Civil Case No. S258191

SUPREME COURT OF CALIFORNIA

VAZQUEZ et al.

Plaintiffs and Appellants,

v.

JAN-PRO FRANCHISING INTERNATIONAL

Defendant and Respondent.

Request under California Rules of the Court Rule 8.548 to Decide a Question of California Law

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APPLICATION TO SUBMIT AMICUS CURIAE BRIEF OF WORKERS' RIGHTS ADVOCATES IN SUPPORT OF PLAINTIFFS

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APPLICATION OF PROPOSED AMICI CURIAE, WORKERS' RIGHTS ADVOCATES, FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PLAINTIFFS/APPELLANTS

Pursuant to California Rules of Court rule 8.520(f), proposed amici request leave to file the attached amicus curiae brief in support of Plaintiffs/Appellants.

Proposed amici—a group of workers' rights advocacy organizations with deep knowledge of subcontracting in the janitorial service industry and its impacts on workers—hereby request that the attached amicus brief submitted in support of plaintiffs/appellants be accepted for filing in this action. The attached amicus brief describes franchising and labor intermediary structures such as the one at issue in this case, their prevalence throughout the janitorial service industry, and their profoundly negative impacts on janitorial service workers, competing employers, and state and federal coffers. The brief argues that *Dynamex* applies to employment relationships like the one seen here, where workers are called "franchisees" by more than one employer.

Dated: August 14, 2020

Respectfully submitted,

/s/ Nayantara Mehta

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici, workers' rights advocates with close ties to the issues in this long-running case, submit this brief under Rule 8.200(c) of the California Rules of Court, and write not to repeat the arguments made by the parties, but rather to counter the false impressions created by Respondent Jan-Pro Franchising International, Inc. ("Jan-Pro") and its amici's previous filings in federal court, by bringing to the Court's attention facts about the kinds of phony franchising and labor intermediary structures used by Jan-Pro and their impacts on janitorial service workers, competing employers, and on state and federal coffers. Amici also write to urge the Court to look beyond labels and find that employment structures like the one created by Jan-Pro are covered by the California Supreme Court's test in *Dynamex*.[1]

California Rural Legal Assistance Foundation ("CRLAF") is a nonprofit legal service provider that represents low-income individuals across rural California and engages in regulatory and legislative advocacy which promote the interest of low-wage workers, particularly farm workers. Since 1986, CRLAF has recovered wages and other compensation for thousands of farm workers, nearly all of whom are seasonal. These workers have been subjected to illegal tactics to deny, interfere with or impede them from taking their

[1] Amici submit this brief in support of the Plaintiffs/Appellants Gerardo Vazquez, Gloria Roman, Juan Aguilar, et al. No one other than amici curiae paid for the preparation of this brief or authored this brief, in whole or in part.

breaks; schemes intended to defraud them of minimum wages, contract wages and overtime wages due to them; and they have been forced to endure working conditions which expose them to pesticides, heat stress, and acute and sustained ergonomic stress. The ability of farm workers to recover unpaid wages and seek redress for their working conditions is impeded by the complex and financially interdependent business relationships created by employers to avoid liability. CRLAF continues to see the multi-employer relationships at issue in *Real v. Driscoll Strawberry Assocs.,* 603 F.2d 748 (9th Cir.1979). While the labels and names of employers have changed overtime, the employer-employee relationship has not. These employment structures created by employers to avoid liability should also be covered under this Court's test in *Dynamex*.

Equal Rights Advocates ("ERA") is a national non-profit legal advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has litigated numerous class actions and other high-impact cases on issues of gender discrimination and workers' civil rights. ERA also leads efforts to advance public policies promoting workplace justice and economic security for people of all genders. From years of experience representing and advocating alongside janitorial workers, ERA knows of the terrible working conditions facing hourly workers in this industry, most of whom are immigrants and many of whom are immigrant women of color. Fissured work structures, such as those created by the "franchise" model and multi-layered contracting, tend to exacerbate

these conditions, heightening workers' vulnerability to sexual harassment, wage theft, and other abuses while making it harder for workers to seek redress for violations of minimum labor standards and basic civil rights.

Legal Aid at Work ("LAAW", and formerly the Legal Aid Society – Employment Law Center) is a non-profit public interest legal organization founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented or disadvantaged communities. LAAW represents low-wage clients in cases involving a broad range of issues, including wage theft, labor trafficking, retaliation, and discrimination. LAAW frequently appears in federal and state courts to promote the interests of clients from wage theft both as counsel for plaintiffs and as amicus curiae. In addition to litigating cases, LAAW assists hundreds of low-wage workers with filing administrative wage claims with the California Labor Commissioner through our Wage Rights Clinics and advises thousands of low-wage workers on their wage rights through our Worker's Rights Clinics. LAAW has represented numerous clients working for franchisors, improperly classified as independent contractors and/or franchisees and experiencing wage theft, including in the janitorial industry, in a variety of legal forums, and it has become more and more common that our low-wage worker clients are in fissured workplaces. LAAW has a strong interest in ensuring that workers receive all protections to which they are entitled, and all employers violating the law are held accountable.

Legal Aid of Marin represents hundreds of workers every year in the County of Marin in wage theft and other wage payment problems. In this period of Covid-19, the discrepancies between individuals who are classified as employees and those who are called "independent contractors" has resulted in confusion and delays in receiving benefits. Legal Aid of Marin often sees people who are clearly employees misclassified as independent contractors, including delivery drivers, haircutters, janitors, housekeepers and hospital workers, who work only for one employer and do not set the pay rates or working conditions for their employment. The outcome of this case could help address these injustices.

National Domestic Workers Alliance ("NDWA") is the nation's leading advocacy organization advancing the dignity, rights and recognition of millions of domestic workers in the United States. NDWA is powered by sixty-four affiliates, plus local chapters in Atlanta, Durham, Seattle and New York City, of over 20,000 nannies, housecleaners, cleaning workers, and home care workers in 36 cities and 17 states. Domestic workers continue to be excluded from some basic federal labor and safety-net protections afforded to all other workers due to outright exclusions and employer structures that de facto exclude workers like the ones seen in this case. NDWA fights for equal and improved treatment for domestic workers in every sector.

National Employment Law Project ("NELP") is a non-profit legal organization with 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers.

NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP has offices in California, and has litigated directly and participated as amicus in numerous cases and has provided state and U.S. Congressional testimony addressing the issue of employment relationships and independent contractors, including sham franchise arrangements, under the Fair Labor Standards Act and state labor standards. NELP has a strong interest in this case because of the impacts of Jan-Pro's franchising schemes and those of similar janitorial companies on low-wage and immigrant workers and their communities.

Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California's most vulnerable low-wage workers. Millions of low-wage and immigrant workers often toil long hours in harsh and hazardous work environments in California. These same workers often face misclassification, which leads to employment and labor violations such as wage theft which is rampant. Worksafe has an interest in ensuring workplace justice for all workers.

SUMMARY OF THE ARGUMENT

This is a case brought by immigrant janitors over ten years ago, seeking unpaid minimum wages and overtime pay guaranteed by California law. Janitorial workers in California are overwhelmingly Latinx and immigrants working for low pay, in hazardous conditions, and in an industry where wage theft and other illegal conduct is endemic. Layers of subcontracting and franchising—such as Jan-Pro's multi-tiered job structure—exacerbate the already poor labor standards in the janitorial industry by imposing obstacles to employer accountability for labor violations.

As is the case with Jan-Pro, these schemes also often involve misclassifying low-wage and often immigrant employees as "franchisees," which seeks to exclude the workers from basic employment protections like the minimum wage, overtime pay, health and safety requirements, and discrimination protections, further degrading labor standards in the industry. The janitors in this case were told by the company that engaged them that if they wanted a job, they had to set themselves up as individual "franchisees," even though the workers were not at any point running their own separate businesses, managing their own clients, or setting their own prices and contract terms. Jan-Pro, the cleaning contractor that set up these structures, continues to evade all responsibility for its janitors by hiding behind tiers of subcontractors it put in place.

The Ninth Circuit panel's decision corrected the misclassification structures Jan-Pro used to deny workers the protections that California statutory and common law guarantee.

Vazquez v. Jan-Pro Franchising Int'l, 923 F.3d 575 (9th Cir. 2019). The decision properly found this ruse was unlawful under the ABC test for covered employment in *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018), and that decision should be affirmed by this Court.

Courts must look beyond the labels an employer assigns and determine whether there is an employment relationship under the ABC test. Jan-Pro's label – "franchisee" – does not afford it any exemption or special treatment under the law, as the Court should apply the same ABC test regardless of the label provided by the employer to determine whether there is an employment relationship.

Finally, independent contractor misclassification, like the sham franchise arrangements foisted on the Plaintiffs, imposes enormous costs on the misclassified workers, law-abiding competitors who are undercut by unscrupulous businesses, and public coffers, which lose out on tax revenue that fund critical programs like unemployment insurance. Given these costs, courts should apply the ABC test broadly to root out misclassification in all its forms.

ARGUMENT

I. Companies such as Jan-Pro that use janitorial "franchise" schemes are misclassifying and exploiting vulnerable workers.

a. Janitorial workers in California are overwhelmingly Latinx and immigrants working for low pay, in hazardous conditions, and vulnerable to illegal conduct.

The janitorial services industry is a "chronically low-wage sector that, in many parts of the country, relies heavily upon undocumented immigrant labor and operates as a virtual outlaw in violation of immigration laws, tax laws, wage and hour laws, and other labor protections."[2] According to a 2017 study of contracted janitors in California, over 80 percent are Latinx and 58 percent are foreign born.[3] Their median hourly wage is $12.22, and 47 percent of the workforce lives in a household with income below 200 percent of the poverty line.[4] Three out of four contracted janitors have a high school diploma or less.[5]

Pervasive illegal practices by employers exacerbate janitorial workers' vulnerability and economic insecurity. A 2009 academic survey of low-wage workers found that at least 26 percent of building service and ground service workers had not received minimum wage payments, 71 percent had not received overtime pay, and 73 percent

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[2] Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 352 (2005).
[3] Ratna Sinroja, Sarah Thomason and Ken Jacobs, *Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries*, U.C. Berkeley Labor Center, Mar. 11, 2019, http://laborcenter.berkeley.edu/misclassification-in-california-a-snapshot-of-the-janitorial-services-construction-and-trucking-industries/. The term "contracted janitor" refers to individuals who work for janitorial services firms (either as employees or as independent contractors) that contract out their labor to other companies.
[4] *Id.*
[5] *Id.*

had been required to work off-the-clock.[6] The same study found that workforce demographics play a role in the prevalence of workplace violations, and that foreign-born Latinx workers—who are significantly overrepresented in the janitorial industry—had the highest minimum wage violation rates of any racial or ethnic group.[7]

Janitorial workers also face dangerous working conditions and high injury rates. According to BLS data, janitors and cleaners had the third highest number of nonfatal injuries and illnesses requiring days away from work of all occupations in 2015.[8] Janitorial workers endure both environmental and physical hazards, including exposure to infectious diseases and harmful chemicals in cleaning equipment, musculoskeletal disorders caused by overexertion and repetitive motions, and slips and falls.[9] Female janitors, particularly those working night shifts or in otherwise isolated conditions, face pervasive sexual harassment and assault.[10]

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[6] Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 31, 34, 36 (2009), https://www.labor.ucla.edu/wp-content/uploads/2018/06/BrokenLawsReport2009.pdf.

[7] *Id.* at 48.

[8] U.S. BUREAU OF LABOR STAT., WORKPLACE INJURIES, ILLNESSES, AND FATALITIES BY OCCUPATION (Apr. 28, 2017), https://www.bls.gov/opub/ted/2017/workplace-injuries-illnesses-and-fatalities-by-occupation.htm.

[9] Thomas J. Bukowski, *Cleaning Up Safely*, SAFETY + HEALTH, Mar. 12, 2012, https://www.safetyandhealthmagazine.com/articles/cleaning-up-safety-2.

[10] Brittny Mejia, *Female Janitors Working the Night Shift Take Safety Into Their Own Hands,* L.A. TIMES, Sept. 4, 2018,

The COVID-19 pandemic has amplified many of these risks. While office workers shelter in place,

> janitors are still being asked to go into offices to battle the invisible germs that threaten public health, even as those germs, and the new, powerful cleaning solutions they are being asked to use, may endanger their own health. They often operate without specialized protective gear. And the increasing demand for their services is adding new stress and risks.[11]

In one example, janitorial workers who clean an office tower in San Francisco were not notified when someone who worked in the building tested positive for COVID-19, even though office workers were evacuated for several days. Building management had notified their employer, a cleaning contractor, but the cleaning contractor failed to alert its employees.[12]

As discussed in detail below, fissuring and misclassification compound these vulnerabilities.

b. **Franchising and other forms of contracting worsen conditions in the already low-wage and labor-intensive janitorial industry.**

Janitorial "franchising," where workers are not truly running an independent business, is a classic example of fissured employment, where larger entities like Jan-Pro shift labor costs and liabilities in

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https://www.latimes.com/local/california/la-me-ln-janitor-self-defense-20180904-story.html.

[11] John Eligon & Nellie Bowles, *They Clean the Buildings Workers Are Fleeing. But Who's Protecting Them?*, N.Y. TIMES, Mar. 18, 2020, https://www.nytimes.com/2020/03/18/us/coronavirus-janitors-cleaners.html.

[12] *Id.*

their business to intermediary companies and individual misclassified workers, while maintaining control of nearly all aspects of the business. Under a typical low-road model of outsourced labor in the janitorial industry, a lead or client company wanting its worksites cleaned contracts with a janitorial company like Jan-Pro to provide maintenance services at the lead company's facilities. The janitorial company seeks out a second-tier subcontractor to provide cleaning services at a lower price.[13]

This second-tier contractor, in turn, provides the janitors to clean the facilities, though it is "often able to make a marginal profit only by engaging in cost-saving strategies, including misclassifying janitors as independent contractors or selling 'franchise' licenses to unwitting workers."[14] The workers are in no way running their own

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[13] David Weil, *How to Make Employment Fair in an Age of Contracting and Temp Work*, HARVARD BUS. REV. Mar, 24, 2017. *See also* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (Boston: Harvard College 2014).

[14] Catherine Ruckelshaus et al., *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, National Employment Law Project, at 9, May 2014, https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf. *See, e.g.*, Gene Maddaus, *How America's Biggest Theater Chains Are Exploiting Their Janitors*, VARIETY, Mar. 27, 2019, https://variety.com/2019/biz/features/movie-theater-janitor-exploitation-1203170717/ (reporting that AMC movie theaters engage janitorial cleaning contractors who in turn call their individual workers "contractors," and these contractors clean up to 80 hours a week and earn $700-$900 every two weeks, meaning their hourly pay dips below $5 per hour in some weeks, with no overtime pay).

separate independent businesses in these arrangements. They lack investment of capital, against which they can earn a profit, they do not have a specialized skill they are bringing to the business, and they do not hold themselves out to the public as running an independent small business. These faux franchising and other so-called independent contracting relationships save employer costs by evading minimum wage requirements, health and safety standards, workers' compensation requirements, and payroll taxes that fund social insurance programs like Social Security and unemployment insurance. The contractors and sub-contractors can also pass along to their "franchisees" and "independent contractors" expenses normally assumed by an employer, such as cleaning supplies and equipment.

Multiple layers of subcontracting have deteriorated conditions in the already low-wage and exploitative janitorial industry. Studies that have analyzed the wages of janitors classified as employees have found that contracted janitors—meaning janitors who are employed by contractor or subcontractor firms who assign them to clean third parties' buildings or other sites—earn lower wages than janitors who are employed directly by the entity for whom they perform the work. One study of janitors' median hourly wages in California found that contracted janitors earned 20 percent less than non-contracted janitors ($10.31 compared to $12.85 per hour) from 2012 to 2014.[15] A similar

[15] Sara Hinkley, Annette Bernhardt, & Sarah Thomason, *Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California's Property Services Industry*, UC Berkeley Labor Center, Mar. 8, 2016, at 4, https://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf.

study of national data in 2010 found that wages decline once janitorial jobs are outsourced, with contracted workers earning anywhere from 4 percent to 7 percent less per hour.[16] More recently, an investigative report of theater chains found that these chains keep their costs down by relying on janitorial contractors that use subcontracted labor, that many of the janitors are the victims of egregious minimum wage and overtime violations, and that the multiple layers of subcontracting impose obstacles to obtaining recourse for these violations.[17]

Approximately twelve percent of all individuals in California who are classified as independent contractors in their primary job work in building and grounds cleaning and maintenance occupations.[18] Janitorial workers labeled as franchisees or

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[16] Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-wage Service Occupations? Evidence from Janitors and Guards,* 63 INDUS. & LABOR RELATIONS REV. 2, 287-306 (2010).

[17] Maddaus, *supra* note 14 ("Over the last eight months, *Variety* has investigated wage complaints from movie theatre janitors across the country, reviewing class-action lawsuits, state labor commission records and investigations by the U.S. Department of Labor. A clear pattern emerged: AMC and other theater chains keep their costs down by relying on janitorial contractors that use subcontracted labor. Those janitors typically have no wage or job protections, toiling on one of the lowest rungs of the U.S. labor market.").

[18] Annette Bernhardt and Sarah Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting*, UC Berkeley Labor Center, June 14, 2017, https://laborcenter.berkeley.edu/what-do-we-know-about-gig-work-in-california/. According to table 6 of this report, 12.2 percent of individuals in California who are classified as independent contractors in their primary job work in building and grounds cleaning and maintenance occupations, while only 3.6 percent of California

independent contractors at the bottom of layers of subcontracting are especially vulnerable to exploitation and egregious labor violations. David Weil, a former Administrator of the Wage and Hour Division of the Department of Labor, has said that misclassification is pervasive and that enforcement actions against cleaning companies for this illegal conduct during his time at DOL were typical.[19] Janitorial companies typically require their "independent contractors" or "franchisees" to pay expenses that are normally assumed by the employer, such as cleaning equipment, and hundreds or thousands of dollars in fees in order to obtain cleaning work, which significantly reduce these workers' income.[20] Wages are abysmally low and sometimes below the minimum wage; in a misclassification enforcement action from 2007, for example, the janitors were paid a flat rate of $50 for a nine-hour work day.[21]

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workers who are classified as employees in their primary job work in building and grounds cleaning and maintenance occupations.

[19] David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters.* HARVARD BUS. REV., July 5, 2017, https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters.

[20] *See, e.g., Williams v. Jani-King of Philadelphia, Inc,.* 837 F3d. 314 (3d Cir. 2016) (granting motion for class certification in a case alleging that janitors were misclassified as franchisees and were required to pay substantial fees, including an initial franchise fee between $14K and $142K and a royalty fee equal to 10 percent of gross revenue, as well as pay for all cleaning equipment and insurance).

[21] California Dep't of Justice, *Brown Sues Janitorial Companies for Exploiting Workers*, Dec. 19, 2007, https://oag.ca.gov/news/press-releases/brown-sues-janitorial-companies-exploiting-workers (janitors who were misclassified as independent contractors endured flagrant

Janitorial workers labeled as independent contractors or franchisees face a profound imbalance of bargaining power vis-à-vis their hiring entity, as evidenced by their substandard wages and working conditions and the illegal employer conduct pervasive throughout the industry. Many have no choice but to accept "take-it-or-leave-it" contracts that attempt to enshrine independent contractor or franchisee status even though the workers have little or no control over their work. It is critical that courts look beyond the labels assigned to these workers so their employers are not shielded from their illegal conduct.

II. The *Dynamex* test should be used to determine whether a "franchisee" is an employee under California's employment laws.

The purpose of the ABC test is to look beyond the labels that employers like Jan-Pro use for their relationships with their workers—such as "franchisor" and "franchisee"—and evaluate whether workers are truly engaged in a separate business. Jan-Pro uses a work structure that categorizes its workers as *de facto* independent contractors, outside of the protections of California labor law. *Dynamex* should

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violations of wage and hour laws, including subminimum wages). *See also Marquez v. NLP Janitorial, Inc.*, No. 16-cv-06089 (BLF), 2019 WL 652866 (N.D. Cal. Feb. 15, 2019) (default judgment against NLP Janitorial —a company that had been the target of enforcement action by the California Department of Industrial Relations in 2014 for wage theft— finding plaintiffs were janitors who had been misclassified as independent contractors and were paid the same amount of money each week regardless of the number of hours worked).

apply to the so-called franchise relationships created by Jan-Pro for its janitorial workers.

No statutory exemption—and hence no special test—exists for determining whether there is an employment relationship under California labor laws in the context of a purported franchisor-individual-worker-as-franchisee relationship as seen here. The so-called franchise arrangements in this case should be analyzed just as any other purported employment relationship where an alleged employer has contracted with another individual or entity for work.

Indeed, courts across the country that have evaluated employment classifications in cases challenging individual worker franchisee arrangements have rejected the argument set forth by Jan-Pro here: that a different test for employment should apply to franchises. *See, e.g., Williams v. Jani-King,* 837 F.3d 314, 325 (3d Cir. 2016) ("Under Pennsylvania law, no special treatment is accorded to the franchise relationship."); *Depianti v. Jan-Pro Franchising International, Inc.*, 990 N.E. 2d 1054, 1065-68 (Mass. 2013) (using relevant Massachusetts employment law test); *Jason Roberts, Inc. v. Administrator*, 15 A.3d 1145, 1150 (Conn. App. 2011) (use of "franchise" label did not warrant any special analysis or defense in worker misclassification case); *Coverall North America, Inc. v. Com'r of Div. of Unemployment Assistance*, 857 N.E.2d 1083, 1086-88 (Mass. 2006) (using usual definition of employment under Massachusetts law); *Hayes v. Enmon Enterprises, LLC,* 2011 WL 2491375, at *6 (S.D. Miss. June 22, 2011) (using usual test to determine whether franchisor was employer of franchisee). State

agencies have also applied their states' traditional employment test in determining whether workers have been misclassified as franchisees.[22]

Creating or applying a different test would not only contradict the history and purpose of California's strong wage protection laws, but it would create an incentive for companies to avoid compliance with wage laws by simply labeling their individual workers "franchisees" and then claiming that they fall into this special carve-out. The label attached to a worker by an employing entity—here, "franchisee"—does not dictate that worker's status under California labor law. The California labor laws broadly define employer in order to remedy abuse and to "prevent evasion and subterfuge." *Martinez v. Combs*, 231 P.3d 259, 276 (Cal. 2010); *Narayan v. EGL, Inc.*, 616 F.3d 895, 904 (9th Cir. 2010) ("[t]he label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.")

III. The ABC test set forth in *Dynamex* should apply to misclassification cases like Jan-Pro where there is more than one potential employer.

The *Dynamex* test must apply to both the entity with which the worker directly contracted and any joint employer that imposes conditions under the contract for work. Otherwise potential employers like Jan-Pro—the larger entities that fissure work—will be able to

[22] *See, e.g., National Maintenance Contractors vs. Employment Dep't*, 406 P.3d 133 (Or. App. 2017); *see also*, cases cited in Raise America PDX, *Cleaning up Oregon's Janitorial Industry* (June 2018), available at: http://raiseamericapdx.org/news/cleaning_up_report/.

evade responsibility for the workplace conditions they control by simply inserting intermediaries in between themselves and their workers.

Jan-Pro's hybrid independent contractor set-up, where the workers at the bottom are called independent contractors or franchisees, via subcontractors that Jan-Pro contracts with to procure the workers, is seen in other labor-intensive industries with low paid, often immigrant workers or workers of color. And these jobs, like the ones the janitors have in this case, are characterized by endemic levels of wage theft and other workplace violations, with no apparent responsible party.

For example, grocery workers in New York City were hired by brand-name stores to provide home delivery via subcontractors that called the workers "independent contractors." The mostly-immigrant workers worked upwards of 70 hours per week for only a few dollars an hour in pay and some tips. Although both the grocery stores and the intermediary subcontractors told the workers they were in business for themselves, the court saw through these labels and the structure, holding that the workers were employees and were employed by both the subcontractor and the stores. *Ansoumana v. Gristede's Operating Corp*., 255 F. Supp. 2d 184 (S.D.N.Y. 2003). Strawberry workers too were called "independent contractors" by a farm labor contractor engaged by a grower in *Real v. Driscoll Strawberry Assocs*., 603 F.2d 748 (9th Cir. 1979). Similar hybrid, or multi-tiered job structures have been imposed on workers in many other industries, including temp

and staffing,[23] construction,[24] cable installation,[25] security,[26] pharmaceutical delivery,[27] and logistics driving.[28] Regardless of the industry or occupation, courts have looked beyond the contracting arrangements and labels imposed on workers and found more than one person or entity to be responsible employers of those workers when those persons or entities create and operate the employment structures that generate workplace standards violations.

None of these workers should have to cut through labels imposed on them by multiple tiers of employers and entities before they are able to claim unpaid wages. The decades-long duration of this case shows that these structures impose profound obstacles and delays on workplace justice and employer accountability. *Dynamex*'s test is well-suited to analyze structures like Jan-Pro's work relationships, and should be used here and in other cases with these hybrid arrangements.

IV. The significant societal costs of misclassification provide additional support for broad application of the ABC test.

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[23] *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998).
[24] *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017).
[25] *Carpenter v. DirecTV, LLC*, No. 14–cv–02854–MJW, 2017 WL 4225797 (D. Colo. May 16, 2017).
[26] *Schultz v. Capital Intern Sec., Inc*., 466 F.3d 298 (4th Cir. 2006).
[27] *Young v. Act Fast Delivery of W.V., Inc.*, No. 5:16-cv-9788, 2018 WL 279996 (S.D. W. Va. Jan. 3, 2018).
[28] *Merrill v. Pathway Leasing LLC*, No. 16-cv-2242 (KLM), 2018 WL 2214471 (D. Colo. May 14, 2018).

The significant societal costs of misclassification, including in the guise of faux franchise arrangements, provide additional support for broad application of the ABC test. These costs are born by the misclassified workers and their families, law-abiding business facing a competitive disadvantage, and the public as a whole, which is losing out on revenue that funds critical programs like unemployment insurance.

Employers who misclassify their workers deny them the protection of workplace laws and exacerbate workers' chronic economic insecurity and instability. Their misclassified workers lose out on minimum wage and overtime protections, workplace health and safety standards, the right to collectively bargain to improve workplace standards, and coverage under critical social safety net programs, like unemployment insurance and workers' compensation.

The COVID-19 pandemic has shone a light on the devastating consequences of excluding workers from these foundational protections and benefits. When these schemes are successful, misclassified workers cannot access workers' compensation if they contract COVID-19 while on the job, a heightened risk for janitorial workers like Jan-Pro "franchisees" who are responsible for sanitizing buildings to prevent the spread of COVID-19. Nor can they receive state unemployment insurance as work dries up during this crisis.[29]

[29] The CARES Act created a new federally-funded unemployment insurance system—Pandemic Unemployment Assistance—for self-employed workers, including those classified as independent contractors, who cannot work for certain COVID-19 related reasons. Although this system may provide unemployment insurance benefits to some misclassified workers, it is narrow in scope, substantially less

They are also excluded from coverage under California's paid sick leave law,[30] which means that they may have no choice but to continue to work if they have symptoms of COVID-19. Misclassified workers' economic insecurity and exclusion from safety net programs may contribute to the spread of COVID-19 and exacerbate this public health crisis.

Federal and state coffers bear the cost of lost tax revenue when workers are illegally classified as independent contractors. A 2009 report by the Government Accountability Office estimated that independent contractor misclassification cost federal revenues $2.72 billion in 2006.[31] More recently, California's Department of Industrial Relations has estimated that the annual state tax revenue loss due to

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generous than traditional unemployment insurance, and expires at the end of 2020 so does not provide a long-term solution. Instead California should focus on encouraging workers who are likely misclassified to apply for traditional unemployment insurance and seeking back taxes and penalties from their employers to shore up California's UI trust fund.

[30] California's paid sick leave law covers employees and providers of in-home supportive services. Cal. Labor Code §246(a)(1)-(2). The Families First Coronavirus Response Act allows self-employed individuals to claim a tax credit to offset their federal self-employment tax if they must take sick or family leave for certain COVID-19-related reasons, though this tax credit is much less generous than the FFCRA provisions for paid leave available to eligible employees. Internal Revenue Service, COVID-19 Related Tax Credits: Special Issues for Employees and Additional Questions FAQs, https://www.irs.gov/newsroom/covid-19-related-tax-credits-special-issues-for-employees-and-additional-questions-faqs#specific.

[31] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, Sept. 2017, https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.

misclassification is as high as $7 billion.[32] According to another analysis, the federal government and the state of California lose out on almost three thousand dollars in revenue per year for each minimum wage worker misclassified by their employer.[33]

The lost tax revenue from Jan-Pro's and other employers' misclassification schemes robs California's unemployment insurance trust fund and workers' compensation system of much-needed dollars. This means that during times when a multitude of workers are relying on these benefits—such as during the current COVID-19 pandemic and recession—California may not be able to pay unemployment benefits or workers' compensation benefits to every worker who is entitled to them. As of early May 2020, unemployment insurance claims in California had exceeded four million, leading Governor Newsom to announce that the state UI fund was very close to depletion.[34]

Given the enormous costs of misclassification to workers, law-abiding employers, and the government, courts should apply the ABC test broadly to root out misclassification in all its forms and improve workplace standards.

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[32] State of California Dep't of Industrial Relations, News Release, *Labor Commissioner's Office Files $6.3 Million Misclassification and Wage Theft Lawsuit Against Glendale Construction Company*, Aug. 14, 2017, https://www.dir.ca.gov/DIRNews/2017/2017-76.pdf.
[33] Hinkley, *supra* note 15, at 25.
[34] George Avalos, *Coronavirus Unemployment: California Jobless Claims Top 4 Million, Funds are Running Dry*, The Mercury News, May 4, 2020.

CONCLUSION

For the foregoing reasons, Amici respectfully request this Court hold that *Dynamex* applies to employment relationships like the one seen here, where workers are called "franchisees" by more than one employer.

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Respectfully submitted,
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CERIFICATION OF COMPLIANCE

I certify that the attached petition and brief use a 14-point Times New Roman font and contain 5,577 words (excluding the cover, tables, and this certification) as counted by the Microsoft Word software program used to prepare this brief.

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