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January 17, 2018

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

RE: *Dynamex Operations West, Inc. vs. Superior Court*, No. S222732
Order filed December 28, 2017 requesting supplemental briefing

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amici curiae California Rural Legal Assistance Foundation (hereafter, CRLAF), the National Employment Law Project, and the Los Angeles Alliance for a New Economy, which have previously filed a brief in support of Real Parties in Interest, submit this supplemental letter brief addressing the Court's question:

> Is the pertinent wage order's suffer-or-permit-to-work definition of "employ" properly construed as embodying a test similar to the "ABC" test that the New Jersey Supreme Court, in Hargrove v. Sleepy's LLC (N.J. 2015) 106 A.3d 449, 462-465, held should be used under the New Jersey Wage and Hour Law which also defines "employ" to include "suffer or to permit to work" (N.J. Stat. ' 34:11-56a1)?

INTRODUCTION

In 2010, this Court concluded that the historical meaning of the Industrial Welfare Commission's definition of "employ" remains not only the **law** of California but "continues to be highly relevant today." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 69.) Accordingly, the undersigned Amici respond as follows to the Court's question.

1. "[E]mploy" is plainly and unambiguously defined by the Industrial Welfare Commission Orders ("wage orders") as "to … suffer or permit to work".[1] "Employer" liability neither incorporates nor depends upon a separate, prior determination to determine if plaintiff and defendant were in an "employment" relationship for purposes of the "suffer or permit" inquiry.[2] This Court has recognized that, at the time the IWC incorporated these terms

[1]Industrial Welfare Commission Order No. 9-2001 (Transportation Industry) §§ 2(E),(G), (8 Cal.Code Regs ' 11090). The IWC's other wage orders contain identical language. (*Martinez*, *supra*, 49 Cal.4th, at 57.)

[2]The wage orders further provide a worker is, alternatively,

into its several promulgations, this language was widely used by legislative bodies, advocates and courts and was considered plain and unambiguous.[3] To now replace "suffer or permit to work" with another State's test or definition of "employ" violates well-understood rules of construction, contradicts the respective intents of California Legislature in authorizing the IWC to regulate wages, hours and working conditions and the Commission in thereafter promulgating its wage orders.

2. The extensive and unambiguous legislative histories make clear that: "suffer or permit to work" was distinct from any concept of "employ"; it regulated conduct beyond and outside common-law employment relationships; and it extended "employer liability" to independent contractors and their employees. This application of the doctrine was recognized and approved by the respective courts of sister states which had adopted "suffer or permit to work" in the same historical time frame. The California Legislature in authorizing the IWC and, in turn, the IWC in promulgating its "wage orders" unequivocally intended that **no** test of or definition for "employ" (or "employment relationship") be interposed as a condition for determining whether a defendant "suffer[ed] or permit[ted] to work" an aggrieved plaintiff.

3. This Court has concluded that the historic legislative intent in authorizing the IWC to regulate, and the historic IWC intent in promulgating its wage orders incorporating "suffer or permit to work" must control California courts' construction and application of the wage orders. Consequently, neither the New Jersey ABC test nor any other test for "employ" outside the consistent, historic meaning of "suffer or permit to work" should be used to determine whether one is "employed" under California's "suffer or permit to work" definition of employer liability.

Amici's arguments below incorporate significant content from briefs filed previously in this Court by appellants in Case No. S121552, *Miguel Martinez, et al. vs. Combs, et al.*, (*Martinez v. Combs*, (2010) 49 Cal.4th 35).[4] In preparation of this letter

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"employed" if the defendant engages" the aggrieved person. This Court has concluded that this language incorporates the common-law definition. The extent to which "engage" may provide a basis for incorporation of the New Jersey (or any other) test is not raised by the Court's question nor further addressed here.

[3]*See, e.g.*, *Curtis & Gartside Co. v. Pigg* (Okla. 1913) 1913 Okla. LEXIS 450, at pp. 12-13 [39 Okla. 31], *cited* by this Court as one "of the most notable [decisions]" applying "suffer or permit to work". (49 Cal.4th, *supra*, at 58 n. 26.)

[4]At various places herein, this letter brief incorporates substance and/or language from, respectively: Appellants' Opening Brief on the Merits (filed January 20, 2006); Appellants' Reply Brief on the Merits (filed June 13, 2006); and, Appellants' Answer to Amici in Support of Respondents (filed August 2, 2006).

brief, Amici have associated as Of Counsel, William G. Hoerger, who was the principal author of those briefs and lead counsel for appellants in the *Martinez* case.

ARGUMENT

I. THE IWC WAGE ORDERS FACIALLY AND PLAINLY DEFINE "EMPLOY" AS TO "SUFFER OR PERMIT TO WORK"; NO FURTHER EXTRANEOUS DEFINITION OR TEST FOR "EMPLOY" IS PROPER

The wage order plainly states that one is an "employer" conditioned upon the fact that he, she or it either directly or indirectly "employs" any person (or, alternatively since 1947, "exercises control" over certain factors - a subject not addressed here).[5] Central to the Court's question, *employ* is itself defined in - and by - the wage orders. To "employ" means "to engage, suffer, or permit to work[6]; "employ is defined by "suffer or permit" (and additionally by other terms not included in the Court's question) - - not the reverse. To read the wage order in such a manner, or to apply an extraneous test of "employ" upon "suffer or permit" would trespass outside the plain language of the wage order and would impose a species of circular reasoning in its application.

This Court recognized in *Martinez* that "suffer" or "permit to work" were not abstract, unknown terms when the Commission promulgated its definitions: these terms had been well-understood for years by sister-state legislatures, advocates and the body politic, and had been consistently construed for years by courts in the many states which preceded California in adopting this doctrine. (49 Cal.4th, *supra*, at 57-58, *citing and quoting*, *Curtis & Gartside v. Pigg* (Okla. 1913) 39 Okla. 31 [1913 Okla LEXIS 450] and *Purtell v. Philadelphia & Reading Coal & Iron Co.* (Ill. 1912) 256 Ill. 110 [99 N.E. 899]). The *Purtell* court, referencing the statutory terms "employ[]", "permit[]" and "suffer[]", stated,

> They very **plainly** say ... The inhibition is just as strong and positive against permitting or even suffering a child of this age to do such things as it is against employing him to do them ... each of the terms ... is given a distinct office in the general plan of prohibition ...the reasonable presumption is that ... [the Legislature] intended to apply an equally prohibitive force to each of the terms chosen, and each term should be given its ordinary significance ...

(*Purtell*, *supra*, 1913 Okla LEXIS 450, at pp. 12-13, boldface added.) Moreover, the proposition that application of "suffer or permit" is conditioned upon some prior determination of "employment" was rejected over 100 years ago, a rejection that this Court observed with approval in *Martinez*.

> [An] argument that the ["suffer" or "permit"] standard could "only apply when the relation of master and servant actually exists ... would leave the words 'permitted or suffered to work' practically without meaning."

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[5] Order 9-2001, *supra*, & 2(G).

[6] *Id.*, & 2(E).

(49 Cal.4th, *supra, quoting, Purtell v. Philadelphia & Reading, supra*, 99 N.E., at 902.)[7]

Where words, assigning their usual and ordinary meanings and construing them in context, are not ambiguous, this Court "presumes the Legislature meant what it said, and the statute's plain meaning governs. (*Martinez, supra,* 49 Cal.4th, at 51). Consequently, application of the New Jersey test - or any other test outside the IWC's definition of "employ" - contradicts the plain language of the wage orders themselves, and should not be applied.

And, as will hereafter be demonstrated, incorporation of such a construction upon "suffer or permit to work" also contradicts the manifest intent of the California Legislature[8] and the Commission.

II. "SUFFER" OR "PERMIT TO WORK" WERE NOT CONDITIONED BY ANY PRINCIPLES OR DOCTRINE OF EMPLOYMENT BUT, RATHER, THE CALIFORNIA LEGISLATURE AND THE INDUSTRIAL WELFARE COMMISSION INTENDED THAT THEY BE DISTINCT IN MEANING FROM "EMPLOY" AND REGULATE CONDUCT BEYOND EMPLOYMENT RELATIONSHIPS

This Court has emphasized that remedial employment statutes should be construed with "consideration of the remedial purpose of the statute, the class of persons intended to be protected," and with "particular reference to the 'history and fundamental purposes' of the statute". (*S.G. Borello & Sons v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 351, 353-354.) Similarly, where regulatory language is subject to more than one reasonable interpretation, the cardinal rule of construction is that the court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the administrative regulation. (*Cal. State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 344-345; *see, also, In re Harris* (1995) 5 Cal.4th 813, 844; *California Grape, etc. League v. Industrial Welfare Com.* (1969) 268 Cal.App.2d 692, 698, referring to Labor Code, ' ' 1171-1398.) "Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies." (*Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d, 287, 292.)

The wider historical circumstances of the adoption or enactment are persuasive in divining intent. (*American Tobacco Co. v. Superior Court* (1989) 208 Cal.App.3d 480, 486; *Steilberg v. Lackner* (1977) 69 Cal.App.3d 780, 785.) When the promulgating body uses language or terms that had at the time a well-known meaning at common law or in the law of this country, the words are presumed to have been used in that sense. (*People*

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[7]Elsewhere in *Martinez*, this Court identified *Purtell* as one "of the most notable" "[o]f the many decisions applying. . . ['suffer or permit to work'] statutes before 1916 ..." (49 Cal.4th, *supra*, at 57 n. 26.)

[8]"[T]he Legislature intended the IWC's wage orders to define the employment relationship in actions under [Labor Code Section 1194]." (49 Cal.4th, *supra*, at 52.)

v.. Overstreet (1986) 42 Cal.3d 891, 897. S*ee also, Steilberg, supra*, 69 Cal.App.3d at 785 ("...the courts should consider not only the words used, but... the object in view, the evils to be remedied, the history of the times, legislation upon the same subject, public policy, and contemporaneous construction.") Consequently, the meaning of "suffer or permit to work" as it was used and applied at the time of the regulation's adoption is presumed, in absence of proof to the contrary, to be the meaning the IWC intended when it adopted the definition.

This Court said as much a mere eight years ago in referring to this historical context when it reviewed "suffer or permit" standard:

> We see no reason to refrain from giving the IWC's definition of "employ" its historical meaning. That meaning was well established when the IWC first used the phrase "suffer, or permit" to define employment, and no reason exists to believe the IWC intended another. Furthermore, the historical meaning continues to be highly relevant today: 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.

(*Martinez*, *supra*, 49 Cal.4th at 69).

A. At the Time California Addressed Regulating Wages, Hours and Working Conditions, "Suffer or Permit to Work" Was a Nationally-Recognized Model For Imposing Employer Liability

California's 1913 act creating the IWC was part of "a wave of minimum wage legislation that swept the nation during the second decade of the 20th century." (*Martinez*, *supra*, 49 Cal.4th, at 53.) In the instant matter, the Court's pending question merits additional details of the history of the wage orders' "suffer or permit to work" definition.

Connecticut was the first state to enact a child labor statute embodying the "suffer" standard in 1855, and Maine followed in 1857. (Goldstein, Linder, Norton & Ruckelshaus, *Enforcing Fair Labor Standards In the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment* (April 1999) 46 UCLA LAW REVIEW 983 (hereafter, "Goldstein"), 1016-1018, 1030.) Connecticut's and Maine's enactments followed the experience in Massachusetts which in 1842 had enacted a law imposing a ten-hour day for children under twelve in manufacturing establishments, but under which the company was not liable unless it acted "knowingly." The "knowingly" provisions led to easy evasion since it was only necessary for the employer to say that he did not know that any children under 12 were employed since, if it had occurred, the children must have lied about their ages. (Goldstein, *id.*, at 1031, *citing*, Otey, *The Beginnings of Child Labor Legislation in Certain States: A Comparative Study* (1910) 6 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES, S.DOC. No. 61-645, at 78.)

New York State's subsequent adoption of labor laws illustrates the intended reach of "suffer or permit." An 1876 statute in that state had prohibited employment of children in certain fields or for immoral or obscene purposes.

> Unsurprisingly, some owners described injured children as "not employees." In 1881, the state legislature enacted a criminal statute providing that "[a]ny person who shall suffer or permit any child under the age of sixteen to play any game of skill or chance in any place wherein ... shall be guilty of misdemeanor." Five years later, the legislature adopted this standard in regulating the employment of women and children in manufacturing establishments. This law ... was regarded as "the real beginning of labor legislation in New York State.

(Goldstein, *supra*, at 1032-1033, *quoting*, Hurwitz, THEODORE ROOSEVELT AND LABOR IN NEW YORK STATE 1880-1900 (1943), at 45.)

The "suffer or permit" language appeared in the 1903 revisions of the New York State provisions on women's hours, the hours of child labor, and restrictions on child labor. (Calcott, CHILD LABOR LEGISLATION IN NEW YORK (1931) 27-28; Felt, HOSTAGES OF FORTUNE: CHILD LABOR REFORM IN NEW YORK STATE (1965), at 1, 39, 52.) One bill, the Finch-Hill Factory Act, made the employer directly responsible for any illegally-working child found in his factory.

> Under the old factory law, employers had often avoided prosecution by claiming that the underage child worker must have "wandered in" for they personally had never hired the youngster. The Finch-Hill Act made the mere finding of a child under fourteen *at work* in a manufacturing establishment evidence of illegal employment by providing that no child under fourteen could be "employed, permitted, or suffered to work" in a factory.

(Felt, *id.*, p. 52.) A New York court interpreted this law as imposing liability on the employer even without knowledge of the child's actual age and even though the child had misled the employer. (*City of New York v. Chelsea Jute Mills* (Mun. Ct. 1904) 88 N.Y.S. 1084, 1090.)

The New York amendments were viewed as a major turning point in the effort to regulate work outside the factories by expanding the coverage of the statute and were in large part the result of the legislative drafting and media campaigning of the newly-formed New York Child Labor Committee (NYCLC). The NYCLC, in turn, was organized in large part by persons associated with, first, the New York - - and then, the National - - Consumers League, the organization to which Louis Brandeis and Felix Frankfurter lent their efforts and expertise. "These reformers sought to eliminate the easy evasions of the existing law occurring outside factories, which were aided by the factory owners' disingenuous claims of ignorance about conditions in the sweatshops with which they contracted." (Goldstein, *supra*, at 1033-1034.)

In 1911, after the revamped use of "suffer or permit" in New York State, the National Consumers League (NCL) - selecting the best provisions from state statutes for its model Standard Child Labor Law - adopted "employed, permitted or suffered to work" as its prohibition standard. The NCL then began a campaign to secure state laws regulation wage rates for women and children through advocacy of its model bill. (Goldstein, *id.*, at 1071-1072, *citing*, NATIONAL CONSUMERS' LEAGUE, CHILD LABOR LEGISLATION: SCHEDULES OF EXISTING STATUTES AND THE STANDARD CHILD LABOR LAW: HANDBOOK (1905) ' ' 1-2, at 35.) The principles of "suffer or permit to work" quickly spread among the states.

The movement to ensure that employers did not avoid liability and undercut intended protection of both child and women workers through subterfuges premised on tort concepts of the common-law employment relationship was well under way by the time the California Legislature took up the minimum-wage bill.

> By 1907, fourteen states already had on the books child labor laws containing the "permit or suffer to work" standard: Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New York, Oregon, Rhode Island, South Dakota and Wisconsin. In addition, many states used the "permit" standard in their child or women's or other protective labor laws: Alabama, Arizona, California, Connecticut, Florida, Kansas, Maine, New Jersey, North Dakota, Oklahoma, Pennsylvania, Vermont, and Wyoming ... By World War I, several more states had adopted the "employed, permitted or suffered to work" standard. For example, in 1913, Arizona enacted a law stating "No female shall be employed, permitted or suffered to work in or about any mine quarry or coal breaker."

(Goldstein, *supra*, at 1036-1037.)

As of 1913, when California adopted its minimum-wage act, the *suffer or permit* doctrine of liability was used to *regulate* conditions of employment for both children and adults, including in some cases males. Among these:

- New York (1886) regulated weekly hours of work for women through "knowingly employs or *suffers or permits"* (Goldstein, *supra*, at 1032-1033, *citing*, Act of May 18, 1886, ch. 409, § 4, 1886 N.Y. Laws 629, 269);
- Maryland (1888) regulated daily hours of workers in the manufacture of yarns, fabrics or domestics through, "require, *permit or suffer*; and again (1898) used "require, *permit or suffer*," to regulate daily hours of street railways employees; (Goldstein, *id.,* 1032, citing respectively, Act of Apr. 5, 1888, ch. 455, □ 1, 1888 Md. Laws 734; Act of Mar. 24, 1898, ch. 123, § 1, § 793, 1898 Md. Laws, 241, 543);
- New York (1903) regulated women's hours of work through "suffer or permit; (Goldstein, *et al., id.* p. 1033);

- Congress (1907) regulated maximum, consecutive on-duty hours of common-carrier railway employees through "requiring or *permitting*" (Goldstein, *id*., p. 1066, citing, Act of Mar. 4, 1907, ch. 2939, § 2, 34 Stat. 1415, 1416);
- Oregon (1910) regulated hours of certain underground miners through "*permit* or require"; and again (1911), regulated maximum, consecutive on-duty hours of common-carrier employees through "require or *permit*, (Sumner and Merritt, CHILD LABOR LEGISLATION IN THE UNITED STATES, U.S. Dept. of Labor Children's Bureau (1915), respectively, p. 946, reprinting, LOL 1910 § 5058; pp. 947-948, reprinting, LOL 1911 ch. 137, § 2);
- Arizona (1913) regulated daily and weekly hours of women employed in certain businesses and in the same year further regulated seating conditions for women employees, both through "employed *or be permitted* to work" (Sumner and Merritt, supra, respectively, p. 507, reprinting, R S 1913 Pen C Pt. 1 t 19; p. 500, reprinting, R.S. 1913 Civ. C t 14 ch. 2, § 3115);
- Again, Oregon (1913) established a ten-hour day for all workers in specified occupations through "require *or permit*" (Sumner and Merritt, *id.,* p. 953, *reprinting*, 1913 ch. 102, §§ 1,3.

In 1913, California adopted the minimum-wage act that created the Industrial Welfare Commission and delegated to it the power to fix minimum wages, maximum hours of work and standard conditions of labor. (Stats. 1913, ch. 324, ' 13, p. 637; *Martinez*, *supra*, 49 Cal.4th at 50.) As will be shown below, the IWC then familiarized itself with efforts by the League and other states in the process of adopting the "suffer or permit to work" language in its wage orders.

B. "Suffer" and "Permit to Work" Were Historically Recognized as Distinct in Meaning From "Employ", And Extended Liability Beyond Common-Law Employment Concepts

Early state statutes using the "suffer or permit" standard were understood to defeat contractual relationships that attempted privately to define the employer relationship by limiting it to a single person or entity. (Goldstein, *supra*, at 1042-1047.) As explained by Judge Learned Hand, these statutes regulating employment conditions "upset the freedom to contract" with respect to the control of those conditions. (*Lehigh Valley Coal Co. v. Yensavage* (2d Cir. 1914) 218 F. 547, 553.) As previously noted, a further goal was to eliminate owners' evasions through "permitting" work to be done at home or through intermediaries under the pretense that no employment relationship existed there.

The "suffer or permit to work" statutes were well recognized as distinct from the common-law principles of employment. Referring to its state child-labor statutes, the Oklahoma Supreme Court in 1913 made clear the distinction:

> The inhibition is just as strong and positive against permitting or even suffering a child of this age to do such things as it is against employing him to do them. The manifest purpose of the law is to positively prevent children of this age from doing work of this character, and each of the

> terms, "*employed*," "*permitted*," and "*suffered*," is given a distinct office in the general plan of prohibition... The moving intent of the Legislature being to positively prevent children from engaging in hazardous work, ... [E]ach term should be given its ordinary significance. If the statute went no farther than to prohibit employment, then it could be easily evaded by the claim that the child was not employed to do the work which caused the injury, but that he did it of his own choice and at his own risk; and if prohibited on the employment and *permitting* a child to do such things, then it might still be evaded by the claim that he was not employed to do such work, nor was permission given him to do so. But the statute goes farther, and makes use of a term even stronger than the term "*permitted*." It says that he shall be neither employed, permitted, nor *suffered* to engage in certain works...

(*Curtis & Gartside Co. v. Pigg, supra*, 1913 Okla. LEXIS 450, at pp. 12-13, italics added.) California's rule of construction is identical to that applied by the Oklahoma court. (*Pigg, supra.*) Whenever possible, effect and significance must be given to every word in a statute when pursuing the legislative purpose, and a court should avoid a construction that makes some words surplusage. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, 234.)

Courts clearly understood that *suffer or permit* was designed to apply to actionable conduct that fell outside the common-law employment relationship. The Illinois Supreme Court, reviewing that state's 1903 Child Labor Act mandating that "[n]o child under the age of fourteen years shall be *employed, permitted or suffered to work* at any gainful occupation ..." in specified industries, rejected the defendant company's contention, "that this act can only apply when the relation of master and servant actually exists. We cannot agree with this contention." (*Purtell, supra*, 99 N.E. 899, 902, italics added.) In *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*- - which arose not as a tort case but from a state inspector's citation based upon his observations while on patrol[9] - - then Judge Cardozo explained that a business owner's or proprietor's liability under *suffer or permit* "rests upon principles *wholly distinct from those relating to master and servant*". ((N.Y.Ct. Appls. 1918) 121 N.E. 474, 475. Italics added.) "The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist." (*Sheffield Farms, supra*, (App.Div. 1917) 167 N.Y..S. 958, *aff'd*, (N.Y.Ct.Appls 1918) 225 N.Y. 25 [121 N.E. 474] (italics added).)

Thus "suffer or permit to work" analyses are far removed from the "common-law principles" of employment "developed to define an employer's liability for injuries caused *by* his employee." (*Borello, supra*, 48 Cal.3d, at 351-352.) This Court has endorsed "the distinction between tort policy and social-legislation policy [that] justifies departures from the common law principles" when considering a "remedial statutory purpose." (*Borello, id.*, at 353-354.) Moreover, this Court recognized that adherence to a traditional common-law interpretation, "would suggest a disturbing means of avoiding an

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[9] *Cf., Borello, supra,* 341 Cal.3d , at 348 fn. 4.

employer's obligations under ... California legislation intended for the protection of "employees," including ... laws governing minimum wages [and] maximum hours...." (*Id.*, p. 359).

New Jersey's recent decision in *Hargrove* ignores this historical context. *See Hargrove*, *supra*, 106 A.3d at 463 (referring to the plain statutory language, agency deference, and statutory purpose, but omitting any reference to historical context). In doing so, that court departed from the historical recognition of a standard that extends beyond the common law, when opting instead to replace "suffer or permit" with the ABC Test which starts with the determination of employee status. *See id.*, *supra*, 106 A.3d at 464-65 (acknowledging that the *D'Annunzio* test it ultimately rejects arises from legislation "designed to reach those not traditionally considered an employee under the common law.")

This Court has taken a materially different approach from New Jersey, deferring to the Industrial Welfare Commission's rich historical context and use of "suffer or permit." *See Martinez*, *supra*, 49 Cal.4th at 69 ("Statutes so phrased were generally understood to impose liability... despite the absence of a common law employment relationship... we see no reason to refrain from giving the IWC's definition of 'employ' its historical meaning.") There is nothing new in the development of California labor law that warrants disturbing this decision by applying New Jersey's standard when construing the discrete suffer or permit relationship.

C. The California Legislature Intended That the IWC Regulate Wages, Hours and Conditions Beyond Common-Law Relationships

As this Court has observed (*Martinez*, *supra*, 49 Cal.4th at 53-55), adoption of wage regulation in California was part of the general movement in California and the rest of the nation for remedial labor legislation that characterized the "Progressive Movement" which supported Theodore Roosevelt on the national stage and, in California, Hiram Johnson. (*See, e.g.*, Elizabeth Brandeis, *Labor Legislation: Minimum Wage Legislation*, in Commons, etc. 3 HISTORY OF LABOUR IN THE UNITED STATES 1896-1932 (1935) 501-539, 514-515, 518;[10] Nash, *The Influence of Labor on State Policy 1860 - 1920* (1963), 42 CALIFORNIA HISTORICAL SOCIETY QUARTERLY No. 3, 241, 245-246; Hundley, *Katherine Philips Edson and the Fight for the California Minimum Wage 1912-1913* (1960), 29 PACIFIC HISTORICAL REVIEW No. 3, 271, 273-274; Jacqueline R. Braitman, KATHERINE PHILIPS EDSON: A PROGRESSIVE-FEMINIST IN CALIFORNIA'S ERA OF REFORM, Dissertation, University of California-Los Angeles (1988) pp. 195-203;[11] Susan Diane Casement,

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[10]The original Commons' treatises are in the collection of the University of California-Berkeley library. They were re-issued in 1966, in REPRINTS OF ECONOMICS CLASSICS, Augustus M. Kelley, Publishers, New York. These, too, are in the University of California library.

[11]The Braitman dissertation, issued through University Microfilms International Dissertation Information Service, is on file at the California State Library in Sacramento.

KATHERINE PHILIPS EDSON AND CALIFORNIA'S INDUSTRIAL WELFARE COMMISSION 1913 - 1931, *thesis* (1987), Kansas State University.) One scholar has described this epoch as follows:

> ....California was one of the leading states in this progressive movement [in the United States]...[I]n 1910 under the leadership of Hiram W. Johnson, who was elected governor in that year, the old control was displaced. Then in the space of two years time the people of the state were given the Initiative, the Referendum and the Recall, woman suffrage, a practically direct primary and the Australian ballot.

(Earl C. Crockett, THE HISTORY OF CALIFORNIA LABOR LAW LEGISLATION 1910-1930, *thesis* (1931) Graduate Division of the University of Pennsylvania, pp. 2-3.) The National Consumers' League campaign was supported not only by the California Consumers' League, but also by, among others, the California Federation of Women's Clubs, led by Katherine Philips Edson. (Goldstein, *supra*, 1033-1034; Brandeis, supra, at 507-514; Nash, *supra*, at 245-246; Hundley, *supra*, at 273-274; Braitman, supra, at 195, 200-201, 410; Casement, *supra,* at 2; David Von Drehle, TRIANGLE: THE FIRE THAT CHANGED AMERICA (2003), 196-199, 214-215.)

California's IWC/Minimum Wage Act of 1913 (Stats 1913, ch. 324, ' 13, p. 637),

> ....was thus part of a national reform movement as well as a product of the state in the midst of its own reform revolution. The most prominent supporters of the legislation were the state and national Consumers' leagues, the national Conference of Charities and Corrections, the California Federation of Women's clubs, the Church Federation of Los Angeles, the Women's Christian Temperance Union, the California Civic League, the Socialist Party, and progressives from both major parties.

(Braitman, *supra,* pp. 200-201; *see, also, id.,* pp. 197-198.)[12] In states such as California where women's suffrage had been achieved,[13] the progressives' newly-enlarged political power was focused overwhelmingly on minimum wage and other remedial labor legislation.

> Women and children figure more prominently in the legislation proposed at the first bifurcated session than ever before in the history of the California legislature. Undoubtedly this is due in a considerable degree to the enfranchisement of women. Women's clubs have exerted a powerful influence in the preparation and introduction of bills for women and children...

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[12]The Braitman dissertation, issued through University Microfilms International Dissertation Information Service, is on file at the California State Library in Sacramento.

[13]Women's suffrage was achieved in California on October 10, 1911 by special election. (Braitman, *supra*, at p. 141.)

... The women who works is to occupy a legislative storm center after the interregnum. That storm will be precipitated by the hearings on the measures analyzed herewith...

(George A. Van Smith, "Proposed Legislation", SAN FRANCISCO CALL, February 12, 1913, p. 1;[14] *see also*, Brandeis, *supra*, at 506-507, 513-515; Nash, *supra*, at 245-246; Braitman, *supra,* at 108, 174, 410; Casement, *supra*, at 16-18; Von Drehle, *supra,* 15, 196, 214-215.[15] Next to the suffrage, minimum wage and child labor were the key thrusts of the women's movement.

In California, credit for the minimum wage belongs to the California Federation of Women's Clubs, led by Katherine Philips Edson, supported by the Progressives (who by 1913 occupied a solid majority in the California Legislature) (Brandeis, *supra*, at 507, 513-515; Nash, supra, at 245-246; Braitman, *supra*, at 195-203; Hundley, *supra,* at 273-277; Crockett, *supra*, pp. 66-77.)[16] Philips Edson, as a member of the executive board of the California Federation of Women's Clubs, selected Assembly Bill 1251 and thereafter served as the bill's chief lobbyist on behalf of the Federation. During this time, Edson consulted closely with Florence Kelley, the Executive Director of the National Consumers League. (Braitman, *supra*, at 176, 203; Casement, *supra*, at 2, 8, 15, 196.) The California statute establishing the IWC, like those of other states, followed the model minimum wage law prepared by Florence Kelley of the National Consumers League. (Casement, *supra*, at 2.)

There is little room for doubt that the California Legislature and the Governor were well aware of trends outside the state as they delegated to the Commission the power to fix wages and conditions for women and minors "*engaged* in any occupation, trade or industry." Thus, the Commission's authorization to establish minimum wages was not limited to protecting those workers who fell within the then-common-law concept of "employment." The Act explicitly empowered the Commission, "to fix ... [a] minimum wage to be paid to women and minors *engaged* in any occupation, trade or industry ..." (Stats. 1913, *supra*, p. 635, ' 6 (italics added).) The bill was approved by a wide margin, passing the Assembly by a vote of 46 to 12 and the Senate by 27 to 7. (Hundley, *supra*, at 276-277.)

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[14]The Van Smith article then proceeds to describe the "Women's Eight Hour Law" (S.B. 466); the "Welfare Commission" Law (S.B. 1134 and A.B. 1251); and the "Minimum Wages for Women and Minors" Law (S.B. Nos. 8 and 24, and A.B. No. 44). A.B. 1251 became the bill selected by Katherine Philips Edson as the vehicle for enacting the IWC.

[15]Mr. Von Drehle's book was published by the Atlantic Monthly Press, of New York City.

[16]The Crockett thesis is available through Interlibrary Loan from the Robert Crown Law Library, Stanford Law School, Stanford University.

Moreover, the California legislature itself had already adopted the *permit to work* standard in both regulating working conditions and in prohibiting certain types of work. ("An act regulating the employment and hours of labor of children...", Stats 1905, ch XVII, ' 2, p. 11.) The "permitted" language was retained in amendments to the act in 1909 (Stats. 1909, ch. 254, ' 2, p. 387), 1911 (Stats. 1911, ch. 116, ' 2, p. 283), and 1913 (Stats. 1913, ch. 214, ' 2, p. 365).

As this Court previously concluded, the Legislature's intent that the IWC's wage orders define the employment relationship in actions (private or otherwise) under Labor Code Section 1194 is "unmistakeabl[e.]" (*Martinez, supra,* 49 Cal.4th at 52.) "Today, the laws defining the IWC's powers and duties remain essentially the same as in 1913 with a few important exceptions" including an amendment to the State Constitution to confirm the Legislature's authority to confer on the IWC its present powers and an expansion of its jurisdiction to include all employees, male and female. (*Id.,* at 55.)

D. The IWC Intended "Suffer or Permit to Work" to Extend Employer Liability Beyond Common-Law Employment Concepts

Following the Legislature's establishing the IWC in 1913 and affirmation of its constitutionality in 1914 by an initiative, Katherine Edson, the drafter and chief proponent of the Act, became the first woman appointed to the IWC. From 1916 to 1931, she served as the IWC's Executive Officer. (Casement, *id.*, 2, 16-18.)

In implementing its powers, the Commissioners visited other states and reviewed the conditions they found therein. (Industrial Welfare Commission Records, *IWC Minutes*, March 12, 1915[17] ("The reports of Commissioner Edson on conditions in New York and Massachusetts were read and ordered filed."); *IWC Minutes*, April 10, 1915[18] ("Commissioner Edson made oral report supplementing her written report of conditions she found in various other states visited by her."); at p. 15 ("During the early part of 1915, Commissioner Edson visited the Industrial Welfare Commissions of Oregon and Washington, also the Minimum Wage Commission of Massachusetts, members of the Factory Investigating Commission of New York...").[19]]

The IWC also studied the work and recommendations of the advocacy groups promoting model legislation, including the National Consumers' League. [*IWC Minutes*,

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[17]Amici request that the Court take judicial notice of the official acts of the California Industrial Welfare Commission cited here and following. (Evidence Code Sections 459(a),(b).) A true copy of the IWC Minutes of March 12, 1915, was filed with this Court in *Martinez, supra*, Case No. S121552, Appellants' Appendix (hereafter, "*Martinez* App.") at 563-564.

[18]A true copy of the IWC Minutes of April 10, 1915, was filed with this Court in *Martinez* App., at 565-566.

[19]A true copy was filed with this Court in *Martinez* App., at 682.

May 29, 1915 ("The chairman announced that the *purpose of the meeting* was to confer with Mrs. Florence Kelly of the *National Consumers' League*", italics added.][20]

During the period between California's 1913 statutory enactment and the IWC's 1916 promulgation of Order No. 1, more jurisdictions continued to adopt *suffer* or *permit.* Congress in 1914, regulating the hours of female workers in the District of Columbia, used the *employed or permitted to work* standard ..... By 1915 at least twenty states regulated hours of labor using the "suffer or permit" scope of accountability. (Goldstein, *supra*, at 1039.)[21]

At the beginning of 1916, the IWC convened a wage board to consider wages, hours and conditions in the fruit and vegetable canning industry. [*IWC Minutes*, Jan. 7, 1916, pp. 1-2).] On February 14, 1916, the Board adopted IWC Order No. 1, regulating wages and hours in that industry. Order No. 1 specifically provided that

> No person, firm or corporation shall *employ or suffer or permit* any women or minor *to work* ... [at piece rates less than specified]" ... "Shall *employ or suffer or permit* any woman or minor *to work* [at hourly rates less than specified]... shall *employ or suffer or permit* any woman or minor *to work* ... [more than hours specified]."

[*IWC Minutes*, February 14, 1916, pp. 1-2, *see* App. 577 at §1, (italics added); *id.*, *see*, p. 2 at § 2, italics added; *id.*, *see*, App. 577-578 at §§ 3-5, italics added.]. Simultaneously, the IWC adopted Order No. 2, mandating that "[n]o person, firm or corporation shall *employ or suffer or permit* any woman or minor *to work* ... [in health and safety conditions below specified standards]" (*Id.*, App. 579 at § 1.)[22]

The Commission thus adopted the child-labor model language, and acknowledged its examination and reliance upon the developing legal landscape in other states. As it stated in its Second Biennial Report:

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[20]A true copy of the IWC Minutes of May 29, 1915 was filed with this Court in *Martinez* App., at 568. *See, also*, *Martinez* App., at 683 (at p. 17, therein, listing other visitors during the year as including, among others, the chair and secretary of the Industrial Welfare Commission of Washington, a representative of the Massachusetts Consumers' League, and the former chief of the Women's Division of the United States Bureau of Labor Statistics.

[21]This Court observed that, as of 1919, fourteen states plus the District of Columbia and Puerto Rico had enacted minimum-wage laws. (*Martinez*, *supra*, 49 Cal.4th, at 53.)

[22]A true copy of the IWC Minutes of Jan. 7, 1916, are filed with this Court in *Martinez* App. 569-574. A true copy of the IWC Minutes of February 14, 1916, are filed with this court in *Martinez* App. 576-579, *see*, 577 at §1; 577-578 at §§ 3-5; see also App. 579 at § 1 regarding Order No. 2.

> The commission appreciates full well the pioneer character of minimum wage legislation in the United States, and has proceeded with great caution in its work. ... Being the largest state in the west that is attempting by legislative action to regulate industry, particularly in providing a living wage for women workers, it is imperative that any action taken here must ... be indicative of what may be accomplished in more complex communities.

[*Martinez* App. 681-682, at "Introduction", pp. 13-14, therein.)

Wage orders 1 and 2, were adopted in 1916 and others followed in short order. (*Martinez*, *supra*, 49 Cal.4th at 57.) With respect to the wage order provisions that "'employ' means *to engage, suffer or permit to work*" this Court observed that "the chosen language was especially apt ... because it was already in use throughout the country ....and had been recommended for that purpose in several model child labor laws...." (*Id.*, 49 Cal.4th at 57-58 (italics in original).)

Legislative authorization to the IWC included "the power to define the employment relationship as necessary 'to insure the receipt of the minimum wage and to prevent evasion and subterfuge'..." (*Martinez*, *id.*, 49 Cal.4th at 64, *citing*, *Cal Drive-in Restaurant Assn.*, *supra*, 22 Cal.2d, at 302.) The phrases used in all current industry and occupation wage orders to define the terms "employ" and "employer" first appeared in the original 1916 wage orders. (*Martinez*, *supra*, 49 Cal.4th at 50.) Any suggestion that the IWC was unfamiliar with the *suffer or permit* liability standard to regulate working conditions defies reason.[23]

E. Following Initial IWC Adoption of "Suffer or Permit to Work", the Doctrine Continued to Be Applied Consistently to Protect Employees of Independent Contractors

(1) State Courts Continued to Apply "Suffer or Permit to Work" Where No Employment Relationship Existed Between the Defendant Business and the Aggrieved Person

As the IWC continued to issue its wage orders, courts in various states continued to apply "suffer or permit" statutes to individuals irrespective of whether they were employees of the defendants under common law definitions. (*Vida Lumber Co. v. Courson* (Ala. 1926) 112 So. 737 (lumber company held liable for death of under-aged boy working for his father who was an independent contractor with the company- -existence of employment relationship between child and defendant immaterial under "suffer or permit"); *Commonwealth v. Hong* (Mass. 1927)158 N.E. 759, 759-760 (fact that minors were employed by an independent contractor not a defense to restaurant owner's conviction of child labor violations); *Nichols v. Smith's Bakery, Inc.* (Ala. 1929) 119 So.

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[23]Indeed, the California Legislature in similarly regulating industrial homework, subsequently copied the IWC's definition of "employ" as meaning "to engage, suffer or permit". (Industrial Homework Act of 1939, Labor Code §2650, subd.(g); Stats. 1939, Ch. 809, p. 2364, § 1.)

638; *Daly v. Swift & Co.* (Mont. 1931) 300 P. 265 (defendant Swift liable for death of 12-year-old child working for an independent junk dealer, under contract to a general contractor, removing ice-making apparatus from the cellar of Swift's meat-packing plant.)

(2) "Suffer or Permit to Work" Also Continued To Be Applied to Businesses That Reasonably Knew Work Was Being Performed For Their Benefit

The IWC continued to issue wage orders during a period in which "suffer or permit" was widely understood to impose regulation wherever the owner had reason to know that work was being done for his benefit. In *Sheffield Farms, supra*, a business engaged in the sale of home-delivered milk was convicted of violating child labor law because its drivers had hired minors to guard their wagons during deliveries despite a company rule that its drivers could not allow anyone to assist them. Of New York's child labor statute, the intermediate court said that its

> purpose and effect ... is to impose upon the owner or proprietor of a business the duty of seeing to it that the condition prohibited by the statute does not exist. He is bound at his peril so to do. The duty is an absolute one, and it remains with him whether he carries on the business himself ... [or entrusts] the conduct of it to others.

(*Id.* (App.Div. 1917) 167 N.Y.S., at 960.) In affirming the lower court, Justice Cardozo concluded that,

> [The defendant] must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he had delegated "his own power to prevent" ...Sufferance as here prohibited implies knowledge or *the opportunity through reasonable diligence to acquire knowledge* ... Within that rule, the cases must be rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided.

(*Supra*, (N.Y.Ct. Appls. 1918) 225 N.Y. 25 [121 N.E., at 475-476, italics added.) Thus, under "suffer or permit to work," the business owner became responsible for labor conditions within his business if he knew that work was being performed for his benefit. Liability in *Sheffield Farms* was not predicated upon any common-law agency or respondeat superior doctrine.

Other state courts have continued to interpret the "suffer or permit" language in their respective state laws consistently with the historic interpretation that existed at the time California adopted that language in its Wage Orders. Thus, in 1948, the Illinois Supreme Court held that even though horse owners who hired an underage child were not employees of the defendant race-track owners, the latter had an extensive right to control the stables and therefore *could* have controlled the child working there. (*Gorczynski v. Nugent* (Ill. 1948) 83 N.E.2d 495.)

> [A]ppellants knew or could have known by the exercise of reasonable care, or by the performance of their effective duty as prescribed by the racing board, that plaintiff was illegally employed on its premises and under such circumstances permitted or suffered plaintiff to work in violation of the statute.

(*Id.*, 499, affirming liability for minor's injury; accord, *Teel v. Gates* (Okla. 1971) 482 P.2d 602; *Gabin v. Skyline Cabana Club* (1969) 54 N.J. 550, 553-555.) Moreover, courts began to adopt the view that customs and common practices in an industry not only served to impute knowledge and an opportunity for control to a business owner, but further proved that the custom or practice benefitted the owner. (*Purtell*, supra, 99 N.E. 899.)

(3) The IWC Continued Its Association With the Drafters of the National Model Rule

The IWC continued its close relationship with the early advocates of "suffer or permit". For example, in 1924, the IWC was supported before this court in litigation seeking to enjoin IWC operations, by an *amicus* brief prepared by Felix Frankfurter, then advisor to the Consumers' League (and Professor of Law at Harvard), and Mary Dewson, Research Secretary of the National Consumers' League.[24] (*Helen Gainer v. A.B.C. Dohrman, Katherine Philips Edson, et al.*, S.F. No. 10,990, BRIEF ON BEHALF OF AMICI CURIAE SUPPORTING RESPONDENTS' CONTENTION, June 9, 1924.)[25]

(4) California Has Enforced the IWC's "Suffer or Permit to Work" Standard Outside the Common-Law Employment Relationship

The Executive Branch, charged with enforcing wage orders, has acted upon the understanding that the IWC possesses authority to promulgate remedies and

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[24]Women continued to be the watchdogs for minimum wage. The *amici* represented by Frankfurter and Dewson included: The California Federation of Women's Clubs; The California League of Women Voters; United Garment Workers of America, Local No. 125 of Los Angeles; Waitress and Cafeteria Workers Union, Local No. 63, Los Angeles; The Women's Christian Temperance Union of Northern California; and The Women's Christian Temperance Union of Southern California. The brief is on file at the Robert Crown Law Library, Stanford Law School, Stanford University.

[25]The challenge to California's law arose as a result of the U.S. Supreme Court's 1923 decision in *Adkins v. Children's Hospital*, 261 U.S. 525 [43 S.Ct. 394], holding the District of Columbia's minimum wage law to be unconstitutional. This Court dismissed the *Gainer* case without decision upon the plaintiff's petition for dismissal alleging that she had been duped into bringing the suit. [IWC *FIFTH REPORT FOR THE BIENNIAL PERIODS July 1, 1922 to June 30, 1924 and July 1, 1924 to June 30, 1926*, at p. 18. (A true copy of the IWC FIFTH REPORT is filed with the Court in Martinez App., *supra*, at 1371.).]

corresponding liabilities more expansively than those provided by statutes, subject to explicit legislative overrule. Indeed, California's enforcement policy has been to apply the IWC *suffer or permit to work* employer definition outside the common-law employment relationships. (8 Ops.Cal.Att.Gen. No. 46-96 (Aug. 1946), pp. 59-60, concluding that Order 10's definition of "employ" as "engage, suffer, or permit to work" makes skating rinks liable as "employers" required to pay minimum wage to minor boys who worked at rinks for tips helping patrons buckle their skates although, "the boys do not report to management ... their hours are not controlled by management ... management keeps no records of these skate boys... [but i]t is obvious that under the facts stated the proprietor of the skating rink at least suffers or permits the minor child to work at the skating rink.")

F. "Suffer or Permit to Work" Is Subject to Reasonable Knowledge

(1) Liability Under "Suffer or Permit to Work" Extends to Those Who Reasonably Should Know of the Violation in Services Performed For Their Benefit

From its earliest application to labor-standards enforcement, the "suffer or permit" standard of liability has been recognized as imposing a "reasonable-care" duty. In 1912, the Illinois Supreme Court in affirming the liability for personal injuries suffered by a minor at a coal wharf, construed "permit or suffer to work":

> while the statute does not require employers to police their premises in order to prevent chance violations of the act, they owe the duty of using reasonable care to see that boys under the forbidden age are not suffered or permitted to work there contrary to the statute.

(*Purtell*, (Ill. 1912) *supra*, 256 Ill., at 117, *quoted and followed, Gorczynski* (Ill. 1949), *supra*, 83 N.E.2d, at 499.)

Six years later, Justice Cardozo, writing for the New York Court of Appeals, affirmed the liability of a dairy company for child labor law violations occasioned by its milk-delivery wagon drivers hiring children to watch the wagons despite company policy forbidding the practice. The statute prohibited *suffering or permitting* the employment.

> The employer ... is chargeable with the sufferance of illegal conditions by the delegates of his power. ... Not every casual service rendered by a child at the instance of a servant is "suffered" by the master. If a traveling salesman employed by a mercantile establishment in New York gives a dime to a boy of 13 who has carried his sample case in Buffalo the absent employer is not brought within the grip of the statute. Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge ...Whatever reasonable supervision by oneself or one's agents would discover and prevent, that, if continued, will be taken as suffered...

(*Sheffield Farms*, *supra*, 121 N.E., at 476.) Referring to the company's policy prohibiting the drivers from engaging the children, the court continued,

> ... [T]he defendant's duty did not end with the mere promulgation of a rule * * * * There was some duty of enforcement. The defendant was not blind to the fact that the rule was often broken. Word had often come to it before that some of its drivers were employing boys to help them ...The inference is permissible that there was no adequate system either of repression or of detection.

(*Id.*, at 475.) Thirty-seven years after its *Purtell* decision, the Illinois Supreme Court, applying "suffer or permit to work", again, concluded that the defendant race-track owner "knew or could have known by the exercise of reasonable care" that horse owners who boarded and raced horses at the track were hiring under-age children to cool down horses. (*Gorczynski*, *supra*, 83 N.E.2d, at 499.)

Custom gives rise to an inference that the principal knows or could know of the violations. The *Purtell* court found that "for many years there has been a custom, which must have been well known to those in charge of ... [the company's] yard, for the ... [workers] to employ a boy as a water carrier." (*Id.,* 256 Ill., at 114.) Rejecting the company's argument that the workers could have gone to the water hydrant themselves and therefore the company had no necessity of hiring a water-boy, the court observed,

> [i]t was therefore to the pecuniary interest of ... [the company] that a boy should be employed by someone to bring water to the men. The existence for years of such a custom of furnishing water is sufficient evidence that the method was considered by all the parties a reasonable and economical one.

(*Id.,* at 115.)

(2) However, Businesses Within the Reach of "Reason" Cannot Contract Away Their Potential Liability

While the reach or scope of the duty is within the confines of "reason," the extent to which the responsibility may be cast off or avoid is subject to a different consideration. (*Sheffield Farms*, *supra*, 121 N.E., at 475-476.) The business within the reach of "reasonable care" cannot escape liability by contracting it away. The duty becomes as absolute for the business as for the entity or person to whom it may have delegated responsibility for hiring the workers or having the service performed. As Justice Cardozo continued in *Sheffield Farms*,

> ... [The employer] must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. * * * He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated "his own power to prevent". * * * What is true of employment, must be true of the sufferance of employment. * * * The personal duty rests on the employer to inquire into the conditions prevailing in his business. He does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates. He must

> then stand or fall with those whom he selects to act for him...It is not an instance of respondeat superior. It is the case of the non-performance of a nondelegable duty.

(*Id.,* at 476.) Two years later, Judge Hand writing for the United States Court of Appeals for the Second Circuit, similarly concluded that the remedial purposes of wage statutes reflected a societal goal to preclude a principal's ability to contract away liability for wages.

> Such statutes are partial; they upset the freedom of contract, and for ulterior purposes put the two contesting sides at unequal advantage; they should be construed ... with some imagination of the purposes which lie behind them.

(*Lehigh Valley Coal, supra,* 218 F., at 553.) In considering the question of whether workers were independent contractors under the common-law test, as denominated in their service agreements, this Court has addressed the consequences of private-party contracts that displaced employee protections:

> The growers suggest that by signing the printed agreement after full explanations, the sharefarmers expressly agree they are not employees and conspicuously accept the attendant risks and benefits. However, the protections conferred by the Act have a public purpose beyond the private interests of the workers themselves. Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury...Of course, a worker's express or implied agreement to forego coverage as an independent contractor is "significant." * * * * However, where compelling indicia of employment are otherwise present, we may not lightly assume an individual waiver of the protections derived from that status.
>
> Moreover, there is no indication that Borello offers its cucumber harvesters any real choice of terms.

(*Borello, supra,* 48 Cal.3d, at 359.)

III. THE IWC'S INTENT IN PROMULGATING ITS ORDERS INCORPORATING "SUFFER OR PERMIT TO WORK" CONTROLS PRESENT APPLICATION OF THE ORDERS

This Court has emphasized that extraordinary judicial deference must be given to the IWC's authority and its wage orders, both in upholding their validity and in enforcing their specific terms. (*Martinez*, supra, at 60-61.)

> Consistently with these deferential principles of review, we have repeatedly enforced definitional provisions the IWC has deemed necessary, in the exercise of its statutory and constitutional authority * * * to make its wage orders effective, to ensure that wages are actually received, **and to prevent evasion and subterfuge**.

(*Id.* at 61-62, boldface added.) With specific reference to the IWC definition of "employ" – "to engage, suffer, or permit to work" adopted by the Commission in 1916, this Court has pronounced,

> We see no reason to refrain from giving the IWC's definition of "employ" its historical meaning. That meaning was well established when the IWC first used the phrase "suffer, or permit" to define employment and no reason exists to believe the IWC intended another. Furthermore, the historical meaning continues to be highly relevant today...

(*Martinez*, *id.,* at 69.) Amici have already demonstrated that the promulgating body's intent should be gauged by the meaning of the words and the historic circumstances at the time of adoption. Other states that adopted early "suffer or permit to work" statutes have continued to construe them in accord with the historic meaning of the test. (*Gorczynski*, *supra*, 83 N.E.2d 495; *Teel v. Gates*, *supra*, 482 P.2d 602 (continuing to apply the Oklahoma court's 1913 analysis of "suffer or permit articulated in *Curtis v. Gartside*, *supra, ante*; *Swift v. Wimberly* (1963)) 51 Tenn.App. 532 [370 S.W.2d 500]; *Smith v. Uffelman* (Tenn. 1974) 509 S.W.2d 229.

CONCLUSION

Amici have demonstrated that replacement of California's longstanding "suffer or permit" standard with the New Jersey Supreme Court's "ABC" test contradicts the plain language of the wage orders' "suffer or permit to work" definition of "employ" and equally contradicts both the IWC's intent in promulgating the wage orders and the California Legislature's intent in the Act creating the IWC. The "suffer or permit" standard must be construed in a manner that is consistent with its historical scope and meaning, and must at a minimum encompass individuals to whom a business owner owes a duty of reasonable care based on its knowledge of, and acquiescence in, the circumstances under which that worker is performing services for its benefit.

Respectfully submitted,

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PROOF OF SERVICE

I, Claudia Bogusz, declare as follows:

I am employed with the law offices of CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, whose address is 2210 K Street, Suite 201, Sacramento, California 95816. I am over the age of eighteen years and I am not a party to this action.

On January 17, 2018, I served the following documents: ***Dynamex Operations West, Inc. vs. Superior Court***, **No. S222732, SECOND SUPPLEMENTAL LETTER BRIEF** on the party(ies) listed below, addressed as follows:

SEE ATTACHED SERVICE LIST

___ By facsimile machine (FAX) by transmitting a true copy thereof via an electronic facsimile machine at the fax number(s) listed above.

_X_ By Golden State overnight delivery service by placing a true copy thereof in a Golden State overnight sealed envelope to the addressee(s) listed herein and placing the envelope in the firm's daily overnight delivery processing center for pick up by a Golden State overnight agent.

___ By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid to the addressee(s) listed herein and placing the envelope in the firm's daily mail processing center for mailing in the United State mail at Sacramento, California.

___ By personal service by delivering a true copy thereof to the addressee(s) listed herein at the location listed herein.

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

Executed on January 17, 2018 at Sacramento, California.

Claudia Bogusz

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