No. S222732

IN THE SUPREME COURT OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.
Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY
Respondent,

CHARLES LEE et al.,
Real Parties in Interest

On Review from a Decision of the Court of Appeal, Second Appellate District, Division Seven, Case No. B249546

Los Angeles County Superior Court Case No. BC 332016,
The Honorable Michael L. Stern, presiding

APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST CHARLES LEE ET AL.

MONIQUE OLIVIER SBN 190835
DUCKWORTH PETERS
LEBOWITZ OLIVIER LLP
100 Bush Street, Suite 1800
San Francisco, California 94104
Tel: 415-433-0333
monique@dplolaw.com

Attorneys for Amicus Curiae
California Employment Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

APPLICATION FOR LEAVE TO FILE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), the California Employment Lawyers Association ("CELA") respectfully requests leave to file the attached amicus curiae brief in support of Plaintiffs and Real Parties in Interest Charles Lee et al. ("Real Parties").

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour class actions involving allegations of independent contractor misclassification similar to those at issue in *Dynamex v. Superior Court.* CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers by, among other things, advocating for effective employment law enforcement procedures such as class actions in appropriate cases, and submitting amicus briefs and letters on issues affecting employment rights, including Supreme Court amicus briefs in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, and *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.)

CELA's proposed amicus brief will assist the Court by offering additional perspective on California's test for employment status and the application of the wage orders of the Industrial Welfare Commission in the context of allegations of widespread independent contractor misclassification. As CELA's proposed brief shows, particularly in light of the broad remedial purposes of California's wage laws, including the wage orders, the applicable wage order's definition of "employ" applies to Plaintiffs' legal claims.

CELA seeks leave to submit the attached brief to emphasize that the arguments advanced by defendant Dynamex Operations West, Inc. if accepted by this Court, would seriously undermine the ability of workers to vindicate their rights when employers

misclassify them to evade compliance with California's wage laws. Recognizing that the Court's forthcoming opinion may impact how courts determine employment status in similar independent contractor misclassification cases, CELA's brief focuses on how employment status should be evaluated. The proposed brief explains the reasons why the IWC's alternative definitions of "employ" apply in misclassification cases. The brief also addresses Dynamex's misguided arguments that application of the wage order definitions is unworkable.

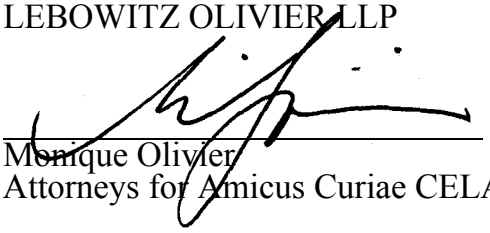
Pursuant to California Rules of Court, rule 8.520(f)(4), CELA affirms that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, CELA respectfully submits that its accompanying brief will assist the Court in deciding the matter, and therefore requests the Court's leave to file it.

Dated: December 4, 2015

Respectfully Submitted,

DUCKWORTH PETERS
LEBOWITZ OLIVIER LLP

By: 

Monique Olivier
Attorneys for Amicus Curiae CELA

INTRODUCTION

> *The misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers and the entire economy. Misclassified employees often are denied access to critical benefits and protections to which they are entitled, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces. Employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers' compensation funds. It hurts taxpayers and undermines the economy.*

The U.S. Department of Labor Misclassification Initiative, available at http://www.dol.gov/whd/workers/misclassification/ (as of November 30, 2015).[1]

California has long recognized the pernicious effects of businesses misclassifying workers as independent contractors. Mislabeling employees in this manner deprives them of the host of protections California law offers while also removing the safety net that employee status provides, depriving the state of important tax revenues, and sparking a race to the bottom for unscrupulous businesses seeking a competitive advantage in the marketplace.[2] California has also long embraced the strong public policy in favor of

---

[1] See also United States Department of Labor, Wage and Hour Division, "The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors,"(July, 2015), p. 1 http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm (as of November 27, 2015).

[2] See National Employment Law Project,"1099'd: Misclassification of Employees as "Independent Contractors"" (April 2010) http://nelp.org/content/uploads/2015/03/1099edFactSheet2010.pdf (as of November 27, 2015). In addition, the California Division of Labor Standards Enforcement (DLSE) estimates that $7 billion of payroll taxes are lost each year from misclassification. DLSE,

protecting the wage earner. As a result, there is, in this state, a presumption that one who does work for another is an employee, and the burden to prove that the worker is, in fact, an independent contractor, rests with the presumed employer. (*Robinson v. George* (1940) 16 Cal.2d 238, 242.)

The question before this Court is what test applies when workers claim they have been misclassified and, but for that misclassification, are entitled to the protections and rights afforded them under the Labor Code and the IWC's wage order. The Court largely answered this question in *Martinez v. Combs* (2010) 49 Cal.4th 35 when it recognized and applied the three alternative definitions of employment contained in the IWC's wage orders. The Court recognized the IWC's power, through its wage orders, "to fix minimum wages, maximum hours and standard conditions of labor for workers in California," which "includes the power to define the employment relationship as necessary 'to insure the receipt of the minimum wage and to prevent evasion and subterfuge…'" (*Martinez v. Combs*, *supra*, at pp. 52, 64, quotation omitted.)

This Court should resist Dynamex's efforts to ignore the plain language of the wage order and roll back this Court's interpretation of that language in *Martinez.* In light of the broad statutory protections afforded workers in this state, and the express language of the applicable wage order, the Court of Appeal properly held that Plaintiffs could demonstrate their employment relationship to Dynamex by any one of the three alternative tests of the wage order.

This Court should also reject Dynamex's dystopian view that affirming the Court of Appeal's considered decision will spell certain doom for California businesses. As the Court recognized in *Martinez*, the IWC wage orders' definitions are not limitless and have to be viewed, as they have been, in the context of both their historical meaning and their statutory purpose.

Worker Misclassification, http://www.dir.ca.gov/dlse/worker_misclassification.html (as of December 2, 2015).

Finally the Court should not be distracted from the facts of this case by Dynamex's rhetoric, as those facts underscore the importance of this Court's ruling. Dynamex seeks to label the plaintiff drivers -- an integral part of its daily labor force -- as independent contractors. These are the same workers who Dynamex had earlier classified as employees. Overnight, these workers lost all of the protections of California's labor laws, such as guaranteed minimum wage, overtime pay, and reimbursement of business expenses. Such an arrangement in exactly what the IWC's alternative definitions of employment are designed to prevent -- the irregular working relationship where the business reaps all of the benefits of having a steady workforce while meeting none of its obligations to its workers.

ARGUMENT

I. The Remedial Purpose of California's Labor Laws and Wage Orders Is to Broadly Protect the Rights of Workers.

California wage laws "are to be construed broadly in favor of protecting employees." (*Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at p. 1103; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.) "[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[.]" (*Industrial Welfare Com. v. Superior Court of Kern County* (1980) 27 Cal.3d 690, 702.) As this Court recently confirmed, these principles "apply equally to the construction of wage orders." (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840.)

This Court has emphatically and repeatedly declared that wages are entitled to special protection in the law. As the Court stated in 1948, "[i]t has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." (*In re Trombley* (1948) 31

Cal.2d 801, 809.) Likewise, two decades later, the Court concluded that "[w]ages of workers in California have long been accorded a special status . . . . This public policy has been expressed in the numerous statutes regulating the payment, assignment, exemption, and priority of wages. . . . California courts have long recognized the public policy in favor of full and prompt payment of wages due an employee." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 325-326; see *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 837.)

The "Legislature and our courts have accorded to wages special considerations" in order to protect the "welfare of the wage earner." (*Kerr's Catering Service v. Department of Industrial Relations*, *supra*, 57 Cal.2d at p. 330.)[3] This policy also encompasses the right of employees to be free from unlawful deductions against those wages. (*Gould v. Maryland Sound Industries, Inc.*, *supra*, 31 Cal.App.4th at pp. 328-329; *Quillian v. Lion Oil Co.* (1979) 96 Cal.App.3d 156, 162-163; *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1119-1121 ["the Legislature has recognized the employee's dependence on wages for the necessities of life and has, consequently, disapproved of unanticipated or unpredictable deductions because they impose a special hardship on employees"]; see *Prachasaisoradej v. Ralphs Grocery Co.* (2007) 42 Cal.4th 217, 241 ["[S]ections 221 through 224, in combination with other statutes, establish a public policy against any deductions, setoffs, or recoupments by an employer from employee wages or earnings…"].)

Illustrating the protective intent of California wage laws, several provisions of the Labor Code expressly provide that the claims asserted by Plaintiffs here are unwaivable. Labor Code section 206.5 makes illegal releases of wage claims when wages are due to a worker. Labor Code section 219(a) provides that "no provision of this article [Labor

---

[3] (See also *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1148, quoting *California Grape etc. League v. Industrial Welfare Com.* (1990) 268 Cal.App.2d 692, 703 ["California courts have long recognized wage and hours laws 'concern not only the health and welfare of the workers themselves, but also the public health and general welfare.' [Citation.]"].)

Code, sections 200-244] can in any way be contravened or set aside by a private agreement." Labor Code section 2804, which pertains to Plaintiffs' claim under Labor Code section 2802, expressly provides that "[a]ny contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State."

Thus, "it is clear from the many Labor Code sections … that there is in this state a fundamental and substantial public policy protecting an employee's wages…" (*Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 574; see, e.g., *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 170 ["[a]n employee's statutory right to reimbursement of job expenses is unwaivable."]; *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 951–952 [rights under § 2802 "are nonwaivable, and any contract that does purport to waive an employee's indemnity right would be contrary to the law and therefore unlawful to that extent"]; *Stuart v. Radioshack Corp.* (N.D.Cal. 2009) 641 F.Supp.2d 901, 904 [claims for wages and reimbursement are protected by statutory anti-waiver provisions].)

Contrary to Dynamex's contention, this rich body of protections for workers does not narrow when there is a dispute as to employee status. Dynamex admits that a "paramount consideration" in evaluating whether a worker is mislabeled as an independent contractor, as with applying the wage laws generally, is "the remedial purposes served by California's employment-related statutes." (AOB p.3.) Yet Dynamex attempts to convince the Court that the well-established protections in the wage orders apply only to the *admitted* employee and not the *disputed* employee. (AOB p.11.) Dynamex may wish that it were so easy to evade the scope of California's wage laws, but it is simply not so.

As this Court stated over half a century ago, "the fact that one is performing work and labor for another is *prima facie* evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary." (*Robinson v. George*, *supra*, 16 Cal.2d at p. 242.) The fact that there is a *presumption in favor of*

employment is by design, because whether a person rendering service to another is an employee must be determined "with deference to the purposes of the protective legislation." (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (19*89) 48 Cal.3d 341, 353-354.) Interpreting this Court's precedential cases, the Ninth Circuit has similarly recognized that it is a "fundamental policy" of California law to presume an employment relationship in cases asserting violations of the California Labor Code. (*Ruiz v. Affinity Logistics Corp.* (9th Cir. 2012) 667 F.3d 1318, 1324 [rejecting application of Georgia law that would presume independent contractor, rather than employee, status because it "would contravene the fundamental California public policy in favor of ensuring worker protections"].) "'The employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose' behind the statute the worker sees to enforce." (*Id*. (emphasis in original), quoting *Borello*, 48 Cal.3d at 353-54; and see *id.* [when applying California law, "the court must consider protective legislation designed to aid employees to determine the employee-independent contractor issue."].)

Indeed, in recent years, California has increased the protections for workers misclassified as independent contractors. In 2012, California strengthened its Labor Code provisions by substantially increasing employer penalties for independent contractor misclassification.[4] It also has been working in partnership with the U.S.

---

[4] Senate Bill 459 (SB 459), which became effective on Jan. 1, 2012, added Labor Code sections 226.8, 2753 to the California Labor Code, and imposes stiff penalties that range between $5,000 to $25,000 for the "willful misclassification" of independent contractors by employers "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." California Senate Majority Leader Ellen M. Corbett, author of SB 459, which added § 226.8 to the Labor Code, clearly stated the concerns that gave rise to this new statute:

> [A]t least ten million workers are classified as independent contractors nationally, an increase of more than two million in just six years. The total cost to California in lost tax revenue has been estimated at $7 billion. When a worker is misclassified as an independent contractor, he or she is not subject to California minimum wage and overtime protection laws.

Department of Labor to coordinate their attack on the problem of worker misclassification.[5]

These actions indicate greater protections against misclassification of workers as independent contractors, and underscore the weakness of Dynamex's clamor for lesser protections for "disputed" employees. Common sense also counsels against such an approach: while an "admitted" employee may be deprived of a single right under the wage laws (e.g. a right to overtime pay), an employee who is misclassified as an independent contractor is denied the protections of *the entire body of wage laws*. To permit employers less scrutiny of their practices with respect to these individuals would be contrary to the fundamental public policy in favor of protecting workers that this Court has repeatedly articulated.

It is through this lens, then, that the Court must address the appropriate test to apply to Dynamex's classification of its drivers as independent contractors.

> Additionally, the worker has no workers' compensation coverage if injured on the job, no right to family leave, no unemployment insurance, no legal right to organize or join a union, and no protection against employer retaliation. The misclassification of workers as independent contractors creates an unfair playing field for responsible employers who honor their lawful obligations to their employees. The misclassification of workers results in a loss of payroll tax revenue to the State and increased reliance on the public safety net by workers who are denied access to work-based protections.

Senate Rules Committee, SB 459 Bill Analysis, at 6, (available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0451-0500 / sb_459_cfa_20110527_120443_sen_floor.html).

[5] See http://www.dol.gov/whd/workers/misclassification/#stateDetails (as of November 30, 2015), outlining joint efforts to reduce misclassification. *See*, *e.g.*, Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, N.Y. TIMES, July 13, 2005, at A2 (highlighting the California Attorney General's crackdown on misclassification, by "seeking $4.3 million from a construction firm [the Attorney General] accused of misclassifying employees" and a $13 million judgment obtained by the Attorney General "when a court ruled that two companies had misclassified 300 janitors, cheated the state out of payroll taxes and not paid minimum wage and overtime.").

II. The Wage Order's Alternative Definitions of "Employment" Apply to the Dispute Before this Court.

As this Court recently confirmed, "wage and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC." (*Mendiola v. CPS Security Solutions, Inc.*, *supra*, 60 Cal.4th at p. 838, quoting *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026.) "The IWC, a state agency, was empowered to issue wage orders, which are legislative regulations specifying minimum requirements with respect to wages, hours, and working conditions." (*Id.*) The IWC's authority includes "the power to adopt rules to make its wage and hour promulgations effective." (*Martinez*, 49 Cal.4th at 64, quoting *Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 302.) It also includes the power to define terms necessary to enforce the wage orders. (*Industrial Welfare Com. v. Superior Court of Kern County*, *supra*, 27 Cal.3d at p. 702; *Martinez v. Combs*, *supra*, 49 Cal.4th at pp. 63-64.) As with the provisions of the Labor Code, wage orders "are to be construed so as to promote employee protection." (*Mendiola v. CPS Security Solutions, Inc., supra,* 60 Cal.4th at p. 840 (quotation omitted); see *Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 340.)

Accordingly, when faced with the question of whether two defendants were the plaintiffs' employer for purposes of their wage claims, this Court in *Martinez* applied the alternative definitions of "employ," each sufficient to establish an employer-employee relationship, contained in the applicable wage order: "(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 v. Combs*, *supra*, 49 Cal.4th at p. 64 (emphasis in original).) These three definitions determine who is an "employer" and liable for compliance with the standards set by the IWC. (*Id.* at pp. 70-71.)

So, too, do those three definitions apply to determine whether the plaintiff drivers in this case are the employees of Dynamex. If Dynamex (a) exercises control over the

drivers' wages, hours or working conditions, *or* (b) suffers or permits them to work, *or* (c) engages them under the *Borello* factors, Dynamex is the employer, and the drivers are employees entitled to the protections of the wage order. (*Martinez v. Combs*, *supra*, 49 Cal.4th at pp. 70-71; see *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419 [examining all three definitions].)

Dynamex contends that these alternative tests cannot be used to determine employee status, and that, instead, the "suffer or permit" and "exercise control" tests "presume the existence of an employment relationship." (AOB p.11.) Putting aside the obvious fact that if the employment status were resolved, there would be no need to ask about the employment relationship, Dynamex's tortured reading of the wage order must be rejected for a multitude of other reasons.

First, Dynamex's argument is simply contrary to the wage order, and it offers no principled reason for a departure from the wage order's express language. There is nothing within the wage order that suggests that *only* the common law test can be used to determine the existence of an employment relationship. Indeed, this Court in *Martinez* held just the opposite. (*Martinez v. Combs*, *supra*, 49 Cal.4th at p. 64.) As the Court made plain, "[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." (*Id.* at p. 65.)

Dynamex's counter that the IWC would be acting beyond its authority by determining who is an "employee" similarly fails. As this Court has recognized, the IWC's authority includes "the power to adopt rules to make its wage and hour promulgations effective." (*Martinez v. Combs*, *supra*, 49 Cal.4th at p. 64 (citation omitted); see also *id.* at p. 60 [the "Legislature and the voters have repeatedly demanded the courts' deference to the IWC's authority and orders."]; Lab. Code, § 1185 [IWC's orders "shall be valid and operative"]; Lab. Code, § 1187 [IWC's findings of fact are conclusive in the absence of fraud].) Further, this Court explicitly approved the IWC's authority to "adopt a definition of 'employer' that brings within its regulatory jurisdiction

an entity that controls any of these aspects [i.e., wages, hours or working conditions] of the employment relationship." (*Martinez v. Combs, supra,* 49 Cal.4th at p. 59.)

Second, Dynamex's attempt to claim that the wage order's definitions must be limited to the joint employment context discussed in *Martinez* cannot withstand scrutiny. While *Martinez* did address an issue of joint employment, the wage order plainly is not so limited. Further, Dynamex offers no cogent explanation for why the test for employment for a *joint* employer would be broader than that for a *single* employer or why the alternative definitions would apply under the facts of *Martinez* but not here.

Third, Dynamex's contention that the Court in *Martinez* intended to address only who is the "employer" but *not* who is the "employee" is illogical. (AOB p.33.) The question of whether Apio and Combs -- the defendants whose liability was at issue in *Martinez* -- are the "employers" of plaintiffs necessarily also asks whether the plaintiffs are their "employees." That is, the determination is made by considering the *plaintiffs' relationship to Apio and Combs*, not merely the relationship between Apio and Combs and the admitted employer. Applying the IWC definitions, the Court found that "neither Apio nor Combs suffered or permitted plaintiffs to work because neither had the power to prevent plaintiffs from working." (*Martinez v. Combs, supra,* 49 Cal.4th at p. 70.) The Court also found that Apio and Combs did not employ plaintiffs because they did not control plaintiffs' wages, hours or working conditions. (*Id.* at pp. 71-72.)[6]

The question here is Plaintiffs' relationship to Dynamex. The alternative definitions of the wage order apply to determine that relationship.

---

[6] Dynamex suggests that this Court's brief discussion of the *Borello* factors in considering whether defendant Munoz was an employee or independent contractor somehow conclusively determines that *Borello* is the sole test to apply in misclassification cases. (AOB pp.10-11.) It is apparent from the Court's opinion, however, that plaintiffs had not contended that Munoz was an employee under the wage order definitions, and this issue was simply not addressed. (*Martinez v. Combs, supra,* 49 Cal.4th at pp. 73-74 (noting plaintiffs' were "taking a different approach not based on the applicable wage order" in arguing that Munoz was an employee of Apio and Combs).)

III. Applying the Alternative Definitions of the Wage Order Will Not Spell the End of Independent Contracting as We Know It.

Dynamex insists that the alternative definitions should not apply because if they did, this would "toss all workers and service providers into the 'employee' basket." (AOB p.11.) But that argument is better directed at the Legislature, not to this Court, which has already read and applied the plain language of the wage order in the same manner as the Court of Appeal applied it below in this case. (See *Martinez v. Combs, supra,* 49 Cal.4th at p. 64.) As set forth in detail in Real Parties' brief and in the brief of amici CRLAF et al., the definitions of "employ" in the wage orders are broadly conceived to protect workers. Such breadth is necessary, as this Court has recognized, to remedy abuse and to "prevent evasion and subterfuge." (*Id.* at p. 61 (quoting *Cal. Drive-in Restaurant Assn.*, *supra*, 22 Cal.2d at 303).)[7]

Moreover, as this Court found in *Martinez* when it held that the defendants there were *not* employers under the wage order definitions, it is simply not the case that applying the wage order definitions will render everyone "employees." While the definitions are broad, they are not intended to sweep every worker into their scope. As this Court has taught, to establish an employment relationship under the "wages, hours or working conditions" definition requires a showing that the purported employer "exercises control," and is intended to reach through sham arrangements to impose liability on the actual employer. (*Martinez v. Combs, supra,* 49 Cal.4th at pp. 59, 71; see also *Futrell v. Payday California, Inc.*, *supra*, 190 Cal.App.4th at p. 1432 ["'Control over wages' means

---

[7] The recent administrative interpretation of the federal "suffer or permit" test (which is decidedly not as broad as California's) as applied to workers alleged to be misclassified as independent contractors is instructive. The interpretation notes that "*most workers are employees* under the FLSA's broad definitions," and the misclassification inquiry must be conducted in light of "the FLSA's statutory directive that the scope of the employment relationship is *very broad*." (See United States Department of Labor, Wage and Hour Division, "The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors,"(July, 2015), p. 1 http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm (as of November 27, 2015) (emphasis added).)

that a person or entity has the power or authority to negotiate and set an employee's rate of pay."].) The "suffer or permit" definition is similarly intended to reach "irregular working arrangements the proprietor of a business might otherwise disavow with impunity." (*Martinez v. Combs, supra,* 49 Cal.4th at p. 58.) The touchstone under that definition is "the defendant's knowledge of and failure to prevent the work from occurring," where the defendant "had the power to prevent plaintiffs from working." (*Martinez v. Combs, supra,* 49 Cal.4th at p. 70.)

These are not definitions without boundaries. Instead, they are the definitions the IWC intended, interpreted and applied with the broad remedial purposes of the wage laws in mind. (*Mendiola*, 60 Cal. 4th at p. 840.) The wage order definitions were designed "to reach irregular working arrangements that fall outside of the common law." (*Martinez v. Combs, supra,* 49 Cal.4th at p. 58.) They do not bring within their scope a traditional independent contractor relationship, such as the plumber, landscaper or dog walker described in Dynamex's brief.

Indeed, this Court rejected the plaintiffs' arguments in *Martinez* that Apio and Combs "suffered or permitted plaintiffs to work because defendants knew plaintiffs were working, and because plaintiffs' work benefited defendants" as "unreasonably broad," and finding no employment relationship because "neither had the power to prevent plaintiffs from working." (*Martinez v. Combs, supra,* 49 Cal.4th at p. 69-70.) In addition, courts have demonstrated the ability to apply the wage order definitions in a rational manner. (See, e.g., *Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1021-1023 [finding triable issues of fact as to whether defendant was employer under wage order definitions where evidence showed that defendant supervised employees, controlled payroll, issued paychecks, issued employee handbooks, and handled employee discipline]; *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 949-951 [applying the wage order definitions and finding that the trial court erred in determining as a matter of law that defendant was not employer where evidence existed that defendant authorized the work, specified the tasks to be completed, determined the rate of pay and authorized payments, acted as the employer for purposes of collective

bargaining negotiations, and retained right to prevent workers from working]; *Futrell v. Payday California, Inc.*, *supra*, 190 Cal.App.4th at p. 1432 [holding that payroll company was not employer under wage order definitions because it did not exercise control over the wages of workers by issuing paychecks and no evidence demonstrated that company had power to cause worker to work or prevent him from working.]; *Johnson v. Serenity Transp., Inc.* (N.D. Cal. Nov. 2, 2015) 2015 U.S. Dist. LEXIS 148384 [granting motion to dismiss with leave to amend where plaintiffs did not allege sufficient facts to bring defendants within wage order definitions of employer].)

Courts are well equipped to apply the IWC's definitions of "employment" to the facts of cases. The IWC's definitions of employment are properly applied to determine whether Dynamex is denying its labor force of drivers (which had earlier been classified as W-2 employees) the benefits of California's wage laws.

IV. The IWC Definition of "Employ" Should Govern Plaintiffs' Claim under Labor Code section 2802.

Finally Dynamex urges this Court to reject application of the IWC definitions to plaintiffs' claims because the Court of Appeal found that such definitions cannot be applied to the plaintiffs' claims under Labor Code section 2802, and applying different definitions to different claims could produce confusing results. As an initial matter, the fact that different definitions may apply to different claims does not counsel in favor of rejecting application of the more protective language of the wage order, especially in light of the mandate to interpret California's wage laws broadly to protect workers. (See *Industrial Welfare Com. v. Superior Court of Kern County*, *supra*, 27 Cal.3d at p. 702.)

More importantly, there is no need to apply different definitions, because the Court may, and should, interpret "employer" in Labor Code section 2802 as the word is defined in the applicable wage order. To that end, CELA endorses the approach explained by amici CRLAF et al. in their amicus brief. Because the IWC regulates wages, hours, and working conditions, and because the wage order requires reimbursement of employee expenses, it makes good sense to apply the IWC's definition of employer to plaintiffs' claims under section 2802. Because plaintiffs' reimbursement

claim is cognizable under the wage order, the wage order definitions of employer should apply. The broad authority given to the IWC to regulate minimum working conditions indicates that the Legislature has provided a definition of employ for those covered by a wage order. Having consistent – and protective – definitions of employer would fulfill the public policy protecting wage earners, and would prevent employers from finding ways to evade the law.

CONCLUSION

Amicus Curiae California Employment Lawyers Association respectfully urges the Court to affirm the decision below, and to remand the case for a determination on the merits of real parties' certified claims.

Dated: December 4, 2015

DUCKWORTH PETERS
LEBOWITZ OLIVIER LLP

By: _____
Monique Olivier
Attorneys for Amicus Curiae CELA

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, Respondents hereby certify that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more and the word count for the portions subject to the restrictions of Rule 8.204(c)(3) is 4,701.

Dated: December 4, 2015

DUCKWORTH PETERS
LEBOWITZ OLIVIER LLP

By: _____
Monique Olivier
Attorneys for Amicus Curiae CELA

PROOF OF SERVICE

Case No. S222732

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 100 Bush Street, Suite 1800, San Francisco, CA 94104. On December 7, 2015, I served the following document(s):

APPLICATION FOR LEAVETO FILE AND BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST CHARLES LEE ET AL.

as follows:

[√] ELECTRONIC SERVICE (E-MAIL): As permitted by the Rules of Court and/or the agreement of the recipients, I transmitted a service copy by e-mail the document(s) listed above to the persons on the attached service list and to:

California Supreme Court

[√] U.S. Mail: I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence is deposited with the United States Postal Service in a sealed envelope or package that same day with first-class postage thereon fully prepaid. I served said document on the parties listed on the attached service list by placing said document in a sealed envelope or package with first-class postage thereon fully prepaid, and placed the envelope or package for collection and mailing today with the United States Postal Service at San Francisco, California addressed on the attached service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 7, 2015, at San Francisco, California.

Monique Olivier

SERVICE LIST

Robert Gordon Hulteng Littler Mendelson PC 650 California Street, 20th Floor San Francisco, CA Ellen Marie Bronchetti Sheppard Mullin Richter and Hampton LLP 4 Embarcadero Center 17th Floor San Francisco, CA	Counsel for Petitioner, Dynamex Operations West, Inc.
Kevin Francis Ruf kruf@glancylaw.com Glancy Binkow and Goldberg LLP 1925 Century Park East Suite 2100 Los Angeles, CA Alan Mark Pope pope@popeberger.com Pope Berger and Williams LLP 3555 Fifth Avenue Suite 300 San Diego, CA	Counsel for Real Parties in Interest, Charles Lee et al.
Clerk of the Court California Court of Appeal Second Appellate District, Div. Seven Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	
Clerk of the Court Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA	Respondent, Superior Court of Los Angeles County