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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

RESPONDENT JAN-PRO FRANCHISING INTERNATIONAL, INC.'S SUPPLEMENTAL BRIEF

JEFFREY M. ROSIN
O'HAGAN MEYER PLLC
111 HUNTINGTON AVENUE
SUITE 2860
BOSTON, MA 02199-7733
TELEPHONE: (617) 843-6800
FACSIMILE: (617) 843-6810
E-MAIL:
JROSIN@OHAGANMEYER.COM

JASON H. WILSON (SBN 140269)
EILEEN M. AHERN (SBN 216822)
AMELIA L. B. SARGENT (SBN 280243)
WILLENKEN LLP
707 WILSHIRE BLVD., SUITE 3850
LOS ANGELES, CA 90017
TELEPHONE: (213) 955-9240
FACSIMILE: (213) 955-9250
E-MAIL:
JWILSON@WILLENKEN.COM

Attorneys for Respondent
JAN-PRO FRANCHISING INTERNATIONAL, INC.

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RESPONDENT'S SUPPLEMENTAL BRIEF

I. INTRODUCTION

Pursuant to California Rule of Court 8.520(d)(1), Respondent Jan-Pro Franchising International, Inc. ("JPI") alerts this Court to three new authorities supporting the position that the retroactivity of *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 ("*Dynamex*") should not be decided in the context of this case.

First, the U.S. District Court for the District of Massachusetts recently held in *Patel et al. v. 7-Eleven, Inc., et al.* (D. Mass. Sept. 10, 2020) Case No. 1:17-cv-11414-NMG, --- F.Supp.3d ---, 2020 WL 5440623 ("*Patel*"), that Massachusetts' version of the ABC Test cannot apply to determine the employment classification status of a franchisee to a franchisor because the test is preempted by federal FTC franchising regulations, 16 C.F.R. § 436.1 *et seq.* (collectively called the "FTC Franchise Rule"). Likewise, here, because JPI is a franchisor, the ABC Test is preempted and—retroactive or not—cannot apply.

Second, the decision in *Mattei v. Corporate Management Solutions, Inc.* (2020) 52 Cal. App. 5th 116 ("*Mattei*"), provides further support that, contrary to the Ninth Circuit's holding in *Vazquez*, the California Courts of Appeal do not interpret *Dynamex* as having overruled the test in *Martinez v. Combs* (2010) 49 Cal. 4th 35 ("*Martinez*") for determining potential liability as a joint employer.

Finally, the decision in *People of the State of California v. Uber Technologies, Inc. et al.* (Cal. App. Dist. 1 Oct. 22, 2020) Case No. A160701, A160706, --- Cal. Rptr. 3d ---, 2020 WL 6193994 ("*Uber*") likewise supports the principle that *Martinez*, not *Dynamex*, provides the test for determining potential joint employer liability.

Because JPI will seek review of *Vazquez v. Jan-Pro Franchising Int'l, Inc.* (9th Cir. 2018) 923 F.3d 575, *vacated and reinstated in part,* (9th Cir. 2019) 939 F.3d 1045 ("*Vazquez*") on these grounds, among others, the Court should abstain from ruling here because its decision, should *Vazquez* be overturned, will be purely advisory.

II. <u>ARGUMENT</u>

A. *Patel et al. v. 7-Eleven, et al.*

In its Answering Brief, JPI argued that this Court should not issue an opinion on the retroactivity of *Dynamex* in this case because doing so will not "determine the outcome" of this matter, Cal. Rule of Court 8.548(a)(1), and ultimately may be rendered an advisory opinion because, among other reasons, application of the ABC Test is preempted by federal franchising regulations in the context of this case—as in the newly-decided, *Patel*. (Answer Br. pp. 41-42.)

Undergirding the Ninth Circuit's error in holding the ABC Test was applicable here was its reduction of *Patterson v. Domino's Pizza*, LLC (2014) 60 Cal.4th 474 ("*Patterson*") to "extensive dicta," rather than

applying the "*Patterson* gloss," which requires assessing franchisor liability in light of the necessary, statutorily mandated "control" a franchisor exerts over a franchisee. (*Vazquez*, *supra*, 923 F.3d 575 at p. 594.) Failure to apply *Patterson*'s rationale to the ABC Test runs afoul of both California and federal law. (*See* Answer Br. at 38-41.) Federal regulations *require*, among other things, that a franchisor "will exert or has authority to exert a **significant degree of control** over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation[.]" (16 C.F.R. § 436.1(h)(2) [emphasis added].) As discussed at length in the Answering Brief, the *Vazquez* panel's holding conflicts with, and is therefore preempted by, federal law. (Answer Br. at p. 39.)

Patel is persuasive authority that JPI is correct. In *Patel*, a putative class of 7-Eleven franchise operators sued 7-Eleven, the well-known convenience store franchisor, alleging that it misclassified them as independent contractors instead of employees in violation of Massachusetts' Independent Contractor Law, Mass. Gen. L. c. 149, § 148B, which is Massachusetts' version of the ABC Test. Like Petitioners here, plaintiffs argued that this alleged misclassification deprived them of their full earnings in violation of state minimum wage laws. (*Patel*, *supra*, 2020 WL 5440623, at *1.)

At summary judgment, 7-Eleven argued that federal regulations made it impossible to satisfy the first prong of the ABC Test, and therefore,

the ABC Test could not apply. (*Id.* at *6.) Prong 1 of Massachusetts' ABC Test, which is identical in the relevant part to Prong 1 of California's ABC Test, requires 7-Eleven to demonstrate that the individual plaintiffs are "**free from control** and direction in connection with the performance of the service." (Mass. Gen. L. c. 149, § 148B(a)(1) [emphasis added].) Conceding that it did in fact "exercise some level of control over its franchisees," *Patel*, *supra*, 2020 WL 5440623 at *7, 7-Eleven argued that it was "bound to do so by federal regulation"—specifically, the FTC Franchise Rule requiring it exercise a "significant degree of control" over the franchisee. (*Id.*; *see* 16 C.F.R. § 436.1(h)(2).)

The district court agreed. It held that the language of the FTC Franchise Rule "is in direct conflict with Prong 1" of the ABC Test. (*Patel*, *supra*, 2020 WL 5440623 at *7.) The district court further rejected each of the Plaintiffs' counterarguments, including the argument that courts "around the country" had routinely applied the ABC Test to franchisors, *id.* at *8, or that the other two disjunctive prongs somehow saved the statute from complete preemption, *id.* The district court recognized that the list of control measures the Plaintiffs proffered in support of their misclassification argument was "nearly identical" to the list of "control and assistance identifiers" in a guide put forth by the FTC to assist franchisors in complying with the FTC Franchise Rule. (*Id.*) And in addition to the strict conflict, the court reasoned that from a policy perspective, "[i]t cannot

be the case, as plaintiffs suggest, that, in qualifying as a franchisee pursuant to the FTC's definition, an individual necessarily becomes an employee. In effect, such a ruling by this Court would eviscerate the franchise business model . . . ." (*Id.* at *9.)

Patel provides strong support for JPI's argument that *Dynamex*'s ABC Test should never have been applied to it in the first place. As set forth in the Answering Brief, it is preempted by the FTC Franchise Rule, and cannot apply to determine the employment classification status of franchisees. (Answer Br. at p. 40.)

Furthermore, notably, when the *Vazquez* Court held that "the franchise context does not alter the *Dynamex* analysis, and the district court need not look to *Patterson* in applying the ABC test," it reasoned that "in Massachusetts . . . courts have routinely applied the codified ABC test to franchises . . . ." (*Vazquez*, 923 F.3d at 595 [citations omitted].) As demonstrated by *Patel*, that is not the case.

B. *Mattei v. Corporate Management Solutions, Inc.*

The *Vazquez* Court's fundamental error was interpreting *Dynamex* as overturning *Martinez*, *sub silentio*. (*See, e.g.*, Answer Br. at pp. 9, 16, 22-23, 31.) If this Court does determine it can rule in this matter consistent with Rule of Court 8.548(a)(1) and the doctrine of justiciability, and determines that *Dynamex* retroactively applies to JPI, this Court effectively

would hold that *Dynamex* overturned both *Martinez* and *Patterson*.[1] Such an unforeseeable change in the law should not, in fairness, be applied retroactively to JPI. (*Peterson v. Superior Court* (1982) 31 Cal. 3d 147, 153 [considerations of "fairness" include "the ability of litigants to foresee a coming change in the law"].)

No California Court of Appeal has concluded, as the *Vazquez* Court erroneously did, that *Dynamex* overruled *Martinez*, impliedly or otherwise. (*See* Answer Br. at p. 32 [discussing *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal. App. 5th 289 ("*Curry*") and *Henderson v. Equilon Enterprises, LLC* (2019) 40 Cal. App. 5th 1111].) (Of course, this is no surprise, as California strictly follows the doctrine of *stare decisis* and no "extraordinary circumstances" exist to depart from earlier precedent. *Johnson v. Dep't of Justice* (2015) 60 Cal. 4th 871, 891.) *Mattei* is another in a line of consistent holdings from the California Courts of Appeal, and at odds with *Vazquez*. In *Mattei*, the defendant CMS was a signatory to entertainment industry union agreements, who loaned its signatory status to a production company in order to hire the union-affiliated plaintiff lighting

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[1] As discussed in the Answering Brief, the district court properly applied *Martinez* and *Patterson* to JPI, and concluded JPI was not a joint employer of Petitioners. (Answer Br. at p. 19.) Therefore, JPI is not a hiring entity and *Dynamex* has no application. Under the justiciability doctrine, this Court cannot side-step the errors of the Ninth Circuit opinion and rule on retroactivity without consideration of the facts in this case. (*See Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal. App. 4th 1559, 1573.)

technicians. (*Mattei*, *supra*, 52 Cal. App. 5th 116, at p. 120.) The Court was required to determine whether CMS was liable as a joint employer for the production company's Labor Code violations involving late pay. (*Id.*) The Court did not apply the ABC Test to determine whether CMS was an employer of the lighting technicians; but, rather, applied the proper test for determining an employer in the joint employment context, using *Martinez*, not *Dynamex*. (*Id.* at pp. 123-125.) Yet, the *Vasquez* Court is directly applying *Dynamex* to JPI here, even though JPI sits in the classic "joint employer" seat under *Martinez*.

C. *People of the State of California v. Uber Technologies, Inc. et al.*

The newly-decided opinion of the California Court of Appeal in *Uber* is another case confirming the continuing viability of *Martinez* in determining "who may be liable" for wage and hour violations in this state. (*See Martinez*, *supra*, 49 Cal. 4th 35, 52.) Nowhere in the *Uber* opinion does the Court suggest that *Dynamex* overruled *Martinez*, or that the ABC Test can be used to define liability in a joint employer context. In fact, the *Uber* Court specifically distinguished *Curry*, a case involving a "putative joint employer," from the case before it. (*Uber*, *supra*, 2020 WL 6193994 at *16.)

When the Court rejected defendant Uber and Lyft's arguments that they were not "hiring entities" under the ABC Test based on a "services

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rendered" test imported from other jurisdictions, *id.* at *10, it neither considered nor rejected the argument proffered by JPI in its Answering Brief that preceding the ABC Test's application, a court must determine that a defendant is a hiring entity by giving that phrase its *plain meaning.* (Answer Br. pp. 26-28.) In other words, consistent with rules of statutory construction, the phrase "hiring entity" should be given its "usual and ordinary meaning," and the ABC Test should apply to a business that has "hired" an individual worker to provide a service or perform a task—and not to entities who did not hire such individual workers. (*Pineda v. Williams-Sonoma Stores, Inc*. (2011) 51 Cal.4th 524, 529 [citations omitted].)

Notably, the *Uber* Court also posited, "[r]eading the term 'hiring entity' in context, we think the phrase is used in *Dynamex* and in [Labor Code] section 2775 for its neutrality, so that it covers both employment status and independent contractor status, and thus does not presuppose an answer one way or another." (*Id*. at *11.) JPI agrees—the determination whether a defendant is an "hiring entity" does not presuppose whether an employment or independent contractor relationship exists; rather, it informs whether to proceed with the ABC Test or an alternate test—i.e., here, in the joint employment context, *Martinez*.

In addition, the *Uber* case strongly supports the argument that because franchise law conflicts with the ABC Test, *Dynamex's* ABC Test

should not apply here, just like it should not "be applied to a particular context based on grounds other than an express exception" under Labor Code section 2775, subd. (b)(3). (*Id.* at *4, fn. 5.) In this section, the Legislature has expressly contemplated that situations may exist, other than those carved out by the statute, where applying the ABC Test is inappropriate. Under such circumstances, the tests under *Borello* or *Martinez* would apply, neither of which conflicts with franchising regulations, unlike the ABC Test.

Finally, with respect to the retroactivity analysis, the *Uber* opinion confirms *Dynamex* was a "landmark" decision that "create[d]" the ABC Test in California—thus the Petitioners' arguments that it merely restated the *Borello* test must be rejected. (*Uber*, *supra*, 2020 WL 6193994 at *3 [*Dynamex* a "landmark" opinion]; *id.* at *19 ["Compared to the six-factor, fact-bound *Borello* test for independent contractor status . . . the *Dynamex* court 'create[d] a simpler, clearer test . . . .'"] [Citation].)

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III. **CONCLUSION**

JPI respectfully requests this Court decertify the question of whether *Dynamex* applies retroactively in this case, in light of the severe errors of law which brought *Vazquez* before it, as further illustrated by *Patel*, *Mattei*, and *Uber*.

Respectfully submitted,

Dated: October 23, 2020

WILLENKEN LLP

/s/ Jason H. Wilson

Jason H. Wilson
Attorneys for Respondent
JAN-PRO FRANCHISING
INTERNATIONAL, INC

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Respectfully submitted,

Dated: October 23, 2020

WILLENKEN LLP

/s/ Jason H. Wilson

Jason H. Wilson
Attorneys for Respondent
JAN-PRO FRANCHISING INTERNATIONAL, INC

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PROOF OF SERVICE

JEFFREY M. ROSIN
O'HAGAN MEYER PLLC
111 HUNTINGTON AVENUE
SUITE 2860
BOSTON, MA 02199-7733
TELEPHONE: (617) 843-6800
FACSIMILE: (617) 843-6810
E-MAIL:
JROSIN@OHAGANMEYER.COM

JASON H. WILSON (SBN 140269)
EILEEN M. AHERN (SBN 216822)
AMELIA L. B. SARGENT (SBN 280243)
WILLENKEN LLP
707 WILSHIRE BLVD., SUITE 3850
LOS ANGELES, CA 90017
TELEPHONE: (213) 955-9240
FACSIMILE: (213) 955-9250
E-MAIL:
JWILSON@WILLENKEN.COM

Attorneys for Respondent
JAN-PRO FRANCHISING INTERNATIONAL, INC.

PROOF OF SERVICE

I am over the age of 18 and am not a party to the within action. I am employed by Willenken LLP and my business address is 707 Wilshire Boulevard, Suite 3850, Los Angeles, California 90017.

On October 23, 2020, I served a true copy of the document titled **RESPONDENT JAN-PRO FRANCHISING INTERNATIONAL, INC.'S SUPPLEMENTAL BRIEF** on the interested parties in this action as follows:

Shannon Liss-Riordan Lichten & Liss-Riordan, P.C. 729 Boylston Street, Suite 2000 Boston, MA 02116	Attorneys for Plaintiff/Appellants/Petitioners *VIA TRUEFILING E-SERVICING*
Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004	National Employment Law Project: Amicus curiae *VIA TRUEFILING E-SERVICING*
Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004	Equal Rights Advocates: Amicus curiae *VIA TRUEFILING E-SERVICING*
Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004	Dolores Street Community Services: Amicus curiae *VIA TRUEFILING E-SERVICING*
Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004	Legal Aid at Work: Amicus curiae *VIA TRUEFILING E-SERVICING*

Catherine Ruckelshaus
National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 10004

Worksafe, Inc.: Amicus curiae

VIA TRUEFILING E-SERVICING

James F. Speyer
Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017

International Franchise Association: Amicus curiae

VIA TRUEFILING E-SERVICING

Bradley Alan Benbrook
Benbrook Law Group, PC
400 Capitol Mall, Suite 2530
Sacramento, CA 95814

National Federation of Independent Business Small Business Legal Center: Amicus curiae

VIA TRUEFILING E-SERVICING

Adam G. Unikowsky
Jenner & Block LLP
1099 New York Avenue, NW Suite 900
Washington, DC 20001-4412

Chamber of Commerce of the United States of America: Amicus curiae

VIA TRUEFILING E-SERVICING

James F. Speyer
Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017

California Chambers of Commerce: Amicus curiae

VIA TRUEFILING E-SERVICING

Catherine Ruckelshaus
National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 10004

National Employment Law Project: Amicus curiae

VIA TRUEFILING E-SERVICING

Kevin F. Ruf
Glancy Prongay & Murray
1925 Century Park East, Suite 2100
Los Angeles, CA 90067

National Employment Law Project: Amicus curiae

VIA TRUEFILING E-SERVICING

Aaron D. Kaufman
Leonard Carder, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612

National Employment Law Project: Amicus curiae

VIA TRUEFILING E-SERVICING

Kevin F. Ruf
Glancy Prongay & Murray
1925 Century Park East, Suite 2100
Los Angeles, CA 90067

California Employment Lawyers Association: Amicus curiae

VIA TRUEFILING E-SERVICING

Aaron D. Kaufman
Leonard Carder, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612

California Employment Lawyers Association: Amicus curiae

VIA TRUEFILING E-SERVICING

Paul Grossman
Paul W. Cane, Jr.
Paul Hastings LLP
101 California Street, 48th Floor
San Francisco, CA 94111

California Employment Law Council and Employers Group: Amicus curiae

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San Francisco, CA 94103

Ninth Circuit Court of Appeals

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Shannon Liss-Riordan Lichten & Liss-Riordan, PC 310719	mjcedeno@llrlaw.com	e-Serve	10/23/2020 6:30:19 PM
James Speyer Arnold & Porter, LLP 133114	james.speyer@arnoldporter.com	e-Serve	10/23/2020 6:30:19 PM
Jeffrey Rosin O'Hagan Meyer, PLLC 629216	jrosin@ohaganmeyer.com	e-Serve	10/23/2020 6:30:19 PM
Paul Grossman Paul Hastings LLP 035959	paulgrossman@paulhastings.com	e-Serve	10/23/2020 6:30:19 PM
Jason Wilson Willenken LLP 140269	jwilson@willenken.com	e-Serve	10/23/2020 6:30:19 PM
Kevin Ruf Glancy Prongay & Murray	kruf@glancylaw.com	e-Serve	10/23/2020 6:30:19 PM
Shannon Liss-Riordan Lichten & Liss-Riordan PC 310719	sliss@llrlaw.com	e-Serve	10/23/2020 6:30:19 PM
Aaron Kaufmann Leonard Carder, LLP 148580	akaufmann@leonardcarder.com	e-Serve	10/23/2020 6:30:19 PM
Paul Cane Paul Hastings LLP 100458	paulcane@paulhastings.com	e-Serve	10/23/2020 6:30:19 PM
Catherine Ruckelshaus	cruckelshaus@nelp.org	e-Serve	10/23/2020 6:30:19 PM

Eileen Ahern 216822	eahern@willenken.com	e-Serve	10/23/2020 6:30:19 PM
Amelia Sargent	asargent@willenken.com	e-Serve	10/23/2020 6:30:19 PM
Bradley Alan Benbrook 177786	brad@benbrooklawgroup.com	e-Serve	10/23/2020 6:30:19 PM
Adam G. Unikowsky	aunikowsky@jenner.com	e-Serve	10/23/2020 6:30:19 PM

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Date

/s/Lily Tom

Signature

Wilson , Jason (140269)

Last Name, First Name (PNum)

Willenken LLP

Law Firm