Case No. S222732

**IN THE SUPREME COURT OF CALIFORNIA**



DYNAMEX OPERATIONS WEST, INC.,
Petitioner,

vs.

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 COUNTY SUPERIOR COURT, CASE NO. BC 332016
MICHAEL L. STERN, JUDGE

# PETITIONER DYNAMEX OPERATIONS WEST, INC.'S OPENING BRIEF ON THE MERITS

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## STATEMENT OF ISSUE

1. In a wage and hour class action involving claims that the plaintiffs are misclassified as independent contractors, may a class be certified based on the Industrial Welfare Commission definitions as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*), or should the common law test for distinguishing between employees and independent contractors discussed in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), control?

## I. INTRODUCTION

For decades, under California common law, as interpreted by this Court in *Borello*, a business has been allowed to deal with sole proprietors and other small service providers as independent contractors. The key distinguishing element of an independent contractor relationship is that the business must relinquish any right to control the manner and means by which the contractor accomplishes the desired result (*Borello*). The courts also look to a number of "secondary factors" identified by the *Borello* court to help make this determination. If the *Borello* standards are met, the option of an independent contractor relationship is available to California businesses.

This case involves wage claims brought under various provisions of the California Labor Code. The *Borello* standard has consistently been applied to wage and hour claims of this kind, whenever an issue arises over whether individuals are employees or independent contractors. *Borello* allows a court to differentiate between employees, who fall within the protections of the Labor Code, and independent contractors, who do not.

The opinion of the Court of Appeal would no longer allow for such differentiation. Indeed, the Court of Appeal effectively eviscerates long-established California precedent. In its opinion, the Court broadly concluded that any business that "suffers or permits" a service provider to work for a contracted fee has automatically "employed" that service provider. In reaching this conclusion, the Court of Appeal relied on language that was first placed in Industrial Welfare Commission (IWC) Orders 99 years ago. For the past century, that language has never been used by the courts to distinguish between employees and independent contractors, until now. The cited language does not, and cannot be used to define who is an "*employee*" – as opposed to an independent contractor. Instead, that language defines who may be considered an "*employer*" of an admitted employee.

Since this Court issued the *Borello* decision in 1989, it has been consistently and extensively relied upon by California courts and agencies at every level. *Borello* requires a nuanced and fact-specific balancing of factors before determining whether an individual is an employee. And the application of *Borello* to a wide range of industries has resulted in a well-reasoned body of law on which California businesses have come to rely.

Over the years, *Borello* has governed status determinations by the Workers' Compensation Appeals Board, Unemployment Insurance Appeals Board and the Division of Labor Standards Enforcement, as well as Courts of Appeal interpreting the statutes enforced by these agencies. And, as is most relevant here, *Borello* has been the standard followed by California courts in wage and hour class actions.

In contrast, the test proposed by the Court of Appeal here is both unprecedented and unrealistic. It is hardly an overstatement to say that the Court of Appeal's redefinition of "employee" would wipe out most independent contractor relationships in California.

As this Court has rightly recognized, both in *Borello* and in its more recent *Ayala*[1] decision, there must be strong protections against abuse of California workers. A paramount consideration in evaluating claimed independent contractor status, therefore, must be the remedial purposes served by California's employment-related statutes. As a result, this Court has long focused on the right to control as the key factor which establishes employment. Individuals who work for a single company, who receive detailed direction from that company, and who fail to establish a business identity are routinely – and correctly – found to be employees in California.

On the other hand, there are many small businesspersons and sole proprietors in California who invest in equipment and supplies, who hire others to work for them, who remain free to work for multiple companies, and who turn down jobs whenever they choose. These entrepreneurs do not wish to be "employees" of anyone but themselves. The Court of Appeal's opinion here would deny them that option.

In *Ayala*, the Court left open the question of whether its *Martinez* decision should have any application to wage and hour class actions. The Court went on to decide *Ayala* based on the traditional *Borello* standard, which the parties had relied upon in their briefing before the trial and appellate courts. (*Ayala*, *supra*, 59 Cal.4th at p. 531.) Here, the Court of Appeal has supplied its own answer to the questions left open in *Ayala*. According to the Court of Appeal, *Borello* should be supplanted as the standard for differentiating between employees and independent contractors in any case raising claims encompassed by IWC Wage Orders. Instead, under the view taken by the Court of Appeal, employee status should be

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[1] *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522.

extended to virtually all service providers in California.

As will be demonstrated below, the Court of Appeal's analysis is fundamentally flawed in numerous respects:(1) it ignores that *Borello* has effectively allowed courts to differentiate between employees and independent contractors for more than 25 years; 2) it misreads the scope and meaning of this Court's decision in *Martinez;* 3) it relies on language adopted into IWC Wage Orders beginning in 1916, which language does not remotely address the legal question here; 4) it presumes that the IWC had powers that exceeded its legislative grant of authority;[2] 5) it largely precludes heretofore legitimate independent contractor relationships between companies (or individuals) and small service providers; 6) it puts California at odds with both federal law and the laws of other states; and 7) it will lead to widespread confusion and contradictory rulings on employee status under various California Labor Code provisions.

For these reasons, this Court is urged to reaffirm that *Borello* remains the test for distinguishing employees from independent contractors in California. This case should be remanded to the trial court, which has already determined that class certification should be denied here if *Borello* is the governing standard.

## II.
## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### A. Plaintiffs Challenge Their Independent Contractor Status Before the Trial Court.

Defendant Dynamex Operations West, Inc. (Dynamex) is a

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[2] The IWC is no longer an active agency. Funding of the IWC was suspended by the Legislature in 2004. (*Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 667, fn. 3.)

nationwide courier and delivery company. Dynamex contracts with sole proprietors and small delivery companies (Drivers) to provide local pick-up and delivery services. The parties—Dynamex and the Drivers alike—have viewed the Drivers as independent contractors. As such, the Drivers have the freedom to hire workers, provide services to other companies (including competitors to Dynamex) and negotiate the method of payment. (See pp. 2572-2579; Vol. 9; Tab 23.)[3]

Two Drivers filed a purported class action complaint against Dynamex in 2005. The Complaint asserted five causes of action based on an alleged employment relationship: 1) unfair business practices in violation of California's Business and Professions Code section 17200; 2) unlawful business practices in violation of California's Business and Professions Code section 17200; 3) failure to pay overtime compensation; 4) failure to provide properly itemized wage statements; and 5) failure to fully compensate for business expenses. (See pp. 1724-1744; Vol. 6.)

In 2006, the trial court first denied certification of a class, holding that individualized issues predominated because: "there are *huge variations* in the duties of Drivers as well as the relationship between the Drivers and defendant and the relationship between the clients and Drivers." (See p. 1657; Vol. 6, emphasis added.) The trial court relied on *Borello* in arriving at this conclusion. Subsequently, Plaintiffs amended the complaints twice, redefining the class and also adding multiple and shifting subclasses. The trial court granted certification, only to later decertify the class based on a motion by Dynamex. Again, Plaintiffs asked to change the class definition.

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[3] Record citations are to the Appendix of Exhibits submitted with Dynamex's Petition for Writ of Mandate, Prohibition, or Other Appropriate Writ, filed in the Court of Appeal on June 24, 2013.

(See pp. 5975-5979; Vol. 20; Tab 53.) In response, the trial court vacated the decertification order, and continued Dynamex's decertification motion to allow Plaintiffs to file a *third* motion for class certification. (See pp. 6015-6016; Vol. 21; Tab 55.)

In their third motion, filed six years into the litigation, Plaintiffs argued that this Court's then-recent decision in *Martinez* enunciated new tests for employment status. Plaintiffs contended that all that was necessary for a Driver to be an employee was that Dynamex knew the Driver was providing services or that Dynamex negotiated the rates paid to the Driver. (See pp. 6020-6048; Vol. 21.)

On May 18, 2011, the trial court relied on *Martinez* to grant Plaintiffs' third certification motion and to deny Dynamex's motion to decertify. (See pp. 6541-6567; Vol. 22.) In doing so, the trial court noted that the result would be different if *Borello* remained the controlling standard. Under *Borello*, the trial court concluded, a class could *not* be certified because: "the main factor in determining whether an employment agreement exists—control—does require individualized inquiries." (See p. 6564; Vol. 21.) The trial court observed that this need for individualized inquiries also existed with respect to the secondary factors referenced in *Borello*, including the opportunity for profit or loss and the method of payment. (See pp. 6563-6564; Vol. 21.)

Nevertheless, the trial court accepted Plaintiffs' argument that *Martinez* indicated a "redefinition of the employment relationship." Under this "redefinition," the trial court concluded that all Plaintiffs needed to show in order to prove employee status was that Dynamex either (i) "knew or should have known" the Drivers were providing services—which included all "drivers with whom it entered into an agreement"—or (ii) had the authority to negotiate the amount it would pay the drivers for their services. (See pp. 6561-6562; Vol. 21.)

On December 28, 2012, Dynamex filed a second decertification motion. (See pp. 6586-6644; Vols. 22-23.) Dynamex noted, among other things, that several opinions published after the trial court's grant of certification had addressed the independent contractor/employee distinction without applying the "suffer or permit" or "exercise control over the wages, hours, or working conditions" standards described in *Martinez*. Dynamex argued that the trial court should follow *Borello* and decertify the class, as the trial court had already ruled that the *Borello* standard could not be applied without individualized inquiries. (See pp. 6604-6606; Vol. 23.)

On April 22, 2013, the trial court denied Dynamex's second motion to decertify the class. At the same time, the trial court invited Dynamex to seek appellate review, observing that: "It's hard to read the cases cited without some realization that the courts of appeal love to decide these issues." (See p. 6919; Vol. 24.)

**B. Dynamex Filed A Petition for Writ of Mandate in the Court of Appeal.**

On June 24, 2013, Dynamex filed its Petition for Writ of Mandate in the Court of Appeal. Dynamex argued that the trial court had abused its discretion by denying Dynamex's decertification motion based on its erroneous interpretation of *Martinez*. In particular, Dynamex argued that: 1) the *Martinez* opinion established new tests for evaluating joint employer status *only*; 2) *Martinez* could only apply to cases involving acknowledged employees; and 3) the *Martinez* tests could not be applied to threshold determination of whether workers were properly classified as employees or independent contractors. (Petition, pp. 4-20.)

The Court of Appeal issued an Order to Show Cause why the trial court's denial of the decertification motion should not be reversed. Briefing and oral argument focused on the scope and meaning of *Martinez*. Dynamex argued that the question addressed in *Martinez* was "who may be

held liable as employers?", a question that assumes the existence of an admitted employee. (Petitioner's Reply, filed Nov. 15, 2013, pp. 6-7.) Dynamex further argued that, because the classification of the admitted employees in *Martinez* was not in dispute, *Martinez* could not be interpreted to redefine who qualifies as an employee. (Reply at p. 7.) Finally, Dynamex argued that use of the *Martinez* joint-employer test to determine whether an individual is an employee would effectively preclude independent contractor status under California wage and hour laws. (Reply at pp. 8-10.)

**C. The Decision of the Court of Appeal.**

The Court of Appeal affirmed the trial court decision certifying the class and applying *Martinez* instead of *Borello*. The Court acknowledged that the trial court had found that individualized inquiries would predominate if the *Borello* test was used for distinguishing independent contractors from employees. (Slip Op., at pp. 7-8 [citing *Ayala, supra,* 59 Cal.4th at p. 529].) The opinion also conceded that "when a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (Slip Op., at p. 15.) The Court of Appeal further recognized that, in *Martinez*, this Court analyzed the legislative history of Labor Code section 1194 and the language used in the IWC Wage Orders to define "employer" because "Labor Code section [1194] does not specify *who is liable* under its terms." (Slip Op., at p. 9, emphasis added.)

The Court of Appeal relied on this Court's decision in *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 for the principle that "language in a judicial opinion is to be understood in accordance with the facts and issues before the court." (Slip Op., at p. 16.) Despite doing so, in a footnote two sentences later, the Court dismissed Dynamex's attempts to limit *Martinez* to joint-employer contexts by stating

"[a]lthough that was the precise factual context in which the issue arose in *Martinez*, nothing in the case supports a limitation of this nature." (Slip Op., at p.16, fn.14.) The Court of Appeal rejected Dynamex's assertions that Respondent's interpretation of *Martinez* would effectively eliminate independent contractor status in California as "overblown rhetoric." (Slip Op., at p. 12.) However, the Court's opinion offered no example of how an independent contractor relationship could still exist under the "suffer or permit" test. (See, generally, *id.*)

The Court of Appeal concluded that *Martinez* should apply to cases in which independent contractor status is challenged. (Slip Op., at p. 16.) In fact, the Court's opinion appears to hold that *Martinez* can be applied to determine who is an employee for the purposes of any claims falling within the scope of the IWC Orders. (Slip Op., at p. 16-18.)

## III.
## DISCUSSION

### A. *Borello* Provides a Clear Basis on Which to Distinguish Employees from Independent Contractors.

*Borello* addressed the question of whether a group of agricultural laborers engaged to harvest cucumbers were independent contractors or, alternatively, employees of the grower. In finding the workers were employees, this Court held that the "right to control" the work performed is the most important of several factors to be considered when evaluating a claim of independent contractor status. The Court went on to enumerate secondary factors that must also be considered, including, among others, ownership of the equipment, the opportunity for profit and loss and the belief of the parties. (*Borello*, *supra*, 48 Cal.3d at p. 355.)

Plaintiffs here were transportation providers engaged to perform local package transport, including pick-up and delivery, using their own vehicles (hereafter "Drivers"). They signed independent contractor

agreements affirming that: 1) Drivers were responsible for providing their own equipment and insurance; 2) Drivers could accept or reject offers of transport jobs from Dynamex; 3) Drivers could determine their days and hours of service; 4) Drivers were free to provide their services to other companies, including competitors of Dynamex; 5) Drivers could select and set compensation for helpers or replacements; and 6) Drivers determined the manner (routing of delivers) and means (the kind of delivery vehicle) to perform the transport service. The agreements also affirmed that the Drivers intended to operate as independent contractors. (See pp. 2581-2593; Vol. 9; Tab 23.)

All of these facts are central to deciding whether the Drivers are independent contractors or employees under the *Borello* standard. They all shed light on whether Dynamex had the right to control the work the Drivers performed (the most important of the *Borello* factors), and they also bear on the secondary *Borello* factors. The inquiry required by *Borello* is nuanced and factually intensive. Indeed, *Borello* requires that "each service arrangement must be evaluated on its facts and the dispositive circumstances may vary from case to case." (*Borello*, *supra*, 48 Cal.3d at p. 354.)

This Court's opinion in *Martinez* deals with an entirely different legal question. *Martinez* does not address how to differentiate between employees and independent contractors. In *Martinez*, the Court engaged in an extensive analysis of a specific issue that arose in an acknowledged employment relationship: whether a produce broker could be deemed a *joint employer* of six admitted employees under the IWC Wage Orders. (*Martinez, supra*, 49 Cal.4th at p. 49.) *Martinez* defines only who qualifies as an "employer." It does not address who is an "employee," because that issue was not presented in the case. Furthermore, the *Martinez* Court—when confronted with the separate question of whether the produce broker

was an employee of various merchants—applied the *Borello* standard. (*Id.* at p. 73.) Thus, contrary to the holding of the Court of Appeal here, it is the *Borello* standard, not *Martinez*, that must be used when differentiating employees from independent contractors.

The IWC's "suffer or permit" standard (invoked in *Martinez*) is understandable when applied to an admitted employee. Equally plausible in that context is the "exercise control over wages, hours or working conditions" standard. Both presume the existence of an employment relationship. Standing on this presumption, these two standards identify the party or parties liable as an employer of the individual conceded to be an employee. But without this foundation of presumed employee status, the tests make little sense. All workers and service providers—employee and contractor alike—are "suffered or permitted" to work by the person or entity requesting services. Likewise, both employees and contractors will reasonably demand to know their compensation, and the timetable for completion, before commencing a job. In short, if used to define "employee," the IWC standards would toss all workers and service providers into the "employee" basket.

The IWC Wage Orders (including Order 9, which governs transportation businesses) were promulgated serially beginning in 1916.[4] (*Martinez*, *supra*, 49 Cal.4th, at p. 57.) All the IWC Wage Orders (IWC Orders) contain identical language regarding the definition of an employer, including the phrases "suffer or permit" and "control over wages, hours or

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[4] The IWC promulgated its first wage order in 1916 for the fruit and vegetable canning industry. By the end of 1918, the IWC had promulgated additional wage orders for the mercantile, laundry, fish canning, and manufacturing industries, and for general and professional office occupations.

working conditions." (See, e.g., Wage Order No. 7 at Section 2(F)). The legislative history that led to the IWC Orders makes clear that they were intended to protect employees, specifically minor children. The IWC Orders simply do not address independent contractor status.

In fact, the IWC was never given authority to regulate independent contractors. The IWC was charged with deciding *how* to protect covered individuals, not with determining *who* to protect. This latter function is reserved for the Legislature.

If the IWC definition of "employer" was used to define "employee" status, it would effectively preclude independent contractor relationships under California wage and hour laws. Even if not, it would lead to bizarre results. For example, the same worker could be defined as an employee for purposes of some provisions of the Labor Code, such as section 1194 (which mirrors IWC Orders on minimum wage and overtime), but not for other sections *within the same Division of the Code*, such as sections 201-203 regarding the payment of wages upon termination (which sections are not incorporated into IWC Orders).

In summary, distinctions between employees and independent contractors should be determined by use of the multi-factor *Borello* test. *Borello* allows a court to realistically assess business relationships between companies and those who provide service to those companies. The approach proposed by the Court of Appeal erases all distinctions and would convert all service providers to employees. This Court should direct that the *Borello* standard be applied to the facts of this case.

### B. California Courts and Agencies Have Consistently Applied the *Borello* Standard for Many Decades.

Since its issuance in 1989, *Borello* has been the standard used by courts and agencies to determine whether an individual is an employee or independent contractor. *Borello* has been relied upon in the full range of

employment cases, including wage and hour class actions. In *Borello*, the Court was quite specific in defining the factors that govern whether a true independent contractor relationship exists. As a result, businesses large and small have relied upon the *Borello* test in structuring their commercial relationships.

The widespread acceptance of *Borello* speaks volumes to its adaptability to a wide range of factual settings. In the wage and hour context, California courts have routinely applied *Borello* to distinguish employees from independent contractors. (See, e.g., *Bradley v. Networkers Int'l, LLC.* (2012) 211 Cal.App.4th 1129; *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580; *Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal.App.4th 419; *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72; *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333; *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1.)

Following the issuance of *Martinez*, California state and federal courts continued to look to *Borello* as the standard for resolving disputes over independent contractor status. No fewer than eleven post-*Martinez* decisions have cited *Borello*—and not *Martinez*—as the controlling authority when determining whether individuals are employees or independent contractors. (See, e.g., *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2014) 754 F.3d 1093; *Ybarra v. John Bean Technologies Corp.* (E.D. Cal. 2012) 853 F.Supp.2d 997; *Ronlake v. US-Reports, Inc.* (E.D. Cal. May 7, 2012) 2012 U.S. Dist. LEXIS 64056; *Hurst v. Buczek Enterprises, LLC* (N.D. Cal. 2012) 870 F.Supp.2d 810; *Juarez v. Jani-King of California, Inc.* (N.D. Cal. 2011) 273 F.R.D. 571; *Beaumont-Jacques v. Farmers Grp., Inc.* (2013) 217 Cal.App.4th 1138; *Monarrez v. Auto.Club of S. Cal.* (2012) 211 Cal.App.4th 177; *Angelotti v. Walt Disney Co.* (2011) 192 Cal.App.4th 1394; *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580;

*Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal.App.4th 419; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286.)

In the unemployment insurance and workers' compensation contexts, courts have relied on *Borello* to find independent contractor status and deny benefits (see, e.g., *Lara v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 393; *State Comp. Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188; *Torres v. Reardon* (1992) 3 Cal.App.4th 831), and likewise find employee status and award benefits. (See, e.g., *Angelotti v. Walt Disney Co.* (2011) 192 Cal.App.4th 1394; *Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839; *JKH Enterprises, Inc. v. Dept. of Indus. Relation* (2006) 142 Cal.App.4th 1046; *Ware v. Workers' Comp. Appeals Bd.* (1999) 78 Cal.App.4th 508; *Gonzales v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 1584; *Johnson v. Berkofsky-Barret Productions, Inc.* (1994) 211 Cal.App.3d 1067; *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363; *Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288.)

In addition to courts, agencies have turned to *Borello* as the guiding authority on independent contractor disputes. (See, e.g., *NCM Direct Delivery v. Employment Development Dept.*, Precedent Tax Dec. No. P-T-495 (2007) at p. 7, fn. 5) (finding "the *Borello* case has strong applicability to cases arising under the Unemployment Insurance Code and that the reasoning of that decision provides important guidance..."); *Catering v. Workers' Comp. Appeals Bd.* (2014) 79 Cal. Comp. Cases 477; *Ceva Freight, LLC. V. Workers' Comp. Appeals Bd.* (2014) 79 Cal. Comp. Cases 935; *Barbosa v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 860; *Carlos v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 691; *Magic Warehouse v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 798; *Ruelas v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.

Comp. Cases 269; *SCI/ONTRAC, Dallas National Ins. v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 271; *JAC Pizza Inc. v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 1029; *Progress Rail v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 1012; *Ziraki v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 918; *Matthew Lawrence Construction v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 747; *Villegas v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 209; *Cooper v. Workers' Comp. Appeals Bd.* (2009) 74 Cal. Comp. Cases 1365; *Tri-Counties Regional Ctr. V. Workers' Comp. Appeals Bd.* (2008) 73 Cal. Comp. Cases 1266.)

California courts have also consistently applied *Borello* to adjudicate the employee status of individuals in a variety of other contexts, including negligence cases, sex discrimination cases, and insurance policy determination cases. (See, e.g., *Jackson v. AEG LIVE, LLC.* (2015) 233 Cal.App.4th 1156; *Beaumont-Jacques v. Farmers Grp., Inc.* (2013) 217 Cal.App.4th 1138; *Varisco v. Gateway Science & Eng'g, Inc.* (2008) 166 Cal.App.4th 1099; *Ali v. L.A. Focus Publication* (2003) 112 Cal.App.4th 1477; *Fireman's Fund Ins. Co v. Davis* (1995) 37 Cal.App.4th 1432.)

California federal courts have uniformly followed the *Borello* common law test in resolving issues involving employment status. (See, e.g., *Alexander v. FedEx Ground Package System, Inc.* (9th Cir. 2014) 765 F.3d 981 (finding employee status); *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2014) 754 F.3d 1093 (finding employee status); *Narayan v. EGL, Inc.* (9th. Cir. 2010) 616 F.3d 895 (holding that the question whether plaintiffs were employees precluded summary judgment); *Henninghan v. Insphere Ins. Solutions, Inc.* (N.D. Cal. 2014) 38 F.Supp.3d 1083 (finding insurance agent to be an independent contractor); *Villalpando v. Exel Direct Inc.* (N.D. Cal. 2014) 303 F.R.D. 588 (applying *Borello* in order to certify a class).) Recently, *Borello* has been applied to assess emerging business

relationships that test the traditional notions of employment, such as mobile car applications Uber and Lyft. (See *Cotter v. Lyft, Inc.* (N.D. Cal. Mar. 3, 2015) No. 13–cv–04065–VC, 2015 WL 1062407; *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. Mar. 11, 2015) No. C–13–3826 EMC, 2015 WL 1069092.)

In sum, *Borello* continues to serve as the single foundational standard on which courts, agencies, and businesses rely whenever an issue arises involving independent contractor status.

### C. The *Borello* Test Allows a Realistic Assessment of Service Provider Relationships.

A wide range of service relationships exist in California. On one end of the spectrum are individuals such as the produce broker Munoz in the *Martinez* case. Munoz had multiple employees working for him, sold his products and services to four separate merchants, and risked profit and loss. This Court found he was not an employee. (*Martinez, supra*, 49 Cal.4th at p. 73.) At the other end of the spectrum are individuals such as the cucumber pickers in *Borello*. They had no investment in equipment, were solely dependent on the cucumber grower for their income, and were substantially controlled by the growers. This Court found them to be employees. (*Borello, supra,* 48 Cal.3d at p. 360.)

Any test that differentiates between employees and independent contractors must be flexible enough to respond to the realities of the marketplace. As this Court held in *Borello*, "Each *service arrangement* must be evaluated *on its facts*, and the dispositive circumstances may vary from case to case." (*Borello, supra,* 48 Cal.3d at p. 354, italics added.).

Post-*Borello* decisions at all levels--trial courts, appellate courts and administrative agencies alike--have proven the wisdom of a factually-intensive and individualized assessment of service relationships. *Estrada v. FedEx Ground Package Systems, Inc.* (2007) 154 Cal.App.4th 1, and

*Alexander v. FedEx Ground Package Systems, Inc.* (9th Cir. 2014) 765 F.3d 981 are illustrative of how two courts evaluated drivers working under the same company's operating model. The bulk of the discussion in both opinions is devoted to the particular facts involved: the size of vehicles, the kind of work performed, the discretion allowed to drivers, the uniforms worn (down to the color of the socks), and a multitude of other work-related elements. After weighing all the specific factors, the two courts both concluded that the drivers were employees.[5]

In *Cristler v Express Messenger Systems* (2009) 171 Cal.App.4th 72, the Court of Appeal addressed the rare situation of a wage and hour class action that proceeded to a jury trial. At issue on appeal was a jury instruction derived from *Borello*. The instruction began with a statement that the "right to control" was the most important factor, and then provided the jury with eleven other factors "to be considered"[6] (*Id.* at p. 85.) In finding the instruction to be proper, the appellate court noted that it "simply lists, in a neutral fashion, the pertinent factors identified in the case law prior to *Borello*, in *Borello* itself, and in the case law that followed *Borello*." (*Id.*)

The *Cristler* court further approved the trial court's instruction that "these individual factors cannot be applied mechanically as separate tests;

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[5] The Ninth Circuit took a similar approach when applying *Borello* in another recent driver case. (See *Ruiz v. Affinity Logistics* (9th Cir. 2014) 754 F.3d 1093.)

[6] These factors included the right to discharge at will, whether the drivers are engaged in distinct occupation or business, whether the drivers paid for their equipment, the method of payment (by the hour or by the job), whether the parties believed they were creating an independent contractor relationship, the drivers' use of helpers/replacements and the opportunity for profit and loss. (*Id.* at p. 85.)

they are intertwined and their weight depends often upon particular combinations." (*Id.* at p. 86.)[7] The jury, applying the multi-factor test they were instructed to use, arrived at the conclusion that all drivers in the *Cristler* class were independent contractors. The trial court agreed and the appellate court affirmed. (*Id.* at p. 88.)

On the surface, the drivers in the FedEx cases (*Estrada, Alexander*) and the *Cristler* case are similar--they all drive trucks and make deliveries to homes and businesses. All were "suffered or permitted" to work, and all were compensated based on an agreed-upon formula. Thus, if the IWC Order "employer" definitions was applied (as construed by the Court of Appeal in the instant case), all would be employees. But the nuanced multi-factor *Borello* test allowed the courts (and jury) to discern the significant differences between the two groups of drivers. Unlike the FedEx drivers, the *Cristler* drivers hired their own assistants or replacements; operated distinct businesses; generally believed themselves to be independent contractors; had significant opportunity for profit and loss; and could work for competitors of the defendant Express Messenger.[8]

Dynamex submits that it would be impossible to determine the status of the Drivers at issue here without a similar multi-factor, factually-intense analysis. Indeed, the presence of certain freedoms would almost certainly lead to a determination that Dynamex has no right to control the service

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[7] The language of this instruction came verbatim from *Borello*.

[8] These facts are set forth in the underlying Statement of Decision in the *Cristler* case, which is submitted herewith. See Request for Judicial Notice (RJN), Ex. J; Declaration of Robert G. Hulteng in Support of Petitioner's Motion for Judicial Notice, ¶5. This Court may properly take judicial notice of a Statement of Decision in a case affirmed by the appellate court. (Evid. Code, § 452(d).)

providers. In applying *Borello*, courts have specifically focused on the following factors to determine whether the right to control exists: 1) the ability to negotiate the price of services; 2) the choice to reject jobs or assignments; 3) the right to determine when and when not to work; and 4) the freedom to work for other companies, including competitors. A service provider with those characteristics controls all key business decisions. That service provider cannot be classified as an employee.

Contrary to the standard proposed by the Court of Appeal below, the multi-factor *Borello* test allows a court (or jury) to take these critical factors into account. Only the *Borello* test allows a weighing of the economic leverage between a company and a service provider. And only the *Borello* test allows truly entrepreneurial businesses to operate as independent contractors and not as employees.

## D. Applying the Holding of *Martinez* to Determinations of Independent Contractor Status Would Have Widespread Negative Consequences for California.

### 1. Virtually all small service providers would be forced to become employees.

Under the Court of Appeal's interpretation of *Martinez*, if a person or company "suffers or permits" an individual to perform work or "exercises control over the wages, hours, or working condition" of that service provider, then the individual is an employee, not an independent contractor. (Op. at pp. 4, 10-11, 14.) This interpretation would make it essentially impossible for any small business to remain an independent contractor for wage and hour purposes. And individual ordinary people would invariably become "employers" if they contracted with a small businessperson to provide a routine service (from mowing the lawn once a week to transporting their children home from after-school activities).

Although the Court of Appeal referred to these same arguments in

Dynamex's briefing below as "overblown rhetoric," neither the Second District nor the trial court attempted to explain how most independent contractor relationships can continue to exist in California under the "suffer or permit" definition of employment. The terms "suffer" and "permit" are extremely broad. As explained in the *Martinez* opinion, these terms both essentially mean *to know that work is being performed and to fail to prevent such work.* (See *Martinez, supra,* 49 Cal.4th at p. 58 ["The standard thus meant that the employer 'shall not . . . *permit* by acquiescence, nor *suffer* by a failure to hinder."].) By definition, one cannot hire an independent contractor to perform work without "suffering and permitting" that work to be done. Applying the Court of Appeal's ruling would, in virtually every circumstance, mean that a person who is asked to provide services would become an employee for the purposes of claims arising under the Wage Orders.

Examples of the dramatic impact the Court of Appeal's decision is sure to have on California small businesses are far too many to catalogue here. A bank "suffers or permits" a janitorial contractor to clean its floors nightly. A law firm "suffers or permits" a court reporter to regularly report its depositions. A homeowner "suffers or permits" a pool service to clean the homeowner's pool twice a week. An elderly retiree "suffers or permits" a trusted Uber or taxi driver to take her to regular medical appointments. California businesses and individuals alike are dependent on service providers who have never been conceived to be "employees."

Even if the "suffer or permit" standard were ignored, the "exercise control over wages, hours or working conditions" standard would have the same effect. It is hard to imagine how one could contract with another to perform services without "exercising control" over that person's compensation *or* hours *or* working conditions. The "exercise control" test is therefore far broader than the common-law control test, which depends

primarily on the "right to control the manner and means of accomplishing the result desired." (*Ayala, supra,* 59 Cal.4th at p. 531; *Borello, supra,* 48 Cal.3d at p. 350 [quoting *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946].)

All service recipients either explicitly or implicitly authorize the remuneration their service providers receive. Similarly, it would be extremely rare for a service recipient not to have some say in the "hours" worked by an independent contractor. For example, a homeowner hiring a plumber to fix a leaking toilet has a role in scheduling when that work is to be performed. By directing the plumber to start "as soon as possible, before the bathroom floods!," or informing the plumbing contractor that work cannot begin before 8 a.m. each day, the homeowner exercises control over the "hours" worked. Even if the plumber then takes over and makes all decisions about how, when and at what cost the toilet is fixed, the plumber would still qualify as an "employee" under the standard applied by the Court of Appeal below.

**2. Service providers should have a right to operate independently, rather than be forced into employee status.**

Adoption of the Second District's test would cause a fundamental shift in the California economy. Virtually every sole proprietor would be converted to an "employee," (and thrust into successive employment relationships with each new client). Every plumber, landscaper, artist, housepainter, process server, dog walker, private sector court reporter, marketing consultant, recruiter, auctioneer, real estate agent, language interpreter, amateur athlete official, and hundreds of other categories of service providers—most of whom have long been considered independent contractors under the *Borello* standard—would now be "employees" of the persons and businesses for whom they perform services. By way of example, the janitorial contractor who cleans the bank floors nightly may

hire several persons to assist with dusting, the cleaning of bathrooms, and the disposal of waste. That contractor reasonably wishes to maximize efficiency and profit by deciding how much to pay each of his workers, when to schedule them to work, and how to assign them each night. But if the janitorial worker is deemed an "employee," he forfeits the right to make these decisions for himself.

Likewise, the court reporter who regularly reports depositions for one law firm may also retain relationships with other law firms. On any given day, that reporter may be offered more money to report a deposition for a second law firm. As an independent contractor, the reporter can make that choice. She can also decide to turn down all assignments in favor of a three-week Hawaiian vacation. Why should she be deemed an "employee" of any law firm for which she regularly reports?

These small businesspersons clearly do not intend—nor want—to be employees. They have no interest in forfeiting the freedoms inherent to independent contractor status. They want the right to schedule their own work, not an obligation to interrupt it to take meal and rest periods at prescribed intervals. They value the profit potential and growth opportunity involved in operating a small business, including freedoms to expand, to take on more risk, to add employees or to market their services to new customers. And they certainly don't desire or intend to be controlled, or told how to perform their work, by the companies to whom they provide their services.

The impact of converting these small businesses to employees would be equally severe on the unwitting "employers." Individuals and companies who, for example, hire a gardening service to regularly maintain private landscaping could now be held liable to the gardening service, or penalized by the California Labor Commissioner for, among other things, doing any of the following:

--- failing to provide tools and equipment necessary for the performance of gardening work, unless the gardeners are paid at least twice the minimum wage (Wage Order No. 15, Section 9(B));

--- failing to pay the gardeners one and one-half (1½) times the regular rate of pay for all hours worked in excess of eight (8) hours, up to and including 12 hours, in any workday and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek and double (2 times) the gardeners' regular rate of pay for all hours worked in excess of 12 hours in any workday (*Id.*, Section 3(A));

--- failing to keep records of the following information—in English—for at least 3 years following the termination of the relationship (*Id.*, Section 7(A)):

(a) Time records showing when the service began and ended each work period.

(b) Total hours worked by the gardening service in the "payroll period" and the applicable rates paid for those hours.

(c) Records showing meal periods, split shift intervals and total daily hours worked by the gardeners.

--- failing to provide suitable lockers, closets or the equivalent for the safekeeping of the gardeners' outer clothing during work periods (*Id.*, Section 13(A));

--- failing to provide a suitable seat to the gardeners during times when the gardeners could perform work from a seated position (*Id.*, Section 14); and

--- failing to maintain a temperature of not less than 68° in the "toilet rooms," resting rooms, and change rooms used by the gardening service. (*Id.*, Section 15(C).)

In essence, every business or individual who "suffers or permits" a service to be provided will become an employer. As a result,

they will be forced to become or hire payroll experts and employment lawyers to ensure they do not violate California wage and hour laws.

### 3. Use of the Court of Appeal's standard would chill entrepreneurial activity and hurt California's economy.

The negative impact of the Court of Appeal's test would not stop at California's borders. California would be embracing an independent contractor standard far more difficult to satisfy than any standard used elsewhere in the nation. Understanding this, non-California contractors will become wary of accepting engagements in the state, fearing (quite reasonably) the impact the legal standard will have upon their ability to conduct business. Fledgling new contractors will likewise look elsewhere than California, preferring to set up shop in a state that recognizes their right to operate as an independent business (a locational choice that was once a luxury, but now widely available due to e-commerce). In the end, by adopting a standard so far out of line with any other state, California would dampen and decrease entrepreneurial activity. In forcing small entrepreneurs to find another state willing to serve as business incubator, California would also be throwing away one of its greatest tools in the fight to attract businesses: the connection that forms when a business is founded and grown within the state.

While the standards to determine independent contractor status do vary from state to state, they all generally take a common approach. Each analyzes the specific relationship by considering multiple factors, many of which are common among the standards. (See, e.g., *Borello*, 48 Cal. 3d at p. 354 (identifying the "six-factor test developed by other jurisdictions" and noting that "there are many points of individual similarity between these guidelines and our own traditional Restatement tests.").) Despite their differences, the factors considered by the various standards around the U.S. all involve some examination of: (1) the nature of the parties' relationship

(usually with a focus on control), and (2) the details surrounding the work performed (including the nature of the services performed and the extent the alleged independent contractor operates as a separate business entity).

For instance, the "ABC test," one of the most common standards, requires satisfaction of three elements to establish independent contractor status: (A) the worker has been and will continue to be free from any control or direction over the performance of the services (both per the terms of the contract and in fact); (B) the service is either outside the usual course of the principal's business OR is performed outside the principal's place(s) of business; and (C) the worker is customarily engaged in an independently established trade, occupation, profession or business.[9] Similarly, the "Economic Realities" test, used to determine status under the Fair Labor Standards Act (FLSA),[10] as well as some state laws,[11] and which is often described as having one of the broadest definitions of "employee",[12]

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[9] (See, e.g., New Jersey Unemployment Compensation Act, N.J.S. 43:21-19(i)(6); Conn. Gen. Stat. § 31-222(a)(1)(B)(ii); VT Stat. tit. 21 §1301; Mass. Gen. Laws ch. 151A, § 2; N.H. Rev. Stat. Ann. § 282-A:9(3); Tenn. Code Ann. § 50-7-207(e); Neb. Rev. Stat. § 48-604; Nev. Rev. Stat. § 612.085; N.M. Stat. § 51-1-42(F)(5).)

[10] Under the FLSA, employment is determined using a totality-of-the-circumstances standard that "examine[s] the circumstances of the whole activity and should consider whether, as a matter of economic reality, the individuals are dependent upon the business to which they render services." (*Real v. Driscoll Strawberry Associates, Inc.* (9th Cir.1979) 603 F.2d 748, 754; *Donovan v. DialAmerica Mktg., Inc.* (3d Cir. 1985) 757 F.2d 1376, 1382 (citations and internal quotation marks omitted), cert. denied, 474 U.S. 919, 106 S. Ct. 246, 88 L. Ed. 2d 255 (1985).)

[11] (See, e.g., *Anfinson v. FedEx Ground Package Sys., Inc.* (2012) 174 Wash. 2d 851 (holding that employment under Washington's Minimum Wage Act is determined using the FLSA's Economic Realities test).)

[12] (See, e.g., *Rutherford Food Corp. v. McComb*, (1947) 331 U.S. 722, 729 ("This Act contains its own definitions, comprehensive enough to require

considers the follow factors: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; (6) whether the service rendered is an integral part of the alleged employer's business.[13] (See, e.g., *Real* v. *Driscoll Strawberry Associates, Inc.* (9th Cir.1979) 603 F.2d 748, 754.) Even the standard that is arguably most difficult to satisfy, set forth in Massachusetts' Independent Contractor Statute, requires examination of the details of the parties' relationship and other work performed.[14] (Mass. Gen. Laws ch. 149, §

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its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category") (internal citation and punctuation omitted); *United States v. Rosenwasser*, (1945) 323 U.S. 360, 362-63 ("A broader or more comprehensive coverage of employees . . . would be difficult to frame.")

[13] As this Court noted in *Martinez*, although the FLSA and IWC Orders both use the phrase "to suffer or permit" to define "employ," the terms have separate origins and interpretations, resulting in very different standards. (*Martinez,* 49 Ca1.4th at pp. 66-67.)

[14] Indeed, the Massachusetts statute uses a standard similar to the traditional ABC test, but with one admittedly significant change: to satisfy prong B, a worker's service must be "outside the usual course of the business of the employer." (Mass. Gen. Laws ch. 149, § 148B(a)(2).) Notably, the Massachusetts Delivery Association is currently challenging the Massachusetts statute on the basis that the narrower prong B effectively bans the use of independent contractor transportation providers in the state, and is therefore preempted under the Federal Aviation Administration Authorization Act ("FAAAA"). (See *Massachusetts Delivery Ass'n. v. Coakley* (1st Cir. 2014) 769 F.3d 11, 23.) The First Circuit has already opined in a published opinion that the statute may in fact be preempted due to prong B's limitation on the use of independent contractors. (*Id.*) The

148B(a).)

In stark contrast, the standard proposed here by the Court of Appeal requires no examination of the working relationship or the details of the work performed. All that is necessary to establish employment is that the party receiving the services acquiesces to the work and does not hinder its performance. These are not elements considered by either the ABC or Economic Realities Tests. They offer no insight into whether a service provider truly operates as a separate business. The Court of Appeal's standard gives no consideration to the opportunity for profit or loss, investment in equipment, hiring of personnel, marketing to the public, or work performed for other customers. All of these indicia of entrepreneurial activity would become entirely irrelevant under the Court of Appeal's test.

Thus, the Court of Appeal proposes to jettison the principal factors relied upon throughout the rest of the country to determine independent contractor status. The Court of Appeal also turns its back on *Borello* and its progeny, eliminating any consideration of separate business activity by service providers.

If the Court of Appeal's standard were adopted, it is not difficult to predict the reaction of entrepreneurs. Looking to other states, an entrepreneur would find that her right to operate independently would be determined based on multiple factors broadly relating to the nature of her business and its relationships. Whereas, with respect to California, she would find that her ability to operate as an independent enterprise could be lost merely by providing services to a principal who has knowledge of the

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same preemption issue would arise in California if the Court of Appeal standard was adopted, resulting in an effective ban on independent contractor relationships under California wage and hour laws.

services being performed and some ability to stop the services. Faced with this choice, the entrepreneur's decision to avoid doing business in California would likely require little consideration.

## E. The Court of Appeal's Standard Would Result in Inconsistent Application of California Employment Laws.

### 1. Individuals would receive disparate treatment under the Labor Code.

The Court of Appeal's proposed standard would result in strange and inconsistent statutory interpretations. To illustrate, the Court of Appeal states that its new standards apply only to claims "falling within the scope of [the] Wage Order[s]." (Op. at pp. 12, 16.) If the Wage Orders, in fact, defined who qualified as an employee, such a limitation might have surface appeal, since the *Martinez* opinion only addressed definitions contained in the Wage Orders. However, followed to its logical conclusion, such a limitation would result in the application of different tests to determine whether a worker was an employee or independent contractor for claims arising under the *same* division, part, and even chapter of the Labor Code.

For example, a worker could be an employee under the "suffer or permit" standard for the purposes of Labor Code section 1194 (which provides a private right of action for recovery of minimum and overtime wages), but not be an employee for claims under Labor Code sections 201-203 (which require the immediate payment of outstanding wages upon termination). This is because sections 201-203 are *not encompassed* in the Wage Orders. Thus, differing definitions of employee would be applied even though section 1192 and sections 201-203 *all appear in the same division* of the Labor Code—Division 2, entitled "Employment Regulation

and Supervision." Dozens of other Labor Code sections in Division 2 are likewise not covered by IWC Orders.[15] Individuals could be treated as employees for some sections of the Labor Code, but as independent contractors under other sections. Besides being inconsistent with common sense, this result would engender massive confusion in the courts and administrative agencies.

Even more confusingly, the Court of Appeal concluded that the "suffer or permit" standard should only be applied to *some* expense reimbursement claims brought under section 2802, such as claims for reimbursement for uniforms or for tools and equipment. Other expense reimbursement claims, such as for gas mileage, would still be subject to the common law definition. In other words, a person would be defined as an employee for some business expenses, and as an independent contractor for other expenses. Operating a business under those rules would be a procedural nightmare.

California's Labor Code is intended to provide a set of minimum protections for employees. Piecemeal application of some provisions of the Labor Code, and not others, to a large segment of California workers would be entirely inconsistent with the purpose of the statute. And yet that would be the inevitable result under the standard proposed by the Court of Appeal.

### 2. Other remedial employment statutes in California follow *Borello.*

Putting aside both *Martinez* and the IWC Order definition of "employer," we are left with the fact that the California Constitution and

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[15] See, e.g., Labor Code sections 201, 202, 203, 203.1, 203.5, 204a, 206, 206.5, 208, 209, 212, 218.6, 221, 226.8, 227, 227.3, 227.5, 230.5, 230.7, 230.8, 231, 232, 233, 240, 243, 351, 353, 2800, 2802, and 2810.5.

many sections of the Labor Code outside the scope of the IWC Order use the term "employee" without defining it.[16] As this Court has previously stated, when a statute refers to an "employee" without defining the term, courts have generally applied the common law test of employment to that statute. (See *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500.)

*Borello* has interpreted the common law as it applies to all these statutory provisions. *Borello* provides clear guidance on who is an independent contractor for purposes of the Workers' Compensation Act, and it has been universally applied to the Unemployment Insurance Code and Labor Code as well. The Second District has articulated no policy reason why a radically different approach should be taken to a subset of Labor Code claims that fall within the scope of IWC Orders.

Under *Borello*, the California courts and administrative agencies have successfully and consistently distinguished between employees and independent contractors for 25 years. Nothing but confusion and increased litigation will result from creating a new standard for some, but not all, employment-related claims.

### 3. A recent New Jersey Supreme Court decision illustrates the need for consistency in enforcement of employment laws.

The New Jersey Supreme Court's decision in *Hargrove v. Sleepy's, LLC* (2015) 220 N.J. 289 (*Hargrove*), offers significant guidance regarding the importance establishing and maintaining a uniform and consistent legal standard. The specific issue decided in *Hargrove* was the standard to be

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[16] See, e.g., Labor Code sections 201, 202, 203, 203.1, 203.5, 204a, 206, 206.5, 208, 209, 212, 218.6, 221, 226.8, 227, 227.3, 227.5, 230.5, 230.7, 230.8, 231, 232, 233, 240, 243, 351, 353, 2800, 2802, and 2810.5.

used to determine employee or independent contractor status for the purpose of New Jersey's Wage Payment Law (WPL), N.J.S.A. section 34:11-4.1 to-4.14, which governs the time and mode of payment of wages. A separate statute, New Jersey's Wage and Hour Law (WHL), N.J.S.A. section 34:11-56a to-56a38, establishes a minimum wage and overtime obligation. The regulations implementing the WHL expressly provide that the distinction between an employee and an independent contractor shall be resolved using the "ABC" test set forth in New Jersey's Unemployment Compensation Act. (*Id.* at N.J.A.C. 12:56-16.1; *Hargrove*, at p. 305.) In contrast, "[n]either the text of the WPL nor its implementing regulations offer any guidance to distinguish between an employee and an independent contractor." (*Hargrove*, at p. 303.) Given this silence, the high court engaged in an extensive analysis to determine the appropriate standard, to adopt. (*Id.* at pp. 301-16.)

Based on its analysis, the Supreme Court ultimately concluded the "ABC" test should govern employee status under both the WPL and WHL. While the court's holding was based on multiple factors, the most critical was its conclusion that "the WPL and WHL should utilize a single test." (*Id.* at pp. 312, 316.) This conclusion was based in part on the statutes' similar language, but "[o]f greater significance" to the court was the common purpose of both statutes. (*Id.* at pp. 312-313.) The court declared that "[s]tatutes addressing similar concerns should resolve similar issues, such as the employment status of those seeking the protection of one or both statutes, by the same standard." (*Id.* at p. 313.) In support of this principle the court cited *Liberty Mut. Ins. Co. v. Land* (2006) 186 N.J. 163, 175, wherein it opined that when engaging in statutory interpretation, "[b]y referring to similar legislation, 'the court not only is able to give effect to the probable intent of the legislature, but also *to establish a more uniform and harmonious system of law.*'" (*Id.* citing Norman J. Singer, 2B

Sutherland Statutory Construction § 53:03, at pp. 328-29 (6th ed. 2000), emphasis added.)

Also significant to the *Hargrove* Court's holding was its finding that a state administrative agency had elected to use the "ABC" test for enforcement of both the WPL and WHL, and the fact that it had done so without challenge since 1995. This "long-standing" use of the "ABC" test, argued strongly in favor of its continued application. (*Id.* at pp. 312, 316.)

This case presents an even more compelling argument for consistency of statutory interpretation. Whereas the *Hargrove* Court concluded that the same legal standard should be used for two closely related, but distinct statutes, the need for harmonization is even greater here, where the Court of Appeal would create two distinct standards within the *same* statutory framework (the Labor Code).

## F. *Martinez* Is Limited to Determining Who Could Be Held Liable as the "Employer" of Undisputed Employees.

Both the trial court and Court of Appeal opined that *Martinez* established new tests to distinguish employees from independent contractors. That is not the case. The only legal issue raised by the facts in *Martinez* was whether two entities were joint *employers* of individuals who were undisputedly employees. The facts presented in *Martinez* did not require any analysis of whether individuals were employees or independent contractors. And the Court's discussion in *Martinez* focused solely on who was an *employer*, not on who was an employee.

In *Martinez*, it was undisputed that the six plaintiffs *were all employees* of produce broker Munoz. (*Martinez, supra,* 29 Cal.4th at p. 42 ["Plaintiffs are seasonal agricultural workers whom Munoz employed ..."].) Munoz filed for bankruptcy and thus could not pay the six workers. (*Id.*) The Plaintiffs also sued the merchants with whom Munoz contracted, based on the allegation that they were "joint employers" and thus liable for

the unpaid wages. (*Id.* at pp. 42, 48-50 [noting "[p]laintiffs contend the . . . Wage Order . . . defines defendants as their employers;" and plaintiffs "contended defendants Apio and Combs, together with Munoz, jointly employed plaintiffs"].)

None of the parties in *Martinez* claimed the plaintiffs were independent contractors. Therefore, the *Martinez* opinion contains no analysis regarding the proper standard for determining whether the plaintiffs were employees or independent contractors. All six plaintiffs were admitted employees. Significantly, the term "independent contractor" is not once used in the *Martinez* opinion in reference to the plaintiffs.

In framing the issues to be addressed, the *Martinez* Court made it clear that the sole issue to be decided was the issue of joint employment. The Court described the question presented as: "How then do we define the employment relationship, and thus *identify the persons who may be liable as employers*, in actions under section 1194?" (*Id.* at p. 51, emphasis added.)

*Martinez* does contain a thorough analysis of the Wage Orders' definition of the term "employ." (*Id.* at pp. 57-60.) But that analysis was squarely in the context of defining the scope of the term "employer," which is (somewhat circularly) defined in the Wage Orders to include "any person . . . who directly or indirectly . . . employs . . . any person." The true focus of the opinion is evident from the Court's explicit rationale for interpreting the Wage Order definitions. The Court noted it was necessary to look beyond the language of Labor Code section 1194—not because the section fails to define "employee," which is true—but because:

(1) Labor Code section 1194 "has . . . given an employee a cause of action for unpaid minimum wages *without specifying who is liable*" but "*only an employer* can be liable [because] no generally applicable rule of law imposes on anyone other than an employer a duty to pay wages"

(*Martinez*, 49 Cal.4th. at p. 49, emphases added);

(2) "the concept of *joint employment* [has] avoided judicial scrutiny in the context of wage claims brought under state law" (*Id.* at p. 50, emphasis added); and

(3) "[a]lthough we have recognized that a person, by exercising significant control *over the employees of another, may come to share the employer's legal obligations*, our decisions on this point have concerned statutory schemes other than the wage laws." (*Id.* at p. 50, emphasis added.)

In sum, although the *Martinez* opinion frequently states that it is analyzing the "employment relationship," the only issue analyzed and decided was who can be held liable as being on the "*employer*" side of that relationship. *Martinez* does not examine who is an "employee," as opposed to an independent contractor, for purposes of California's wage laws.

## G. The Wage Order Definitions of "Employer" and "Employ" Cannot Be Used to Displace the *Borello* Standard.

### 1. The IWC lacks power to regulate independent contractors.

As *Martinez* correctly explains, the initial authority the Legislature conferred on the IWC was broad.[17] But that authority was not so broad as to give the IWC the power to *redefine the scope* of its own authority. (See *Martinez, supra,* 49 Cal.4th at p. 61 ["an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by statute"].) The IWC's authority was

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[17] As this Court has previously noted, the "Legislature defunded the IWC in 2004, however its wage orders remain in effect." (*Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 667, fn. 3.)

limited to adopting wage orders that applied to "employees." As is made clear by Labor Code section 3357, independent contractors are not employees: "Any person rendering service for another, *other than as an independent contractor*, or unless expressly excluded herein, is presumed to be an employee." (Lab. Code, § 3357, emphasis added.) Labor Code section 3357 constitutes an explicit recognition by the Legislature that independent contractors exist in California, and that they are distinct from employees.[18]

As this Court explained in *Martinez*, "the scope of IWC's delegated authority is, and always has been, over wages, hours and working conditions. For the IWC to adopt a definition of 'employer' that brings within its regulatory jurisdiction an entity that controls any one of these aspects of the employment relationship makes eminently good sense." (*Martinez*, *supra*, 49 Cal.4th at p. 59.) It follows from this statement that the "wages, hours and working conditions" over which the IWC has authority are limited to *employees* in an *employment* relationship.

Labor Code section 1173 authorizes the Industrial Wage Commission to regulate the wages and working conditions of "employees." The scope of that authority is confirmed in Article XIV, Section 1 of the California Constitution. (See *Martinez,* 49 Cal.4th at p. 54; *California Labor Federation, AFL-CIO v. Indus. Welfare Com.* (1998) 63 Cal.App.4th

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[18] Legislative recognition of the separation between employees and independent contractors is also reflected in Labor Code section 3353, which provides that: [an] "independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." This statutory definition is consistent with *Borello*, and entirely inconsistent with the standard proposed by the Court of Appeal here.

982, 990.) The relevant legislative history demonstrates that the IWC's scope of authority was always limited to the regulation of wages and working conditions of "employees" as that term was understood in 1913.

Section 1173 currently states (in relevant part):

> It is the continuing duty of the Industrial Welfare Commission, hereinafter referred to in this chapter as the commission, to ascertain the wages paid to *all employees* in this state, to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which *employees* are *employed* in this state, and to investigate the health, safety, and welfare of those *employees*.

(Lab. Code, § 1173, emphasis added.)

The original grant of authority to the IWC is contained in Section 3 of Chapter 324 of the Statutes of 1913, the predecessor to section 1173, and was limited to women and minor employees. (See *Martinez, supra,* 49 Cal.4th at p. 54.)

Due to concern that this new delegation of legislative authority to the IWC might later be found unconstitutional,[19] Assembly Constitutional Amendment No. 90 was also passed in 1913, putting Proposition 44 on the General Election ballot on November 3, 1914. Proposition 44 was approved by voters and added former section 17½ of Article XX to the California Constitution. (*Martinez,* 49 Cal.4th at p. 54, fn. 20.)[20] Section

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[19] Ballot Pamp., Gen. Elec. (Nov. 3, 1914) argument in favor of Assem. Const. Amend. No. 90, p. 29 [RJN, Ex. B] ["The legislature also passes constitutional amendment to article XX, numbered section 17½ . . . to make sure that after the commission's work is done, its findings and rulings cannot be assailed and made useless by the state courts declaring [the 1913 Act] unconstitutional."][also cited in *Martinez, supra,* 49 Cal.4th at p. 54].

[20] Section 17½ was the predecessor to current Article XIV, Section 1 of the California Constitution. (*Martinez,* 49 Cal.4th at p. 54, fn. 20.)

17½ originally read:

> The legislature may, by appropriate legislation, provide for the establishment of a minimum wage for *women and minors* and may provide for the comfort, health, safety and general welfare of *any and all employees*. No provision of this constitution shall be construed as a limitation upon the authority of the legislature to confer upon any commission now or hereafter created, such power and authority as the legislature may deem requisite to carry out the provisions of this section.

(*Id.*)

Notably, this Court has previously held that under this original language of Section 17½, the power conferred on the Legislature was limited to regulation of only employees, not other relationships, such as principal to independent contractor:

> It is sufficient for the purposes of this case to say that section 17½ only purports, so far as here involved, to authorize legislation with reference to 'employés,' and its application, therefore, must be based upon the existence of an employment. The same considerations that led this court to hold unconstitutional the effort of the Legislature to extend the provisions of the Workmen's Compensation Act to relations other than those of employer and employé would apply with equal force to legislation under this section.

(*Perry v. Indus. Acc. Comm.* (1919) 180 Cal. 497, 501.)

**2. The authority of the IWC has never been expanded since 1913.**

In 1970, Assembly Constitutional Amendment No. 65 ("ACA 65") was proposed to amend Section 17½ to include the same language that is currently in Article XIV, Section 1 of the California Constitution:

> The legislature may provide for minimum wages and for the general welfare of *employees* and for those purposes may confer on a commission legislative, executive, and judicial powers.

(Assem. Const. Amend. No. 65, Stats. 1970 (1970 Reg. Sess.) res. ch. 189, p. 3782 [RJN, Ex. C], emphasis added.)

In its analysis of the impact of ACA 65, the Assembly Committee on Elections and Constitutional Amendments stated that, other than "extend[ing]" the IWC's "minimum wage authority to include all employees, rather than just women and minors," the proposed revisions to Section 17½ were meant only to "condense" the original language of the Section. (Assem. Com. on Elections and Constitutional Amendments, Analysis of Assem. Const. Amend. No. 65 (1970 Reg. Sess.) as Amended June 17, 1970, p. 3 [RJN, Ex. D].)

Following the amendment of Section 17½, and in response to the threat of the IWC's regulations regarding women being held unconstitutional under the Equal Rights Act of 1964, the California Legislature amended Labor Code section 1173 in 1972 and 1973. (See *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700-701.) The 1972 amendment extended the IWC's authority with respect to wages to "all employees."[21] The 1973 amendment extended the IWC's authority with respect to "hours and conditions of labor and employment" and investigation of "comfort, health, safety, and welfare" to all "employees."[22]

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[21] After the 1972 amendment, section 1173 read: "It shall be the continuing duty of the Industrial Welfare Commission, hereinafter referred to in this chapter as the commission, to ascertain the wages paid to *all employees* in this state, and to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which *women and minors* are *employed* in this state, and to investigate the comfort, health, safety, and welfare of such *women and minors*." (Stats. 1972, ch. 1122, p. 2153 [RJN, Ex. G], emphasis added.)

[22] After the 1973 amendment, section 1173 read, in relevant part: "It shall be the continuing duty of the Industrial Welfare Commission, hereinafter

As with the prior constitutional amendment, these changes to Labor Code section 1174 were intended only to extend the IWC's authority to male "*employees*," and *not* to expand the definition of "employee" in any way. The stated purpose of AB 256 was to "Extend[] minimum wage to men as well as women and minors . . ." and this purpose was effectuated by extending the IWC's authority under section 1173 "to ascertain the wages paid" to include "*all employees*," rather than only "women and minors." (Assem. Bill No. 256 (1972 Reg. Sess.), as introduced Jan. 31, 1972, §§ 1-4 [RJN, Ex. E].) The analysis of the Assembly Committee on Labor Relations stated that "AB 256 would extend the minimum wage to men as well as women and minors. This bill responds to the current public interest in providing equality for men and women in *employment*." (Assem. Com. on Lab. Relations, Analysis of Assem. Bill No. 256 (1972 Reg. Sess.), Mar. 15, 1972 [RJN, Ex. F], emphasis added.)

Similarly, the stated purpose of AB 478, introduced in 1973, was to "Extend[] to men specified regulations regarding hours and working conditions now applicable to women and minors." (Legis. Counsel's Dig., Assem. Bill No. 478 (1973-1974 Reg. Sess.), p. 2 [RJN, Ex. I].) With respect to the delegation of authority to the IWC stated in Labor Code section 1173, this purpose was effectuated by changing "women and minors" to "employees." (Assem. Bill No. 478 (1973-1974 Reg. Sess.), § 1.5 [RJN, Ex. I].) The same bill also amended Labor Code section 1194 –

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referred to in this chapter as the commission, to ascertain the wages paid to *all employees* in this state, and to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which *employees* are *employed* in this state, and to investigate the comfort, health, safety, and welfare of such *employees*." (Stats. 1973, ch. 1007, p. 2002 [RJN, Ex. H], emphasis added.)

which Plaintiffs rely on in this case for their overtime claim – to expand the private right of action for "any woman or minor receiving less than the legal overtime compensation" to a right of action for all "employees." (*Id.* at § 8.)

The portion of Labor Code section 1173 that defines the scope of the IWC's authority *has not been materially changed since 1913*, other than to extend that authority to include "all employees," instead of the original limitation to women and minor employees.[23] As such, there is nothing in the legislative history of section 1173 that would support a finding that the IWC has the authority to issue regulations to protect anyone other than "employees," as that term was understood in 1913, or that the IWC has the authority to redefine who qualifies as an "employee" under California law.

**3. The IWC has no power to expand its scope of authority.**

Absent Legislative authorization, the IWC could not presume to redefine the statutory and constitutional limits on its own authority. As noted above, in 1914, the constitutional limit of the IWC's authority was constitutionally limited to "any and all employees." Although not

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[23] The only revisions from the original 1913 enactment of the uncodified predecessor to section 1173 to its present version are as follows:

> It ~~shall be~~ is the continuing duty of the Industrial Welfare Commission, hereinafter referred to in this chapter as the commission, to ascertain the wages paid~~,~~ *to all employees in this state*, to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which ~~*women and children*~~*employees* are employed in ~~the State of California~~this state, and to ~~make investigations into~~investigate the ~~comfort,~~ health, safety, and welfare of ~~*such women and minors*~~*those employees*.

Compare Stats. 1913, ch. 324, p. 633 [RJN, Ex. A] to Lab. Code, § 1173, italics reflect material changes relevant to this matter.

explicitly defined in the California Constitution, the term "employee" was a well-understood term in 1914. (See *Perry, supra,* 180 Cal. at p. 501.) The standards of "suffer or permit" and "exercise control over wages, hours, or working conditions" appeared for the first time in IWC Wage Orders issued in the years 1916 and 1947, respectively. (*Id.* at pp. 50, 57, 59 [citing IWC former wage order No. 1, "Fruit and Vegetable Canning Industry" (Feb. 29, 1916) sections 1–5 (IWC, approved minutes for Feb. 14, 1916, meeting); IWC former wage order No. 1R, "Wages, Hours, and Working Conditions for Women and Minors in the Manufacturing Industry" (June 1, 1947) section 2(f)].) IWC Order 9 (Transportation) was issued in 2001, and carried forward the identical language relevant here ("suffer or permit" and "exercise control over wages, hours or working conditions").

Those standards were applicable only to "employees"—and specifically, to defining who is the *employer* of an admitted employee. The IWC lacked jurisdiction to enact standards to protect anyone other than employees. To hold otherwise would be to find that the IWC could exceed the authority conferred upon it by the California legislature, and/or could unilaterally amend the California Constitution. (See *Martinez, supra,* 49 Cal.4th at p. 6 ["an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by statute"]; *Rippon v. Bowen* (2008) 160 Cal.App.4th 1308, 1313 ["Article XVIII of the California Constitution allows for amendment of the Constitution by the Legislature or initiative, and revision of the Constitution by the Legislature, or a constitutional convention. There is no other method for revising or amending the Constitution."].)

## H. The *Martinez* Decision Applies the *Borello* Standard to Define Employment Status.

The *Martinez* decision itself undermines the conclusions reached by the Court of Appeal here. One question that arose in *Martinez* was whether

Munoz, the employer of the six plaintiff employees, was himself an employee. Munoz worked exclusively as a broker for several produce merchants. The plaintiffs had argued that Munoz was himself an employee of the merchants and, by extension, that the plaintiffs were therefore employees of the merchants. (*Martinez, supra*, 49 Cal.4th at p. 73.)

In response, this Court turned to the traditional *Borello* test to decide the question of Munoz' employee status. This Court opined that "Munoz was not [the merchants'] employee" because, unlike the employees in *Borello,* he "held himself out in business, invested substantial capital and equipment, employed over 180 workers, sold produce through four unrelated merchants, enjoyed an opportunity for profit or loss dependent on his business acumen and market conditions, and had indeed made a profit in prior years' operating in the same manner." (*Martinez, supra,* 49 Cal.4th at p. 73.) Thus, Munoz was found not to be an employee due to his entrepreneurial activity. The facts emphasized by the Court in reaching this conclusion are all consistent with the secondary factors identified in *Borello*.

It was undisputed that the produce merchants "suffered or permitted" Munoz to provide services to them. It was equally undisputed that the produce brokers "engaged" Munoz by negotiating his rate of pay (i.e., exercised control over his wages). Under the view of the Second District, these facts would have made Munoz an employee of the produce merchants. Instead, this Court reached the opposite result, and found Munoz was not an employee. (*Id.*) This holding cannot be reconciled with the test for employment proposed by the Court of Appeal.

## I. As *Martinez* Illustrates, The Wage Order Definitions Were Not Meant to Distinguish Employees from Independent Contractors.

In *Martinez*, this Court engaged in a detailed analysis of the analysis of the IWC's definition of "employer." The Court's discussion

demonstrates that the subsumed definitions of "suffer or permit" and "control over wages, hours, or working conditions" were not intended to distinguish employees from independent contractors.

With respect to the "suffer or permit" standard, *Martinez* explained that the standard arose from situations in which a child was "permitted" to provide labor, such as a child "paid by coal miners to carry water" or "a boy hired by his father to oil machinery." (*Martinez, supra,* 49 Cal.4th at pp. 58, 69.) The "suffer or permit" language allowed for the imposition of criminal sanctions against the employers of the coal miners and fathers for employing children in their businesses. It also imposed civil liability against those same employers for injuries suffered by the child employees. (See *id.* at p. 58.) Under that definition, "[a] proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so." (*Id.* at p. 69.) As such, the standard was meant to protect persons, specifically children, working in "irregular working relationships the proprietor of a business might otherwise disavow." (*Id.* at p. 58.) It was not even contemplated that child laborers could be independent contractors. The "suffer or permit" standard was created to determine who should be liable to the child laborers..

The "control over wages, hours, or working conditions" standard was also not meant to distinguish independent contractors from employees. Instead, as explained in *Martinez*, that standard was created to address "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.* at p. 59, emphasis added.) Specifically, the IWC intended the definition to identify as "employers" both "temporary employment agencies and

employers who contract with such agencies *to obtain employees*." (*Id.* [quoting IWC Statement as to the Basis for Wage Order No. 16 Regarding Certain On-site Occupations in the Construction, Drilling, Mining, and Logging Industries (Jan. 2001), at p. 5], emphasis added.) In other words, this standard was meant to identify who shared control over an admitted employee. No thought was given to replacing the common law test for distinguishing independent contractors from employees.

Thus, the two definitions for "employ" that are subsumed within the IWC's definition of "employer" were never intended to distinguish independent contractors from employees. As such, neither the *Martinez* opinion, nor the IWC Orders' definition of "employer," shed any light on the issue presented here—namely, what test to use in evaluating the status of Drivers for Dynamex.

In sum, there is nothing in the *Martinez* decision that supports the interpretation urged by the Court of Appeal. *Martinez* dealt solely with who is an "employer" of persons whose employment status was not in dispute. *Martinez* cannot be read any more broadly than that.

## IV.
## CONCLUSION

The Court of Appeal wrongly applied *Martinez* to the facts of this case, rather than the *Borello* standard. The trial court here has already concluded twice that the facts presented do not support class certification under the *Borello* standard. For these reasons, Dynamex respectfully urges the Court to reverse the decision of the Court of Appeal and order the case remanded to the trial court, with instructions to vacate the order denying decertification of the class, and to enter a new and different order decertifying the class based on the trial court's prior rulings.

DATED: May 11, 2015

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## CERTIFICATE OF WORD COUNT

Pursuant to CRC 8.204(c) and 8.486(a)(6), the text of this Opening Brief, including footnotes and excluding the cover information, table of contents, tables of authorities, signature blocks, and this certificate, consists of 11,878 words in 13-point Times New Roman type as counted by the word-processing program used to generate the text.

DATED: May 11, 2015 LITTLER MENDELSON, P.C.

By: _____
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## PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, Fl. 20, San Francisco, CA 94108, I served the within document(s):

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Xuan Nguyen