Case No. S222732

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner.

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

CHARLES LEE, et al.,
Real Parties in Interest.

On Review From a Decision by the Court of Appeal
Second Appellate District, Division Seven, Case No. B249546
Los Angeles Superior Court, Case No. BC 332016
Hon. Michael L. Stern.

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER DYNAMEX OPERATIONS WEST, INC.

ORRICK, HERRINGTON & SUTCLIFFE, LLP

Andrew R. Livingston (No. 148646)
Michael Weil (No. 209056)
405 Howard Street
San Francisco, CA 94105
Telephone: (415) 773-5700
Fax: (415) 773-5759
e-mail: alivingston@orrick.com
e-mail: mweil@orrick.com

Lauri Damrell (No. 241010)
400 Capitol Mall, Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7914
Fax: (916) 329-4900
e-mail: ldamrell@orrick.com

Attorneys for *Amici Curiae*
CALIFORNIA EMPLOYMENT LAW COUNCIL (CELC)
and EMPLOYERS GROUP

Case No. S222732

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner.

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

CHARLES LEE, et al.,
Real Parties in Interest.

On Review From a Decision by the Court of Appeal
Second Appellate District, Division Seven, Case No. B249546
Los Angeles Superior Court, Case No. BC 332016
Hon. Michael L. Stern.

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER DYNAMEX OPERATIONS WEST, INC.

ORRICK, HERRINGTON & SUTCLIFFE, LLP

Andrew R. Livingston (No. 148646)
Michael Weil (No. 209056)
405 Howard Street
San Francisco, CA 94105
Telephone: (415) 773-5700
Fax: (415) 773-5759
e-mail: alivingston@orrick.com
e-mail: mweil@orrick.com

Lauri Damrell (No. 241010)
400 Capitol Mall, Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7914
Fax: (916) 329-4900
e-mail: ldamrell@orrick.com

Attorneys for *Amici Curiae*
CALIFORNIA EMPLOYMENT LAW COUNCIL (CELC)
and EMPLOYERS GROUP

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Employment Law Council ("CELC") and the Employers Group respectfully request permission to appear as *amici curiae* in this proceeding and to file the attached proposed *amici curiae* brief in support of Petitioner Dynamex Operations West, Inc. ("Dynamex").

I. INTEREST OF AMICI

CELC is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership includes more than 80 private sector employers, including representatives from many different sectors of the nation's economy (health care, aerospace, automotive, banking, technology, construction, energy, manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively they employ hundreds of thousands of Californians. CELC has been granted leave to participate as amicus curiae in many of California's leading employment cases, such as: *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Harris v. Superior Court* (2011) 53 Cal.4th 170; *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094; *Green v. State of California* (2007) 42 Cal.4th 2254; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317; and *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly three million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. It also provides on-line, telephonic, and in-company human resources consulting services to its members.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal fora over many decades, the Employers Group is distinctively able to assess both the impact and implications of the legal issues presented in employment cases such as this one. The Employers Group has been involved as amicus in many significant employment cases, including: *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512; *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104; *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272; *Arias v. Superior Court* (2009) 46 Cal.4th 969; *Amalgamated Transit Union v. Superior Court* (2009) 46 Cal.4th 993; *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937; *Gentry v. Superior Court* (2007) 42 Cal.4th 443; *Prachasaisoradej v. Ralphs Grocery Co.* (2007) 42 Cal.4th 217; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360; *Smith v. Superior Court* (2006) 39 Cal.4th 77; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028; *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264;

Reynolds v. Bement (2005) 36 Cal.4th 1075; *Miller v. Department of Corrections* (2005) 36 Cal.4th 446; and *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319.

II. PROPOSED *AMICI* PRESENTATION

Amici have a significant interest in the outcome of this case. The issue of employee classification, and the specific legal controversy surrounding the long-term status of workers classified as "independent contractors," are of vital importance to the California employers we represent.

The Court of Appeal opted to read a definition of "employee" into the Industrial Welfare Commission (IWC) Wage Order at issue in this case (Wage Order No. 9-2001, Cal. Code Regs., tit. 8, § 11090) by borrowing from the Wage Order's conceptually distinct definitions of "employ" and "employer," assuming that the concepts are two sides of the same coin. *Amici*'s proposed brief will assist the Court by offering additional perspective on why this reading is flawed.

First, *amici* provide a deeper discussion regarding the historical context in which the language was drafted. As the history shows, the definitions of "employ" and "employer" were focused on identifying who is *liable* for wage-and-hour violations, not who is an "employee" entitled to protection under the law. The Wage Order does not (and has never) defined "employee," and there is no basis to read a definition of the term into the Wage Order that does not exist.

Amici also provide important context regarding the value of independent contracting in today's modern economy. Adopting the Court of Appeal's broad definition of "employee" for the Wage Order could seriously undermine thousands of carefully negotiated working relationships—relationships that are immensely valuable to businesses and workers alike. This could not have been the intent of lawmakers at

the time the Wage Order was drafted, and it would lead to an absurd result to read the Wage Order this way now.

Pursuant to California Rules of Court, rule 8.520(f)(4), *amici* affirm that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the *amici*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

III. CONCLUSION

For the foregoing reasons, CELC and Employers Group respectfully request that the Court grant them leave to participate in this proceeding as *amici curiae* and accept their proposed brief.

Dated: December 7, 2015

Respectfully submitted,
ORRICK, HERRINGTON & SUTCLIFFE LLP

By: _____
Andrew Livingston
Attorneys for *Amici Curiae*
CALIFORNIA EMPLOYMENT LAW COUNCIL
EMPLOYERS GROUP

Case No. S222732

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner.

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

CHARLES LEE, et al.,
Real Parties in Interest.

On Review From a Decision by the Court of Appeal
Second Appellate District, Division Seven, Case No. B249546

Los Angeles Superior Court, Case No. BC332016
Hon. Michael L. Stern.

BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF PETITIONER DYNAMEX OPERATIONS WEST, INC.

ORRICK, HERRINGTON & SUTCLIFFE, LLP

Andrew R. Livingston (No. 148646)
Michael Weil (No. 209056)
405 Howard Street
San Francisco, CA 94105
Telephone: (415) 773-5700
Fax: (415) 773-5759
e-mail: alivingston@orrick.com
e-mail: mweil@orrick.com

Lauri Damrell (No. 241010)
400 Capitol Mall, Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7914
Fax: (916) 329-4900
e-mail: ldamrell@orrick.com

Attorneys for *Amici Curiae*
CALIFORNIA EMPLOYMENT LAW COUNCIL (CELC)
and EMPLOYERS GROUP

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE COURT OF APPEAL'S NOVEL AND UNPRECEDENTED TEST FOR DETERMINING WHO IS AN EMPLOYEE UNDER THE WAGE ORDER SHOULD BE OVERTURNED 2

A. The Court of Appeal's Decision Ignores the History and Fundamental Purposes of the Law 2

B. Defining Who is an "Employee" Requires a Distinct Analysis 6

C. The Court of Appeal's Novel Standard Makes No Sense in Today's Modern Economy 10

III. CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Arnold v. Mutual of Omaha Ins. Co.
(2011) 202 Cal.App.4th 580 9

Brinker Rest. Corp. v. Superior Court
(2012) 53 Cal. 4th 1004 14

Curtis & Gartside Co. v. Pigg
(Okla. 1913) 1913 OK 214 3

Dynamex Operations West, Inc. v. Superior Court
(2014) 230 Cal.App.4th 718 ..... 2, 7

Futrell v. Payday California, Inc.
(2010) 190 Cal.App.4th 1419 8

Martinez v. Combs
(2010) 49 Cal.4th 35 ..... *passim*

Ex parte Miller
(1912) 162 Cal. 687 ..... 4, 8, 9

O'Connor v Uber Technologies, Inc.
(N.D. Cal. 2015) 82 F. Supp. 3d 1133 15

Purtell v. Philadelphia & Reading Coal & Iron Co.,
(Ill. 1912) 256 Ill. 110 3

Rutherford Food Corp. v. McComb (*Rutherford*)
(1947) 331 U.S. 722 5

S. G. Borello & Sons, Inc. v. Department of Industrial Relations
(1989) 48 Cal.3d 341 ..... *passim*

State v. Shorey
(Ore. 1906) 48 Ore. 396 3

Strafford v. Republic Iron & Steel Co.
(Ill. 1909) 238 Ill. 371 4

Statutes

29 U.S.C.A. § 203(g) 5

Cal. Lab. Code § 2802 14

Regulations

Industrial Welfare Commission Wage Order No. 9-2001, Cal. Code Regs., tit. 8, § 11090..... 3

I. INTRODUCTION

The Court of Appeal created a novel interpretation of the Industrial Welfare Commission (IWC) Wage Order at issue in this case that upends nearly 100 years of precedent in defining who is an "employee." In a purported attempt to protect workers, it has instead quashed entrepreneurial spirit and virtually eliminated any possibility for businesses and workers to create innovative and flexible work arrangements that match the unique needs of today's modern economy.

The Wage Order's "suffer or permit" standard at issue in this case was conceived nearly a century ago in the context of state child labor laws and was crafted to impute liability upon employers who abused "weak and helpless" labor but sheltered themselves by claiming they did not directly "employ" the workers. Liability was appropriately crafted to be as broad as possible with little room for a business to "explain away" its behavior towards a class of workers who were undoubtedly protected by the law. As the laws evolved both at the state and federal level, the intent was to protect workers from the abuses that existed in the New Deal era. But, even then, courts acknowledged that not everyone needed protection and that reading the laws too broadly could have negative consequences. For that reason, the courts developed carefully considered multi-factor tests, like that set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, for determining when a worker should be covered.

None of this factored into the Court of Appeal's analysis. Instead, the court opted to read a definition of "employee" into the Wage Order that not only does not exist, but is wholly inconsistent with the history and fundamental purpose of the law. Giving such broad effect to the Wage Order threatens thousands (if not millions) of existing working relationships that will necessarily have to be re-evaluated if the Court of Appeal's

decision is upheld. This absurd result is not what lawmakers intended for workers in the early 20th century, nor does it make sense to apply it in the 21st century. For these reasons, *amici* urge this Court to reverse the decision below.

II. THE COURT OF APPEAL'S NOVEL AND UNPRECEDENTED TEST FOR DETERMINING WHO IS AN EMPLOYEE UNDER THE WAGE ORDER SHOULD BE OVERTURNED

A. The Court of Appeal's Decision Ignores the History and Fundamental Purposes of the Law

The "history and fundamental purposes" of the law must be considered when deciding who is an employee and who is an independent contractor. (*S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations* (*Borello*) (1989) 48 Cal.3d 341, 353-354; *see also Martinez v. Combs* (*Martinez*) (2010) 49 Cal.4th 35, 51 ["The question is ultimately one of legislative intent, as "[o]ur fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute."].) The Court of Appeal ignored the history and fundamental purpose of the Wage Order altogether. Instead, it opted to read a definition of "employee" into the Wage Order by borrowing from the Wage Order's conceptually distinct definitions of "employ" and "employer," assuming that the concepts are flip sides of the same coin. (*See Dynamex Operations West, Inc. v. Superior Court* (*Dynamex*) (2014) 230 Cal.App.4th 718, 727-30.) But as the legislative history shows, determining what it meant to "employ" or be an "employer" had nothing to do with what it meant to be an "employee" entitled to protection of the law.

When the first IWC Wage Order was adopted in 1916, the IWC sought to protect what was then viewed as the "weakest and most helpless class" of workers—women and children—to ensure they had "safety and...sanitary conditions" as well as "a wage that insures for them the

necessary shelter, wholesome food and sufficient clothing." (*Martinez, supra,* 49 Cal. 4th at p. 54.) California's legislation "joined a wave of minimum wage legislation that swept the nation in the second decade of the 20th century," which was motivated by a "widespread public recognition of the low wages, long hours, and poor working conditions under which women and children often labored." (*Id.* at p. 53.)

As this Court acknowledged in *Martinez* through its reference of the history both in California and in other states (*id.* at pp. 53, 58), there was no doubt at the time that children were to be protected by the law. For instance, the Oregon Supreme Court explained in 1906:

> [Minors] are not *sui juris* and can only contract to a limited extent. They are wards of the state and subject to its control. As to them, the state stands in the position of *parens patriae*, and may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health and morals of its future citizens.

(*State v. Shorey* (Ore. 1906) 48 Ore. 396, 398-99.) This is one of the reasons why many states started prohibiting child labor, and no child was excluded from the protections of the law. (*See, e.g., Curtis & Gartside Co. v. Pigg* (Okla. 1913) 1913 OK 214 [affirming liability for company in personal injury suit arising from 14-year-old machine oiler's loss of a hand; where 1909 child labor statute provided that "[n]o child under the age of sixteen years shall be employed, permitted or suffered to work..."]; *Purtell v. Philadelphia & Reading Coal & Iron Co.*, (Ill. 1912) 256 Ill. 110, 116-17 [affirming damage award to 11-year-old waterboy for injuries suffered while working on company premises, citing Section of the Child Labor Act of 1903 as stating that "[n]o child under the age of fourteen years shall be employed, permitted, or suffered to work at any gainful occupation..."]; *Strafford v. Republic Iron & Steel Co.* (Ill. 1909) 238 Ill. 371, 373 [affirming judgment finding defendant-corporation was liable for

limb-loss injuries to 13-year-old worker, where 1897 child labor law provided that no children under 14 could not be "employed, permitted or suffered to work" in hazardous industrial positions].)

For women, "[t]he application of short hour laws...[was] justified" and unquestioned because of the now antiquated view that women were "less robust in physical organization and structure than men, that they have the burden of child-bearing, and, consequently, that the health and strength of posterity and of the public in general [was] presumed to be enhanced by preserving and protecting women from exertion which men might bear without detriment to the general welfare." (*Ex parte Miller* (*Miller*) (1912) 162 Cal. 687, 695.)

Because it was clear when it was crafted that the Wage Order was designed to protect the "weakest and most helpless" workers, the language in the Wage Order focused not on defining who was an "employee," but rather who was an "employer." The goal was to track down those who were trying to evade responsibility for mistreating these "weakest and most helpless" workers by claiming they did not directly "employ" them. (*Martinez*, *supra,* 49 Cal. 4th at pp. 57-60.) As this Court explained at great length in *Martinez*, it was within this context that the IWC defined the employment relationship. (*Id.*) Although the first Wage Order did not define "employ," it used the same language that the Wage Order uses to define the term today and stated that "[n]o person, firm or corporation ***shall employ or suffer or permit*** any woman or minor to work in the fruit and vegetable canning industry in any occupation at time rates less than the following..." (*Id.* at p. 57 [emphasis in original].) The "suffer or permit" standard was "especially apt" to address who was liable for improper treatment of women and children at work "because it was already in use throughout the country in statutes regulating and prohibiting child labor (and occasionally that of women), having been recommended for that purpose in several model child labor laws published between 1904

and 1912." (*Id.* at pp. 57-58 [citing *Rutherford Food Corp. v. McComb* (*Rutherford*) (1947) 331 U.S. 722, 728 fn.7].) At the time of the 1938 enactment of the federal Fair Labor Standards Act, which also defines "employ" as "to suffer or permit to work" (29 U.S.C.A. § 203(g)), the phrase was contained in the child labor statutes of thirty-two States and the District of Columbia. (*Rutherford*, *supra*, 331 U.S. at p. 728 fn.7.) The universal understanding of the "suffer or permit" standard at the time was "to impose criminal liability for employing children, or civil liability for their industrial injuries, even when no common law employment relationship existed between the minor and the defendant, based on the defendant's failure to exercise reasonable care to prevent child labor from occurring." (*Martinez*, *supra*, 49 Cal. 4th at p. 58.) The idea was to reach "irregular working arrangements the proprietor of a business might otherwise disavow with impunity." (*Id.*)

Likewise, the Wage Order's similarly broad definition of "employer" (one who "employs or exercises control over the wages, hours, or working conditions of any person") "has the ***obvious utility*** of reaching situations in which multiple entities control different aspects of the employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work." (*Id.* [emphasis added].)

This historical context reveals that the definitions of "employ" and "employer" were focused on identifying who is *liable* for wage-and-hour violations, not who is an "employee" entitled to protection under the law. This is why this Court held in *Martinez* that the IWC's Wage Order "define[s]...who may be *liable.*" (*Martinez*, *supra*, 49 Cal. 4th at p. 52 [emphasis added].) And, that was all that was at issue in *Martinez*. Six workers sought to bring claims against their direct employer—Munoz—as well as several produce merchants for whom Munoz worked. (*Id.* at p. 48.) The Court ultimately concluded that the produce merchants were not

liable because they did not "suffer or permit" the work performed. (*Id.* at pp. 69-75.) There was never any question that the workers were "employees" entitled to protection of the law.

B. Defining Who is an "Employee" Requires a Distinct Analysis

The fundamental flaw of the Court of Appeal's analysis is that it assumed that the *Martinez* test for determining who is an "employer" must be used in lieu of the *Borello* common law test to determine who is an "employee." As Dynamex points out in its Reply Brief, the two tests address distinct legal issues. (Reply Brief of Petitioner (Reply Brief) at p. 5.) They are complementary, not parallel tests, and one cannot replace the other. Though both tests may require looking at a common set of facts related to the relationship between the parties, what we care about when looking at those facts is fundamentally different for each analysis. We view the facts with a different lens.

Given the original intent of the Wage Order to criminalize professional conduct that exploited children and under-empowered workers, the broad definitions of "employ" and "employer" made good sense. It was highly desirable that there were few, if any, considerations that could explain away an entity's liability for injury to a limited and readily identifiable class of female and child workers who were undoubtedly already protected by the law. The focus was on distinguishing between possible bad actors and understanding who should share in responsibility for the bad acts, making it more akin to the analysis a court conducts when determining whether to pierce a corporate veil. Is one entity trying to shield itself from liability by virtue of a sham wall it has erected between itself and the worker?

On the other hand, evaluating who is an "employee" is a threshold analysis that focuses on who is entitled to protection of the law. In that regard, it is similar to a standing or jurisdictional analysis to determine

whether a plaintiff has suffered a harm that is cognizable by a court in the first place. At the heart of this inquiry is whether the plaintiff is someone the law intended to protect. Only when the answer to this threshold question is "yes" is there a need to get to the next question to determine which entities are liable. In *Martinez*, there was no dispute that the plaintiff workers were employees. (*Martinez, supra,* 49 Cal.4th at p. 48.) So it was appropriate to jump to the next question to determine whether the produce merchants played any part in "suffering or permitting" the employees to work. Had they done so, the court could have found them liable for wage-and-hour violations that occurred while the employees were working. But because they did not suffer or permit the employees to work, they were absolved of any potential liability. (*Id.* at pp. 69-75.)

There is nothing in the legislative history to suggest that the legislature or the IWC intended the same broad standard used to determine who is a liable "employer" should be used to determine who is a protected "employee." If anything, the history suggests quite the opposite. As Dynamex argued, the Court of Appeal's ruling "eviscerates long-established California precedent" and "would effectively eliminate independent contractor status in California ..." (Opening Brief of Petitioner (Opening Brief) at pp. 2, 9.) The appellate court called this "overblown rhetoric." (*Dynamex, supra,* 230 Cal.App.4th at p. 730.) But the only non-employee example the court could come up with to counter Dynamex's assertion was a payroll company that merely cuts the paychecks, citing *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419. (*Id.*) This leaves open a whole host of non-traditional, independent working relationships that, under the Court of Appeal's interpretation, will now be swept into coverage under the Wage Order simply because one entity "suffers or permits" a person to work. (*See* Opening Brief at pp. 20-21 [*e.g.*, a law firm "suffers or permits" a court reporter to report its depositions; a homeowner "suffers or permits" a pool

service to clean the homeowner's pool; an elderly retiree "suffers or permits" a taxi driver to take her to regular medical appointments].) These independent service providers are far from the "weakest and most helpless" workers that the IWC originally intended to protect through its Wage Order. (*Martinez*, *supra*, 49 Cal.4th at p. 54.)

Moreover, imposing a definition of "employee" that brings within its ambit virtually every working relationship that exists ignores the near universal recognition—by virtue of the more flexible tests set forth in nearly every other jurisdiction that analyzes contractors vs. employees (*see* Opening Brief at pp. 24-27)—that the law was not intended to devalue a working arrangement which arises out of a mutual contractual agreement to perform work in a non-traditional way. This Court warned against wage-and-hour laws that "arbitrarily interfer[e] with the right of contract" or "impos[e] restrictions upon lawful occupations" in its 1912 *Miller* decision.[1] (*Miller*, *supra*, 162 Cal. at p. 694). And decades later, it developed the *Borello* test with the understanding that "[e]ach service arrangement must be evaluated on its facts, and the dispositive

[1] The *Miller* Court recognized that, although the short-hour laws only impose punishment on the employer, the hour limitations "restrict[] the liberty of both the employer and the employed...to freely contract with each other as to the length of the day's service or to perform such contracts, when made." (*Miller*, *supra*, 162 Cal. at p. 693.) For that reason, "a law arbitrarily interfering with the right of contract, or imposing restrictions upon lawful occupations, will be held void." (*Id.* at p. 694.) It was not the role of the legislature to "judge for persons in this respect and interfere solely to prevent them from injuring themselves by excessive labor." (*Id.*) Rather, the focus was on preventing "injury...to the public health and general welfare." (*Id.*) This is why lawmakers carved out specific occupations held by women and children that had "a tendency to injure the health of those engaged therein...[that was] so general or extensive as to affect the public health and general welfare." (*Id.*) Thus, in this Court's view, it was improper to impose working hour limitations on *all* businesses and workers without regard to their unique circumstances and working relationships.

circumstances may vary from case to case." (*Borello*, *supra*, 48 Cal.3d at p. 354].)

The Wage Order does not provide and has never provided a definition of "employee," and there is no basis to read a definition of the term into the Wage Order that does not exist and makes no logical sense. As this Court explained in *Martinez*, "[t]he statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs." (*Id.* at p. 51.) The Wage Order does not supply a definition of "employee" that is clearly and unequivocally intended to supplant the common law definition, and "when a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586-587.) For these reasons, the common law *Borello* test must apply. To hold otherwise essentially authorizes the Court of Appeal to re-write the law and upend the fundamental purpose of the Wage Order.

C. The Court of Appeal's Novel Standard Makes No Sense in Today's Modern Economy

The Court should also consider the consequences of the Court of Appeal's flawed interpretation, "including its impact on public policy." (*Martinez*, *supra*, 49 Cal. 4th at p. 51.) The Court of Appeal's re-write of the Wage Order is problematic not only because it has no basis in history or the plain language of the Wage Order, but also because it makes no sense in today's modern economy. Inventing such a broad definition of "employee" for the Wage Order treats "independent contracting" with the same kind of abhorrence typically reserved for the exploitative practices of The Gilded Age. It risks treating business owners like criminals and could seriously undermine thousands of carefully negotiated working

relationships—relationships that are immensely valuable in the development of the U.S. economy. Moreover, it imposes unnecessary paternalistic protections on thousands of independent workers who not only have no need for the protection but may be harmed by it.

Notwithstanding the Court of Appeal's apparent distaste for the independent contractor model, it is critical to preserve it. The world in which we work is evolving at a rapid pace. Nationwide, "a shift is underway with an entrepreneurial spirit and a fundamental understanding that given current and emerging technology and the global economy, how we define and engage in work has changed." (Cohen et al., *Independent Contracting Policy and Management Analysis* (Aug. 2013) Columbia University School of International and Public Affairs, at p. 11 <http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf> [as of Dec. 1, 2015] (hereafter Cohen).) This could not be truer than in California, a state whose mission is "to develop an ecosystem that enables entrepreneurship and promotes long term economic growth and job creation through innovation." (Calif. Governor's Office of Business and Economic Development, *Innovation @ Work* (2012) <http://business.ca.gov/Programs/Innovation/Innovation Work.aspx> [as of Nov. 21, 2015].)

Giving workers the opportunity to define the contours of their work through contract is vitally important to today's economy and modern workplace. Indeed, the U.S. Department of Labor has celebrated the value of flexible workplace strategies that "can meet the needs of a wide range of employee groups, including those who must balance work and family responsibilities, formal and informal caregivers, older workers with chronic conditions, veterans with post-traumatic stress disorders, people with disabilities (including those with HIV/AIDS), and workers who value a balance between work and their personal lives." (U.S. Dep't of Labor, Office of Disability Employment Policy & Women's Bureau, Advancing

Workplace Flexibility Policy and Practices, Synthesis Report (Sept. 30, 2011) p. 6 <http://www.dol.gov/odep/pdf/WBForum.pdf> [as of Nov. 21, 2015] (hereafter DOL Workplace Flexibility Report).)

The beauty of the independent contractor relationship is that it allows anyone to set up shop for themselves and earn money in a flexible way by choosing their own hours, clients, and how the work is performed. "One of the most frequently cited benefits of engaging in independent contracting is the flexibility and independence that this type of arrangement affords." (Cohen, *supra,* at p. 16 [*citing* Bidwell et al., *Who Contracts? Determinants of the Decision to Work as an Independent Contractor among Information Technology Workers* (2009) 52:6 Acad. of Mgmt. J. 1148, 1148].) Contractors can "move in and out of the workforce as their situations dictate," and a contractor relationship can "serve as a transition for laid-off workers." (Cohen, *supra,* at p. 16 [*citing* Eisenach, *The Role of Independent Contracting in the U.S. Economy* (Dec. 2010) Navigant Econ., at p. 42, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1717932> [as of Nov. 21, 2015].) It is also often "a first step toward entrepreneurship and small business creation" because "unlike employees, independent contractors are required to learn how to prepare and send invoices, maintain records, acquire capital, comply with licensing and other regulatory requirements, file taxes, and so on." *Id.*

Self-employment is also uniquely valuable for individuals with disabilities. Griffin, et al., *Self-Employment and Microenterprise: A Customized Employment Option*, <http://www.onestops.info/pdf/SelfemploymentCE1.pdf> [as of November 21, 2015].). Indeed, self-employment is a rehabilitative option under the Rehabilitation and the Workforce Investment Acts. (*Id.*) Self-employment allows individuals with disabilities to engage in anything from construction equipment rentals to mobile dog grooming to art-work

and photography to truck driving. (*Id.*) And, the U.S. Social Security Administration is actively promoting the use of business ownership to increase opportunities for individuals with disabilities through the Plan for Achieving Self Support. (*Id.*)

The many benefits of an independent contractor relationship lead to greater work contentment. Many of today's workers view contracting relationships as liberating them from detailed personnel policies that apply to traditional employees and the rigid structure of the 9-5 traditional workday. According to a recent Pew Research Center survey, self-employed workers are "significantly more satisfied with their jobs than other workers. They are also more likely to work because they want to and not because they need a paycheck." (Cohen, *supra*, at p. 17 [*citing* Morin, *Take this Job and Love It: Job Satisfaction Highest Among the Self-Employed* (Sept. 17 2009) The Pew Charitable Trusts, <http://www.pewtrusts.org/en/research-and-analysis/reports/2009/09/17/take-this-job-and-love-it-job-satisfaction-highest-among-the-selfemployed> [as of Nov. 21, 2015].) In addition, "39% of self-employed workers [were] 'completely satisfied' with their jobs, compared to 28% of workers in wage or salary jobs." *Id.* And, a 2005 Bureau of Labor Statistics study found that "fewer than 1 in 10 independent contractors said they would prefer a traditional work arrangement. (Cohen, *supra*, at p. 17 [*citing* Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements (July 27, 2005), <http://www.bls.gov/news.release/conemp.nr0.htm> [as of Nov. 30, 2015].)

Independent truck drivers—such as the ones engaged by Dynamex—are no exception. A 2011 University of Arkansas study found that: "independent contract drivers operate in that status because they see more advantages than disadvantages. This is specifically illustrated in the fact that 80 percent of the drivers felt that it would be "easy" or "very

easy" to be hired on as a company driver." (Cohen, *supra*, at p. 17 [*citing* Johnson, *Relative Advantages and Disadvantages of Independent Contractor Status: A Survey of Owner-Operators' Opinions and Rationale* (Jan. 2012), Mack-Blackwell Rural Trans. Ctr., Univ. of Ark., at p. 55, <http://ntl.bts.gov/lib/43000/43500/43500/MBTC_DOT_3026.pdf> [as of Nov. 30, 2015].)

The independent contractor relationship also offers flexibility that is otherwise hampered by the very laws that are designed to protect employees in a traditional employment relationship. For instance, to ensure compliance with Section 3(A) of the Wage Order that requires payment of overtime for work in excess of eight hours a day and forty hours a week, the employer must keep tabs on when and for how long each employee is working every hour of every day. (*See* Industrial Welfare Commission Wage Order No. 9-2001, Cal. Code Regs., tit. 8, § 11090.) The Wage Order mandates that the employer keep records of time worked for at least three years following the termination of the relationship. (*Id.* at subd. 7(A).) Employers must also track when and for how long workers take their lunch breaks (*id.* at subd. 13(A)) and ensure that the opportunity to take a meal break is provided no later than the start of the sixth hour of work (*see generally, Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1041). For employees whose work requires travel, employers must keep track of every meal purchased, every hotel stay, and every mile driven to ensure that the employee is properly reimbursed for all reasonable and necessary business expenses incurred. (Cal. Lab. Code § 2802.) And, if employers want to ensure that expenses do not run out of control (because employees might otherwise be inclined to choose first-class accommodations and five-star hotels on every trip), they have no choice but to impose policies and procedures on how and where to book travel. These controls are antithetical to the freedom necessary in a flexible work arrangement.

In this environment, it is no surprise that "[i]ndependent contracting is a growing and important contributor to the U.S. economy, particularly among small businesses." (Cohen, *supra*, at p. 8.) In 2010, alternative workers accounted for approximately $626 billion in personal income, of which independent contractors accounted for approximately $473 billion. (*Id.*) And, in 2012, there were roughly 17 million independent workers, up from 16 million in 2011. (*Id.*) This trend is not likely to slow down any time soon, particularly in light of the burgeoning on-demand economy. According to a new study and forecast from Intuit, Inc. and Emergent Research, the number of Americans regularly working in the on-demand economy will more than double by 2020 from a current total of 3.2 million to an estimated 7.6 million. (Intuit Investor Relations, *Intuit Forecast: 7.6 Million People in On-Demand Economy by 2020* (Aug. 13, 2015) Business Wire, <http://www.businesswire.com/news/home/20150813005317/en/> [as of Nov. 30, 2015].) The broader contingent workforce is also expected to explode from 36 percent today to 43 percent by 2020 (and it was only at 17 percent 25 years ago). (*Id.*)

Giving the broad effect to the IWC Wage Order as dictated by the Court of Appeal's decision threatens an enormous and very vital component of California's economy. Precisely because the "suffer or permit" standard was written with such black-and-white, paternalistic motivations, it would be fundamentally unwise to allow the standard to impose unnecessary restrictions on millions of workers in dozens of industries in California. The *Borello* standard more appropriately balances the interests of businesses and workers alike and is crucial in defining the scope and limits of employer-employee relationships and liabilities.

This is not to say that new standards should not be developed. Many courts and policy makers have recently recognized the need for new legal standards that take into account the realities of the modern workplace. (*See, e.g., O'Connor v Uber Technologies, Inc.* (N.D. Cal.

2015) 82 F. Supp. 3d 1133, 1153 ["It may be that the legislature or appellate courts may eventually refine or revise that test in the context of the new economy. It is conceivable that the legislature would enact rules particular to the new so-called 'sharing economy.' Until then, this Court is tasked with applying the traditional multifactor test of *Borello* and its progeny to the facts at hand."]; *see also* Bercovici, *Why the Next Uber Wannabe is Already Dead* (Nov. 2015) Inc. Magazine <http://www.inc.com/magazine/201511/jeff-bercovici/the-1099-bind.html> [as of Nov. 30, 2015] ["If we just say everybody's been misclassified, it's not going to solve the problem. ... A hope for resolution resides in a rewrite of existing law." (*internal quotations omitted*)].)

Rewriting the law is not the province of the Court of Appeal. But that is exactly what the court has done. And in doing so, it went the opposite direction and did so in a way that further limits the various types of flexible work arrangements that are now vital to today's modern economy and deeply threatens California's innovation infrastructure.

III. CONCLUSION

For these reasons, the Court should reverse the decision below and confirm that the common law *Borello* test is the proper test under existing law for distinguishing between employees and independent workers who choose to define by contract the flexible terms of their work engagements.

Dated: Dec. 7, 2015

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 

Andrew Livingston

Attorneys for *Amici Curiae*

CALIFORNIA EMPLOYMENT LAW COUNCIL

EMPLOYERS GROUP

CERTIFICATE OF COMPLIANCE

In accordance with California Rule of Court 8.520(c)(1), counsel for the California Employment Law Council hereby certifies that the **BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF PETITIONER DYNAMEX OPERATIONS WEST, INC.** is proportionately spaced, uses Times New Roman 13-point typeface, and contains 4,922 words, including footnotes, but excluding the Table of Contents, Table of Authorities, and this Certificate, as determined by our law firm's word processing system used to prepare this brief.

Dated: Dec. 7, 2015

Respectfully submitted,
ORRICK, HERRINGTON & SUTCLIFFE LLP

By: _____
Andrew Livingston
Attorneys for *Amici Curiae*
CALIFORNIA EMPLOYMENT LAW COUNCIL
EMPLOYERS GROUP

PROOF OF SERVICE BY MAIL

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. On December 7, 2015, I served the following document(s):

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF PETITIONER DYNAMEX OPERATIONS WEST, INC.

on the interested parties in this action by placing true and correct copies thereof in sealed envelope(s) addressed as follows:

Party	Attorney
Dynamex Operations West, Inc. Petitioner	Robert Gordon Hulteng Littler Mendelson PC 650 California Street, 20th Floor San Francisco, CA 94108 Ellen Marie Bronchetti Sheppard Mullin Richter and Hampton LLP 4 Embarcadero Center 17th Floor San Francisco, CA 94111 Philip Andrew Simpkins Littler Mendelson PC 650 California Street, 20th Floor San Francisco, CA 94108
Superior Court of Los Angeles County Respondent	Frederick Bennett Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012

Charles Lee : Real Party in Interest & Pedro Chevez : Real Party in Interest	Kevin Francis Ruf Glancy Binkow and Goldberg LLP 1925 Century Park East, Suite 2100 Los Angeles, CA 90067 Alan Mark Pope Pope Berger and Williams LLP 3555 Fifth Avenue, Suite 300 San Diego, CA92101 Jon R. Williams Boudreau Williams LLP 666 State Street San Diego, CA 92101
Hon. Michael L. Stern : Non-Title Respondent	Los Angeles Superior 111 North Hill Street, Dept. 62 Los Angeles, CA 90012

I am employed in the county from which the mailing occurred. On the date indicated above, I placed the sealed envelope(s) for collection and mailing at this firm's office business address indicated above. I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the firm's correspondence would be deposited with the United States Postal Service on this same date with postage thereon fully prepaid in the ordinary course of business.

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

Executed on December 7, 2015, at San Francisco, California.

Jeffrey G. Ball