S.Ct. Case No.: S222732

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner and Defendant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
Respondent,

CHARLES LEE and PEDRO CHEVEZ, individually, and on behalf of all others similarly situated,
Plaintiffs and Real Parties in Interest.

After Decision by the Court of Appeal
Second Appellate District, Div. Seven (B249546)

Superior Court of Los Angeles County (BC332016)
Hon. Michael L. Stern

ANSWERING BRIEF ON THE MERITS

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Real Parties in Interest

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Plaintiffs and Real Parties in Interest, CHARLES LEE and PEDRO CHEVEZ, individually, and on behalf of all others similarly situated ("Real Parties"), hereby file this Answering Brief on the Merits in response to the Opening Brief filed by Defendant and Petitioner, DYNAMEX OPERATIONS WEST, INC. ("Dynamex").

I.

INTRODUCTION

Misclassification of entire corporate workforces as independent contractors is found in an increasing number of workplaces in California, as business seek to bypass the regulations and costs associated with properly employing people. Cynically comparing these workforces to "entrepreneurs," those businesses turn authentic independent contractor relationships on their head: instead of a contractor starting a business and then seeking out customers, the "customer" in misclassification cases such as this one creates the independent contractor in a fashion tailored to fit the customer's exclusive needs. Such misclassification or "restructuring" of labor is most often associated with businesses (like Dynamex, in this case) which require a large workforce of unskilled labor to perform an integral part of their production of goods or provisioning of services, and has gained dubious prominence in the parcel delivery industry.

Consequently, the timing of this Court's recent decision in *Martinez v. Combs* (2010) 49 Cal.4th 35 could not have been more relevant. Indeed, although many companies had specifically designed their "independent contractor" operations (like incorporation "kits") to avoid classwide scrutiny under the traditional common law test of employment, *Martinez* identified the Industrial Welfare Commission ("IWC") wage orders as another source for evaluating employment – one that was broader than the common law – specially designed to pierce through subterfuge and to reach "irregular working arrangements."

Subsequently, this Court in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522 then revisited the common law definition of the employee relationship under the factors it previously announced in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341. In doing so, it clarified that the predominant indicia of employment under that test – the right to control – should focus more on an employer's right to exercise control over its workforce than on variations in how that right is exercised, given that many tasks (like delivering a newspaper or a parcel) do not require detailed control.

In light of those two landmark decisions, this Court has now granted review to consider the following issue:

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

The simple answer is that *both* tests remain viable, and may be applied depending upon the circumstances presented and the claims asserted. As the Court of Appeal concluded below, the trial court correctly allowed Real Parties to rely on the IWC's definition of an employment relationship for purposes of those claims falling within the scope of Wage Order No. 9-2001 ("Wage Order No. 9"; see Cal. Code Regs., tit. 8, § 11090.) With respect to any claims which may theoretically fall outside the scope of Wage Order No. 9, the Court of Appeal further observed (without deciding) that the common law "*Borello* factors" test will control, as that test was subsequently refined by this Court's recent decision in *Ayala*. That application of both the "Wage Order test" and the "*Borello* factors test" properly recognizes the broadly delegated role the Legislature intended the IWC and its wage orders to occupy in regulating the employment relationship in California, while also allowing well-developed

common law standards to remain relevant in defining that relationship where no wage order is implicated.

Accordingly, Real Parties discuss below why the Court of Appeal properly determined that both tests remain viable, but further explain why *only the Wage Order test need be applied in this case.* They further detail how it is the nature of the claims presented, and whether or not a wage order is associated with those claims, which determines which test of employment should be applied. Where no wage order is connected with those claims, Real Parties further clarify how this Court should approve the use of the *Borello* factors common law test, as further clarified by this Court in *Ayala.* Finally, Real Parties illustrate how, in any event, whether the Wage Order test of *Borello* factors test is utilized, the Court of Appeal's decision upholding certification of the Real Parties' wage and hour claims was fundamentally correct and should be affirmed by this Court. Accordingly, Real Parties respectfully request this Court to affirm the Court of Appeal's ruling in this matter and to remand the case back to the trial court for a determination on the merits of their certified claims.

II.

RELEVANT FACTS AND PROCEDURAL HISTORY

A. Background Facts.

As the Court of Appeal previously recognized in its first opinion in this case, Dynamex is a nationwide courier and delivery service, which has operated in California since 1995 through its wholly-owned subsidiary entities, using Real Party drivers to make deliveries of packages, letters, and parcels to Dynamex customers. (See *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1329-1330.) In 1995, Dynamex expanded its operations into California, and at that time, operated four facilities in California: La Mirada, Hayward, Sacramento, and San Diego. (*Ibid.*)

As alleged by Real Parties, as late as April of 2001, Dynamex employed approximately 810 drivers in California, considering and compensating them as its "employees." (*Ibid.*) But in December of 2004, Dynamex management decided to unilaterally change that employment relationship. (*Ibid.*) Specifically, Dynamex – without first undertaking any analysis or study to determine whether its drivers (the Real Parties), in light of their duties, could be properly reclassified under California law – "converted" all of its employee drivers to "independent contractors." (*Ibid.*)

Notwithstanding that change in label, Real Parties contend that after they were reclassified by Dynamex as "independent contractors," they have, as a practical matter, continued to perform the very same tasks as when Dynamex classified them as "employees," with no substantive change in the means of performing their duties or the level of control exerted by Dynamex over their work. (Exh. 20.)[1]

Indeed, under that new regime, Dynamex continues to utilize Real Parties to service either fixed or dedicated Dynamex-designated routes, and to be available for "on-demand" pickups and deliveries to and from Dynamex customers. (*Ibid.*; see also *Lee, supra,* 166 Cal.App.4th at 1329-1330.) Specifically, for fixed routes, Real Parties are assigned a route by Dynamex and service that route for either a flat-fee or for a set amount per package picked-up and delivered. (*Lee, supra,* 166 Cal.App.4th at 1329-1330.) For on-demand work, Real Parties maintain contact with Dynamex via a required cellular phone and are assigned work by Dynamex dispatchers. (*Ibid.*) For either set-routes or on-demand work, Real Parties perform pick-ups and deliveries to Dynamex customers, as assigned and according to Dynamex requirements, using their personal vehicles, wearing Dynamex uniform shirts

[1] Factual references in this brief are to the 24 volumes of exhibits Dynamex filed with its writ petition, abbreviated as follows: ([Exh. number] at [Bates-stamped page number]; and to the Court of Appeal's Slip Opinion, abbreviated as follows: (Opn. at [page].)

and badges, and maintaining contact with Dynamex dispatchers via their specifically required cellular telephones, for which Real Parties must pay the costs of obtaining that phone service. (*Ibid.*) Further, Dynamex establishes the rates for its customers serviced by Real Parties, such that Real Parties have no control over the price charged to Dynamex customers for the pick-up or delivery services they perform on behalf of Dynamex. (*Ibid.*)

As previewed above, the economic advantage Dynamex enjoys by this scheme is purely economic. For example, Dynamex requires Real Parties to use their personal vehicles in rendering services and does not provide reimbursement for any of the miles driven by drivers in the performance of their duties. (Exh. 20 at 1739.) Further, Real Parties are required to obtain their own policies of vehicle insurance coverage, as well as occupational and accident insurance of a type specified by Dynamex and provided by an affiliated third-party entity, the National Independent Contractor's Association ("NICA"), which Dynamex then requires all Real Parties to join and to pay its dues. (*Lee, supra,* 166 Cal.App.4th at 1329-1330.) NICA, and later Dynamex, issues "settlement checks" as payment for work performed by Real Parties which contain no itemization of hours worked, rates of pay, or any detail as to how the "commission" sum was calculated. (*Ibid.*)

Real Parties also contend that they cannot practically refuse work assigned by Dynamex and can face discipline or "blackballing" if they attempted to do so, despite Dynamex's "official" policy to the contrary. (*Ibid.*) Further, Real Parties are expected to work a particular time or route and to maintain contact with Dynamex during their "on-time" so as to be available for additional work from Dynamex and provide Dynamex with status of work already being performed. (*Ibid.*) Notably, Real Parties may be terminated by Dynamex without notice, and for any or no reason. (*Ibid.*)

B. Real Parties' Claims in the Respondent Court.

On April 15, 2005, Real Parties filed a class action lawsuit against Dynamex to address what they characterize as "a systematic course of conduct" by Dynamex, including illegal employment practices and policies in violation of the IWC's Wage Orders, the California Labor Code, the California Business and Professions Code, and the public policy of the State of California. (Exh. 1.)

Specifically, Real Parties alleged that as late as 2004, they were properly considered to be Dynamex's employees, subject to well-established rights, benefits and protections under California law. (Exh 1; see also Exh. 20 [Real Parties' operative Second Amended Complaint].) However, in an effort to illegally shift its costs of doing business to those employees, Real Parties

contended that Dynamex unilaterally decided to reclassify its employees as "independent contractors" in order to avoid: (a) maintaining or paying for Workers' Compensation Insurance for the protection of Real Parties; (b) paying overtime premium pay to Real Parties for hours worked in excess of eight per day or forty per week; (c) paying the employer's share of payroll taxes for Real Parties, as required by federal and state law; (d) reimbursing Real Parties for the costs they incur for vehicle expenses, tolls, parking, insurance or other expenses incurred in direct consequence of the discharge of their duties; (e) paying any share of the cost of medical or other health insurance for Real Parties, while paying such costs for its other employees; (f) providing or paying for State Disability Insurance for Real Parties, although, again, it did so for its other employees; and (g) paying Real Parties the California minimum wage for all hours worked. (*Ibid.*)

Real Parties further contended that Dynamex requires all of them to enter into a contract or agreement with NICA for the primary purpose of creating and maintaining the illusion of an arms-length relationship between Dynamex and Real Parties to enable Dynamex to claim that Real Parties are properly classified as "independent contractors." (*Ibid.*)

Real Parties' operative complaint sounded in five causes of action, all of which they allege are proper for class treatment:

- **First Cause of Action:** Unfair business practices in violation of California Business and Professions Code Section 17200;
- **Second Cause of Action:** Unlawful business practices in violation of California Business and Professions Code Section 17200;
- **Third Cause of Action:** Failure to pay overtime compensation, in violation of California law;
- **Fourth Cause of Action:** Failure to provide properly itemized wage statements, in violation of California law; and
- **Fifth Cause of Action:** Failure to compensate for business expenses, in violation of California law. (Exh. 20.)

On that basis, Real Parties sought monetary damages, statutory damages and penalties, injunctive relief, and restitution. (*Ibid.*)

C. Class Proceedings in the Respondent Court.

Dynamex's Opening Brief lays out the basic chronology of events leading up to the Respondent Court's most recent denial of Dynamex's *second* motion to decertify the class. Consequently, a long overview of the procedural history will be omitted here. Suffice it to say that Dynamex has repeatedly attempted to block class certification, and to decertify any class the Respondent Court has certified.

Specifically, the Respondent Court initially granted class certification in July of 2009 for the benefit of over 1,800 putative class members. (Exh. 34; Exh. 59 [internal exhibits 1-2]; see also Exh 71 at 6542-6545.) As a result of a mutually agreed, jointly drafted, and court-ordered questionnaire process, a total of 279 drivers returned questionnaires. (*Ibid.*) The parties then further agreed that 50 drivers did not qualify as class members for various reasons, 186 drivers did qualify as class members based on their questionnaire responses, and there was a dispute about the status of another 45 drivers. (*Ibid.*) The Respondent Court ultimately resolved class membership issues on October 31, 2011, with all 45 disputed drivers determined to be class members based on their questionnaires. (*Ibid.*)

In the interim, Dynamex brought its first motion to decertify the class in December of 2010. (*Ibid.*) On February 9, 2011 the Respondent Court granted that motion to decertify, but vacated it and ordered the decertification motion and the Real Parties renewed motion to certify to be heard on April 4, 2011. (*Ibid.*) Following a short continuance, on May 18, 2011, the Respondent Court denied that decertification motion and again granted class certification with a modified class definition. (*Ibid.*) In doing so, the Court found that the proposed class was ascertainable, there was sufficient numerosity such that individual joinder was impracticable, and Real Parties were typical class

members and adequate class representatives. (Exh. 71 at 6549-6566.) The Respondent Court also found that common issues predominate, and cited this Court's decision in *Martinez* as providing further definitional guidance on the common issue of whether Real Parties were Dynamex's employees. (*Ibid.*)

Notably, Dynamex did not seek writ review of that class certification order, but instead moved yet again to decertify the class. The last such motion, denied by the Respondent Court on April 22, 2013, served as the basis for Dynamex's writ petition to the Court of Appeal. (See Exh 82.)

D. The Court of Appeal's Opinion.

After initially issuing an order to show cause why the Respondent Court should not be compelled to vacate its order denying the motion to decertify the class, the Court of Appeal ultimately granted Dynamex's writ petition only in part. (Opn. at 3.) Specifically, it concluded that the Respondent Court correctly allowed Real Parties to rely on the IWC's definition of an employment relationship for purposes of those claims falling within the scope of Wage Order No. 9-2001 (Wage Order No. 9). (*Ibid.*) With respect to any additional claims theoretically falling outside the scope of Wage Order No. 9, the Court of Appeal held that the common law *Borello* factors definition of employee should control, and as to those claims, remanded the matter to allow the Respondent Court to reevaluate more closely the nature of those claims and

whether, in light of this Court's interim decision in *Ayala,* class certification remains appropriate for those other claims under that refined common law test. (*Ibid.*)

In reaching that decision, the Court of Appeal first undertook a careful and detailed review of the common law *Borello* factors test traditionally used to define the employment relationship, and the refinements made to that test by this Court's subsequent decision in *Ayala*. (Opn. at 7.) In doing so, the Court of Appeal recognized that this Court in *Ayala* had previously sought supplemental briefing discussing the relevance of its decision in *Martinez* and the impact, if any, of IWC Wage Order No. 1-2001 to the class certification issues raised in *Ayala*. However, it also noted how this Court in *Ayala* ultimately declined to address that issue and resorted instead to the common law *Borello* factors test because the plaintiffs in *Ayala* had proceeded under that common law test in seeking class certification. (Opn. at 8, citing *Ayala, supra,* 59 Cal.4th at 531.)

The Court of Appeal next analyzed this Court's discussion of the Wage Order test discussed in *Martinez*. (Opn. at 8-12.) It observed how this Court in *Martinez*: (1) "discussed at length the impact of the IWC regulatory scheme on whether an employment relationship had arisen"; (2) "made clear that IWC wage orders are to be accorded the same weight as statutes"; and (3) confirmed

that "the applicable wage order defines the employment relationship for wage and hour claims within its scope." (Opn. at 9, citing *Martinez, supra,* 49 Cal.4th at 52, 61.) That discussion in *Martinez* was further buttressed by this Court's previous analysis in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, where it had reiterated the delegated authority the IWC uniquely enjoys "to investigate various industries and promulgate wage orders fixing for each industry minimum wages, maximum hours of work, and conditions of labor." (Opn. at 9, citing *Brinker, supra,* 53 Cal. 4th at 1026.) This is so even though the Legislature defunded the IWC in 2004, as its 18 wage orders remain in full force and effect in 16 distinct industries or occupations, along with one general minimum wage order, and one order implementing the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. (Opn. at 10, fn. 8, citing *Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 667, fn.3.) Thus, in light of *Martinez's* very clear directive that limiting plaintiff-employees to the common law *Borello* factors test where a wage order is implicated would "impair the commission's authority and effectiveness of its wage orders," the Court of Appeal correctly concluded that the Wage Order test could be applied to at least a portion of the Real Parties' class claims. (Opn. at 11-12.) Indeed, as this Court emphasized in *Martinez* – and as was further recognized by the Court of Appeal – "[w]ere we to define

employment exclusively according to the common law in the civil actions for unpaid wages we would render the commission's definitions effectively meaningless." (Opn. at 11, citing *Martinez, supra,* 49 Cal.4th at 65.) As such, the Court of Appeal permitted the Wage Order test for employment to be utilized for Real Parties' claims arising under Wage Order No. 9 consistent with the IWC's broad regulatory authority and the definitional standards it has adopted to exercise that authority, both of which extend well beyond the confines of the common law. (See also Opn. at 11-12 [further observing how "*Martinez,* in effect, fills the gap between the common law employer-focused approach and the need for a standard attuned to the needs and protection of employees," especially where the IWC Wage Orders "provide an employee-centric test gauged to mitigate the potential for employee abuse in the workplace . . . ."]; *id.* at 12 [where the Court of Appeal further recognized this Court's unmistakable admonition in *Martinez* that "[f]or a court to refuse to enforce such a provision in a presumptively valid wage order simply because it differs from the common law would thus endanger the commission's ability to achieve its statutory purposes"].)

It was on those related bases that the Court of Appeal also rejected Dynamex's rhetorical argument that under the Wage Order test, no independent contractor relationship could exist in California. (Opn. at 12-13.) It further cited to numerous cases – most notable *Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129 – where certification of a class of telecommunication workers was upheld under either the *Borello* factors test or the Wage Order test. (*Ibid.*) The Court of Appeal further concluded that Dynamex had failed to demonstrate that *Martinez's* discussion and analysis of the Wage Order test was simply limited to determining whether an entity is a joint employer, as "nothing in [*Martinez*] supports a limitation of this nature; and, as the foregoing discussion demonstrates, no other court has adopted it." (Opn. at 16, fn. 14.)

Accordingly, the Court of Appeal granted Dynamex's writ petition only as to those claims asserted by Real Parties which might theoretically fall outside the wage orders, and as to those claims, remanded the matter back to the Respondent Court for reevaluation of the nature of those claims. In all other respects, it denied Dynamex relief. (Opn. at 18.)

III.

DISCUSSION

A. The Problem: The Rising Tide of Misclassification of Employees as Independent Contractors.

1. The Financial Incentives to Misclassify.

Businesses which require a large workforce of relatively unskilled workers to operate are incentivized to misclassify those workers as independent contractors to avoid several employment-related obligations and thereby save on labor and administration costs, often the highest component of their operating overhead. For example, independent contractor misclassification enables those businesses to avoid mandatory payroll taxes, including the employers' half of the Social Security pension contribution and Medicare tax, which nationwide totaled 15.3% of gross wages for 2013 and 2014. Additionally, those employers avoid paying both state and federal unemployment insurance taxes because independent contractors are not considered employees and thus are not covered by the unemployment insurance system unless they affirmatively appeal and win coverage as employees.[2]

[2] See, generally, Reif, *To "Suffer or Permit to Work": Did Congress and State Legislatures Say What They Meant and Mean What They Said?* (2014) 6

Businesses that misclassify their workforce also avoid legally required workers' compensation insurance and state mandates concerning that coverage, as well as disability insurance. Workers' compensation and disability programs vary across states, so the cost that employers seek to avoid varies as well. However, where workers' compensation premiums for individual employers and specific jobs are affected by injury frequency and severity, some industries have a greater stake in avoiding premiums (and workplace and disability-related disputes) and therefore have a higher incidence of misclassification than others.

But perhaps most relevant to this case is the fact that employers who misclassify their workforce avoid the reach and scope of California's labor laws, meant to protect the wages and working conditions of employees in the state. This includes regulation of wages and hours worked, meal and rest breaks, payroll documentation and reporting, and expense reimbursements, among many others. Indeed, sophisticated employers who misclassify their workforce can operate outside California's labor restrictions by dictating highly advantageous terms and conditions of employment based upon

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Northeastern Univ. L.J. 347 (No. 2); Carre, *Independent Contractor Misclassification*, a report for the Economic Policy Institute (June 8, 2015): http://www.epi.org/publication/independent-contractor-misclassification/; *Cf.* United States Department of Labor (Wage and Hour Division) Administrator's Interpretation No. 2015-1 (July 15, 2015).

"independent contractor" contracts which they alone draft, propose, and require to be accepted without negotiation as a condition of offering employment to unskilled or uneducated workers. Those workers typically lack economic and bargaining leverage and therefore often feel that they have no choice but to agree to those onerous terms and conditions in order to work. Yet misclassifying employers facetiously applaud those contractual arrangements as providing "entrepreneurial opportunities," even though those same workers otherwise do not operate independent businesses of their own.

2. The Legal and Economic Impacts of Misclassification.

The costs of employee misclassification to tax, social insurance systems, and to workers add up. Businesses that misclassify fail to pay mandatory payroll taxes, Social Security and Medicare (FICA), unemployment insurance, and workers' compensation insurance. Instead, the purported "independent contractor" is made wholly responsible for the full FICA tax, rather than half. (Carre, *supra*, *Independent Contractor Misclassification.*) That loss of billions of dollars in tax revenue alone creates a significant financial burden for local, state, and the federal governments, not only due to lost revenue but also because of the added cost of providing social services to uninsured workers. (*Ibid.*)

Competing businesses also are harmed by the practice of worker misclassification. Law-abiding firms that pay their taxes and properly classify their workers as employees face a competitive disadvantage and may feel pressured to cut corners with their workers' employment status if they wish to remain competitive. Indeed, employers who play by the rules and comply with all employment laws lose when they are underbid by others who have lowered their labor costs by shedding workers and avoiding mandated payroll taxes and compliance with wage and hour laws. (*Ibid.*) Thus, the proliferation of misclassification in some industries further incentivizes competitors to engage in a perverse "race to the bottom" to also misclassify their workforce so they can compete in an increasingly price-sensitive marketplace. (*Ibid.*)

B. The Evolution of Common Law Standards Developed to Address Rampant Misclassification.

1. *Borello* and Its Progeny.

In *Borello*, this Court examined whether a group of migrant "share farmers" were employees for workers' compensation purposes despite an apparent absence of direct supervision and a written agreement purporting to make them "independent contractors." (*Borello, supra,* 48 Cal.3d at 351.) In doing so, this Court re-examined the traditional common law test of employment, noting that it had primarily evolved to delineate principals'

vicarious liability for the tortious acts of their workers. (*Id.* at 350.) Within that developmental context, the main focus was on the degree of "supervisory power" possessed by the principal; that is, the principal's "right to direct the details of the work" or to assert "complete and authoritative control of the mode and manner in which the work is performed." (*Ibid.*) In other words, as *Borello* observed, "[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them." (*Ibid.*)

In revisiting that test, however, the *Borello* court held that the common law conception of "control" was far too restrictive and "often of little use" in evaluating "the infinite variety of service arrangements" where direct control is not common or necessary. Indeed, *Borello* reasoned that in those circumstances, direct control of the details of the work need not be shown, so long as the principal retains pervasive control over the operation as a whole, and the worker's duties are an integral part of the operation. (*Borello, supra,* 48 Cal.3d at 355-358.) Finding that the grower in that case maintained that sort of pervasive control over the entire cucumber growing and harvesting enterprise, the *Borello* court warned:

> A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks "control" over the exact means by which one such step is performed by the responsible workers. (*Id.* at 357.)

Additionally, while examining other "secondary" factors, this Court in *Borello* further emphasized that: (a) "strong evidentiary support of the employment relationship is the right of the employer to end the service whenever he sees fit to do so" (*id.* at 350); (b) the permanence of the relationship the grower had with the workers (*i.e.,* many returned every year to form an integral part of the grower's enterprise) was also "strong indicator" that the workers were employees and not "independent contractors" (*id.* at 357); and (c) the contract which purported to make the workers "independent contractors" was offered by the grower on a "take it or leave it" basis, with no real opportunity to negotiate terms. (*Id.* at 358-359.) Accordingly, with those factors properly framed, the *Borello* court had little difficulty concluding that the workers were employees and not "independent contractors." (*Id.* at 360.)

In the wake of *Borello*, several Court of Appeal decisions have applied its more expansive definition of "control" to find – in a variety of contexts – that workers labeled by their principals as "independent contractors" were instead employees, especially where the work in question did not by its nature require detailed control, and the principal maintained pervasive control over

the entire enterprise. (See, *e.g., Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1298-1299 [where the First District found that "lease agreements" with cab drivers did not make them independent contractors, but were a mere "subterfuge" to avoid California's workers' compensation law in light of their employers' pervasive control over their work]; accord *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363 [where the Sixth District also applied *Borello's* expansive definition of "control" to reach a similar result]; see also *Waggener v. County of Los Angeles* (1995) 39 Cal.App.4th 1078, 1082-1083 [where the Second District held that although County does not, and cannot, exercise control over juror's ultimate work product (that is, the deliberative process), County does exercise pervasive control over the entire jury operation, thereby making jurors "employees" under the Workers' Compensation Act]; *Gonzalez v. WCAB* (1996) 46 Cal.App.4th 1584, 1592-1594 [where the Second District reasoned that newspaper delivery workers who worked daily delivery routes were employees, even where there was no control of the details of their work, given their permanent integration into their principal's core business and their principal's pervasive control over that delivery operation]; *Ware v. Workers' Comp. Appeals Bd.* (1999) 78 Cal.App.4th 508, 514-515 [where the Second District found golf caddies to be employees and not independent

contractors, even where Golf Club members directed caddies on the golf course, but Golf Club retained pervasive control over caddie operations as a whole, and caddying services was an integral part of Golf Club's business].)

Moreover, a recent spate of decisions has only reinforced *Borello's* more expansive definition of "control" in the relevant parcel delivery industry. For example, in *JKH Enterprises v. Dept. of Industrial Relations* (2006) 142 Cal.App.4th 1046, the Sixth District affirmed that the appellant, AAA Courier (a Bay Area courier service) had misclassified its drivers as "independent contractors" and had therefore failed to procure workers' compensation coverage for them. (*JKH Enterprises, supra,* 142 Cal.App.4th 1046, 1064-1065.) It did so finding that the delivery functions of the drivers – although not controlled in detail by AAA Courier – constituted an integral part of the entire delivery enterprise, over which AAA Courier retained pervasive control. (*Ibid.* ["the functions performed by the drivers, pick-up and delivery of papers or packages and driving in between . . . constituted the integral heart of JKH's courier service business. By obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all *necessary* control over the operation as a whole"] [emph. in orig.].)

Similarly, in *Air Couriers International v. Employment Devel. Dept.* (2007) 150 Cal.App.4th 923, the Third District ruled that drivers who worked for another parcel delivery business ("Sonic") should be considered employees, notwithstanding some indicia of an independent contractor relationship. Notably, in making that finding, the *Air Couriers* court rejected Sonic's contention that the standards established in *Borello* are only relevant to determining coverage under the Workers' Compensation Act and do not apply in other contexts, where the policy concerns behind the Act are not present. (*Air Couriers, supra,* 150 Cal.App.4th at 932-937.) It then concluded that the nature of Sonic's delivery operation did not make detailed control of its drivers necessary. (*Id.* at 937 ["take this package from point A to point B"].) Yet, as Sonic maintained pervasive control over its overall delivery operation, had a long term working relationship with its drivers (most of whom worked regular schedules), and the drivers performed "an integral and entirely essential aspect of Sonic's business," *Air Couriers* found that drivers were improperly classified by Sonic as "independent contractors." (*Id.* at 937-939.)

And in *Estrada v. Fedex Ground Package Systems, Inc.* (2007) 154 Cal.App.4th 1, the Second District similarly opined that FedEx had misclassified its drivers through an elaborate "independent contractor" program in an attempt to escape reimbursement for work-related expenses. Despite an

Operating Agreement purporting to make all drivers "independent contractors" and FedEx's contention that its drivers had the opportunity to earn more or less based upon their own management skills, the *Estrada* court correctly confirmed that the drivers were "wholly integrated into FedEx's core operation." (*Estrada, supra,* 154 Cal.App.4th at 9 ["the drivers look like FedEx employees, act like FedEx employees, are paid like FedEx employees, and receive many employee benefits"]; see also *id.* at 9 (where the trial court characterized FedEx's Operating Agreement as "a brilliantly drafted contract creating the constraints of an employment relationship with the drivers in the guise of an independent contractor model"].) Applying *Borello*, the Second District in *Estrada* then reasoned that as FedEx retained pervasive control over its entire delivery enterprise (*i.e.,* customers receiving the packages were FedEx's customers and not the drivers', the drivers were terminable at will, worked regular schedules, were paid weekly [and not by the job], and had no "true entrepreneurial opportunity depending on how well they performed"), the trial court correctly found them to be FedEx's employees. (*Id.* at 11-12.)

2. The Need for Further Clarity Regarding the True Meaning of *Borello's* "Right to Control" Criterion.

As the foregoing decisions illustrate, *Borello* and its progeny have emphasized the primacy of the employer's "right to control" criterion as being the most important factor in evaluating the existence of an employment relationship. Yet that singular focus on control – untethered to *Borello's* equally critical amplification of what that factor means where "control over details" is not part of the job description – has created an opportunity for misclassifying employers and confusion for the lower courts. Indeed, perhaps presaging the need for this Court's later decision in *Ayala* (discussed in more detail below), misclassifying employers, knowing that control is the most important indicia in the *Borello* factors test, intentionally structure their relationships with their workforce (usually through one-sided "independent contractor agreements") to avoid detailed control. This is done with particular ease in certain industries (like the parcel delivery industry) where detailed control of the worker's activities is not required to complete the core functions of the job. (See *Air Couriers, supra,* 150 Cal.App.4th at 937 ["take this package from point A to point B"].)

For example, in *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, another misclassification case in the parcel delivery industry, one of the main contentions on appeal was whether the jury was properly

instructed on the *Borello* factors test. Specifically, in light of the absence of a standardized CACI jury instruction on that issue, the parties contested whether it was sufficient to instruct the jury under *Borello* that "[t]he most important factor to consider is the extent to which the Defendant has the right to control *the details of the work performed*" without also providing the jury with *Borello's* further admonitions that "detailed control" is nevertheless not required where the nature of the work performed does not require that level of control. (*Cristler, supra,* 171 Cal.App.4th at 85-87 [emph. added].) The plaintiff-drivers further asserted that the jury was misled by that incomplete instruction in light of the defendant's arguments that because it does not exercise control over the details of how those drivers delivered the parcels in question, the jury should find those drivers were independent contractors merely exploiting "entrepreneurial opportunities." The Fourth District agreed with the defendant, dismissing the driver's challenge to the incompleteness of that *Borello* factors instruction as merely a "nuanced critique," and rejecting their contention that to put *Borello's* "control over details" formulation in its proper context, the jury should have also been instructed how "pervasive control over its operation as a whole," or the drivers' "permanent integration" into that operation, was sufficient under *Borello* to demonstrate the requisite level of "control." (*Id.* at 87; see also *Borello, supra,* 48 Cal.3d at 355-358.)

Consequently, by approving a *Borello* factors instruction which merely emphasized the importance of a principal's "right to control the *details* of the work performed," the Court of Appeal in *Cristler* highlighted and legitimized a conception of "control" which had little or no relevance in both *Borello* and in *Cristler*, given that "control over the *details* of the work performed" was neither necessary for the share farmers to perform their job in *Borello*, nor for the drivers to deliver their packages in *Cristler*.

While *Cristler's* articulation of the *Borello* factors test – reflecting a retreat back to the old common law tort-based "control over details formulation" actually rejected in *Borello* – could be cynically viewed as an outlier, it instead has further encouraged misclassifying employers to argue that in the absence of detailed control, their worker are necessarily independent contractors. Again, that argument has particular allure in employment situations where the nature of the work in question – such as the delivery of parcels – does not require that level of control. Thus, it was hardly surprising that subsequently in *Alexander v. FedEx Ground Package System, Inc.* (9th Cir. 2014) 765 F.3d 981, FedEx contended that a Multi-District Litigation ("MDL") panel had correctly ruled that its drivers were independent contractors "as a matter of law" because under *Borello*, FedEx did not control the "details" and the "manner and means" by which those drivers delivered

parcels for FedEx. (*Alexander, supra,* 765 F.3d at 990-991.) Specifically, FedEx highlighted several aspects of its drivers' work that it did not control, including that it did not require drivers to follow specific routes or to deliver packages in a specific order, and it did not require drivers to follow managers' recommendations after ride-along evaluations. (*Ibid.*) In essence, FedEx argued what every misclassifying employer in the parcel delivery industry has argued: its drivers are independent contractors because it controls them only with respect to the *results* it seeks, not the *manner and means* in which its drivers achieve those results. (*Id.* at 990.) It further lauded how that lack of control over details provides drivers with concomitant "flexibility and entrepreneurial opportunities that no 'employee' has." (*Id.* at 991-992.)

However, unlike the Fourth District in *Cristler*, the Ninth Circuit in *Alexander* looked beyond that "control over details" benchmark, recognizing that a number of decisions applying *Borello* in the parcel delivery industry had instead utilized an "all necessary control" test precisely because the delivery of parcels does not require detailed control. (*Ibid.*, citing the *JKH Enterprises, Air Couriers,* and *Estrada* decisions.) The *Alexander* court further noted that an "all necessary control" analysis was more consistent with *Borello's* holding that although the share farmers in that case had significant autonomy over the harvest itself, the grower retained "all necessary control over the harvest

portion of its operations," leading *Borello* to conclude they were employees as a matter of law. (*Alexander, supra,* 765 F.3d at 991.) And finally, *Alexander* observed that "all necessary control" formulation of the *Borello* factors control criterion was later clarified and adopted by this Court in *Ayala,* 59 Cal.4th at 531.)

In short, while the common law *Borello* factors test has demonstrated incredible resiliency and adaptability to different scenarios and industries, it remains susceptible to inconsistent application on the critical issue of control. As this Court would later observe in *Ayala*, it is the right to exercise control, and not variations in the manner in which that right is exercised, which most accurately define *Borello's* control criterion. (*Ayala, supra,* 59 Cal.4th at 535-536.) Yet the fact that this Court even found it necessary to take up the *Ayala* decision so it could make that clarification – one which *Borello* itself articulated 25 years previously – only further demonstrates the variability (and vulnerability) of the *Borello* factors test, and how it is still being both manipulated by employers and misapplied by the lower courts.

C. The Regulatory Role of the IWC and the Wage Orders.

1. The Creation of the IWC and the Continued Vitality of Its Wage Orders.

By statute passed by the Legislature in 1913, the IWC was created and delegated the power to fix minimum wages, maximum hours of work, and standard conditions of labor. (Stats. 1913, ch. 324, § 13, p. 637.) The statute creating the IWC "joined a wave of minimum wage legislation that swept the nation in the second decade of the 20th century." (*Martinez, supra,* 48 Cal.4th at 53.) No state's law provided for a minimum wage before 1912. By the end of 1913, however, nine states had enacted such laws, motivated by widespread public recognition of the low wages, long hours, and poor working conditions under which women and children often labored. (*Ibid.*) Although those states would take a variety of approaches to the problem, California went much further than most by directing commissions to study labor conditions and to set minimum wages based on the cost of living, and by making the failure to pay the minimum wage a crime." (*Ibid.*)

Following those studies, the 1913 legislation that created the IWC delegated to it "broad authority to regulate the hours, wages and labor conditions of women and minors," and proposed to voters "a successful constitutional amendment confirming the Legislature's authority to proceed in

that manner." (*Id.* at 54.) As further summarized by this Court in *Martinez,* "[t]he IWC's initial statutory duty under the 1913 act was to 'ascertain the wages paid, the hours and conditions of labor and employment in the various occupations, trades, and industries in which women and minors are employed in the State of California, and to make investigations into the comfort, health, safety and welfare of such women and minors.' (Stats. 1913, ch. 324, § 3, subd. (a), p. 633.) To assist the IWC in this work, the Legislature gave the commission broad investigatory powers, including free access to places of business and employment (*id.*, § 3, subd. (b), par. 2, p. 633), as well as the authority to demand reports and information under oath (*id.*, § 3, subd. (b), par. 1, p. 633), to inspect records (*id.*, § 3, subd. (b), par. 2, p. 633), and to issue subpoenas requiring the appearance and sworn testimony of witnesses (*id.*, § 4, pp. 633-634). If, after investigation, the IWC determined that the wages paid to women and minors in any industry were 'inadequate to supply the cost of proper living, or the hours or conditions of labor [were] prejudicial to the health, morals or welfare of the workers,' the IWC was to convene a 'wage board' of employers and employees. (*Id.*, § 5, p. 634.) Based on the wage board's report and recommendations, and following a public hearing, the commission was to issue wage orders fixing for each industry '[a] minimum wage to be paid to women and minors . . . adequate to supply . . . the necessary

cost of proper living and to maintain [their] health and welfare' (*id.*, § 6, subd. (a), par. 1, p. 634), the maximum hours of work, and the standard conditions of labor (*id.*, subd. (a), pars. 2-3, pp. 634-635)." (*Martinez, supra,* 48 Cal.4th at 54-55.)

As further summarized by this Court in *Martinez,* "[t]oday, the laws defining the IWC's powers and duties remain essentially the same as in 1913, with a few important exceptions: First, the voters have amended the state Constitution to confirm the Legislature's authority to confer on the IWC '*legislative, executive, and judicial powers.*' (Cal. Const., art. XIV, § 1, italics added [added by Assem. Const. Amend. No. 40 (1975-1976 Reg. Sess.), as approved by voters (Prop. 14), Primary Elec. (June 8, 1976)]; *see Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 701.) Second, the Legislature has expanded the IWC's jurisdiction to include all employees, male and female, in response to federal legislation barring employment discrimination because of sex (tit. VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*). (See Stats. 1973, ch. 1007, § 8, p. 2004; Stats. 1972, ch. 1122, § 13, p. 2156; see generally *Industrial Welfare Com. v. Superior Court, supra,* at pp. 700-701.) Third, 'while retaining the authorizing language of [the 1913 act],' the Legislature has 'restated the commission's responsibility in even broader terms' (*Industrial Welfare Com. v. Superior Court, supra,* at

pp. 701-702), charging the IWC with the 'continuing duty' to ascertain the wages, hours and labor conditions of 'all employees in this state,' to 'investigate [their] health, safety, and welfare,' to 'conduct a full review of the adequacy of the minimum wage at least once every two years' (Lab. Code, § 1173), and to convene wage boards and adopt new wage orders if the commission finds 'that wages paid to employees may be inadequate to supply the cost of proper living' (*id.*, § 1178.5, subd. (a); see also *id.*, § 1182). Finally, while the amount of the minimum wage has in recent years been set by statute (*e.g.*, *id.*, §§ 1182.11, 1182.12), specific employers and employees still become subject to the minimum wage only through, and under the terms of, the IWC's applicable wage orders (*id.*, § 1197)." (*Martinez, supra,* 48 Cal.4th at 55.)

Following its creation, the IWC moved diligently to exercise its broad delegated powers. After investigating labor conditions in the fruit and vegetable canning industry, the commission convened the first wage board in 1916 and later that year issued its first wage order (IWC former wage order No. 1; see p. 50, fn. 13, *ante*), making women and minors working in that industry the first employees in California to receive a legally established minimum wage. By the end of 1918, the commission had issued additional orders establishing minimum wages in the mercantile, laundry, fish canning,

fruit and vegetable packing, and manufacturing industries, and in general and professional office occupations. (IWC, Third Biennial Rep. (1919) pp. 9-11.) Today 18 wage orders are in effect, 16 covering specific industries and occupations, one covering all employees not covered by an industry or occupation order, and a general minimum wage order amending all others to conform to the amount of the minimum wage currently set by statute. (*Martinez, supra,* 48 Cal.4th at 57.)

2. Wage Order No. 9.

The IWC wage orders share common definitions and schemes, including the definition of employment. Like all other wage orders, Wage Order No. 9, applicable to the transportation industry, defines the word "employ" as "to engage, suffer, or permit to work." (Cal. Code Regs., tit. 8, § 11090, subd. 2(D).) An employer is further defined as any person "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." (*Id.*, § 11090, subd. 2(F).) As the Court of Appeal correctly observed and as further discussed below, "[t]his is the same language examined by the Supreme Court in *Martinez.*" (See *Martinez, supra,* 49 Cal.4th at 64.)

D. The Court's Recent *Martinez* and *Ayala* Decisions.

1. *Martinez* and the Wage Order Definition of Employment.

While discussed in some detail previously in this brief, *Martinez* represents the first time this Court has engaged in a sweeping analysis of the application of the IWC wage orders and their definition of the employment relationship. (See *Martinez, supra,* 49 Cal.4th at 50.) Nevertheless, Dynamex has argued in the trial court, the Court of Appeal, and now in this Court that *Martinez* was instead very narrowly decided, addressing only the question of joint employment, and that its application must therefore be limited to that factual context. Yet "nothing in [*Martinez*] supports a limitation of this nature," and "no other court has adopted it." (Opn. at 16, fn. 14.) To be sure, no case decided post-*Martinez* has construed its definitional analysis as being limited to joint employer scenarios alone. For example, in *Bradley, supra,* 211 Cal.App.4th 1129, the plaintiffs asserted a total of seven causes of action, six of which were not based upon Labor Code section 1194. (*Id.* at 1135.) The *Bradley* court correctly held *Martinez's* broad definition of "employer" (by reference to the wage orders) applies to any "claims brought under the Industrial Welfare Commission's wage orders . . . ." (*Id.* at 1146.) *Bradley* further concluded that under either *Martinez's* broad definition or *Borello's* common law definition, "the evidence relevant to the factual question whether

the class members were employees or independent contractors is common among all class members." (*Ibid.*) In so doing, the *Bradley* court announced no limitation on the definitions supplied this Court in *Martinez*, and properly viewed that decision as incorporating both the wage order and common law definition of employment as viable alternatives under those wage orders, generally applicable to claims (such as those before it) where joint employment was *not* at issue.

Similarly, although *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, 661 ultimately upheld the denial of class certification in a case involving newspaper carriers and distributors against about 30 interconnected newspaper publishers and conglomerates for fraud and wage and hour violations, it also affirmed that the common law test for employment was not the only test applicable to define the employment relationship. In doing so, *Sotelo* described the *Martinez* decision as "a case bearing directly on the tests for employment that are relevant to one of the causes of action." (*Id.* at 660) *Sotelo* also concluded that the holding in *Martinez* was not limited to the facts of that case (*id.* at 661), and reinforced *Martinez's* broad application in that regard by reasoning that "[t]he assumption that the common law test was the only applicable test of an employer/employee relationship for the causes of action in this case was flawed." (*Id.* at 662.)

Rather than limiting its scope to the joint employer context, *Martinez* instead peppered its analysis of the wage orders' definition of employment to emphasize that definition's broad reach, and to confirm the sweeping authority delegated to the IWC to construct a definition of employment consistent with its regulatory charge. To that end, this Court in *Martinez* embraced the IWC's authority to define the employment relationship in a manner which not only incorporates common law definitions, but also exceeds them:

> To employ, then, under the IWC's definition, has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions; or (b) to suffer or permit to work; or (c) to engage, thereby creating a common law employment relationship. (*Martinez*, *supra*, 49 Cal.4th at 64.)

To arrive at that definition of employment, *Martinez* thoroughly examined the history of the IWC's wage orders and their relationship with the Labor Code, concluding that the Legislature specifically intended that the IWC's definition should control. (*Id.* at 52 [holding that it was "unmistakeabl[e] that the Legislature intended the IWC's wage orders to define the employment relationship"].) *Martinez* then noted that:

> Concerning the wage orders' validity, "[j]udicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, the IWC engages in *a quasi-legislative endeavor, a task which necessarily and properly requires the commission's exercise of a considerable degree of*

> *policy-making judgment and discretion.* (*Id.* at 61 [emph. added].)

The Court further emphasized the IWC's broad authority stating:

> Moreover, past decisions . . . teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection. (*Id.* at 61, citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 701.)

Thus, the IWC's powers include the authority to "adopt reasonable rules and regulations which are deemed necessary to the due efficient exercise of the powers expressly granted . . . ." (*Id.* at 61.) Under that broad authority, this Court in *Martinez* recognized that it has "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 62, citing *Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 302-333.)

Significantly, the *Martinez* court further explained that because the Legislature granted the IWC broad authority over wages, hours, and working conditions, it makes "eminently good sense" 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 . . . ." (*Id.* at

59; see also *id.* at 64 ["The Legislature has delegated to the IWC broad authority over wages, hours and working conditions, the voters have repeatedly ratified that delegation, and the Court has repeatedly confirmed that the IWC may adopt rules to make its wage orders effective"] [citations omitted].) Thus, *Martinez* concluded that where an applicable wage order exists, courts *must* look to that applicable IWC wage order to define the employment relationship. To hold otherwise (*i.e.,* to hold that only the common law definition of employment controlled), reasoned *Martinez,* "would render the commission's definitions effectively meaningless." (*Id.* at 65.) Under those thoroughly vetted and firmly established principles, *Martinez* then concluded that the IWC Wage Order 14-2001 provided the definition of employment for claims made under Labor Code Section 1194. (*Ibid.*)

In sum, *Martinez* made very clear that the IWC has wide-ranging authority to regulate who is an employee and to ensure that those employees are broadly protected by the Labor Code and the IWC's wage orders. Thus, in cases such as this one, where Real Parties have specifically alleged that Dynamex violated specific IWC wage orders (see Exh. 20 at 1733-1740), those wage orders' definition of the employment relationship is controlling after *Martinez.*

2. *Ayala's* Subsequent Clarification of the Common Law Standards for Claims Falling Outside of the Wage Orders.

Also discussed previously in this brief is this Court's most recent decision in *Ayala*. As mentioned, the *Ayala* court initially solicited supplemental briefing regarding the impact of *Martinez*, but ultimately decided to apply only the common law *Borello* factors test to the claims asserted in that case, as the plaintiffs below had only used that common law test and had not otherwise asserted that their claims were covered by any wage order. (*Ayala, supra,* 59 Cal.4th at 531.)

As the Court of Appeal aptly summarized, in *Ayala* this Court revisited the *Borello* factors' definition of the employment relationship in the same context as is at issue in this case – that is, whether a class may be certified in a wage and hour action alleging the defendant had misclassified its employees as independent contractors. (Opn. at 7.) In *Ayala,* the trial court had denied the plaintiffs' motion to certify the putative class of newspaper carriers hired by the Antelope Valley Press to deliver its newspaper after finding common issues did not predominate. (*Ayala, supra,* 59 Cal.4th at 529.) The trial court reasoned *Borello*'s common law test for an employment relationship would require "heavily individualized inquiries" into the newspaper's control over the carriers' work. (*Id.* at 529.)

But finding the trial court should have focused instead on "differences in [the defendant's] right to exercise control" rather than "variations in how that right was exercised" (*id.* at 528), *Ayala* reversed the order denying class certification and remanded the case for reconsideration of the motion under the correct legal standards. (*Id.* at 540). In doing so, *Ayala* clarified that "the relevant inquiry" at the class certification stage is not what degree of control the employer exercised over the manner and means of its papers' delivery, but rather whether its *right of control* over its carriers is sufficiently uniform to permit classwide assessment. (*Id.* at 533.) *Ayala* further observed how the trial court "lost sight of this question" when it denied class certification based upon the varied ways in which the employer exercised control over individual carriers. (*Id.* at 534.)

Notably, *Martinez* parsed its articulation of each of the three different prongs of the Wage Order test in the alternative so that it was still appropriate for the Respondent Court in this case to have concluded that the Real Parties' class could be certified where any of those first two prongs could be shown through common proof. (*Martinez*, *supra*, 49 Cal.4th at 64.) However, the *Ayala* decision further demonstrates how the Respondent Court nonetheless erred when it concluded that variations in Dynamex's *exercise of control* over the details of Real Parties' work necessarily meant that the action could not

satisfy the "right to control" criterion articulated in *Borello*. This is especially true where the Respondent Court otherwise correctly concluded that several of *Borello's* "secondary factors" did *not* require individualized inquiries. (Exh. 71; accord *Ayala,* 59 Cal. 4th at 539-540 [explaining "the impact of individual variations on certification will depend on the significance of the factor they affect," as some of those factors may be of no consequence if they involve minor parts of the overall calculus and common proof is available on key factors such as control, the skill involved, and the right to terminate at will]; see also *Ayala, supra,* 59 Cal.4th at 539-540 [further explaining how the proper course, if there are individual variations in parts of the common law test, is to consider whether they are likely to prove material and whether they can be managed].) Thus, *Ayala* demonstrates that it is incorrect for a trial court simply to recite secondary factor variations it may find without doing the necessary weighing or considering of the *materiality* of those factors and whether any variations can be managed. (*Ibid.*)

E. The Appropriate Use of the Three-Pronged Wage Order Test Encompassed in Wage Order Number 9 and Endorsed by This Court in *Martinez*.

1. The Court of Appeal's Decision.

In the wake of this Court's decision in *Martinez*, the Court of Appeal followed this Court's directives and found that the Respondent Court had not erred in allowing at least some of the Real Parties' class claims to be certified under the Wage Order test confirmed in *Martinez*. (Opn. at 12-15.) In doing so, it painstakingly discussed and distinguished the other cases on which Dynamex continues to rely for the proposition that no post-*Martinez* decision has construed *Martinez* to have such broad application and has therefore "never" applied *Martinez's* Wage Order test to the class certification question. (*Ibid.*) As the Court of Appeal correctly pointed out, however, both the *Sotelo* and *Bradley* courts did just that, while the other cases relied upon by Dynamex either discussed *Martinez* only in passing, or did not arise in the relevant wage and hour or class certification context. (*Ibid.*) Furthermore, the Court of Appeal noted how its sister division in *Estrada* had applied only the *Borello* factors test in analyzing the misclassification of the class of FedEx drivers in that case. Yet it quite aptly observed how *Estrada* was decided "three years before the Supreme Court's decision in *Martinez,*" and given the compelling facts of *Estrada* (which are strikingly similar to the facts of this case) "[w]e

have little doubt, if decided today, the *Estrada* court would follow *Martinez* and find the FedEx drivers were employees within the meaning and scope of Wage Order No. 9." (Opn. at 15, fn. 12.)

Without deciding the issue, the Court of Appeal did express some concern whether all of Real Parties' claims fell within the ambit of Wage Order 9. (Opn. at 17-18.) While it mused that some of those Labor Code section 2802 expenses could be covered by that wage order, it questioned whether others may not be construed as a violation of Wage Order 9. (*Ibid.*) Thus, consistent with both the holding and logic of both *Martinez* and *Ayala*, as to those claims which may fall outside the scope of any wage order, the Court of Appeal directed that they be reconsidered by the trial court to determine whether they, indeed, fall under the ambit of Wage Order No. 9. If they do not (again, a question the Court of Appeal never determined), then it further directed the Respondent Court to reconsider the suitability of those claims to class treatment under the common law *Borello* factors test, as that test was further clarified in *Ayala*. (Opn. at 18.)

By taking that approach, the Court of Appeal demonstrated compliance with this Court's directives in *Martinez*, giving proper deference to the IWC's unique role in regulating the employment relationship, and deferring to its authority to define that relationship in a way that best serves that regulatory

purpose, even if that definition varies from common law definitions. (See *Martinez, supra,* 49 Cal.4th at 61 ["Obeying these formal expressions of legislative and voter intent, the courts have shown the IWC's wage orders extraordinary deference, both in upholding their validity and in enforcing their specific terms"]; *ibid.* ["past decisions . . . teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection"]; *ibid.* ["Concerning the specific terms of wage orders, we have explained that '[t]he power to fix [the minimum] wage does not confine the [IWC] to that single act. It may adopt rules to make it effective'"]; *id.* at 61-62 ["Consistent 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 (citations), to make its wage orders effective, to ensure that wages are actually received, and to prevent evasion and subterfuge"]; *id.* at 62 ["Courts must enforce such provisions in wage actions because, as we have explained, an employee who sues to recover unpaid minimum wages under section 1194 actually sues to enforce the applicable wage order. Only by deferring to wage orders' definitional provisions do we

truly apply section 1194 according to its terms by enforcing the "legal minimum wage"].)

Further, while *Martinez* found that the common law definition of employment was encompassed in the Wage Order test (see *id.* at 64), it nevertheless emphasized that courts should not be restrained by that common law definition in addressing violations of the wage orders. (*Martinez, supra,* 49 Cal.4th at 65 ["While the common law definition of employment plays an important role in the wage orders' definition, and thus also in actions under section 1194, to apply only the common law definition while ignoring the rest of the IWC's broad regulatory definition would substantially impair the commission's authority and the effectiveness of its wage orders"].) To that end, *Martinez* emphasized the power of the IWC wage orders to define the employment relationship differently from common law standards, and the responsibility of courts to utilize and enforce that wage order definition. (*Id.* at 65 ["For a court to refuse to enforce such a provision in a presumptively valid wage order (citation) simply because it differs from the common law would thus endanger the commission's ability to achieve its statutory purposes"].) It further concluded that "[w]ere we to define employment exclusively according to the common law in civil actions for unpaid wages we would render the commission's definitions effectively meaningless." (*Ibid.*)

Bound by that reasoning, the Court of Appeal correctly approved of the application of the Wage Order test to certify certain claims raised in Real Parties' class action complaint. But also having the benefit of this Court's subsequent *Ayala* opinion, the Court of Appeal also gave deference to *Ayala* by at least raising the possibility that the Wage Order test should not be utilized to decide claims not covered by an applicable wage order. (*Id.* at 17-18.) As that reasoning paralleled this Court's reasoning in *Ayala*, such a distinction between which definition of employment would be applied to which claims was not hard to make.

2. Criteria to Be Considered – and Analytical Steps to Be Followed – in All Misclassification Cases After *Martinez*.

As perhaps the first decision to address the interplay of both this Court's *Martinez* and *Ayala* decisions in any meaningful way, the Court of Appeal correctly reconciled those opinions and the different definitional tests of the employment relationship each applied. To that extent, the Court of Appeal's opinion illuminated a path both this Court should approve and other courts should follow.

Indeed, the Court of Appeal made clear that where a claim is either asserted as violating a wage order (or if demonstrated, would violate an applicable wage order), the IWC's Wage Order test of employment should

apply to that claim through all phases of the case, including the purely procedural analysis applied during class certification. If, on the other hand, the claim asserted does not fall under any wage order, it should be analyzed according to the well-developed common law *Borello* factors test, as that test (and in particular, the critical element of "control") has been refined by this Court in *Ayala*. Only in taking that approach can the lower courts pay proper deference to the unique role the IWC occupies to regulate the employment relationship and to create a definition of employment which furthers that regulatory function and goal. But so, too, is that approach necessary to afford reasonably deference and reconciliation to this Court's decisions in both *Martinez* and *Ayala*, while recognizing the important role the common law definition of employment continues to play after both.

Thus, the first step in the analysis post-*Martinez* should be for the trial court to determine whether the claims asserted are covered by an applicable wage order. Where they are so covered, *Martinez* dictates that the Wage Order test of employment should be applied. If, on the other hand, no wage order covers the claims asserted, then the common law *Borello* factors test (as refined by *Ayala*) should apply. In a "mixed" scenario where some claims are covered by wage orders and some are not but all proceed to the class certification stage, the lower courts should be encouraged to utilize subclasses

(*i.e.*, "wage order subclass," "common law subclass") to apply the proper criteria to each. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339 [where this Court confirmed that it has long encouraged lower courts to be "procedurally innovative" in managing class actions, and that trial courts have "an obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class"].) In any event, since the common law test is one of the three alternative criteria under the Wage Order test (*Martinez, supra,* 49 Cal.4th at 64), if a class is certifiable under those common law standards, then it will necessarily be certifiable as to *all* claims asserted, whether they arise out of the wage orders or not.[3]

Next, with respect to all claims covered by a wage order, *Martinez's* three prong Wage Order test demonstrates that the first criteria – to exercise control over the wages, hours *or* working conditions (all couched in the *alternative*) – should be broadly construed to determine the nature of that

[3] While Dynamex might assert that applying two different tests depending on the nature of the claims asserted would be unworkable, that dilemma is more imagined than real. To be sure, it is not uncommon for both the common law and statutory law to apply to the same conduct by the defendant and to provide for different definitions and elements of proof to prevail on either a common law basis or a statutory basis. (See, *e.g., Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1002-1003 [comparing and contrasting the common law tort of invasion of privacy with the statutory remedy for misappropriation of name and likeness later created by the Legislature under Civil Code section 3344].) This occurs when – as was the case in *Miller* and is certainly the case with the creation of the IWC and its wage orders – the common law definitions and remedies are viewed to be somehow inadequate, and power is therefore vested in the Legislature (or delegated by it to an agency, like the IWC) to create new standards which supplement common law standards.

control in all three of those aspects of the relationship in question. For example, the *Martinez* court found the following considerations relevant to this inquiry in determining whether the defendants in that case – Apio, Combs, and Ramirez – exercised that requisite control: (1) whether the purported employer has the right and ability to pay the claimed employees; (2) whether the purported employer regularly pays the claimed employees out of the revenues or assets of his or her integrated business; and (3) whether the purported employer has the right to hire and fire the claimed employees, trains and supervises them, determines their rate and manner of pay (hourly or piece-rate), and sets their hours, telling them when and where to report to work and when to take breaks. (*Martinez, supra,* 49 Cal.4th at 71-77; see also Wage Order 9, subd. 2(F) ["Employer means any person as defined in Section 18 of the Labor Code who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of any person"].)

Third, the lower courts may look to the alternative second prong of the Wage Order test – "to suffer or permit to work" – to determine the existence of an employment relationship. On that point, the *Martinez* court explained how the terms "suffer or permit" have a unique significance and meaning, and were crafted by the IWC to be intentionally broad to address those situations where a

purported employer's intent to hire someone may be subject to some form of subterfuge or denial, and thus it would be hard to say that the employer intentionally "engaged" that worker's services. (*Martinez, supra,* 49 Cal.4th at 65.) Within that historical context, "suffer and permit" has therefore come to encompass *passive receipt of the benefits of the labor provided by one who had the power to stop it, but did not do so and benefitted nonetheless.* And in that sense, "suffer and permit" is essentially just another expression of employer control, defined more broadly as *passive control while receiving benefits.* To that end, the High Court in *Martinez* observed:

> Not requiring a common law master and servant relationship, the widely used "employ, suffer or permit" standard reached irregular working arrangements the proprietor of a business might otherwise disavow with impunity. Courts applying such statutes before 1916 had imposed liability, for example, on a manufacturer for industrial injuries suffered by a boy hired by his father to oil machinery (citations), and on a mining company for injuries to a boy paid by coal miners to carry water (citations). (*Martinez, supra,* 49 Cal.4th at 58 [citations omitted].)

The *Martinez* court further explained how those "suffer or permit" standards, "while foreign to the common law," were "generally understood as appropriate under child labor statutes." (*Id.* at 58-59.) Without such a broad definition of employment, unscrupulous employers might claim that a 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." (*Ibid.*) The standard thus meant that the employer "shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder." (*Ibid.*)

In *Martinez,* this Court "s[aw] no reason to refrain from giving the IWC's definition of 'employ' its historical meaning," as it found it to be "highly relevant today," confirming that "[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 69.) Yet in applying that reasoning, the Court nonetheless found that although Apio and Combs may have known about the plaintiffs' work, they benefitted from it only indirectly through their contractual relationship with Munoz. (*Id.* at 69-70.) Moreover, they did not "suffer or permit" that work, as "neither had the power to prevent plaintiffs from working." (*Id.* at 70.)

Fourth, the final prong of the Wage Order test – "to engage, thereby creating a common law employment relationship" – is defined by the common law criteria included in the *Borello* factors test. To that end, this Court in *Martinez* reasoned that "the verb 'to engage' has no other apparent meaning in the present context than its plain, ordinary sense of 'to employ,' that is, to create a common law employment relationship." (*Id.* at 64.) That conclusion

makes sense "because the IWC, even while extending its regulatory protection to workers whose employment status the common law did not recognize, could not have intended to withhold protection from the regularly hired employees who undoubtedly comprise the vast majority of the state's workforce." (*Ibid.*) While the *Martinez* court did not then analyze in any detail the common law definition of employment included in the Wage Order test, this Court in *Ayala* subsequently provided substantial guidance on that question. In doing so, *Ayala* confirmed that although "control over how a result is achieved lies at the heart of the common law test for employment," "what matters is whether a hirer has the legal right to control the activities of the alleged agent," and not the individual variations in which that control is either exercised or retained. (*Ayala, supra,* 59 Cal.4th at 535 ["That a hirer chooses not to wield power does not prove it lacks power"]; see also *Estrada, supra,* 154 Cal.App.4th at 13-14 [recognizing that how a hirer exercised control over a particular hiree might show, not the hirer's differential control of that hiree, but the extent of its common right to control all its hirees].) Consequently, as *Martinez* further clarifies, the common law definition of employment continues to have significance and vitality "as one alternative" included within the Wage Order test. (*Martinez, supra,* 49 Cal.4th at 64; see also *Bradley, supra,* 211 Cal.App.4th at 1129, 1147 [confirming that under either *Martinez* or *Borello,*

"the focus is not on the particular task performed by the employee, but the global nature of the relationship between the worker and the hirer, and whether the hirer or the worker had the right to control the work"].) Thus, the common law notion of control defined under *Borello* and *Ayala* animates the concept of control as one an alternative criteria under the Wage Order test.

3. Application to This Case.

Beginning with the threshold examination of whether the Real Parties' claims fall under Wage Order No. 9, the Court of Appeal was correct to conclude they did so. As the Court of Appeal noted, Real Parties' operative Second Amended Complaint alleges Dynamex's classification of drivers as independent contractors rather than employees violated provisions of Wage Order No. 9, and as such, each cause of action related to that misclassification would be covered under that wage order. (Opn. at 3.) It only questioned (without deciding) whether Real Parties' cause of action under Labor Code 2802 for reimbursement of certain expenses was similarly covered under Wage Order No. 9, reasoning that certain expenses might be covered while others are not. (Opn. at 17; see also *Estrada*, *supra*, 154 Cal.App.4th at 21-25 [holding that reimbursement for the rental or purchase of personal vehicles used in performing delivery services, even if viable under section 2802, appear to be outside the ambit of Wage Order No. 9].)

Labor Code section 2802, subd. (a) plainly requires an employer to indemnify its employees for expenses they necessarily incur in the discharge of their duties. The purpose of section 2802 is to "prevent employers from passing their operating expenses on to their employees." (*Gattuso v. Harte-Hanks Shapers. Inc.* (2007) 42 Cal.4th 554, 562.) Similarly, Wage Order No. 9, subd. 9, complements Labor Code section 2802, and just like section 2802 mandates that an employer must pay for the expenses an employee incurs in performing his or her job duties. Thus, a claim for failure to reimburse is enforceable under *both* section 2802 and that Wage Order No. 9.

This is especially the case where one of the critical expenses Real Parties seek reimbursement for is the automobile expenses they incurred in delivering their routes. This Court has previously recognized that this is a recoverable expense. (*Gattuso, supra,* 42 Cal.4th at 567 [holding that an employer is obligated to indemnify its employees for the automobile expenses they incur in performing their employment tasks].) To be clear, however, *Real Parties are not seeking the costs for the rental or purchase of their vehicles, but rather expenses related to their mileage*, which is compensable to all employees at a standardize rate set by the Internal Revenue Service. (See 26 U.S.C. § 162.) Thus, it is the costs and expenses associated with the *use* of those personal vehicles (and *not* expenses related to their original rental or purchase), which

Real Parties seek to have reimbursed, and which is therefore covered under both Labor Code section 2802 and Wage Order No. 9.[4]

In light of the fact that these claims are – just like Real Parties' other claims – thoroughly grounded in both the Labor Code and Wage Order No. 9, there is no sound reason why the same definition of "employer" provided by the three prong-test articulated in *Martinez* cannot similarly be used to determine Real Parties' expense reimbursement claims. This is especially true where it cannot be disputed that Real Parties incurred those expenses using their vehicles to make deliveries on Dynamex's delivery routes and schedules to Dynamex's customers. (See Opn. at 17 [reasoning that "[t]o the extent the reimbursement sought by Lee and Chavez in their section 2802 claim are confined to these items, the IWC definition of employee must be applied pursuant to *Martinez*, as discussed in the preceding section of our opinion"].) Consequently, where this Court concludes – as it should – that Real Parties' expense reimbursement claims under section 2802 are for expenses recoverable

[4] As this Court confirmed in *Martinez*: "[i]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Martinez, supra,* 49 Cal.4th at 61.) Given the centrality of the IWC's authority over the protection of minimum wages for all workers in California (including a catch-all wage order assuring minimum wage for those not covered by an industry-specific wage order), it is obvious that any actions of an employer that have the practical effect of reducing the wages of workers would be within the mandate of the IWC. Thus, policies which require workers to pay for the necessary expenses of their employment (and thus reduce their wages) are well within the IWC's jurisdiction.

under Wage Order No. 9, only the Wage Order test need be applied to *all* of Real Parties' causes of action contained in their Second Amended Complaint, and there is simply no need to remand any portion of those claims back to the trial court to apply a different test.

Applying the first alternative criteria of that Wage Order test in this case, the Court of Appeal was correct in affirming the lower court's finding that Dynamex exercises control over Real Parties' wages, hours, or working conditions. To that end, the record before the Respondent Court demonstrated at the class certification stage that "[w]hether or not Dynamex had the authority to negotiate each driver's rate of pay can be answered by looking at its policies with regard to hiring drivers," and that "rates paid to drivers are standardized" by Dynamex. (Exh. 71 at 6561; see *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432 ["We conclude that 'control over wages' means that a person or entity has the power or authority to negotiate and set an employee's rate of pay, and not that a person or entity is physically involved in the preparation of an employee's paycheck"].) To be sure, that evidence showed that like any like any other employer, Dynamex had the exclusive power and authority to negotiate and set the rate of pay for the drivers who serviced its customers, and did so in rather elaborate contracts it required Real Parties to sign, upon terms which were *not* subject to further negotiation. (Exh.

79 [internal exhibits 3-8].) Similarly, like any other employees, Real Parties showed that they have no control over the price charged to Dynamex customers for pick-ups or deliveries, or the wages they received for those delivery services, because those amounts are also standardized by Dynamex. (Exh. 71 at 6561; see also Exh. 79 [internal exhibit 4].) In short, the Respondent Court correctly concluded there was enough evidence to satisfy this first alternative definition of employment under the applicable wage orders. (*Martinez, supra,* 49 Cal.4th at 64.)

With respect to the second "suffer and permit" prong of the Wage Order test, Dynamex unquestionably knew that Real Party drivers were performing work for its customers and, obviously "suffered and permitted" them to perform that work because, whether on-demand, scheduled route, or dedicated fleet, *Dynamex assigned that work to them.* (Exh. 79 [internal exhibit 3].) In that same respect, Dynamex unquestionably has the power to prevent the Real Parties in the class from servicing its customers because it not only makes all delivery assignments, it can also terminate Real Parties' services at any time, without cause, or not give them any parcels to deliver. (Exh. 79 [internal exhibits 3-8].) Indeed, the form contracts Real Parties were required to sign made it clear that actually giving them any work to perform (and getting paid for that work) was at the "sole discretion" of Dynamex. (Exh. 79 [internal

exhibits 5-8].)[5] Moreover, the deeper meaning of "suffer or permit" – its ability to pierce "passive control" subterfuges – has direct application to situations like this, where businesses specifically contrive *not* to control the details of their employees' work so they can call them independent contractors, but do so passively through their control of their operations as a whole.

While the Respondent Court did conclude that the third common law prong of the wage order definition of employer approved of in *Martinez* required individualized inquiries (an in correct determination when reconsidered under *Ayala*), because it had already determined that the first two prongs were satisfied and could be proven with common evidence, no decertification of the class was mandated. Again, *Martinez* parsed those three different prongs *in the alternative*, such that it was appropriate for the Respondent Court to have concluded that the class could be certified where any

[5] Employing overheated rhetoric, Dynamex argues that the "suffer and permit" standard is going to endanger the very existence of any legal independent contractor relationship in California. But companies like Dynamex cannot reasonably decry the fact that a true independent contractor relationship may be harder to establish under this "suffer and permit" criterion where there is nothing *passive* about their actions directed toward Real Parties. In other words, there is absolutely no evidence in this record that Dynamex merely passively suffered and permitted Real Parties' delivery of its parcels to its customers, or did little more than acquiesce that work. Instead, Dynamex *actively engaged* Real Parties' services as an integral part of its own core delivery business, using elaborate contracts Dynamex alone drafted to provide only the appearance of an independent contractor relationship. Consequently, Dynamex has no credible basis to attack the suffer and permit criterion where it so actively and deliberately engages Real Parties' labor as an essential component of its operations.

of those first two prongs could be shown through common proof. (*Martinez, supra,* 49 Cal.4th at 64; Exh. 71 at 6564-6565.)

F. Further Proceedings Applying the Common Law Standards, as Clarified by this Court in *Ayala.*

Real Parties have explained above why only the Wage Order test should be applied to *all* of their claims (including their Labor Code section 2802 claim). As the Court of Appeal held, the Respondent Court's order certifying the class on that basis should remain undisturbed. However, should this Court conclude that either the common law prong of the Wage Order test should be applied to Real Parties' claims, or that the common law *Borello* factors test should be used instead of the Wage Order test on *all* of Real Parties' claims, Real Parties would request that the matter be remanded to the Respondent Court to apply that test consistent with the refinement of the predominant "control" criteria this Court provided in *Ayala.* Indeed, that clarification by the *Ayala* court places that control factor in its proper perspective, confirming bot its primacy and scope, while also adhering to *Borello's* original intention that employers who maintain pervasive control over their operations cannot misclassify their workforce by claiming that they do not exercise control over the details of particular tasks. In other words, in the wake of *Ayala,* misclassifying employers should no longer be able to persuade the lower courts

to deny class certification by pointing to variations in the exercise of control (as Dynamex attempted here), especially where those same employers maintain elaborate contracts detailing the standardized nature of their control over their workforce as a whole. (*Ayala, supra,* 59 Cal.4th 536-537.) This is also true where "[c]ertification of class claims based on the misclassification of common law employees as independent contractors generally does not depend upon deciding the actual scope of a hirer's right of control over its hires," but rather "[t]he relevant question is whether the scope of the right of control, whatever it might be, is susceptible to classwide proof." (*Id.* at 537.) Under that test, as properly clarified and articulated by *Ayala*, Real Parties' claims in the lower court should also remain certified.

IV.

CONCLUSION

Based on the foregoing, Real Parties respectfully request this Court to affirm the Court of Appeal's ruling in this matter and to remand the case back to the trial court for a determination on the merits of their certified claims.

Respectfully submitted,

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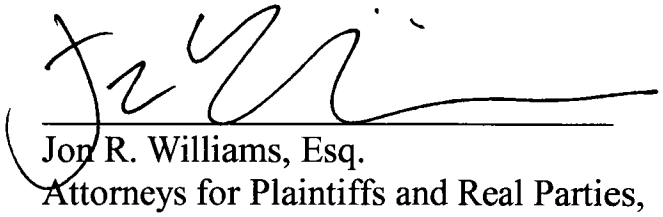
DATED: 08/28/15

BOUDREAU WILLIAMS LLP



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CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)

Pursuant to the California Rule of Court, Rule 8.204, subd. (c), I certify that the foregoing Return to Writ Petition and Memorandum of Points and Authorities is proportionally spaced, has a typeface of 14 points, is double-line spaced, and based upon the word count feature contained in the word processing program used to produce that brief (Microsoft Word 2010), contains 14,475 words.

Date: 08/28/15

Jon R. Williams

Dynamex Operations West, Inc. v. Superior Court of Los Angeles County, et al.
Supreme Court of the State of California
California Supreme Court Case No.: S222732
Court of Appeal Case No.: B249546
Los Angeles County Superior Court Case No.: BC332016

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 666 State Street, San Diego, California 92101.

On **August 28, 2015**, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

1) ANSWERING BRIEF ON THE MERITS

In a sealed envelope, postage fully paid, addressed as follows:

Robert G. Hulteng, Esq. Phillip A. Simpkins, Esq. Littler Mendelson, PC 650 California Street, 20th Floor San Francisco, CA 94108	*Petitioner: Dynamex Operations West, Inc.*
Ellen M. Bronchetti, Esq. Sheppard Mullin Richter & Hampton LLP 4 Embarcadero Center, 17th Floor San Francisco, CA 94111	
Frederick Bennett, Esq. Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012	*Respondent: Superior Court of Los Angeles County*
Hon. Michael L. Stern Superior Court of Los Angeles County 111 North Hill Street, Dept. 62 Los Angeles, CA 90012	*Non-Title Respondent*
Paul Grossman, Esq. Paul Hastings LLP 515 South Flower Street, 25th Floor Los Angeles, CA 90071	*California Employment Law council: Pub/Depublication Requestor*
Court of Appeal, State of California 2ndAppellate District, Division 7 300 South Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	*Appellate Court*

On the above date:

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__X__ (STATE ONLY) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

____ (FEDERAL ONLY) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **August 28, 2015**, at San Diego, California.

Chenin Andreoli

Chenin M. Andreoli