S258191

IN THE SUPREME COURT OF CALIFORNIA

GERARDO VAZQUEZ et al.,
Petitioners,

v.

JAN-PRO FRANCHISING INTERNATIONAL, INC.,
Respondent.

ON A CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NO. 17-16096

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT JAN-PRO FRANCHISING INTERNATIONAL, INC.

HORVITZ & LEVY LLP
JEREMY B. ROSEN (BAR NO. 192473)
PEDER K. BATALDEN (BAR NO. 205054)
*FELIX SHAFIR (BAR NO. 207372)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
jrosen@horvitzlevy.com
pbatalden@horvitzlevy.com
fshafir@horvitzlevy.com

ATTORNEYS FOR AMICUS CURIAE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f)(1), the Chamber of Commerce of the United States of America (the Chamber) requests permission to file the attached amicus curiae brief in support of respondent Jan-Pro Franchising International, Inc.[1]

The Chamber is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million businesses and professional organizations of every size, in every industry, from every geographic region of the country—including throughout California. An important function of the Chamber is to represent its members before Congress, the Executive Branch, and the courts. To that end, the Chamber routinely files amicus curiae briefs in cases, such as this one, involving issues of concern to the business community.

---

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

The Chamber and its members have a significant interest in judicial decisions demarcating the distinction between employees and independent contractors. A significant number of the Chamber's members and the broader business community rely upon the flexibility of independent contractor relationships, which have promoted innovation and growth for the Chamber's members and workers alike.

In *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), this Court adopted an "ABC test" for distinguishing between employees and independent contractors. No one could have foreseen this Court embracing that test, which differs radically from the prior test that had governed independent contractor status in California under the longstanding legal principles reaffirmed by *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341. *Dynamex* thereby upended public reliance on previously well-settled principles. Retroactively applying *Dynamex*'s ABC test would threaten many businesses with crushing and unexpected liability for the pre-*Dynamex* work arrangements they entered into in reliance on the well-established *Borello* regime.

The Chamber is deeply interested in whether *Dynamex* applies retroactively. The parties devote only a portion of their appellate briefs to addressing *Dynamex*'s retroactivity under state law because they also focus on other legal issues. The Chamber believes this Court would benefit from additional briefing on the fundamental question whether California law

precludes the retroactive application of *Dynamex*. Therefore, the Chamber respectfully requests that this Court accept and file the attached amicus curiae brief addressing whether *Dynamex* should be applied solely on a prospective basis.

August 14, 2020

HORVITZ & LEVY LLP
JEREMY B. ROSEN
PEDER K. BATALDEN
FELIX SHAFIR

By: _____
Felix Shafir

Attorneys for Amicus Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

AMICUS CURIAE BRIEF

INTRODUCTION

For more than half a century, California courts, regulators, and businesses distinguished employees from independent contractors based upon a standard that came to be known as the "*Borello*" test—named after *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), the seminal decision that reaffirmed longstanding legal principles governing independent contractor status in California.

The *Borello* test was not the law in every state. Legislatures in a number of other states adopted materially different standards for assessing independent contractor status—standards typically known as "ABC" tests. But ABC tests were not part of California law, and they differed dramatically from the *Borello* test.

The *Borello* standard consists of many flexible factors, none of which can be applied mechanically because they are all intertwined, with each factor's weight depending on a case-by-case "totality-of-the-circumstances" assessment. By contrast, the significantly different ABC tests consist of three rigid requirements (the A, B, and C prongs after which the test is named), with workers presumed to be employees unless they satisfy all three of these inflexible prerequisites. For example, under the Massachusetts ABC test, a worker is an independent contractor only if: (A) the worker "is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in

fact;" *and* (B) "the service is performed outside the usual course of the business of the employer"; *and* (C) the worker "is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." (Mass. Gen. Laws ch. 149, § 148B, subd. (a)(1)-(3).) ABC tests differ markedly from the *Borello* test because they fail to include many of *Borello*'s flexible factors, give different weight to the few considerations that do overlap with the remaining *Borello* factors, and render workers employees unless the putative employer meets each one of an ABC test's strict requirements—all without affording any opportunity for *Borello*'s multi-factor, totality-of-the-circumstances balancing approach.

No California court had mentioned an ABC test until this Court adopted one in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*). The Court's revolutionary *Dynamex* decision holds that a variant of Massachusetts's ABC test now governs whether California workers are employees or independent contractors for purposes of California wage order obligations. (*Id.* at pp. 916-917, 955-956 & fn. 23.)

Here, the Court has agreed to resolve whether *Dynamex*'s groundbreaking adoption of an ABC test applies retroactively to cases pending before *Dynamex* was decided in April 2018. Although judicial decisions are generally applied retroactively under California law, this Court repeatedly has held that decisions announcing new, unforeseeable rules that break sharply with prior legal rules should be applied prospectively

only when the public has relied on the former rule. That is the case with *Dynamex*, and this Court should refuse to apply *Dynamex* retroactively.

Dynamex wrought a sea change in California law. For decades, California courts, regulators, and companies turned to the *Borello* test to decide whether workers were independent contractors or employees. *Dynamex*'s adoption of the ABC test upset longstanding reliance on the *Borello* test. No one foresaw, or could have foreseen, this dramatic change in the law. In *Dynamex* itself, no party had advocated for an ABC test—this Court requested supplemental briefing on it *sua sponte* well after the main merits briefing had concluded.

Dynamex's material and unforeseeable departure from the prior *Borello* rule unfairly threatens to subject a host of companies to substantial liability. These companies reasonably relied on the *Borello* test when they entered into pre-*Dynamex* work arrangements with workers they believed to be independent contractors. Retroactive application of *Dynamex* would improperly deprive these companies of their substantive rights and interfere with their lawful, pre-*Dynamex* conduct. By contrast, applying *Dynamex* prospectively would preserve hirers' settled expectations. And workers could still allege they were misclassified—under the longstanding *Borello* regime. Accordingly, this Court should hold that *Dynamex* does not apply retroactively.

ARGUMENT

Dynamex should not apply retroactively under California law.

A. Judicial decisions do not apply retroactively if they break unforeseeably from past precedent on which the public relied.

"Generally, judicial decisions are applied retroactively" under California law. (*Estate of Propst* (1990) 50 Cal.3d 448, 462 (*Propst*).) "This rule of retroactivity, however, has not been an absolute one." (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 979 (*Newman*).) " ' "[C]onsiderations of fairness and public policy" may require that a decision be given only prospective application.' " (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378 (*Claxton*).)

Whether to apply a decision retroactively "turns primarily upon the extent of the public reliance upon the former rule [citation], and upon the ability of litigants to foresee the coming change." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 193 (*Neel*), superseded by statute on another ground as stated in *Gordon v. Law Offices of Aguire & Meyer* (1999) 70 Cal.App.4th 972, 977.)

These key considerations of reliance and foreseeability, in turn, hinge primarily on whether the decision represented a clear break from prior precedent. (See *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372-373 (*Smith*), superseded by statute on another ground as stated in *Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1384.) The retroactivity question "has been answered consistently and

categorically when a new rule is 'a clear break with the past.' " (*People v. Hicks* (1983) 147 Cal.App.3d 424, 427 (*Hicks*).) "In such cases the court 'almost invariably has gone on to find such a newly minted principle nonretroactive.' " (*Ibid.*) "A ' "sharp break" occurs when [a] "decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon." ' " (*Ibid.*)

B. *Dynamex* clearly and unforeseeably broke with prior precedent on which the public had long relied.

1. Before *Dynamex*, the public relied on the *Borello* standard to distinguish employees from independent contractors.

For decades before *Dynamex*, California courts had looked to *Borello* and its predecessors to classify workers as employees or independent contractors. (See *Dynamex*, *supra*, 4 Cal.5th at pp. 927-928, 934; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530-531 (*Ayala*).)

Borello articulated a "flexible," "multi-factor," "case-by-case, totality-of-the-circumstances" assessment of the employment arrangement. (*Dynamex*, *supra*, 4 Cal.5th at p. 954.) It focused on whether the employer had the " 'right to control the manner and means of accomplishing' " the work, while also considering " 'secondary' indicia of the nature" of the work relationship. (*Borello*, *supra*, 48 Cal.3d at p. 350.)

The " ' "right to control" ' " component is the "foremost consideration in assessing whether" a worker is an employee under the *Borello* test. (*Ayala*, *supra*, 59 Cal.4th at p. 531,

quoting *Borello*, *supra*, 48 Cal.3d at pp. 350, 357.) This component of *Borello* requires "an assessment of the extent to which the hirer had a right to control the details of the service provided." (*Linton v. Desoto Cab Company, Inc.* (2017) 15 Cal.App.5th 1208, 1215 (*Linton*).)

Borello's additional secondary "factors" include:

> (1) whether there is a right to fire at will without cause; (2) whether the one performing services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the principal; (9) whether or not the parties believe they are creating an employer-employee relationship; (10) whether the classification of independent contractor is bona fide and not a subterfuge to avoid employee status; (11) the hiree's degree of investment other than personal service in his or her own business and whether the hiree holds himself or herself out to be in business with an independent business license; (12) whether the hiree has employees; (13) the hiree's opportunity for profit or loss depending on his or her managerial skill; and (14) whether the service rendered is an integral part of the alleged employer's business.

(*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1064, fn. 14, citing *Borello*, *supra*, 48 Cal.3d at pp. 350-355.)

Indeed, courts had relied on this " 'control of details' " test, as well as " 'secondary' factors," for decades prior to *Borello*. (*Dynamex*, *supra*, 4 Cal.5th at pp. 927-928 [collecting cases].) For example, *Empire State Mines Co. v. California Employment Commission* (1946) 28 Cal.2d 33, overruled on another ground by *People v. Sims* (1982) 32 Cal.3d 468, 479, fn. 8—one of California's "oldest case[s] on employment status"—focused on the same "primary factor of control" and secondary factors that *Borello* would later reaffirm. (*Air Couriers International v. Employment Development Department* (2007) 150 Cal.App.4th 923, 933-936 (*Air Couriers*).)

In April 2018, however, *Dynamex* abruptly concluded that an alternative standard governed independent contractor status in California, requiring the "hiring entity" to establish each of three requirements set by Massachusetts's " 'ABC' test." (*Dynamex*, *supra*, 4 Cal.5th at pp. 916-917, 943-944, 956-957 & fn. 23.)

2. ABC tests originated outside of California, were established by state legislatures, and were never considered part of California law before *Dynamex*.

ABC tests trace their roots to unemployment compensation laws. (See *F. A. S. Intern., Inc. v. Reilly* (Conn. 1980) 427 A.2d 392, 394-395; *Carpet Remnant Warehouse v. Dept. of Labor N.J.* (N.J. 1991) 593 A.2d 1177, 1184 (*Carpet Remnant*).) The federal

government's enactment of the Social Security Act in 1935 spurred state legislation defining who qualified as an employee for purposes of such laws. (See *Carpet Remnant*, at p. 1183.) These laws varied greatly from state to state. (See *ibid*.)

Some states codified different variations of the ABC test as their statutory definition of "employment." (See, e.g., *Carpet Remnant*, *supra*, 593 A.2d at p. 1183; Asia, *Employment Relation: Common-Law Concept and Legislative Definition* (1945) 55 Yale L.J. 76, 83-85 (hereafter *Employment Relation*).) New Jersey, for example, was one of the earliest states to adopt an ABC test, which was codified by statute in the 1930s. (See *Hargrove v. Sleepy's, LLC* (N.J. 2015) 106 A.3d 449, 456 (*Hargrove*); *Carpet Remnant*, *supra*, 593 A.2d at p. 1184.) Vermont has used an ABC test since 1947 (see *Vermont Securities v. Vermont Unemploy. Comp. Com'n* (Vt. 1954) 104 A.2d 915, 917 [applying the ABC test set forth in former Vt. Stats. 1947, § 5343, subd. VI.(b), now codified as Vt. Stat. Ann. tit. 21, § 1301, subd. (6)(B)]; *State v. Stevens* (Vt. 1951) 77 A.2d 844, 847), while Massachusetts and Connecticut have used an ABC test since 1971 (Mass. Gen. Laws ch. 151A, § 2 [ABC test adopted by session law at 1971 Mass. Acts 832-833]; *Standard Oil v. Adm'r, Unemployment Compen.* (Conn. 2016) 134 A.3d 581, 606; see also Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes* (2015) 18 U.Pa. J.L. & Soc. Change 53, 67 & fns. 79-81 (hereafter *ABC on the Books*) [canvassing state statutes codifying ABC test].)

While ABC tests were used in some states, California took a different approach. As discussed above, both before *Borello* and after, California followed the more flexible multi-factor, totality-of-the-circumstances test for "distinguishing employees from independent contractors in many contexts, including in cases arising under California's wage orders." (*Dynamex*, *supra*, 4 Cal.5th at p. 945.) The Division of Labor Standards Enforcement (DLSE)—"the agency charged with interpreting and enforcing state wage and hour laws" (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 84)—operated no differently. (See, e.g., Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 2000.05.17-1 (May 17, 2000) pp. 1-2, 8 <https://bit.ly/32LmKIx> [as of Aug. 14, 2020] [applying *Borello* to assess independent contractor status under California wage-and-hour laws]; Cal. Division of Labor Standards Enforcement, The 2002 Update Of The DLSE Policies and Interpretations Manual (Revised August 2019) p. 28-1 <https://bit.ly/3fKytxn> [as of Aug. 14, 2020] ["whether an individual providing service to another is an independent contractor or an employee" must be decided pursuant to the *Borello* test, under which "there is no single determinative factor"].) Thus, ABC tests were unknown to California—until *Dynamex*. (See, e.g., *Dynamex*, at pp. 951, fn. 20, 955-957 & fn. 23, 958, fn. 25, 958, fn. 27, 959-964 [not citing a single pre-*Dynamex* decision from a California court that had previously adopted the ABC test, and instead relying on out-of-state authorities addressing ABC tests]; *Lawson v. Grubhub, Inc.* (N.D.Cal., Nov. 28, 2018, No. 15-cv-05128-JSC)

2018 WL 6190316, at p. *5 (*Lawson*) [nonpub. opn.] [no case "adopted the ABC test for the classification of California workers prior to the California Supreme Court's decision in *Dynamex*"].)[2]

3. *Dynamex*'s adoption of Massachusetts's ABC test materially changed California law.

Under the variant of the Massachusetts ABC test adopted by *Dynamex*, workers can be classified as independent contractors only if a "hiring entity" demonstrates that workers meet each of three requirements. (*Dynamex*, *supra*, 4 Cal.5th at pp. 956-957 & fn. 23.) These three requirements are: "(a) that the worker is free from the control and direction of the hirer 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 that involved in the work performed." (*Id.* at pp. 955-956.) By contrast, under *Borello*, there are no *requirements*; there are only " '*factors*,' " and they " '*cannot* be applied mechanically as separate tests,' " but " 'are intertwined and their weight depends often on particular

---

[2] Accord, e.g., Spandorf, *Who's the Boss? Franchisors Must Be Able to Demonstrate the Separate and Distinct Businesses That They and Their Franchises Operate* (Mar. 2011) L.A. Law. 18, 21; *Employment Relation*, *supra*, 55 Yale L.J. at p. 84, fn. 28; Comments, *Interpretation of Employment Relationship under Employment Compensation Statutes* (1942) 36 Ill. L.Rev. 873, 875-876.

combinations.' " (*Borello*, *supra*, 48 Cal.3d at pp. 350-351, 354-355, emphasis added.)

The "differences between the *Borello* standard and the ABC [t]est are significant" because *Dynamex*'s "ABC [t]est dispenses with many of the *Borello* secondary factors, gives different weight to the factors that do overlap, and forces the hiring entity to establish *all* of the ABC [t]est's prongs to establish that a worker is an independent contractor, rather than show the balance of the applicable factors weigh in their favor." (*Goro v. Flowers Foods, Inc.* (S.D.Cal., Feb. 18, 2020, No. 17-cv-2580 JLS (JLB)) 2020 WL 804841, at p. *3 (*Goro*) [nonpub. opn.].)

Accordingly, California state and federal courts "have acknowledged that *Dynamex* represented a 'sea change' in this area of [California] law." (*Goro*, *supra*, 2020 WL 804841, at p. *3; accord, e.g., *Salazar v. McDonald's Corp.* (9th Cir. 2019) 944 F.3d 1024, 1032 [*Dynamex* "adopted a new test"]; *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 572 (*Garcia*) ["*Dynamex* changed the appropriate standard"].)

The Labor Commissioner has likewise recognized the fundamental shift in California law wrought by *Dynamex*. The Labor Commissioner informed a Court of Appeal in another case that *Dynamex* was "unexpected" and "*dramatically changed the law concerning employment status*." (Amicus Letter of the Chamber of Commerce of the United States of America in support of the Ninth Circuit's Certification Request, *Vazquez v. Jan-Pro*

Franchising International (Oct. 15, 2019, S258191) exh., p. 2, emphasis added.)

Similarly, numerous commentators have recognized *Dynamex*'s adoption of the ABC test as a groundbreaking departure from prior California law. (See, e.g., Thorne, *Retroactive Application of* Dynamex (2019) 42 L.A. Law. 19, 20 (hereafter *Retroactive Application*) [*Dynamex* "created new law drastically different from existing law"]; Morgan, *Clarifying the Employee/Independent Contractor Distinction: Does the California Supreme Court's* Dynamex *Decision Do the Job* (2018) 69 Lab. L.J. 129, 130 [2018 WL 4194899] (hereafter *Clarifying the Employee/Independent Contractor Distinction*) [*Dynamex* "greatly altered the landscape for determining wage and hour claims" by "scrapp[ing] the well-accepted scheme"—"dominant in California and throughout the nation in both federal and state venues"—"for classifying a worker that requires the decision-maker to consider a litany of factors in reaching the conclusion that the worker is either an employee or an independent contractor"]; Dolan & Khouri, *California's top court makes it more difficult for employers to classify workers as independent contractors* (Apr. 30, 2018) L.A. Times <https://lat.ms/34COIrc> [as of Aug. 14, 2020] (hereafter Dolan & Khouri) [referring to *Dynamex* as a "new standard" that "could change the workplace status of people across the state" in "nearly every employment sector"]; Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling* (Apr. 30, 2018)

N.Y. Times <https://nyti.ms/33pBIoM> [as of Aug. 14, 2020] [referring to *Dynamex* as a " 'game-changer' "].)[3]

Even plaintiffs in this case initially conceded, shortly after this Court decided *Dynamex*, that the prior rule governing independent contractor status in California had "been entirely upended by *Dynamex*" because it sharply departed from the prior rule's focus "on the degree of control" over a worker. (Plaintiff-Appellants' Motion to Remand, *Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. May 9, 2018, No. 17-16096) at p. *5 [original formatting altered] [Ninth Circuit Docket Entry No. 37]; see ABOM 51.) Likewise, in another case, the same counsel who represents plaintiffs here conceded that the "landmark" *Dynamex* decision "created a sea change in the law of independent contractor misclassification"—"drastically alter[ing]" California law—by requiring "a new and extremely employee-protective test in determining whether a worker is an employee or an independent contractor." (Opening Brief of Plaintiff-Appellants, *Haitayan v. 7-Eleven, Inc.* (9th Cir. Oct. 1, 2018, No. 18-55462),

---

[3] Accord, e.g., Fisch et al., *Unintended Consequences of* Dynamex *decision could affect California health care employees* (Oct. 8, 2019) S.F. Bus. Times <https://bit.ly/2rloGu9> [as of Aug. 14, 2020] [referring to *Dynamex* as a "redefin[ition] of the employment relationship between entities and workers in California"]; Adams & Jencunas, *California's* 'Dynamex' *decision spells doom for state's businesses and freelancers* (June 13, 2018) The Hill <https://bit.ly/2WVp8uJ> [as of Aug. 14, 2020] [explaining that *Dynamex* "flips the old classification system on its head"]; Steigart, *Calif. Supreme Court Transforms Test for Who Is An Employee* (Apr. 30, 2018) Bloomberg Law <https://bit.ly/31618Yw> [as of Aug. 14, 2020] [*Dynamex* "dramatically changed" independent contractor test].

2018 WL 4901732, at pp. *2-*3, *28, boldface and capitalization omitted; see ABOM 51-52.)

In short, until *Dynamex*, California courts, regulators, businesses, and litigants had relied on the *Borello* standard to determine independent contractor status, and *Dynamex* upended this public reliance by adopting an ABC test that "represented a significant departure from existing law." (*Retroactive Application*, *supra*, 42 L.A. Law. at p. 20.)

4. *Dynamex*'s dramatic change in the law was unforeseeable.

Nobody could have foreseen *Dynamex*'s sharp departure from longstanding precedent. Businesses operating in California before *Dynamex* had no reason to think that any ABC test (let alone Massachusetts's) governed in California. "[T]here was nothing unsettled about whether the ABC test applied to the misclassification inquiry prior to *Dynamex*. It did not." (*Lawson*, *supra*, 2018 WL 6190316, at p. *5.) Rather, "[p]rior to *Dynamex*, the California and federal courts nearly unanimously applied *Borello* to decide whether a California worker has been misclassified as an independent contractor." (*Id.* at p. *4; see *id.* at p. *5 ["Plaintiff does not cite a single case, and the Court is aware of none, that adopted the ABC test for the classification of California workers prior to the California Supreme Court's decision in *Dynamex*"].) Because "California courts applied the *Borello* test 'nearly unanimously' to determine worker classification" and California regulators had "long endorsed the *Borello* test's application" to the question of whether workers

were independent contractors for purposes of California's wage-and-hour laws, businesses had no reason to think an ABC test governed independent contractor status in California. (*Retroactive Application*, *supra*, 42 L.A. Law. at p. 20.)

In fact, no one who followed the proceedings in *Dynamex* could have predicted that an ABC test might apply in California until well after the case reached this Court:

- Neither the trial court nor the Court of Appeal in *Dynamex* concluded that an ABC test governed in California.[4]
- In the principal appellate briefs filed with this Court in *Dynamex*, neither the plaintiffs nor the defendant asserted that an ABC test governed.[5] Instead, the defendant explained that ABC tests were employed in *other* jurisdictions, whereas California courts applied the *Borello* test.[6]

---

[4] See *Dynamex*, *supra*, 4 Cal.5th at pp. 924-925, 965.

[5] See generally Petitioner Dynamex Operations West, Inc.'s Opening Brief on the Merits, *Dynamex Operations West, Inc. v. Superior Court* (May 11, 2015, S222732) 2015 WL 2327714 (hereafter Dynamex's Opening Brief); Answering Brief on the Merits, *Dynamex Operations West, Inc. v. Superior Court* (Aug. 28, 2015, S222732) 2015 WL 6122295; Petitioner Dynamex Operations West, Inc.'s Reply Brief on the Merits, *Dynamex Operations West, Inc. v. Superior Court* (Nov. 4, 2015, S222732) 2015 WL 6984457.

[6] See Dynamex's Opening Brief, *supra*, 2015 WL 2327714, at pp. *24-*27, *29-*32.

- When this Court asked the parties in *Dynamex* to file supplemental briefs addressing the DLSE's Enforcement Interpretations Manual,[7] no party asserted that an ABC test governed.[8]
- When the DLSE filed an amicus brief in *Dynamex*, the agency did not argue that an ABC test applied in California.[9] Instead, the DLSE affirmed that the "Labor Commissioner continues to use the *Borello* analysis in adjudicating individual wage claims" when "threshold questions of employee versus independent contractor status arise . . . ."[10]

---

[7] Order requesting Supplemental Briefing, *Dynamex Operations West, Inc. v. Superior Court* (Dec. 21, 2016, S222732).

[8] See generally Supplemental Brief Regarding Relevance of DLSE Enforcement Manual, *Dynamex Operations West, Inc. v. Superior Court* (Feb. 20, 2017, S222732) 2017 WL 679447; Petitioner Dynamex Operations West, Inc.'s Supplemental Brief, *Dynamex Operations West, Inc. v. Superior Court* (Feb. 21, 2017, S222732) 2017 WL 735717; Plaintiff's Reply to Supplemental Briefs Regarding Relevance of DLSE Enforcement Manual, *Dynamex Operations West, Inc. v. Superior Court* (Mar. 7, 2018, S222732) 2017 WL 945373; Petitioner Dynamex Operations West, Inc.'s Reply to Plaintiffs and Real Parties in Interest's Supplemental Brief, *Dynamex Operations West, Inc. v. Superior Court* (Mar. 8, 2017, S222732) 2017 WL 949478.

[9] See generally Amicus Curiae Brief of Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, *Dynamex Operations West, Inc. v. Superior Court* (Feb. 21, 2017, S222732) 2017 WL 11049098 (hereafter DLSE Amicus Brief).

[10] DLSE Amicus Brief, *supra*, 2017 WL 11049098, at pp. *12-*13.

This Court first referred to an ABC test in *Dynamex* roughly four months before issuing its April 2018 decision and less than two months before the February 2018 oral argument there—when it asked for another round of supplemental briefing to address whether the Court should apply "the 'ABC' test that the New Jersey Supreme Court" applied in *Hargrove*, *supra*, 106 A.3d 449, without mentioning Massachusetts's ABC test.[11] The parties then filed briefs discussing the New Jersey version of the ABC test, without asking the Court to adopt Massachusetts's ABC test.[12] No one could have suspected that the Court was thinking of adopting a variant of Massachusetts's ABC test until this Court issued its opinion, and no one could have suspected the Court would apply any ABC test until the last round of requested supplemental briefing filed shortly before oral argument.

Indeed, the New Jersey test that the parties addressed in these supplemental briefs is very different from the variant of the Massachusetts test adopted in the Court's decision. Under the test espoused by *Dynamex*, prong B requires a hiring entity to

---

[11] Order requesting Supplemental Briefing, *Dynamex Operations West, Inc. v. Superior Court* (Dec. 28, 2017, S222732).

[12] See generally Letter Brief of Plaintiffs and Real Parties in Interest, *Dynamex Operations West, Inc. v. Superior Court* (Jan. 17, 2017, S222732) 2018 WL 8060520; Petitioner's Letter Brief on ABC Test, *Dynamex Operations West, Inc. v. Superior Court* (Jan. 18, 2018, S222732) 2018 WL 8060521; Letter Brief of Plaintiffs and Real Parties in Interest, *Dynamex Operations West, Inc. v. Superior Court* (Jan. 24, 2018, S222732) 2018 WL 8060523; Petitioner's Reply Letter Brief, *Dynamex Operations West, Inc. v. Superior Court* (Jan. 24, 2018, S222732) 2018 WL 8060524.

establish that a worker performs work that "is outside the usual course of the business of the hiring entity." (*Dynamex, supra*, 4 Cal.5th at p. 956 & fn. 23.) But in New Jersey, prong B requires the hiring entity to establish *either* that the work is "outside the usual course of the business for which such service is performed, *or that such service is performed outside of all the places of business of the enterprise for which such service is performed*." (*Hargrove*, *supra*, 106 A.3d at p. 458, emphasis added.) This difference means that more workers are classified as employees under Massachusetts's test than under New Jersey's test. (See *ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change at pp. 69-70.)

Consequently, *Dynamex*'s adoption of an ABC test—and particularly, Massachusetts's ABC test—was unforeseeable and upended public reliance on the well-settled *Borello* standard that, until *Dynamex*, had governed whether California workers were employees or independent contractors. (See *Lawson*, *supra*, 2018 WL 6190316, at p. *4 ["*Dynamex* upset a settled legal principle"].)[13]

---

[13] Plaintiffs argue that *Dynamex*'s adoption of an ABC test was foreseeable because "twenty-two other states had adopted the standard for some purpose." (RBOM 21.) Far from establishing foreseeability, this further confirms why *Dynamex* amounted to an unforeseeable sea change in the law: while some other states adopted differing ABC tests through legislative action, California legislators, regulators, and courts uniformly had followed the distinct *Borello* test. (*Ante*, pp. 22-31.)

5. This Court should decline to apply *Dynamex* retroactively because it unforeseeably upended public reliance on the well-settled and different *Borello* test.

Dynamex's unforeseeable change in the law matters greatly. California has long been a "hotbed" of wage-and-hour litigation. (See, e.g., Seyfarth Shaw LLP, *Annual Workplace Class Action Litigation Report: An Overview of 2018 in Workplace Class Action Litigation* (2019) 70 Lab. L.J. 5 [2019 WL 1263331, at p. *24].) Many such cases involve worker classification. Given the enormous numbers of independent contractors—roughly one-tenth of the American workforce—it should come as little surprise that there were "hundreds of lawsuits in California alleging employee misclassification" when *Dynamex* was decided. (Dolan & Khouri, *supra*, L.A. Times <https://lat.ms/34COIrc>.)

If *Dynamex* were to apply (retroactively) to all of those pending cases, numerous companies—potentially thousands of businesses, if not more—would face "substantially greater liability . . . for conduct that occurred before *Dynamex*, than [under] the pre-*Dynamex* legal regime." (*Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2019) 939 F.3d 1045, 1049 (*Vazquez*); see also *Clarifying the Employee/Independent Contractor Distinction*, *supra*, 69 Lab. L.J. at p. 130 [incorrectly treating an employee as independent contractor "has potentially severe consequences for the hiring entity, including liability for unpaid overtime, meal and rest breaks, failure to withhold income taxes, and failure to pay the employer's obligation for

taxes and insurance," as well as civil penalties for "willful misclassification" and "criminal liability for intentional misclassification"].)

Small and emerging businesses will be especially hard hit. (See, e.g., *Vazquez*, *supra*, 939 F.3d at p. 1049; Gentry, Dynamex *to* Vazquez *and the Uncertainties They Unleash* (2019) vol. 61, No. 12, Orange County Lawyer 46, 47.) And companies "might have to reverse on a business plan that was possibly already largely implemented" in accordance with independent contractor status determined under the previously settled *Borello* test—"even when [the plan] had been the foundation of outside investment funding." (Gentry, at p. 47.)

This Court repeatedly has held that decisions should not be applied retroactively where, as here, the Court's adoption of an unforeseeable new rule upset public reliance on a prior legal rule or practice. (See, e.g., *Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 688-689 (*Camper*) [declining to retroactively apply new rule where litigants and practitioners may have reasonably relied on the prior rule]; *Moradi-Shalal v. Fireman's Fund Ins. Co.* (1988) 46 Cal.3d 287, 292, 305 (*Moradi-Shalal*) [judicial decision overruling prior legal rule "should be prospective only" due to the "interest of fairness" stemming from the "substantial number" of people who had already relied on the prior rule].)[14]

---

[14] Accord, e.g., *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1282 (*Williams*) [declining to retroactively apply judicial decision announcing new unforeseeable rule where

For example, *Claxton*, *supra*, 34 Cal.4th at pages 377-378, changed existing law governing the admissibility of evidence extrinsic to the language of a workers' compensation compromise and release form. The new rule, unlike the old rule, prohibited the admissibility of such evidence in certain circumstances. (*Ibid.*) The Court declined to apply the new rule retroactively because the "parties in this and other cases may have relied" on the prior rule to settle cases, and employers in particular "may have refrained" from executing certain documents expressly releasing claims given that, under the prior rule, "they were confident they could prove by extrinsic evidence a mutual intent to release such claims." (*Id.* at pp. 378-379.)

Similarly, *Smith*, *supra*, 29 Cal.4th at pages 350-351, changed the legal standard that had governed when costs and fees could be assessed against a party who unsuccessfully appealed from the Labor Commissioner's decision resolving an administrative wage claim. This Court declined to apply the new rule retroactively because the plaintiff "and perhaps others similarly situated" had relied on the prior rule. (*Ibid.*)

Westbrook v. Mihaly (1970) 2 Cal.3d 765, 771, 799, 801 (*Westbrook*), judg. vacated on another ground and cause remanded for further consideration in light of *Gordon v. Lance*

---

retroactive application " 'would unfairly undermine the reasonable reliance of parties on the previously existing state of the law' "]; *Propst*, *supra*, 50 Cal.3d at pp. 463-465 [judicial decision announcing new but unforeseeable legal rule should not be applied retroactively to a party that reasonably and detrimentally relied on prior rule].

(1971) 403 U.S. 1 [91 S.Ct. 1889, 29 L.Ed.2d 273], changed the rules governing voter approval of certain bond proposals. The bonds voted on by the public there had not satisfied the prior rule, and the Court declined to apply its new rule retroactively to validate the bonds because doing so "might well impose severe and unforeseen hardships upon many Californians who, quite reasonably, have made significant personal, financial, and civic decisions" based upon previously settled law. (*Id.* at pp. 772, 800-801.)

This Court should likewise refuse to apply *Dynamex* retroactively because courts had resolved cases, regulators had implemented rules, and the public had arranged their affairs—all based on their understanding of the *Borello* test. They could not reasonably have foreseen *Dynamex*'s decision to require independent contractor status to be evaluated under a far different ABC test premised on Massachusetts law.

6. Plaintiffs' arguments in favor of retroactivity fail.

First, plaintiffs argue that *Dynamex* should be applied retroactively because "it did not create new law" and did no more than extend legal principles from *Borello*. (OBOM 22-25; RBOM 10, 17-22.) They are wrong. *Dynamex* adopted an ABC test that differed radically from the *Borello* test that governed independent contractor status before *Dynamex*. (*Ante*, pp. 22-31.)

Second, plaintiffs are wrong to suggest that *Dynamex* merely extended legal principles from *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*). (See OBOM 22-23; RBOM 9-10, 18-20;

see also OBOM 37, 41.) *Martinez* determined that three alternative definitions for the terms "employ" and "employer" in California's wage orders could be used to decide which of several possible employers were subject to suit by employees for unpaid minimum wages. (See *Lawson*, *supra*, 2018 WL 6190316, at p. *4; *Dynamex*, *supra*, 4 Cal.5th at pp. 935-940; OBOM 37 [conceding *Martinez* was "a joint employer case"].)

But *Martinez* "did not address whether workers had been misclassified as independent contractors." (*Lawson*, *supra*, 2018 WL 6190316, at p. *4.) That very issue arose four years after *Martinez*, in the *Ayala* misclassification case. There, this Court applied *Borello* in reviewing an order denying class certification. (*Ayala, supra*, 59 Cal.4th at pp. 529-540; see *Dynamex*, *supra*, 4 Cal.5th at pp. 940-941.) Although *Ayala* for the first time "mused that *Borello* might not be the only test for deciding" independent contractor status in misclassification cases brought under California's wage-and-hour laws, the Court "did not adopt a different test." (*Lawson*, at p. *4, citing *Ayala*, at pp. 530-531.) Rather, this Court viewed *Borello* "as the seminal California decision on this subject." (*Dynamex*, at p. 929.)

One of the three alternative wage order tests that *Martinez* embraced for the purpose of assessing joint employment was a suffer-or-permit-to-work standard. (See *Dynamex*, *supra*, 4 Cal.5th at p. 938 [*Martinez* held that the phrase " '[t]o employ' " under the wage orders meant, among other alternatives, "to suffer or permit to work"].) But while *Dynamex* later equated this standard to Massachusetts's ABC test (*id.* at pp. 955-956 &

fn. 23), "prior to *Martinez* no California decision had discussed" this suffer-or-permit-to-work standard "*in any context*" even though the suffer-or-permit-to-work standard had "been a part of California wage orders for over a century" (*id.* at pp. 945-946, emphasis added).

And *Martinez* itself never said any of the wage order standards, much less the suffer-or-permit-to-work standard, constituted an ABC test. This is unsurprising since wage orders first adopted the suffer-or-permit-to-work language in 1916 (*Martinez*, *supra*, 49 Cal.4th at p. 57), while ABC tests originated decades later, following the federal government's enactment of the Social Security Act in 1935 (*ante*, pp. 24-25). Ironically, before *Dynamex*, courts addressing Massachusetts's ABC test would point to pre-*Dynamex* California law to illustrate how Massachusetts's test operated differently. (See, e.g., *Schwann v. FedEx Ground Package Systems, Inc.* (1st Cir. 2016) 813 F.3d 429, 438.)

Third, plaintiffs claim that several of this Court's decisions as well as a published district court ruling support the retroactive application of *Dynamex*. (See RBOM 9, 12, 15-16.) But these cases are inapposite. Each one involved the retroactive application of judicial decisions that foreseeably changed the law or had not meaningfully changed settled law. (See, e.g., *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1057 (*Frlekin*); *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 573 (*Alvarado*); *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838, 848, fn. 18; *Waller v. Truck Ins. Exchange, Inc.*

(1995) 11 Cal.4th 1, 25; *Newman*, *supra*, 48 Cal.3d at pp. 986-988; *Dardarian v. OfficeMax North America, Inc.* (N.D.Cal. 2012) 875 F.Supp.2d 1084, 1090-1094.) That is not the case here. (*Ante*, pp. 22-35.)[15]

Finally, plaintiffs argue that the specific defendant here did not rely on *Borello*. (RBOM 11, 14-17.) Plaintiffs are wrong. (ABOM 43-52.) Their assertion is also irrelevant in this forum.

The Ninth Circuit did not ask this Court to decide whether *Dynamex* applies retroactively solely to the defendant in this case, nor would this Court have accepted review of such a limited question. Rather, the Ninth Circuit asked the Court to answer a broad and "open question of California state law": "Does the Court's decision in *Dynamex* . . . apply retroactively?" (*Vazquez*, *supra*, 939 F.3d at p. 1046.) The Court agreed to answer that general question of state law. (11/20/2019 Docket Entry: Request for Certification Granted; 02/26/2020 Docket Entry: Order Filed.) Once the Court does so, the Ninth Circuit can determine how the Court's general answer applies to the parties in the case. And even then, the defendant here—as well as any businesses facing misclassification lawsuits commenced before *Dynamex*—must be given an opportunity to "prove the reasonable reliance and substantial detriment" sufficient to avoid retroactive application.

---

[15] Plaintiffs also claim support from *Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489. (RBOM 21.) But that case is also inapposite because, in sharp contrast to the circumstances here, *Sierra Club* applied a new decision retroactively where it was clear there had been "no substantial detrimental reliance" on the prior rule. (*Sierra Club*, at p. 509.)

(*Propst*, *supra*, 50 Cal.3d at pp. 464-465; see *Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 Cal.App.4th 42, 53 ["the issue of a party's reliance on prior law is a question for the trier of fact"]; *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 443 [whether a party relied on a prior rule for purposes of a retroactivity analysis is for a trial court to decide].)

7. The post-*Dynamex* decisions on which plaintiffs rely are unpersuasive.

In support of their argument for applying *Dynamex* retroactively, plaintiffs also cite a handful of unpublished federal district court decisions, an unpublished California trial court decision, and two California Court of Appeal opinions that have discussed *Dynamex*'s retroactivity. (OBOM 16-17, 21, fn. 9, 23-25; RBOM 16-17.) None of these cases justifies *Dynamex*'s retroactive application.

To begin with, several of these cases never said *why Dynamex* should be applied retroactively. For example, *Juarez v. Jani-King of California, Inc.* (N.D.Cal., Dec. 14, 2018, No. 09-cv-03495-YGR), at page 1 [nonpub. opn.] [Northern District of Cal. Docket Entry No. 240], merely stated without explanation that *Dynamex* "applies retroactively to the instant action." (*Ibid.*; see *Garcia*, *supra*, 28 Cal.App.5th at p. 572, fn. 12 [briefly discussing *Dynamex*'s retroactivity as "an academic point" but ultimately "not address[ding]" retroactivity on the merits because the defendants there had "implicitly assume[d] retroactivity"]; *Yeomans v. World Financial Group Ins. Agency, Inc.* (N.D.Cal.,

Nov. 6, 2019, No. 19-cv-00792-EMC) 2019 WL 5789273, at p. *4, fn. 1 [nonpub. opn.] [noting another court had decided that *Dynamex* applied retroactively, but not itself adopting that conclusion and instead concluding plaintiffs had sufficiently pleaded a plausible misclassification claim under *Borello*].)[16] And another decision applied *Dynamex* retroactively under compulsion of the Ninth Circuit's then-binding original but subsequently withdrawn opinion in this case. (*Henry v. Central Freight Lines, Inc.* (E.D.Cal., June 13, 2019, No. 2:16-cv-00280-JAM-EFB) 2019 WL 2465330, at p. *6 [nonpub. opn.]; see *Vazquez*, *supra*, 939 F.3d at pp. 1046, 1048 [noting withdrawal of original opinion here].) These cases are simply of no use in analyzing whether to apply *Dynamex* retroactively.

The remaining two trial court decisions cited by plaintiffs—one from a district court, another from a superior court—are unpersuasive because they espouse reasons for applying *Dynamex* retroactively that contravene California law. (See *Valdez v. CSX Intermodal Terminals, Inc.* (N.D.Cal., March 15, 2019, No. 15-cv-05433) 2019 WL 1975460, at p. *5 (*Valdez*) [nonpub. opn.]; *Johnson v. VGS-IS, LLC* (Cal.Super.Ct., July 18, 2018, No. 30-2015-00802813-CU-CR-CXC) 2018 WL 3953771, at

---

[16] If anything, *Garcia* undermined plaintiffs' arguments here by conceding that "*Dynamex* changed the appropriate standard for determining whether [an individual] was an employee entitled to wage order protection, or an independent contractor who was not." (*Garcia*, *supra*, 28 Cal.App.5th at p. 572.)

p. *2 (*Johnson*) [nonpub. opn.].)[17] The trial courts in *Valdez* and *Johnson* chose to apply *Dynamex* retroactively because this Court had applied its own new rule to the defendant in *Dynamex*. (See *Valdez*, at p. *5; *Johnson*, at p. *2.) But this consideration does not warrant retroactive application under California law. This Court's *Dynamex* decision never discussed whether it applied retroactively. (See *Dynamex*, *supra*, 4 Cal.5th at pp. 965-967.) Cases are not authorities for propositions they did not consider. (*California Building Industrial Assn. v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1043.)

Johnson further emphasized that, when the defendant in *Dynamex* filed a rehearing petition asking this Court not to apply *Dynamex* retroactively, the Court denied rehearing without comment. (See *Johnson*, *supra*, 2018 WL 3953771, at p. *2.) But the denial of a rehearing petition, without more, ordinarily does not convey this Court's approval or disapproval of an issue. (See *Otten v. Spreckels* (1920) 183 Cal. 252, 254; *People v. Haydon* (1912) 18 Cal.App. 543, 571; cf. *Camper*, *supra*, 3 Cal.4th at p. 689, fn. 8 ["a denial of a petition for review is not an expression of opinion of the Supreme Court on the merits of the case"].)

Valdez also chose to apply *Dynamex* retroactively because the defendant there had failed to present evidence demonstrating detrimental reliance on *Borello*. (See *Valdez*, *supra*, 2019 WL 1975460, at p. *5.) That feature is absent here; the defendant in

---

[17] The superior court decision also cannot provide guidance because it may not properly be cited. (See, e.g., *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761.)

this case has never had an opportunity to make such a factual showing in a trial court, as California law requires. (See, e.g., *Propst*, *supra*, 50 Cal.3d at pp. 464-465.) *Dynamex* was decided while this case was pending in an appellate court, as is the case with numerous litigants in many pending wage-and-hour disputes. Thus, *Valdez* does not support applying *Dynamex* retroactively as to any business—including the defendant here—who has not had a fair opportunity to prove its reliance on *Borello* in the trial court.

Finally, the remaining case on which plaintiffs rely—*Gonzales v. San Gabriel Transit, Inc.* (2019) 40 Cal.App.5th 1131, review granted Jan. 15, 2020, S259027—likewise does not support retroactive application. *Gonzales* held that *Dynamex* applied retroactively because "*Dynamex* did not establish a new standard." (*Id.* at p. 1156 & fn. 13.) But *Gonzales* reached this remarkable conclusion only by disagreeing with another Court of Appeal's contrary published view in *Garcia*. (*Ibid.*; see *ante*, pp. 28, 44, fn. 16.) *Gonzales*' conclusion is also directly at odds with the views of the Ninth Circuit and Labor Commissioner, each of which have determined that *Dynamex* changed the law. (*Ante*, pp. 28-29.) This conflict is presumably one of the reasons this Court granted review in *Gonzales* and is holding that appeal pending its retroactivity decision here. At any rate, *Gonzales* is wrong for the reasons discussed above: *Dynamex*'s embrace of Massachusetts's ABC test constituted a radical and unforeseeable departure from the well-settled *Borello* standard that had

previously governed independent contractor status in California. (*Ante*, pp. 22-39.)

C. Retroactivity analysis in civil cases should not include a "purpose" factor.

Plaintiffs argue that *Dynamex* should be applied retroactively because that would best serve the *purpose* for adopting an ABC test. (OBOM 24-25; RBOM 13-14.) But "purpose" analysis is notoriously vague—the antithesis of the predictability that is prized in civil cases. This Court should hold that "purpose" analysis has no place in civil retroactivity disputes.

The Court has issued conflicting decisions about the role, if any, of a "purpose" factor in civil cases. Some decisions deny (or limit) retroactive application without analyzing the new rule's "purpose." (See, e.g., *Moradi-Shalal*, *supra*, 46 Cal.3d at pp. 292, 305; *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 743-744; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829-830; *Westbrook*, *supra*, 2 Cal.3d at p. 801; see also, e.g., *Propst*, *supra*, 50 Cal.3d at pp. 463-465.) But the Court has occasionally referred to a " 'purpose' " factor in civil cases (*Newman*, *supra*, 48 Cal.3d at p. 986) and intermittently considered it in assessing retroactivity (see, e.g., *Alvarado*, *supra*, 4 Cal.5th at p. 573; *Williams*, *supra*, 2 Cal.5th at p. 1282; *Smith*, *supra*, 29 Cal.4th at pp. 372-373; *Woods v. Young* (1991) 53 Cal.3d 315, 330 (*Woods*); *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 154-160 (*Peterson*)). The Court has weighed different considerations without ever delineating a standard. (Compare, e.g., *Frlekin*, *supra*, 8 Cal.5th

at p. 1057, and *Alvarado*, at p. 573 with *Williams*, at p. 1282, and *Camper*, *supra*, 3 Cal.4th at p. 689.) Such a nebulous, free-ranging "purpose" inquiry should have no place in the *civil* retroactivity analysis, which focuses on reliance and foreseeability. (See, e.g., *Neel*, *supra*, 6 Cal.3d at p. 193; *Connor v. Great Western Savings & Loan Assn.* (1968) 69 Cal.2d 850, 869, abrogated by statute on another ground as stated in *Anthony v. Kelsey-Hayes Co.* (1972) 25 Cal.App.3d 442, 454, fn. 5 (dis. opn. of Stephens, J.); *Forster Shipbuilding Co. v. County of Los Angeles* (1960) 54 Cal.2d 450, 458-459 (*Forster*).)

The Court's experience in criminal cases is different. There, the Court has followed a consistent methodology for analyzing "purpose" in retroactivity cases. (See, e.g., *People v. Guerra* (1984) 37 Cal.3d 385, 402-406 [canvassing cases], called into doubt on another ground by *People v. Hedgecock* (1990) 51 Cal.3d 395, 410, fn. 4.)

These criminal cases likely explain how "purpose" analysis occasionally has surfaced in the Court's civil cases. (See, e.g., *Peterson*, *supra*, 31 Cal.3d at p. 153 [drawing "purpose" factor from criminal case], citing *Stovall v. Denno* (1967) 388 U.S. 293, 297 [87 S.Ct. 1967, 18 L.Ed.2d 1199], overruled on another ground by *Griffith v. Kentucky* (1987) 479 U.S. 314, 321-326 [107 S.Ct. 708, 93 L.Ed.2d 649].) But criminal cases are unsuitable guides to retroactivity analysis in civil cases. The underlying policies differ. The "purpose" factor in the criminal law context entails a narrow, objective inquiry: does the new rule squarely affect the "determination of guilt or innocence"?

(*People v. Kaanehe* (1977) 19 Cal.3d 1, 10; see, e.g., *Hicks*, *supra*, 147 Cal.App.3d at p. 427 [no retroactive application of new criminal rule that did not involve the integrity of the factfinding process].) An abstract interest in reliance on past precedent in criminal cases pales in comparison to the imperative to avoid imprisoning the innocent. (See *In re Johnson* (1970) 3 Cal.3d 404, 413, 416.)

The stakes are quite different in *civil* cases. A civil court must "protect those who acted in reliance on the overruled decision" so as to "mitigat[e] the hardships" resulting from a change in "established law." (*Forster*, *supra*, 54 Cal.2d at p. 458.) A nebulous inquiry into whether the "purpose" of a new civil rule favors retroactivity is antithetical (if not irrelevant) to preserving stability in the law. And retroactive applications risk punishing litigants for failing to conform to new rules that took effect after they relied in good faith upon the prior legal rule. (See *Kreisher v. Mobil Oil Corp.* (1988) 198 Cal.App.3d 389, 404.) The Court accordingly should dispense with a "purpose" factor in analyzing whether *Dynamex* applies retroactively.

D. If a "purpose" factor is nonetheless applied here, it weighs against applying *Dynamex* retroactively.

1. Applying *Dynamex* solely on a prospective basis is consistent with its underlying purpose.

The Court's prior decisions do not provide clear guidance for how to conduct a "purpose" inquiry in civil retroactivity disputes. (*Ante*, pp. 47-48.) We discuss below a few common threads appearing in this Court's limited "purpose" analysis in civil retroactivity cases. Each weighs against the retroactive application of *Dynamex*.

a. *The Court's objective in Dynamex would not be compromised by non-retroactivity, nor would workers lose rights.* In this Court's view, the ABC standard effectuated California wage orders' remedial purpose of protecting workers. (See *Dynamex*, *supra*, 4 Cal.5th at pp. 953-957.) But that purpose would not be undermined by applying *Dynamex* solely prospectively. The *Borello* test serves the same remedial purpose of protecting workers against misclassification as independent contractors. (See *Borello*, *supra*, 48 Cal.3d at pp. 352-353; accord, e.g., *Dynamex*, at p. 930 ["the employee-independent contractor issue" under the *Borello* test "cannot be decided absent consideration of the remedial statutory purpose" of the statute at issue]; *Air Couriers*, *supra*, 150 Cal.App.4th at p. 935 [same].) Consequently, in the context of wage-and-hour laws, the *Borello* test—like *Dynamex*'s ABC test—serves these laws' remedial

purpose of protecting workers. (*Linton*, *supra*, 15 Cal.App.5th at pp. 1218-1220.)

Dynamex said its adoption of a "simpler, more structured [ABC] test" would better serve that remedial purpose than *Borello*'s multi-factor "case-by-case, totality-of-the-circumstances" test. (*Dynamex*, *supra*, 4 Cal.5th at pp. 954-957.) But that does not answer the *retroactivity* question. Whenever this Court changes a previously settled legal rule (as in *Dynamex*), the Court does so to enhance California law. If this consideration alone justified the retroactive application of a new rule, then *every* decision of this Court adopting a new rule would apply retroactively. Yet the Court has not embraced automatic retroactivity. (*Ante*, pp. 21-22, 37-39.)

There should be no dispute that *Borello* protected workers from pre-*Dynamex* misconduct. Prior to *Dynamex*, the "California Legislature ha[d] not exhibited or registered any disagreement" with *Borello* and its application to misclassification cases. (*Dynamex*, *supra*, 4 Cal.5th at p. 935.) For good reason: *Borello* helps (not hinders) workers seeking to hold businesses liable for misclassification under California's labor laws. As with the ABC test, *Borello* presumes workers are employees unless they qualify as independent contractors (*Linton*, *supra*, 15 Cal.App.5th at pp. 1220-1221), and workers can sue to recover for misclassification under various wage-and-hour laws. (See, e.g., *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 337-351 [affirming trier-of-fact's finding that workers were employees under *Borello* in wage-and-hour class action];

Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal.App.4th 1, 4 [same].)

Of course, workers did not always prevail under *Borello*. Nor will they always prevail under the ABC test. (See, e.g., *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, 314-316 [affirming summary judgment in favor of defendant under the ABC test].) The point is simply that *Dynamex*'s purpose will not be thwarted if its ABC test applies solely on a prospective basis.

b. ***Conversely, applying Dynamex retroactively would deprive defendants of substantive rights and alter the legal consequences of their pre-Dynamex conduct.*** Whether a worker is an independent contractor under the *Borello* test is an affirmative defense that must be asserted and established by a defendant. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608; accord, e.g., *Germann v. Workers' Compensation Appeals Board* (1981) 123 Cal.App.3d 776, 783.) Asserting an affirmative defense is the substantive right of the defendant. (See, e.g., *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 34.)

Before *Dynamex*, a business that entered into an independent contractor arrangement with a worker relied on *Borello* in doing so. In the event *Dynamex* applies retroactively, that business is now prevented from asserting a *Borello* affirmative defense if the worker later sues for misclassification. That is because *Dynamex* unforeseeably subjected the business's past conduct (informed by *Borello*) to a different ABC test

(supplied by *Dynamex*). In other words, *Dynamex*'s retroactive application would deprive the business of its pre-existing substantive right to defend itself under *Borello*. Altering the legal consequences that a business faces for its pre-*Dynamex* work arrangements is a serious matter counseling against applying *Dynamex* retroactively. (See, e.g., *Claxton*, *supra*, 34 Cal.4th at p. 379.)

c. *Applying Dynamex retroactively is fundamentally unfair.* In other jurisdictions, the ABC test was adopted by legislators. (See *ante*, pp. 24-25; see also, e.g., Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work* (2019) 39 Northern Ill. U. L.Rev. 379, 408.) By contrast, in California, the ABC test was adopted by (what the Ninth Circuit called) "judicial fiat," in *Dynamex*. (*Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2019) 923 F.3d 575, 593, withdrawn on other grounds (9th Cir. 2019) 930 F.3d 1107, reinstated in part (9th Cir. 2019) 939 F.3d 1050, 1051.)

The manner of adoption matters. If the California Legislature had adopted the ABC test, it would have applied solely on a prospective basis. (See *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 470 [a "change in the law does not apply retroactively to impose liability for actions not subject to liability when performed"]; see also, e.g., *City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 419-420 (*San Jose*).) This is illustrated by the fact that, when the Legislature subsequently enacted

Assembly Bill No. 5 (2019-2020 Reg. Sess.) (AB 5) in late 2019 to add the ABC test to California's Labor Code, the legislation applied solely on a prospective basis. (At pp. 56-58, *post*.)

Fairness matters to retroactivity analysis. (See, e.g., *Woods*, *supra*, 53 Cal.3d at p. 330.) It would be unfair to apply *Dynamex* retroactively based on the fortuity that it was first adopted by this Court. *Dynamex* would have applied only on a prospective basis had California followed other jurisdictions and adopted the ABC test by legislation. Hence, the fashion in which the ABC test was first introduced into California law further weighs against the retroactive application of *Dynamex*.

2. Plaintiffs' arguments do not compel a contrary conclusion.

Plaintiffs argue that *Dynamex* must be applied retroactively because *Dynamex* adopted the ABC test to ensure workers receive the remedial protection of California's wage-and-hour laws. (See OBOM 24-25; RBOM 13-14.) But plaintiffs are mistaken for the reasons we just catalogued in the preceding section. Beyond that, plaintiffs also point to recent cases and AB 5. Those arguments are unavailing.

Plaintiffs assert that *Frlekin* and *Alvarado* support the retroactive application of *Dynamex*; in those cases, the Court chose to apply a new rule retroactively where *not* doing so would have negated civil penalties authorized by the Legislature and thereby given a defendant a free pass for its alleged misconduct. (RBOM 9, citing *Frlekin*, *supra*, 8 Cal.5th at p. 1057 and *Alvarado*, *supra*, 4 Cal.5th at p. 573.) But *Frlekin* and

Alvarado are inapposite. In those cases, the Court agreed to retroactive application where there had been no reasonable reliance on settled law, which is not the case here. (*Ante*, pp. 41-42.) Moreover, unlike in *Frlekin* and *Alvarado*, applying *Dynamex* solely on a prospective basis would *not* negate civil penalties or immunize a business from misclassification liability. If a business has misclassified an employee under the *Borello* test, it will be liable for misclassification and civil penalties under *Dynamex* too. (See *ante*, pp. 22-24; *Dynamex*, *supra*, 4 Cal.5th at p. 935 [where *Borello* applies, civil penalties are available for willful misclassification]; RBOM 11 [acknowledging that civil penalties for misclassification existed before *Dynamex*].)

Plaintiffs also invoke AB 5 (OBOM 25; RBOM 11, 14, 17, 22; cf. RBOM 23-25), but AB 5 does not support the retroactive application of *Dynamex*. According to plaintiffs, AB 5 "confirm[ed]" that the ABC test "is necessary to forward the purpose of California wage and hour law and protect workers." (OBOM 25; accord, RBOM 14.) That does not follow. Applying *Dynamex* solely on a prospective basis would not undermine remedial protections for workers under wage-and-hour laws. The *Borello* test would still apply to pre-*Dynamex* conduct. *Borello* serves a similar remedial purpose, while ensuring defendants are not deprived of a substantive defense and do not face unforeseeable legal consequences for pre-*Dynamex* conduct. (*Ante*, pp. 50-53.)

Indeed, the structure of AB 5 confirms that the *Borello* test is suitable and that applying *Dynamex* retroactively is unnecessary. AB 5 includes "numerous exceptions" where the ABC test does not apply, and it provides that *Borello* "remains in effect" when those exceptions apply. (*Olson v. State of California* (C.D.Cal., Feb. 10, 2020, No. CV 19-10956-DMG (RAOx)) 2019 WL 905572, at p. *2 (*Olson*) [nonpub. opn.], app. pending (9th Cir., Mar. 10, 2020, No. 20-55267).) Surely the Legislature would not have allowed the *Borello* test to remain in effect if it thought the *Borello* test insufficiently protected against misclassification.

Plaintiffs nonetheless argue that AB 5 is relevant to pre-*Dynamex* conduct. They say *Dynamex* did not change the law because AB 5 *itself* applies retroactively. (See RBOM 17, 22.) This is incorrect. " 'New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise.' " (*San Jose*, *supra*, 178 Cal.App.4th at pp. 419-420.) AB 5 not only lacks a clear indication of retroactivity, the new law enacted by AB 5—Labor Code section 2750.3—specifies that "the provisions of this section of the Labor Code shall apply to work performed *on or after January 1, 2020*" (Lab. Code, § 2750.3, subd. (i)(3), emphasis added)—i.e., *prospectively*.

Plaintiffs disagree based on subdivision (i)(1) of Labor Code section 2750.3. (RBOM 17.) That provision says that the ABC test added to California law by subdivision (a) "does not constitute a change in, but is declaratory of, existing law with

regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders." (Lab. Code, § 2750.3, subd. (i)(1).) But that does not mean the ABC test reflects the state of the law *before Dynamex*. Indeed, "the intent of the Legislature in enacting" AB 5 was to "*codify* the decision of the California Supreme Court in Dynamex . . . ." (Stats. 2019, ch. 296, § 1(d), emphasis added; accord, *id.*, § 1(e).) AB 5 did not say that "existing law" *before Dynamex* included, or should retroactively be required to include, an ABC test. This is why the Legislative Counsel's Digest accompanying the law observed that the "[e]xisting law" to which AB 5 referred was the rule "established in the case of *Dynamex* . . . ." (Legis. Counsel's Dig., Assem. Bill No. 5 (2019-2020 Reg. Sess.) Stats. 2019., ch. 296; see *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169-1170 [presuming the Legislature acted with the " 'intent and meaning expressed in the Legislative Counsel's digest' "].)

Plaintiffs' argument thus boils down to a contention that *Dynamex* did not change California law, which, as we have explained, is wrong. (*Ante*, pp. 22-31.) Moreover, AB 5 would have been unnecessary if, as plaintiffs contend, it did not change pre-*Dynamex* law. Had "existing" law predating *Dynamex* included an ABC test, the Legislature would have had no reason to codify the *Dynamex* decision, since the ABC test would have already been part of California law before *Dynamex*. (See OBOM 52.) That the "Legislature imported the ABC [t]est from

Dynamex wholesale" constitutes "an overt acknowledgment that the ABC [t]est was new law." (*Ibid.*)

In short, as one of plaintiffs' own authorities (RBOM 11, 25) explains, "AB 5 does not apply retroactively" and instead applies prospectively "to work performed after January 1, 2020." (*Olson*, *supra*, 2020 WL 905572, at p. *12.) Contrary to plaintiffs' contention, AB 5 does not support *Dynamex*'s retroactive application.

CONCLUSION

This Court should hold that, under California law, *Dynamex* does not apply retroactively.

August 14, 2020

HORVITZ & LEVY LLP
JEREMY B. ROSEN
PEDER K. BATALDEN
FELIX SHAFIR

By: _____
Felix Shafir

Attorneys for Amicus Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(b)(1).)

The text of this brief consists of 9,664 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

Dated: August 14, 2020

Felix Shafir

PROOF OF SERVICE

Vazquez v. Jan-Pro Franchising International
California Supreme Court Case No.: S258191

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

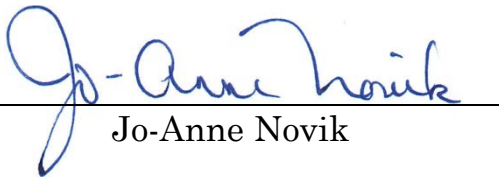
On August 14, 2020, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT JAN-PRO FRANCHISING INTERNATIONAL, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on August 14, 2020, at Burbank, California.



Jo-Anne Novik

SERVICE LIST

Vazquez v. Jan-Pro Franchising International
California Supreme Court Case No.: S258191

ATTORNEY NAME/ADDRESS	PARTY(IES) REPRESENTED
Shannon Liss-Riordan Lichten & Liss-Riordan, P.C. 729 Boylston Street, Suite 2000 Boston, MA 02116 sliss@llrlaw.com	Attorneys for Plaintiffs and Appellants Gerardo Vazquez, Gloria Roman, Juan Aguilar ***[via Truefiling]***
Jeffrey M. Rosin O'Hagan Meyer, PLLC 111 Huntington Ave., Suite 2860 Boston, MA 02199 jrosin@ohaganmeyer.com	Attorneys for Defendant and Respondent Jan-Pro Franchising International, Inc. ***[via Truefiling]***
Jason H. Wilson Eileen M. Ahern Amelia B. Sargent Willenken LLP 707 Wilshire Blvd., Suite 3850 Los Angeles, CA 90017 jwilson@willenken.com eahern@willenken.com asargent@willenken.com	Attorneys for Defendant and Respondent Jan-Pro Franchising International, Inc. ***[via Truefiling]***
Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004 cruckelshaus@nelp.org	Attorneys for Amici Curiae National Employment Law Project; Equal Rights Advocates; Dolores Street Community Services; Legal Aid at Work; Worksafe, INC. ***[via Truefiling]***

ATTORNEY NAME/ADDRESS	PARTY(IES) REPRESENTED
Kevin F. Ruf Glancy Prongay & Murray 1925 Century Park East, Suite 2100 Los Angeles, CA 90067 kruf@glancylaw.com	Attorneys for Amicus Curiae National Employment Law Project; California Employment Lawyers Association ***[via Truefiling]***
Aaron D. Kaufmann Leonard Carder, LLP 1330 Broadway, Suite 1450 Oakland, CA 94612 akaufmann@leonardcarder.com	Attorneys for Amicus Curiae National Employment Law Project; California Employment Lawyers Association ***[via Truefiling]***
James F. Speyer Arnold & Porter Kaye Scholer, LLP 777 South Figueroa St., 44th Floor Los Angeles, CA 90017 james.speyer@arnoldporter.com	Attorneys for Amici Curiae International Franchise Association; California Chambers of Commerce ***[via Truefiling]***
Bradley Alan Benbrook Benbrook Law Group, PC 400 Capitol Mall, Suite 2530 Sacramento, CA 95814 brad@benbrooklawgroup.com	Attorneys for Amicus Curiae National Federation of Independent Business Small Business Legal Center ***[via Truefiling]***
Paul Grossman Paul Hastings LLP 515 S. Flower St., 25th Floor Los Angeles, CA 90071-2228 paulgrossman@paulhastings.com	Attorneys for Amicus Curiae California Employment Law Council; Employers Group ***[via Truefiling]***
Paul W. Cane Paul Hastings LLP 101 California Street, 48th Floor San Francisco, CA 94111 paulcane@paulhastings.com	Attorneys for Amicus Curiae California Employment Law Council; Employers Group ***[via Truefiling]***

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: **fshafir@horvitzlevy.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
APPLICATION	S258191_ACB_USChamberofCommerce

Service Recipients:

Person Served	Email Address	Type	Date / Time
George Howard Jones Day 076825	gshoward@jonesday.com	e-Serve	8/14/2020 5:27:14 PM
Theodore Boutrous Gibson, Dunn & Crutcher LLP 132099	tboutrous@gibsondunn.com	e-Serve	8/14/2020 5:27:14 PM
Shannon Liss-Riordan Lichten & Liss-Riordan, PC 310719	mjcedeno@llrlaw.com	e-Serve	8/14/2020 5:27:14 PM
Connie Christopher Horvitz & Levy LLP	cchristopher@horvitzlevy.com	e-Serve	8/14/2020 5:27:14 PM
James Speyer Arnold & Porter, LLP 133114	james.speyer@arnoldporter.com	e-Serve	8/14/2020 5:27:14 PM
Jeffrey Rosin O'Hagan Meyer, PLLC 629216	jrosin@ohaganmeyer.com	e-Serve	8/14/2020 5:27:14 PM
Peder Batalden Horvitz & Levy LLP 205054	pbatalden@horvitzlevy.com	e-Serve	8/14/2020 5:27:14 PM
Luke Wake NFIB Small Business Legal Center 264647	luke.wake@nfib.org	e-Serve	8/14/2020 5:27:14 PM
Paul Grossman Paul Hastings Janofsky & Walker 035959	paulgrossman@paulhastings.com	e-Serve	8/14/2020 5:27:14 PM
Jason Wilson Willenken LLP 140269	jwilson@willenken.com	e-Serve	8/14/2020 5:27:14 PM

Kevin Ruf Glancy Prongay & Murray	kruf@glancylaw.com	e-Serve	8/14/2020 5:27:14 PM
Felix Shafir Horvitz & Levy LLP 207372	fshafir@horvitzlevy.com	e-Serve	8/14/2020 5:27:14 PM
Jo-Anne Novik Horvitz & Levy LLP	jnovik@horvitzlevy.com	e-Serve	8/14/2020 5:27:14 PM
Kevin Ruf Glancy Prongay & Murray LLP 136901	kevinruf@gmail.com	e-Serve	8/14/2020 5:27:14 PM
Aaron Kaufmann Leonard Carder, LLP 148580	akaufmann@leonardcarder.com	e-Serve	8/14/2020 5:27:14 PM
Paul Cane Paul Hastings LLP 100458	paulcane@paulhastings.com	e-Serve	8/14/2020 5:27:14 PM
Kerry Bundy Faegre Baker Daniels LLP 0266917	kerry.bundy@faegrebd.com	e-Serve	8/14/2020 5:27:14 PM
Jeremy Rosen Horvitz & Levy LLP 192473	jrosen@horvitzlevy.com	e-Serve	8/14/2020 5:27:14 PM
Shannon Liss-Riordan 310719	sliss@llrlaw.com	e-Serve	8/14/2020 5:27:14 PM
Eileen Ahern	eahern@willlenken.com	e-Serve	8/14/2020 5:27:14 PM
Amelia Sargent	asargent@willenken.com	e-Serve	8/14/2020 5:27:14 PM
Catherine Ruckelshaus	cruckelshaus@nelp.org	e-Serve	8/14/2020 5:27:14 PM
Bradley Benbrook 177786	brad@benbrooklawgroup.com	e-Serve	8/14/2020 5:27:14 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.

8/14/2020

Date

/s/Felix Shafir

Signature

Shafir, Felix (207372)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm