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,
Defendant and 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

BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP

ANDREW R. LIVINGSTON (State Bar No. 148646)
alivingston@orrick.com
KATHRYN G. MANTOAN (State Bar No. 239649)
kmantoan@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: 415-773-5700
Facsimile: 415-773-5759

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

SERVICE ON ATTORNEY GENERAL AND DISTRICT ATTORNEY PER BUS. & PROF. CODE § 17209 AND CAL. RULES OF COURT, RULE 8.212(C).

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kmantoan@orrick.com
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San Francisco, CA 94105-2669
Telephone: 415-773-5700
Facsimile: 415-773-5759

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

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Amici curiae California Employment Law Council ("CELC") and the Employers Group respectfully submit this supplemental brief in response to the Court's orders filed on December 21, 2016, January 18, 2017, and February 2, 2017.

STATEMENT OF INTEREST

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 Corporation 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, supra*, 59 Cal.4th 1; *Brinker, supra*, 53 Cal.4th 1004; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512; *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104; *Chavez, supra*, 47 Cal.4th 970; *Hernandez, supra*, 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 Company* (2007) 42 Cal.4th 217; *Murphy, supra*, 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 Brothers 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.

I. INTRODUCTION

The fundamental issue in this appeal is whether a court can certify a class of allegedly misclassified employees under either the joint-employment standards set forth in *Martinez v. Combs* (2010) 49 Cal.4th 35, mod. June 9, 2010, or the long-standing common-law test of employee status in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341. The Court asked the parties and *amici* to address what, if any, bearing the Division of Labor Standards Enforcement ("DLSE")'s Enforcement Policies and Interpretations Manual (2002 update, as revised March 2006) (the "DLSE Manual") has on that fundamental issue. The short answer is none.

The DLSE Manual has historically, and appropriately, been afforded no independent deference by the courts. (See *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.) Given the DLSE's admittedly pro-employee bent, it is unsurprising that courts have eschewed reliance on its pronouncements. The DLSE Manual sections at issue here actually misstate the law, and for that further reason should not be relied upon by this (or any) Court to ascertain the law's meaning. It is the province of courts—not unaccountable agencies promulgating handbooks without soliciting stakeholder input—to determine the law.

II. ARGUMENT

A. Courts Are Not Required to Afford Any Deference to the DLSE Manual.

Twenty years ago, this Court held in *Tidewater Marine Western, Inc. v. Bradshaw* that provisions of the then-effective DLSE Operations and Procedures Manual were "void," accepting the plaintiffs' argument that the manual was in effect an "underground regulation" not adopted in compliance with the Administrative Procedure Act, California Government Code sections 11340 *et seq.* ("APA"). (*Tidewater*, *supra*, 14 Cal.4th at pp. 563, 572.) The Court ruled that the DLSE does not have any special authority to issue "rule[s] of general application" without respecting the APA's notice and comment process, which was put in place "to ensure that those persons or entities whom a regulation will affect have a voice in its

creation." (*Id.* at pp. 572, 568.) The Court directed that the Legislature could revise the APA to allow agencies to "adopt regulations informally and without following the APA's elaborate procedures" if it felt agencies generally (or the DLSE in particular) possessed the expertise to warrant such authority. (*Id.* at p. 576.) The Legislature has taken no such action in the intervening decades, and as such has opted not the vest the DLSE with any special rulemaking or interpretive authority.

Following *Tidewater*, this Court has continued to recognize that the general policy pronouncements laid out in the DLSE Manual "should be given no deference." (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582, mod. May 10, 2000.) In *Morillion*, the Court was tasked with interpreting the phrase "hours worked" in the relevant wage order as applied to travel and commute time, and considered what (if any) weight to give to the DLSE Manual provisions on point. (*Id.* at pp. 579-80.) Both the plaintiffs and defendant acknowledged that *Tidewater* controlled, but urged different takeaways from the case. (*Id.* at p. 581.) The plaintiffs argued that the DLSE Manual was entitled to "some deference" because it was "long-standing"; the defendants argued that it was entitled to "no deference" because it constituted a "void regulation." (*Ibid.*) This Court was clear that it had "repeatedly rejected plaintiffs' argument," and held unequivocally that the DLSE Manual "should be given no deference" whatsoever. (*Id.* at pp. 581-82.)

Again in *Martinez*—the very case Respondent urges this Court to inject into analysis of the employee-independent contractor dichotomy—the Court refused to defer to the DLSE Manual. In evaluating whether the defendant was liable for unpaid wages as a joint employer, the Court noted that the DLSE had "devoted some attention to the wage orders' definition of employer in [DLSE's] published policies governing the enforcement of wage claims." (*Martinez*, *supra*, 49 Cal.4th at p. 50, fn. 15.) But the Court then promptly restated the well-established rule that courts should "give the DLSE's current enforcement policies no deference." (*Ibid.* [citing *Morillion*, *supra*, 22 Cal.4th at pp. 581-82; *Tidewater*, *supra*, 14 Cal.4th at pp. 575-77].) That the Court felt no need to elaborate on this explanation underscores how entrenched and uncontroversial the holding had become.

Indeed, as recently as last April, this Court once again reiterated the rule unchanged. (See *Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal.4th 1, 13 [citing *Tidewater*, *supra*, 14 Cal.4th at pp. 568-77; *Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 670; *Morillion*, *supra*, 22 Cal.4th at pp. 581-82].) The Courts of Appeal have, properly, followed suit. For example, in *Areso v. CarMax*, the court addressed an issue of first impression: the meaning of the word "amount" in Labor Code section 204.1, in order to determine whether the payments at issue were commission wages exempt from overtime. (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1007.) The plaintiff urged the court to adopt the

DLSE Manual provisions discussing commission compensation. (*Ibid.*) Even on an issue of first impression, the court held that it should "afford no deference to the statement in the DLSE manual because regulators did not properly adopt [it], making it nonbinding on courts." (*Ibid.* [citation and internal quotation marks omitted].) Other Courts of Appeal are in accord. (See, e.g., *Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1579 [giving "no weight" to interpretations "implied from" DLSE Manual]; *Cash v. Winn* (2012) 205 Cal.App.4th 1285, 1302 [citations omitted; emphasis in original] [holding DLSE Manual provisions have "*no* persuasive value and are entitled to *no* deference even if the policy reflects the DLSE's 'long-standing' interpretation of a wage order"].) Even the DLSE has, in candor, conceded that its manual provisions "do[ ] not have the force of law" and constitute "underground regulation[s]." (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 25.)

This Court has distinguished the limited persuasive value of DLSE Manual provisions—which contain broad pronouncements of the Labor Commissioner's views on the scope and shape of the law, at least as of the date the manual was issued—from DLSE opinion letters, which respond to specific inquiries predicated on particular fact patterns. This Court recently noted, for example, that DLSE "interpretations that arise in the course of case-specific adjudication" may be entitled to "respect." (*Kilby, supra*, 63 Cal.4th at p. 13; accord *Cash, supra*, 205 Cal.App.4th at p. 1302 [citations

omitted] ["Unlike DLSE interpretive policies, advice letters are not subject to the rulemaking provisions of the APA because they generally reflect an opinion on enforcement of the wage orders with respect to a specific factual circumstance."].) These DLSE opinion letters have thus been held to "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"—not deference—in subsequent, factually analogous cases. (*Brinker*, *supra*, 53 Cal.4th at p. 1029, fn. 11; accord *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 268 [reviewing DLSE opinion letters regarding rest period obligations and finding they "tend to support" interpretation of wage order the Court had already embraced].) That is a far cry from adopting or deferring to the DLSE's general interpretations about what the law, in any and all circumstances, dictates.

Even where DLSE opinion letters are at issue, moreover, the Court has conducted its own independent analysis before "agree[ing]" with—rather than simply deferring to—the DLSE's interpretations. (*Brinker*, *supra*, 53 Cal.4th at p. 1036; see also *Harris*, *supra*, 53 Cal.4th at p. 190 [citations and internal quotation marks omitted] ["Although we generally give DLSE opinion letters consideration and respect, it is ultimately the judiciary's role to construe the language [of the wage orders]."].) Courts retain the obligation to "independently determine" whether even these letters—and certainly any general policies in the DLSE Manual—

accurately reflect the law. (*Peabody*, *supra*, 59 Cal.4th at p. 670; see also *In re United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1011 [noting courts may "independently determine whether a DLSE interpretation contains persuasive logic"].)

Independent determination is, in essence, *de novo* review, requiring an assessment and application of the law without reference to how some other entity (in this case, the DLSE) has opined. That the DLSE has taken an interpretive position in its manual is thus a fact that courts may note, but it is not a fact to which courts may or should properly defer. The merits of arguments made for and against particular interpretations of an at-issue question of law—rather than the identity of the DLSE as the one making any of those arguments—should ultimately guide the courts.

B. Courts Should Not Abdicate Their Responsibility to Interpret the Law to A One-Sided Body.

Courts have correctly refused to defer to the DLSE's general pronouncements about California law, which were adopted without any formal opportunity for employers to ask questions or provide input. The Industrial Welfare Commission ("IWC") once had rule-making authority, but it was long ago defunded by the Legislature. (See *Murphy*, *supra*, 40 Cal.4th at p. 1102 fn. 4.) That does not mean that the DLSE can unilaterally assume the IWC's authority. (See *Brinker*, *supra*, 53 Cal.4th at

p. 1026 [citations omitted] [identifying as the two "sources of authority" regarding California law only the Labor Code and the IWC wage orders].)

In assessing what if any independent weight to afford the DLSE Manual, it is important to keep in mind not only the process by which the manual was developed, but also the perspective particular to the DLSE. The DLSE is, by its own lights, an entity friendly to and interested in protecting what it perceives as the interests of employees. It publicly describes itself as responsible for "combating wage theft" and "protecting workers from retaliation." (Dept. of Industrial Relations, *About Us*, <http://www.dir.ca.gov/dlse/AboutUs.htm> [as of Feb. 20, 2017].) It further declares that its mission is to "achieve long-term compliance from the employers of the State of California" by "ensur[ing] that wages earned are put into the pockets of the workers." (*Ibid.*) An entity that defines its purpose in these terms is not casting itself as a neutral party in disputes between employers and employees.

There is further reason to question whether the DLSE Manual fairly and accurately portrays the law delineating independent contractors from employees in particular. The DLSE's views on this point may well be informed by the fact that its jurisdiction extends only to claims by "employees." Workers operating as independent contractors are free to strike arrangements outside the DLSE's purview. The more workers the law deems "employees," the greater DLSE's scope of responsibility and the

more influence it can exert. This may well lead the DLSE to endorse a broader interpretation of the concept of "employee" than the law, fairly read, supports. This potential for administrative bias argues decisively against relying on the DLSE's interpretive policies.

By way of just one example, one of CELC's members recently reviewed publicly available records of Orders, Decisions or Awards ("ODAs") issued by the DLSE's Long Beach office following informal administrative hearings. Between January 1, 2013 and July 1, 2016, that office issued 299 ODAs in cases where truck drivers who worked at the Port of Los Angeles claimed they were misclassified. Of those 299 ODAs, the DLSE issued ***zero*** finding a driver was properly classified as an independent contractor. Courts can and should independently review the facts and law in those cases should they be appealed out to the superior courts. (See Cal. Lab. Code § 98.2(a).) Likewise, courts can and should review the legal questions before them independent of the positions advocated in the DLSE's informal and perspective-driven manual.

C. The Particular Manual Provisions Here Omit Key Factors and Do Not Fairly Reflect the Law.

Although the DLSE Manual is not entitled to deference in any event, it should not be regarded as persuasive or even relevant authority where it misstates the applicable law. Section 28 of the DLSE Manual purports to contain "a detailed discussion on how to distinguish between an employee

and an independent contractor." (DLSE Manual § 2.2.1.) But that discussion does not accurately present even the (limited) cases it does discuss, rendering it of little help to courts seeking to fairly apply the law.

Section 28 does note, correctly, that *Borello* is the leading guidance on the distinction between employees and independent contractors in California. (See DLSE Manual § 28.3 *et seq.*) But it cherry-picks from *Borello* only those points it wishes to highlight. It omits entirely *Borello*'s recognition that "the right to control work details is the 'most important' or 'most significant' consideration" in addressing the employee-independent contractor issue. (*Borello, supra*, 48 Cal.3d at p. 350; see also *ibid.* [quoting *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946] ["[T]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."].) And it fails to acknowledge that further factors, while instructive, are "secondary" indicia only. (*Borello, supra*, 48 Cal.3d at p. 350.)

The DLSE inaccurately states that *Borello* called control only "significant," and identified seven "additional factors that ***must*** be considered." (DLSE Manual § 28.3.2.1 [emphasis added].) But *Borello* listed far more than the seven factors the DLSE chose to mention. Indeed, the DLSE selected (and selectively reworded) only ***half*** of the factors

identified in *Borello*, omitting entirely the factors (or significant portions thereof) emphasized below:

> Additional factors ... include
> (a) whether the one performing services is engaged in a distinct occupation or business;
> (b) 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;
> (c) the skill required in the particular occupation;
> (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
> ***(e) the length of time for which the services are to be performed***;
> ***(f) the method of payment, whether by the time or by the job***;
> (g) whether or not the work is a part of the regular business of the principal; and
> ***(h) whether or not the parties believe they are creating the relationship of employer-employee***. ...
>
> We also note the six-factor test developed by other jurisdictions ... [which] include
> (1) the alleged employee's opportunity for profit or loss depending on his managerial skill;
> ***(2)*** the alleged employee's investment in equipment or materials required for his task, ***or his employment of helpers***;
> ***(3) whether the service rendered requires a special skill***;
> ***(4) the degree of permanence of the working relationship***; and
> ***(5) whether the service rendered is an integral part of the alleged employer's business***.

(*Borello*, *supra*, 48 Cal.3d at pp. 350-51, 354-55 [citations omitted, emphasis added].)

This selective quoting does not represent a full, fair, or faithful interpretation of the law, and is not one to which courts should defer. Indeed, courts applying *Borello* have—unlike the DLSE—been careful to note the full range of secondary factors that might inform the employee-

independent contractor classification in a given case. (See, e.g., *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 656-57; *JKH Enterprises, Inc. v. Dept. of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1064, fn. 14.) The DLSE Manual eschews this approach in favor of a narrower, ultimately stilted framing of the state of the law.

These selective omissions in the DLSE Manual are not mere oversights. They present a fundamentally different picture of the employee-independent contractor dichotomy, and in effect ignore indicia that may point towards independent contractor status. For example, when noting the *Borello* factor regarding "the alleged employee's investment in equipment or materials required for his task," the DLSE omits the further disjunct "or his employment of helpers." (Compare *Borello*, *supra*, 48 Cal.3d at p. 351 with DLSE Manual § 28.3.2.1, factor 4.) But the ability of a worker to employ other workers to perform his tasks has been noted by even pro-employee commentators as "[p]erhaps the most likely sign that a worker is not an employee," as a worker who hires others to assist him and expand his scope of work "is more likely, though not necessarily, an independent contractor." (Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying* (2001) 22 Berkeley J. Emp. & Lab. L. 295, 352.) The DLSE's failure to include this "likely sign" of independent contractor in its recitation of the secondary

factors, and wholesale omission of other factors, renders its interpretation unreliable and lacking in persuasive power.

Finally, the sections of the DLSE Manual at issue here were last updated in 2006. They do not address or incorporate recent holdings from this Court that might bear on the employer-independent contractor relationship. (See, e.g., *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 497 [describing as an issue of first impression the question of who should be considered an employee in "a modern business-format system operating on a grand scale while allocating control along a fine contractual line," and carefully evaluating the concept of "control" in that context].) For this further and final reason, the DLSE Manual cannot be considered an accurate reflection of current law.

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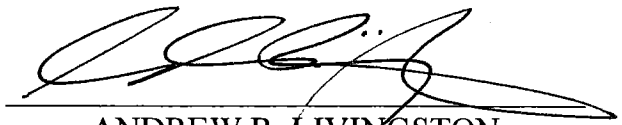
III. CONCLUSION

This Court should give no weight to the DLSE Manual provisions that express the Labor Commissioner's view on the factors relevant to determining whether a worker is an independent contractor or employee. Settled law recognizes that the DLSE's general policy pronouncements are entitled to no weight, and the particular provisions at issue here misstate the relevant law and belie the DLSE's lack of neutrality. The DLSE also has no statutory mandate to determine who is an employee, or to craft a test to distinguish between employees and non-employees. This Court should independently examine the relevant common and case law authorities that bear on the question, without reference or deference to the DLSE Manual.

Dated: February 20, 2017

ANDREW R. LIVINGSTON
KATHRYN G. MANTOAN
Orrick, Herrington & Sutcliffe LLP

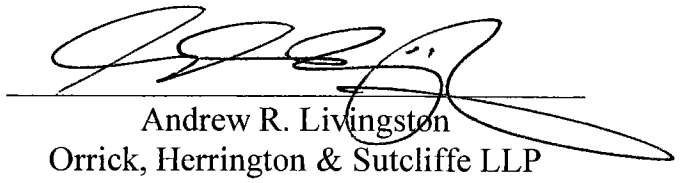


ANDREW R. LIVINGSTON
Attorneys for *Amici Curiae*
CALIFORNIA EMPLOYMENT LAW COUNCIL (CELC) and EMPLOYERS GROUP

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.504(d)(1), I certify this brief was produced on a computer and contains 3,554 words, including footnotes. I relied on the word count of Microsoft Word, the computer program used to prepare the brief.

Dated: February 20, 2017



Andrew R. Livingston
Orrick, Herrington & Sutcliffe LLP
Attorneys for *Amici Curiae*
CALIFORNIA EMPLOYMENT LAW COUNCIL (CELC) and EMPLOYERS GROUP

PROOF OF SERVICE

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 San Francisco, State of California. My business address is The Orrick Building, 405 Howard Street, San Francisco, CA 94105-2669.

On February 21, 2017, I served a true copy of

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 as follows:

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Robert Gordon Hulteng Damon Myers Ott Philip Andrew Simpkins Littler Mendelson PC 333 Bush Street, 34th Floor San Francisco, CA 94108 Ellen Marie Bronchetti DLA Piper LLP 555 Mission Street, Suite 2400 San Francisco, CA 94111	Attorneys for Petitioner **DYNAMEX OPERATIONS WEST, INC.**
Frederick Bennett Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012	Attorneys for Respondent **SUPERIOR COURT OF LOS ANGELES COUNTY**
Kevin Francis Ruf Glancy Binkow and Goldberg LLP 1925 Century Park East, Suite 2100 Los Angeles, CA 90067 Alan Mark Pope Pope Berger Williams & Reynolds LLP 401 B Street, Suite 2000 San Diego, CA 92101 Jon R. Williams Boudreau Williams LLP 666 State Street San Diego, CA 92101	Attorneys for Real Parties in Interest **CHARLES LEE AND PEDRO CHEVEZ**
Hon. Michael L. Stern Superior Court of Los Angeles County 111 North Hill Street, Dept. 62 Los Angeles, CA 90012	Los Angeles Superior Court Case No. BC 332016
John A. Taylor Horowitz & Levy LLP 3601 West Olive Avenue, 8th Floor Burbank, CA 91505-4681	Attorneys for *Amici Curiae* **CHAMBER OF COMMERCE FOR THE UNITED**

	STATES OF AMERICA; CALIFORNIA CHAMBER OF COMMERCE
Della Barnett Impact Fund 2210 K Street, Suite 201 Sacramento, CA 95816 Anthony Mischel National Employment Law Project 405 14th Street, Suite 401 Oakland, CA 94612 Jean Hyung Choi Los Angeles Alliance For A New Economy 464 Lucas Avenue, Suite 202 Los Angeles, CA 90017	Attorneys for *Amici Curiae* **CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION; NATIONAL EMPLOYMENT LAW PROJECT; LOS ANGELES ALLIANCE FOR A NEW ECONOMY; LA RAZA CENTRO LEGAL; LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER; ASIAN AMERICANS ADVANCING JUSTICE-LA; ASIAN AMERICANS ADVANCING JUSTICE-ALC; IMPACT FUND; ALEXANDER COMMUNITY LAW CENTER; UCLA CENTER FOR LABOR RESEARCH; WOMEN'S EMPLOYMENT RIGHTS CLINIC; WORKSAFE**
Monique Olivier Duckworth Peters Lebowitz Olivier LLP	Attorneys for *Amicus Curiae*

100 Bush Street, Suite 1800 San Francisco, CA 94104	**CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION**
Michael Rubin Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108	Attorneys for *Amici Curiae* **SERVICE EMPLOYEES INTERNATIONAL UNION; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; INTERNATIONAL BROTHERHOOD OF TEAMSTERS**
California Court of Appeal Second Appellate District, Division Seven 300 S. Spring Street, 2nd Floor North Tower Los Angeles, CA 90013	Court of Appeal Case No. B249546
Attorney General Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	Service per Bus. & Prof. Code, § 17209 and Cal. Rules of Court, rule 8.212(c)
District Attorney's Office County of Los Angeles 320 West Temple Street, #540 Los Angeles, CA 90012	Service per Bus. & Prof. Code, § 17209 and Cal. Rules of Court, rule 8.212(c)

BY U.S. MAIL: On the date indicated above, I placed the sealed envelope(s) for collection and mailing at this firm's office business address

indicated above for service on the trial court. 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 foregoing is true and correct.

Executed on February 21, 2017, at San Francisco, California.

/s/

Maria L. Swirky