing and policy advocacy and understands on a fundamental level the necessity for workers to be made whole after the Court's seminal decision in *Dynamex Operations West v. Superior Court*. The test laid out is not only a logical progression of a decade's worth of advocacy to end harmful misclassification, but is in keeping with the remedial purpose of California law.

III. MISCLASSIFICATION IS A SCOURGE ON CALIFORNIA WHICH DRAINS STATE RESOURCES AND HARMS WORKERS

A. Worker Misclassification Depletes Public Resources And Harms California Workers.

The costs of misclassification are widespread and pernicious. They are borne by California workers, law-abiding businesses, and the general public through the loss of tax revenue and the depletion of social programs. As this Court noted in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903 ("*Dynamex*"), whether an individual worker is classified as an employee or independent contractor has "considerable significance for workers, businesses, and the public generally." 4 Cal.5th at 912. Businesses that classify workers as independent contractors do not pay federal Social Security taxes, payroll taxes, unemployment insurance taxes, state employment taxes, or workers' compensation coverage. Nor must they "[comply] with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees." *Id.* at 913. These costs do not vanish when businesses do not pay them – they are instead passed on to those least able to bear them – workers and their families. This vicious cycle continues when businesses that "save" on these costs gain an unfair competitive advantage over law-abiding businesses, thereby lowering the floor of labor

standards for workers and leeching state and federal governments of revenue used for programs most urgently needed by workers, such as unemployment insurance funds, paid sick leave, and other social programs.

When the harms of misclassification are quantified in monetary terms, they are staggering. In 2011, the Congressional Research Service estimated that if IRS rules were altered to require prospective reclassification of some currently misclassified workers for the purposes of employment taxes, the federal government would collect $8.71 billion from 2012-2021, an amount that currently goes unpaid.[1] The misclassification of workers also has downstream effects at the state and local levels. For example, when misclassified workers are denied access to benefits like health insurance, state budgets are strained by an increased demand for benefit programs like Medicaid and supplemental nutrition assistance. *Id.* at 7. Thus, governments, in effect, subsidize misclassification.

The high prevalence of independent contracting makes proper classification all the more urgent. In 2014, 13.3 percent of all American workers nationwide earned at least some income from independent contracting work, and 34.8 percent of workers who earned both wages and independent contracting income earned more than a third of their income from independent contracting alone.[2] These workers - already left out in the cold when it comes to basic protections like minimum wage requirements, or workers' compensation laws - must also contend with a long-term earnings gap. Employees can expect that with time, their wages and benefits increase as they "climb the ladder." Misclassified workers are cut off from such pathways, resulting in lower wage growth,

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[1] James M. Bickley, *Tax Gap: Misclassification of Employees as Independent Contractors*, Congressional Research Service, 6 (March 10, 2011), available at https://www.bradfordtaxinstitute.com/Endnotes/CRS_Tax_Gap_3_10_2011.pdf

[2] Annette Bernhardt and Sarah Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting*, UC Berkeley Labor Center, June 14, 2017. Table 2 of this report indicates percentages of the U.S. workforce who earn income from independent contracting.

reduced benefit access, and in aggregate, higher levels of income inequality.[3] Wage losses are multiplied over time as misclassified workers are denied the wages and benefits they worked for year after year.

B. California Has Every Incentive To Ensure Proper Classification Given The Harms To The State Economy.

The threat independent contractor misclassification poses to state budgets and workers has given California every incentive to ensure its workers are properly classified. At 8.5 percent of the workforce, a significantly higher percentage of Californians are classified as independent contractors at their main jobs as compared to the national average (which sits at 6.3 percent).[4] Although it is difficult to estimate the exact rate of misclassification, studies suggest that 1 to 2 percent of the independent contractor workforce is misclassified nationally. Researchers estimate that misclassification is especially concentrated in specific industries, including home care, janitorial services, trucking, hospitality, and construction. In fact, in the latter industry, one study found that as many as one in six California workers are misclassified as independent contractors.[5] Although California has a reputation for strong labor protections, misclassification has remained a persistent problem throughout the state. California's inability to protect its workers has serious consequences: in 2000, it was estimated that misclassifying even just one percent of workers results in an average annual loss of $198 million to

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[3] David Weil, *How to Make Employment Fair in an Age of Contracting and Temp Work.* HARVARD BUSINESS REVIEW, March 24, 2017, https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work. In addition to lower wages and denied benefits, contract workers also face "diminished opportunities for on-the-job training, protections from social safety nets like unemployment insurance and workers' compensation, access to valuable social networks, and other pathways to upward advancement. Taken together, the fissured workplace contributes to growing earnings inequality."

[4] Bernhardt and Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting* (2017).

[5] Bernhardt and Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting* (2017).

unemployment insurance trust funds, an even larger amount today when adjusted for inflation.[6]

California has responded to the serious problem of worker misclassification through interagency task forces - such as the Labor Enforcement Task Force - legislative reforms,[7] and periodic tax audits by agencies such as the Employment Development Department. One such audit in 2015 identified 96,039 unreported employees and helped collect $201 million in unpaid state income taxes.[8] Yet, when state agencies estimated that the real cost of worker misclassification in California, they estimated it to be around $7 billion annually,[9] making it clear that such audits and policy reforms have failed to stem the tide of misclassification and its attendant harms to vulnerable California workers.

IV. *DYNAMEX* REPRESENTS A FORESEEABLE CONTINUATION OF THE LAW AND THUS SHOULD BE APPLIED RETROACTIVELY

A. Retroactive Application Of Judicial Decisions Is Well-Established And Subject To Narrow Exceptions.

Retroactive application of judicial decisions is a commonplace rule that is "basic in our legal tradition." *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978-9 ("*Newman*"); *see also Frlekin v. Apple, Inc*. (2020) 8 Cal.5th 1039, 1057. The "principle that statutes operate only prospectively, while judicial decisions operate retrospectively,

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[6] Lalith de Silva *et al.*, *Study of Alternative Work Arrangements: Independent Contractors*, iv.
[7] *See, e.g.*, Cal. Lab. Code § 226.8 (imposing civil penalties for willful misclassification).
[8] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasures* 4, Sept. 2017, https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.
[9] State of California Dep't of Industrial Relations, News Release, *Labor Commissioner's Office Files $6.3 Million Misclassification and Wage Theft Lawsuit Against Glendale Construction Company,* Aug. 14, 2017, https://www.dir.ca.gov/DIRNews/2017/2017-76.pdf.

is familiar to every law student." *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79.

The rule is a default one, requiring those seeking an exception to argue affirmatively for its application, *see Dardarian v. OfficeMax N. Am., Inc.* (N.D. Cal. 2012) 875 F. Supp. 2d 1084, 1090 ("*Dardarian*"), and it is a general rule that "has been applied *without regard* to the area of law at issue." *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 442 (relying on *Newman, supra,* 48 Cal.3d at 995, n. 3) (emphasis in the original). The rule operates with particular force when the judicial decisions to be applied retroactively are a "logical extension" of previously established rulings. *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 25; *see also Newman, supra* 48 Cal.3d at 986 (noting that the rule of retroactivity applies with clearer force when the "rule of law . . . [does] not overrule a prior decision of this court"). Indeed, as described below, there are only a few narrow exceptions in which a judicial decision does not apply retrospectively. Moreover, like prior cases establishing the rule, the *Dynamex* decision was a "logical extension" of the rules regarding independent contractor classification.

This tradition is also core to the conduct of judicial business and satisfies a number of prudential goals. It helps the uniformity and application of the law. Even if a court "confronts a truly unprecedented case, [it] still [arrives] at a decision in the context of judicial reasoning with recognizable ties to the past." *Newman, supra,* 48 Cal.3d at 980. This process ensures that the case can be integrated fully into other cases that connect to one another, rather than veering abruptly in one direction or another. *Id.*; *see also Rogers v. Tennessee* (2001) 532 U.S. 451, 452 (observing that prohibiting the retroactive application of judicial decisions would "unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system"). Nowhere is this consistency more vital than in the application of independent contractor classification laws that ensure both that workers are able to earn a living with dignity and businesses are able to compete on a level playing field.

Retroactive application of judicial decisions also represents a commonsense understanding of human nature. As described in the tort context in *Newman*,

> the hardship on parties who would be saddled with an unjust precedent if the overruling were not made retroactive, ordinarily outweighs any hardship on those who acted under the old rule or any benefits that might be derived from limiting the new rule to prospective operation. Neither the tortfeasor nor the victim normally takes account of expanding or contracting rules of tort liability except tangentially in the course of routinely insuring against such liability.

Id. at 981. Similarly, one would be hard-pressed in the arena of employment law to find the party that so carefully weighed every movement in the law such that their hardships would outweigh applying refinements to the law retroactively.[10]

Respondent in this litigation clearly recognizes the strength and durability of these traditions, given that its citations to cases addressing exceptions to retroactivity have themselves rejected the exceptions and applied the laws under consideration retroactively. *See, e.g.*, Answering Brief, at 43, 45, 54 (citing to *Peterson v. Superior Court* (1982) 31 Cal.3d 147; *Los Angeles County v. Faus* (1957) 48 Cal.2d 672; and *Newman*, all of which rejected attempts at limiting judicial decisions to prospective only application). Given the weight, consistency, and history that brought about the *Dynamex* decision, there is no doubt the case should be applied retroactively.

B. The *Dynamex* Decision Was Based On A Logical Extension Of Cases Stretching From *Borello* To *Ayala.*

In *Dynamex,* this Court engaged in a detailed analysis of the various tests used to determine employee status. At the outset, the Court noted the significant risk of unlawful misclassification "in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors." 4 Cal. 5th at 913. The Court then analyzed the key cases involving the "treatment of the employee or independent contractor distinction under California law." *Id.* at 927.

[10] Indeed, this Court has recognized that, in the tort context, "California courts have consistently applied tort decisions retroactively even when those decisions declared new causes of action or expanded the scope of existing torts in ways defendants could not have anticipated prior to our decision." *Newman, supra,* 48 Cal.3d at 981-82.

The Court first recognized that its early decisions addressing whether a worker should be classified as an employee or an independent contractor arose in the tort context to determine whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In this context, "the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because '[t]he extent to which the employer had a right to control [the details of the service] activities was ... highly relevant to the question whether the employer ought to be legally liable for them....'" *Id.* (quotation omitted).

The Court then reviewed its earlier decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 ("*Borello*"). The Court explained that the concept of employment "is not inherently limited by common law principles," and that *Borello* "call[s] for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue." *Id.* at 930, 934. Thus, the multi-factor test applied in *Borello* is *but one way* to demonstrate employee status, and that "'by any applicable test' the farmworkers [in that case] were employees *as a matter of law*." *Id.* at 932 (emphasis in original).

The Court emphasized that the "statutory purpose" of social welfare legislation upon which claims are pursued is the "touchstone" for deciding whether particular workers are employees rather than independent contractors, which "sets apart the *Borello* test" from federal cases which apply "a more traditional common law test." *Id.* at 935. The Court also noted that in the almost 30 years since *Borello*, the California Legislature has responded to the "continuing serious problem of worker misclassification" by imposing "substantial civil penalties on those that willfully misclassify, or willfully aid in misclassifying, workers as independent contractors." *Id.* Yet, to date, these attempts at interceding and resolve the crisis of independent contractor misclassification have not been successful.

Turning to *Martinez v. Combs* (2010) 49 Cal. 4th 35 ("*Martinez*"), the Court rejected Dynamex's argument – the same one that Respondent makes here – that the

alternative definitions of "employ" in the wage orders at issue were limited to the joint employment context. The Court also rejected Dynamex's argument that the *only* way to demonstrate employment status in a misclassification case is the common law test.[11] Instead, the Court explained, *Martinez* teaches that the IWC's wage orders were "unmistakably" intended to define the employment relationship for actions under the Labor Code for minimum wages and overtime. *Id.* at 21. The wage orders recognized three alternative definitions of "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 938, quoting *Martinez*, 49 Cal.4th at 64. As the Court in *Dynamex* noted, "the court in *Martinez* thereafter took pains to emphasize the importance of *not* limiting the meaning and scope of 'employment to only the common law definition for purposes of the IWC's wage orders[.]" *Id.* (emphasis in the original).

The Court turned finally to its decision in *Ayala v. Antelope Valley* (2014) 59 Cal.4th 522 ("*Ayala*"), in which the Court revisited the *Borello* analysis in the context of a trial court's denial of class certification. In *Ayala*, the parties *agreed* that the common law multi-factor test for employment status controlled. *Id.* at 941. Applying *Borello*, the Court reversed the denial of class certification, holding that "[w]hether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control . . ." and "what matters under the common law is not how much control a hirer exercises, but how much control the hirer retains the right to exercise." *Ayala*, *supra,* 59 Cal.4th at 528, 533. Indeed, *Ayala* demonstrates the Court's willingness to sharpen and hone the *Borello* standard, yet it left unresolved the question it subsequently answered in *Dynamex*, i.e., whether the wage order definitions of "employ" and "employer" as construed in *Martinez* apply to claims under the Labor Code where the workers allege misclassification. 4 Cal.5th at 941-42. The Court's answer is a crystalline "yes."

[11] The definitions contained in the wage order at issue in *Dynamex* are the same as those included in each of the other 15 wage orders issued by the IWC. *Dynamex*, 4 Cal.5th at 926, n.9.

To reach this outcome, the Court focused its discussion on the "suffer or permit" definition contained in the wage orders (the second definition of "employ" outlined in *Martinez*), describing it as an "exceptionally broad" standard that "must be liberally construed." *Dynamex*, *supra,* 4 Cal.5th at 952-53. Its breadth is rooted in the "necessity of the minimum wage and maximum hour legislation," which recognizes the lack of workers' bargaining power and the fact that "workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions" (or, in the case of the janitorial workers in this case, *pay* for the privilege to work). *Id.* at 952. The wage orders thus are intended to ensure that responsible companies that comply with their provisions are not hurt by unfair competition, and that the public at large benefits by raising living standards. *Id.*

To satisfy these aims, the *Dynamex* Court held that

> it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test—namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Id. at 956-57. Not only are each of the factors presented here part of *Borello*'s conception of the standard (as the Petitioners detail, e.g., Opening Brief at 23), but the test even captures the burdens outlined in *Borello*. 48 Cal.3d at 349 (finding that the "[o]ne seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees" under the worker's compensation act, the statute at issue in *Borello*).

Thus, beginning with *Borello* and extending to *Ayala*, this Court has taken pains to trace the evolution of the law in a way that justifies retroactive application. More

specifically, because the refinement brought about in *Dynamex* was foreseeable, there is no inherent reason to avoid retroactive application.

C. Correctly Understood, *Borello* Compelled The Result In *Dynamex*, Making It Foreseeable For Employers.

It should be noted at the outset that "no question of retroactivity arises" when there is not a material change in the law, such as a court explicitly overruling prior precedent. *People v. Guerra* (1984) 37 Cal. 3d 385, 399. "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," something which the preceding section demonstrates is the case with the *Dynamex* decision. *Id*. at 386; *see also Dardarian*, *supra,* 875 F. Supp. 2d at 1091 (noting that the case at bar "did not overrule a California Supreme Court precedent and thus, was not a clear break from a well-established prior rule"). And as the Petitioner's briefing indicates, multiple cases addressing the retroactivity issue have done so by affirming the proposition that the general rule should apply. *See, e.g.*, *Garcia v. Border Transportation Group LLC* (2018) 28 Cal.App.5th 558, 572 n. 12 ("[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."); *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). This line of cases recognizes the propriety of applying *Dynamex* retroactively.

Yet, assuming *arguendo* that an exception could apply, Respondent and other employers would need to establish that the change to the law was not foreseeable. *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 153 ("*Peterson*"). A closer reading of *Borello* demonstrates that the Court not only invited such refinement, but made it abundantly clear that future courts should act to refine their holdings in light of the wage laws' remedial purpose and, in particular with respect to employee status, to end abusive independent contractor misclassification.

As noted above, the *Borello* Court's conception of employment is not moored permanently to the common law tradition when interpreting statutes and legislation (like the wage orders) which have at their core a broad remedial purpose. 48 Cal.3d at 351 (interpreting California's workers' compensation statute). The Court was explicit in noting that "social-legislation" policy calls for greater attention on effectuating the underlying statutory goals. *Id.* at 352. "[The] traditional California tests for independent contractor status *must be supplemented* in compensation cases by consideration of the remedial purpose of the statute, the class of persons intended to be protected, and the relative bargaining positions of the parties." *Id.* at 353 (emphasis added). Rather than seek a fixed point in time and declare a universal and static rule, as the Respondent and their *amici* have suggested, courts were directed after *Borello* to continually refine their approach and seek out the best test to ensure that California's employment laws are given their fullest effect.

For example, the *Borello* Court described the Restatement of Agency that largely led to the multi-factor test established in California as merely "a useful reference" for identifying employees, not that is was the beginning and end of any analysis. *Id.* at 354. The Court also pointed employers, through their analysis, toward older tests in California and those in other jurisdictions. For instance, the Court explicitly noted that California Labor Code § 2750.5 was "a helpful means of identifying the employee/contractor distinction." That section of the code contains a conjunctive test similar to the ABC test adopted in *Dynamex* that applies in the construction industry and has been California law since 1978. *Id.*[12]

[12] The statute requires an employer in the construction industry to affirmatively establish the independent contractor status of their workers by meeting all three factors: "(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for; (b) That the individual is customarily engaged in an independently established business; [and] (C) [inter alia] That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status." *See* Cal. Lab. Code § 2750.5.

Strikingly, the Court in *Borello* explicitly endorsed the approach later taken by the Court in *Dynamex* by noting that "test[s] developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation" can be helpful guides. 48 Cal.3d at 354 (referencing the 6-factor Fair Labor Standards Act test in *Real v. Driscoll Strawberry Associates, Inc.* (9th Cir.1979) 603 F.2d 748, 754). Each test that the Court pointed to remain "logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor." *Id.* at 355.

Respondent and their *amici* thus misconstrue prior precedent and attempt to frame *Borello* as having offered a strict test on which they built their reliance. To the contrary, the Court indicated a clear willingness – and in fact an explicit encouragement – for the law to adapt to changing circumstances, including reaching out to sister jurisdictions for legal tests that best achieve the remedial purpose of the state's wage orders. The Court in *Dynamex* simply accepted this invitation by refining the test for independent contractor misclassification and relying on precedent from other jurisdictions to do so.

And as well it should have, given the strong drumbeat from jurists, advocates, and human resource professionals who have consistently argued that the old *Borello* standard (and other multi-factor tests) should be refined. *See, e.g., O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2015) 82 F.Supp.3d 1133, 1153 (stressing that the *Borello*-style analysis so consistently falls short that, "the legislature or . . . courts may eventually refine or revise that test"); *Cotter v. Lyft, Inc.*, (N.D. Cal 2015) 60 F.Supp.3d 1067, 1082 (describing *Borello*'s multi-factor standard as "outmoded" and, when put to juries, was the equivalent of being "handed a square peg and asked to choose between two round holes"); Peter Tran, *The Misclassification of Employees and California's Latest Confusion Regarding Who is an Employee or an Independent Contractor*, 56 Santa Clara L. Rev. 677, 700 (2016) (detailing how a multi-factor tests inhibits the ability of litigants to foresee the outcome of contested legal issues which only increases the risks and expense of litigation); Steve Bates, *A Tough Target: Employee or Independent Contractor?*, Society for Human Resource Management (2001) (lamenting the challenges

regarding multi-factor tests and detailing how businesses have called on lawmakers to reconsider simplified alternatives). Indeed, the weaknesses of the *Borello* standard – combined with its command to look to the best rules available to serve the remedial purposes of California's wage and hour laws – brought this Court to adopt the ABC test. *Dynamex*, 4 Cal.5th at 964.

Therefore, it is clear not only that the *Borello* standard invited additional refinement, but that it was not intended as the final word on employee classification. California policy already includes ABC-like tests from which to model and there has been a sustained chorus describing the *Borello* approach alone as insufficient to correct misclassification. Since the *Borello* Court invited the very analysis and application used in *Dynamex*, it is disingenuous to claim now that the refinement in the law was somehow unforeseeable. This is the type of refinement that is "distinctly foreshadowed." *Solem v. Stumes* (1984) 465 U.S. 638, 646; *see also Neel, supra,* 6 Cal.3d at 194 (holding that retroactive application of a malpractice liability holding could "fairly have been foreseen" in light of eight years of criticism against the prior rule from appellate courts and analogous changes to malpractice law from sister jurisdictions in other professions). When 22 other states seek to make a similar change to employee classification, it strains credulity to think that a similar change would not occur in California. *See* Answering Brief at 20-21. These states have made changes to their employment classification laws precisely because of the decade's long claim from employers, among others, who have derided the *Borello* standard as distinctly unworkable. *See* Steve Bates, *supra*.[13]

[13] As one article explained: "The difference between an 'employee' and an 'independent contractor' remains far less than crystal clear, and although entering into a contract with the worker specifying that the parties understand the worker to be an 'independent contractor' is helpful, it is never dispositive when challenged. To make matters worse, different legal tests are used by different California agencies and by the courts. The IRS has its well known 20-factor test, while the EDD has a 10-factor test, and the Labor Commissioner heavily relies on the 'economic realities' test. There is no checklist that an entity can use to be sure that a worker is properly classified as an independent contractor under the various tests." *See* GJ Stillson MacDonnell and Alison Hightower, *New California Law Discourages Independent Contractors and Sole Proprietorships by Potentially Penalizing Businesses that Use Their Services*, ASAP, October 2011,

V. BECAUSE THE REFINEMENT OF THE LAW WAS FORESEEABLE, IT IS NEITHER UNFAIR NOR CONTRARY TO PUBLIC POLICY FOR THE COURT TO APPLY *DYNAMEX* RETROACTIVELY

Because the ABC test is a foreseeable interpretation of the law, it applies retroactively unless "compelling and unusual circumstances justifying departure from the general rule" of retroactive application. *Newman*, *supra,* 48 Cal.3d at 983. As the *Newman* Court noted, there is no "broad exception to the general rule of retrospectivity."' *Id.* at 983. If, and only if, considerations of fairness and public policy are "so compelling" that they outweigh the considerations underlying the usual rule of retroactivity will an exception be warranted. *Id.* Here, there is no compelling reason to deviate from the expected retroactive application of *Dynamex.*

A. It Is Neither Unfair Nor In Violation Of The Reliance Interests Of Employers For The Court To Apply *Dynamex* Retroactively.

The fairness component of the exception to the general rule of retroactivity also looks at a party's reliance on the prior rule. *S*ee *Peterson, supra,* 31 Cal.3d at 153 (noting that the fairness inquiry includes "reliance on old standards by parties or others similarly affected"); *Neel, supra,* 6 Cal.3d at 193 (resolving the general exception to the retroactive application of judicial decisions "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"). The "mere fact of the 'novelty' of the rule adopted" is not a consideration in the analysis, but rather the focus is on "the purposes behind the new rule, and, even more important, the reliance of parties on the preexisting state of the law." *Newman, supra,* 48 Cal.3d at 986, 988.

Areas of law that are in flux or beset by dispute – specifically the decades long struggle to end independent contractor misclassification in California – are the type that

https://www.littler.com/files/press/pdf/2011_10_ASAP_NewCALaw_DiscouragesIndependentContractors_PenalizingBusinesses.pdf)

do not lend themselves to the reliance-based arguments Respondent now asserts. *See, e.g.*, *Newman*, *supra,* 48 Cal.3d 987 (noting that exceptions to the retroactive application of a tort doctrine could not be found where there was a history of prior rulings where "lower courts were still seeking to inscribe a coherent road map"). As described above, *Dynamex* stated plainly that the multi-factor test applied since *Borello* had failed to stem worker misclassification, noting that "such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor *has significant disadvantages*, particularly when applied in the wage and hour context." 4 Cal.5th at 954 (emphasis added). Like the uncertainty of applying prior tort precedent in *Newman*, courts faced the same challenge with *Borello*, struggling to determine a priori the rights or obligations of the parties at bar, a point highlighted in *Dynamex*. *Id.* at 954-55.

Moreover, employers can hardly argue that the ABC test is so novel as to upset the existing state of the law, given the ongoing active litigation of misclassification issues and the swirling reforms that have come to fruition over the last decade. Indeed, fairness not only measures reliance, but the "'the ability of litigants to foresee the coming change in the law.'" *Peterson*, *supra,* 31 Cal.3d at 153 (quoting *Neel*, *supra*, 6 Cal.3d at 193). As *Dynamex* itself correctly notes, jurisdictions around the country have been adopting simplified tests for employee classification that could not have slipped the attention of employers. 4 Cal.5th at 955. As described above, these movements in the law are the type identified by *Borello* as having relevance to the employee classification issue. Indeed, as the Court in *Peterson* detailed, the acts of sister jurisdictions entertaining and enacting the very rules under consideration should be enough to make a litigant aware that the law would change, thus blunting any argument by employers that there has been justifiable reliance on prior law. 31 Cal.3d at 160 (detailing how the retroactive application of punitive damages in drunk driving cases in California was appropriate and foreseeable given that it had become the majority rule in other jurisdictions; indeed it was clearly "foreshadowed").

Further, employers should not be allowed to rest their reliance arguments on contracts written with the express purpose of evading wage and hour obligations. Entering into suspect franchise agreements, for example, does not create a judicially recognized form of reliance. One thing made abundantly clear by *Borello* was that "[t]he label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." 48 Cal.3d at 349.

Finally, it would be hard to consider employers' reliance reasonable based on a test in *Borello* that is famous for being unreliable. *See Dynamex* 4 Cal.5th at 954-55 (describing approvingly of jurists and academics describing the unpredictable nature of multi-factor tests). Indeed, where this Court has recently applied precedent prospectively only, they have done so when the language of prior decision was "unequivocal" – something that plainly could not be said of outcomes when applying the *Borello* standard. *See, e.g.*, *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1282-83 (granting prospective only application to a taxpayer plaintiff who reasonably relied on a prior precedent when failing to timely exhaust administrative remedies and would otherwise be deprived of "any remedy whatsoever"); *Claxton v. Waters* (2004) 34 Cal.4th 367, 378-79 (applying a prospective only application to a change in the law regarding the admissibility of extrinsic evidence in a worker's compensation case). Such reliance arguments should not act as a shield for employers to evade the retroactive application of *Dynamex* when one takes into consideration the clearly foreseeable nature of the change given the famously fact-intensive, case-by-case nature of the *Borello* standard.[14]

[14] Though we would continue to note that there was not so great a break with prior law that an employer would still be in a position to argue that these exceptions should apply. *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'").

B. Sound Public Policy Compels The Retroactive Application Of *Dynamex*.

The second exception to retroactive application addresses considerations of public policy. As this Court stressed in *Newman*, such an inquiry looks to the "the purpose to be served by the new rule" (described as a "primary consideration") as well as the "the effect on the administration of justice of retroactive application" of the rule at hand. *Newman*, *supra,* 48 Cal.3d at 986 (quoting *Peterson* 31 Cal.3d at 153).

1. The Rule In *Dynamex* Plays An Important Role In Policing Employer Conduct.

As practitioners who have litigated thousands of independent contractor misclassification cases, *Amici* can assure the Court that *Dynamex* offers the clearest and best hope yet for ensuring compliance with California law. As described above, employers have been able to obscure and elide nearly every basic duty owed to their workers, their communities, and the state given the "substantial economic incentives" that encourage worker misclassification. *Dynamex, supra,* 4 Cal. 5th at 913. The goal of the ABC test is to effectuate the remedial purpose of wage legislation and to stem abusive independent contractor misclassification that has allowed employers to maneuver around nearly every employee-protective law on the books. *Id.* at 956-57 (finding merit in the detailed commentary "regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors"). Further refining the "suffer or permit" definition in *Martinez* by the ABC test is in service to that definition's broad application, which reaches "irregular working arrangements" to enforces compliance with standards employers "might otherwise disavow with impunity." *Id.* at 937.

The role of the ABC test in policing employer misconduct is also clear from the fact that, like the statutory standard in the Worker's Compensation Act (as construed in *Borello*), the test places the burden of establishing independent contractor status on the employer, the party in the best position to evaluate the worker's position. *Id.* at 956-57,

n. 24 (detailing how the presumption was used in *Borello* but is also applied consistently outside of this statutory framework). Absent a clear test and a command that the employer is obliged to make an affirmative showing of worker classification, there is no doubt that employers will continue to evade the law and use multi-factor, flexible standards to do it.[15]

2. Far From Frustrating The Administration Of Justice, The *Dynamex* Ruling Strengthens It.

Further, applying the *Dynamex* holding retroactively will not frustrate the administration of justice for the parties to this litigation or to any other employer held to the same standard. In *Newman*, the Court similarly noted that concerns over the complications for tort defendants if a given rule were applied retroactively were unfounded. 48 Cal.3d at 991-92. Employers complying with the holding in *Dynamex* – as Respondent and all other employers must do now – would simply need to extend the application of this standard for the relevant statutory period, akin to adjustments defendants must make when assessing the application of new tort rules.

And, as mentioned before, instead of relying on a multitude of factors which can ebb and flow depending on the emphasis in any given case, only three factors need to be applied by employers (all of which employers were *already* compelled to consider an apply under the *Borello* approach). *Compare Dynamex*, *supra,* 4 Cal.5th at 957 *with Borello, supra,* 48 Cal.3d at 351. Any confusion is sown by Respondent in order to avoid compliance with a test designed precisely to bring "greater clarity and consistency, and less opportunity for manipulation." *Dynamex,* Cal.5th at 964.

[15] See generally Veena Dubal, "Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy," 2017 Wis. L. Rev. 739 (detailing successful efforts by FedEx and other defendants to avoid reclassifying their workforce as employees regardless of court rulings that found employee status by contorting their business operations to take advantage of multi-factor classification standards).

VI. RETROACTIVE APPLICATION OF *DYNAMEX* DOES NOT OFFEND EMPLOYER'S DUE PROCESS RIGHTS SINCE IT IS NOT ARBITRARY OR IRRATIONAL AND DOES NOT UNFAIRLY EXPAND CIVIL LIABILITY

A. It Is Not Arbitrary Or Irrational To Give *Dynamex* Retroactive Effect.

The last remaining basis for the employers and Respondent to argue for an exception to retroactive application of the holding in *Dynamex* is by claiming that it would offend due process, because the decision was either arbitrary or irrational. *See 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"). While this rational basis standard is derived from an evaluation of legislation, it applies equally to judicial pronouncements. *See, e.g.*, *Gibson v. Am. Cyanamid Co.* (7th Cir. 2014) 760 F.3d 600, 622 ("Even more deference is owed to judicial common-law developments, which by their nature must operate retroactively on the parties in the case.").

We observe at the outset, as Petitioners have in this case, that the Ninth Circuit rejected such an argument and reinstated its opinion on that ground. Opening Brief at 26; *Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2019) 923 F.3d 575, 589 *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 (reinstating the holding that retroactive application of *Dynamex* would not offend the due process rights of Respondent in this case).

Dynamex itself notes that the rule established (i.e., the ABC test) was necessary to faithfully and liberally implement the state's wage orders, which have a remedial purpose at their core. 4 Cal.5th at 952. Workers, law-abiding businesses, and communities benefit when work laws designed to allow individuals to live with dignity, security, and health are maximized. Indeed, "the public will often be left to assume responsibility for

the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions." *Id.* at 953. And as described in the lengthy historical analysis in *Dynamex*, these aims are in keeping with over a century's worth of legal tradition in California. *Id.* at 936 (noting that the wage orders in effect in California have been in existence, in some form, since 1916). These are not irrational or arbitrary ends, nor would it be an outsized burden for employers who create these work arrangements to comply faithfully with the law.

B. Retroactive Application Does Not Unfairly Expand Civil Penalties.

Finally, Respondent and its *amici* argue that due process would also be offended if civil liability were imposed retroactively. This argument fails, like those above, when considering California law on the issue.

As an initial matter, due process cannot be offended where, as here, the newly articulated legal standard is a reasonable and predictable interpretation of the law. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal. 5th 542, 572, as modified (Apr. 25, 2018) ("*Alvarado*"); *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1057; *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 848 n.8. This is particularly the case in light of what this Court has noted is the well-established obligation on courts to liberally construe wage laws so as to protect workers. *Alvarado*, 4 Cal. 5th at 572.

Further, to the extent that Respondent decries "unfairness" at "expanded" civil penalties, no such expansion occurs as a result of the ABC test. As this Court explained in *Alvarado*, in which defendants advanced a similar argument that employers would unfairly be saddled with "costly civil penalties," given the contested nature of misclassification law, Respondent "cannot claim reasonable reliance on settled law." *Alvarado*, 4 Cal.5th at 573. Restricting the holding in *Dynamex* to prospective application would be "giving employers a free pass as regards their past [unlawful] conduct." *Id.* Particularly in light of the fact that the test under *Borello* has not been a reliable predictor of employee classification and that *Martinez* had already recognized at least three separate definitions of "employee," including the "suffer or permit" standard,

this Court should take a dim view of Respondent's *post hoc* assessment of their "compliance" with their own inaccurate view of the "settled" state of the law.

What's more, if the rule in *Dynamex* were to be applied retroactively, no "new" civil penalty is assessed, only existing penalties that would be applied within the scope of the retroactive statute of limitations. In rejecting the calls to limit the retroactive application of prior precedent because of the same due process concerns, the Court in *Peterson* recognized, "California courts have routinely applied . . . decisions retroactively even though such decisions redefined the duty owed, thus the conduct prohibited." 31 Cal.3d at 161. That logic applies here. Due process is not offended by the retroactive application of *Dynamex.*

VII. CONCLUSION

For the foregoing reasons, the Court should conclude that *Dynamex* applies retroactively.

Dated: August 14, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of the Court 8.520(c), I certify that, according to the word-count feature in Microsoft Word, this Amicus Curiae Brief contains 7,897 words, including footnotes, but excluding the application and the content identified in rule 8.520(c)(3).

Dated: August 14, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2020, I electronically filed the foregoing AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND PARTNERSHIP FOR WORKING FAMILIES IN SUPPORT OF PETITIONERS with the Clerk of the Supreme Court of the State of California by using the TrueFiling electronic system. I certify that all the participants in the case are registered TrueFiling users and will be served by the TrueFiling system.

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