Case No. S222732

IN THE SUPREME COURT OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.
Defendant-Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY
Respondent,

CHARLES LEE, *et al.*
Plaintiffs-Real Parties in Interest.

On Review from a Decision by the Court of Appeal,
Second Appellate District, Division Seven, Case No. B249546
L.A. County Super. Ct. Case No. BC332016 (Hon. Michael L. Stern)

SUPPLEMENTAL BRIEF OF AMICI CURIAE SUPPORTING PLAINTIFFS-REAL PARTIES IN INTEREST

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QUESTION PRESENTED BY THE COURT'S SUPPLEMENTAL BRIEFING ORDER:

> This matter, in which review has been granted, presents the following issue: In a wage and hour class action involving claims that the plaintiffs are misclassified as independent contractors, may a class be certified based on the Industrial Welfare Commission definitions as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*), or should the common law test for distinguishing between employees and independent contractors discussed in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), control? The court requests the parties in the above entitled matter to file supplemental briefs addressing the following question: In resolving the above issue, what relevance, if any, should the court give to the Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual (2002 update as revised March 2006) and, in particular, to the sections of the manual that discuss the independent contractor/employee distinction (§§ 2.2, 2.2.1, 28-28.4.2.4)?

INTRODUCTION

The crucial question before this Court is whether the definition of employment set forth in the Industrial Welfare Commission's Wage Orders, as construed by this Court in *Martinez v. Combs* (2010) 49 Cal.4th 35, governs all claims arising under the Wage Orders and related provisions of the Labor Code, or whether the IWC's definition applies only to claims involving "joint" employment, leaving all disputes as to employee classification to be resolved by applying the version of the common law test set forth in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341. The DLSE Enforcement Policies and Interpretations Manual has no relevance to the Court's consideration of that statutory interpretation question, because the Manual does not take any position on that issue. By its own terms, the Manual does not offer new interpretations of California law, but merely summarizes the policies and interpretations set forth in other sources of authority, such as DLSE interpretive letters,

adjudicative decisions by the Labor Commissioner, and judicial opinions construing California law. The provisions of the Manual addressing the distinction between independent contractors and employees were last modified *before* this Court held in *Martinez* that the Wage Orders' definition of employment requires consideration of three separate and distinct prongs, only one of which is based upon the common law test set forth in *Borello*. Because the independent contractor-related provisions have not been revisited since *Martinez* was decided, they were not intended and cannot be construed to reflect any considered position by the DLSE regarding whether the definition of employment set forth in *Martinez* applies to misclassification claims arising under the Wage Orders and related Labor Code provisions.

ARGUMENT

I. The DLSE Enforcement Manual Summarizes Other Sources of Authority Without Offering New Interpretations of California Law.

This Court has long held that the provisions of the DLSE Enforcement Manual are not entitled to receive any deference from California courts. *See, e.g.*, *Martinez*, 49 Cal.4th at 50 n.15 (citing *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581–82; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 575–77). Regardless of any positions expressed in the Manual, this Court must exercise its independent judgment in determining whether the IWC's definition of employment applies whenever a worker claims to be employed by a particular employer for the purposes of the Wage Orders and related Labor Code provisions, or whether the IWC's definition of employment applies only to disputes involving purported "joint employers."

The Manual itself acknowledges the limitations on the DLSE's interpretive authority, and does not purport to provide any new interpretations of California law. *See* DLSE Enforcement Manual §1.1.3 (citing *Tidewater* and acknowledging that as a general matter the DLSE "may not interpret the myriad of laws which it must enforce without utilizing the [Administrative Procedures Act process]"). Instead, the Manual merely "summarizes the policies and interpretations which DLSE has followed in discharging its duty to administer and enforce the labor statutes and regulations of the State of California." *Id.* §1.1.6. Those policies and interpretations are derived from *other* sources of authority—namely:

1. Decisions of California's courts which construe the state's labor statutes and regulations and otherwise apply relevant California law.

2. California statutes and regulations which are clear and susceptible to only one reasonable interpretation.

3. Federal court decisions which define or circumscribe the jurisdictional scope of California's labor laws and regulations or which are instructive in interpreting those California laws which incorporate, are modeled on, or parallel federal labor laws and regulations.

4. Selected opinion letters issued by DLSE in response to requests from private parties which set forth the policies and interpretations of DLSE with respect to the application of the state's labor statutes and regulations to a specific set of facts.

5. Selected prior decisions rendered by the Labor Commissioner or the Labor Commissioner's hearing officers in the course of adjudicating disputes arising under California's labor statutes and regulations.

Id.

For each policy and interpretation presented in the Manual, the Manual cites the underlying source upon which the DLSE relied. *Id.* §1.1.6.1. For example, in stating that "[t]he definition of employer for purposes of California's labor laws" is "'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,'" the Manual identifies as its source "the Wage Orders promulgated by the Industrial Welfare Commission." *Id.* §2.2 (quoting 8 C.C.R. §11090(2)(F)).[1]

Similarly, the Manual's discussion in Chapter 28 of the (then-current) test for distinguishing independent contractors from employees identifies the specific sources for that discussion—namely, this Court's holding in *Borello*, two Court of Appeal decisions decided shortly thereafter, and various pre-*Borello* decisions construing Labor Code §2750.5. *Id.* §28-28.4.2.4 (citing, e.g., *Borello*, 48 Cal.3d 341; *Yellow Cab Coop. v. Workers Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288; *Toyota Motor Sales v. Super. Ct.* (1990) 220 Cal.App.3d 864; *Fillmore v. Irvine* (1983) 146 Cal.App.3d 649). Consistent with the express limitations on the Manual's scope, Chapter 28 offers no analysis but simply an objective description of the common law test "adopted . . . in *Borello*." *Id.* §28.3. Nowhere does the Manual's discussion of that test suggest that the *Borello* test takes precedence over the IWC's definition of employment, and

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[1] Notably, the Manual takes the position that this definition of employment applies to all of "California's labor laws" and not merely to claims specifically arising under the Industrial Welfare Commission's Wage Orders. DLSE Enforcement Manual §2.2; *see also Martinez*, 49 Cal.4th at 64 (concluding that "the Legislature intended to defer to the IWC's definition of the employment relationship in actions under [Labor Code §1194]").

nowhere does it cite any authority that would support such an interpretation of California law.

II. The Enforcement Manual Has Not Been Revised To Account for *Martinez*.

Any ambiguity regarding whether the DLSE intended its Enforcement Manual to take a position regarding the question before this Court is resolved by the revision history of §2.2, §2.2.1, and Chapter 28. The Manual identifies each of those sections as having last been revised in June 2002. *Martinez*, of course, was decided in 2010. Because the DLSE has not yet revised Chapter 28, §2.2, or §2.2.1 to account for that decision, those provisions cannot be construed as adopting any position regarding the question before this Court.

As noted above, the provisions of the Manual addressing the distinction between independent contractors and employees simply describe *Borello*'s version of the common law test for determining whether a particular worker is an independent contractor rather than an employee. Construing the Workers' Compensation Act's statutory definition of "independent contractor," *Borello* established a multi-factor test grounded in the common law's concern with the alleged employer's right to control the worker's manner and means of production. 48 Cal.3d at 349-53. *Borello* recognized that employment should not be defined exclusively through the narrow test used to determine whether an individual is "vicarious[ly] liab[le] for the misconduct of a person rendering service to him" and that courts should consider other relevant factors (including those set forth in the Restatement Second of Agency). *Id.* at 350-51. *Borello* nonetheless concluded, on the basis of the Act's express incorporation of the common law's definition of employment, that the employer's right to control the means and manner of production remains the "most important" consideration in determining whether a particular individual is an employee

rather than an independent contractor. *Id.* at 350; *see also id.* at 349 ("The Act defines an independent contractor as 'any person who renders service for a specified recompense for a specified result, under the control of his principal *as to the result of his work only and not as to the means by which such result is accomplished.*'") (quoting Cal. Labor Code §3353) (emphasis added). Accordingly, *Borello* has been recognized as an application of the common law definition of employment. *See, e.g., Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530-31 (*Borello* applied "the common law test" for determining whether individuals were employees or independent contractors").

In *Martinez*, this Court considered the IWC's definition of employment, as set forth in the Wage Orders, and concluded that the IWC's definition is *not* limited to the common law. *Martinez* explained that the IWC's definition of "employ" "has three alternative definitions": "(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." 49 Cal.4th at 64 (emphasis in original). As *Martinez* explained, only the third definition of "employ" ("to engage") incorporates the common law standard addressed in cases like *Borello*. *Id.* ("[T]he IWC's definition of employment incorporates the common law definition *as one alternative.*"). With respect to the other two definitions, the focus is not on the hiring entity's control over the worker's performance (as under the common law), but instead on the power of the hiring entity to ensure compliance with California's minimum labor standards. The "suffer or permit" definition, for example, was intended to extend the Wage Orders' protection beyond the "common law master and servant relationship" and to establish that the entities that benefit from workers' efforts have a duty to "us[e] reasonable care" to prevent the existence of prohibited working conditions. *Id.* at 58-59 (citation omitted). Similarly,

the "control over wages, hours or working conditions" definition of employment was designed to "bring[] within [the Industrial Welfare Commission's] regulatory jurisdiction an entity that controls any . . . aspect[] of the employment relationship" falling within the Commission's "delegated authority," whether or not that entity would be an "employer" under the common law. *Id.* at 59; *see also Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 262 Cal.Rptr.3d 634, 639 ("When construing the Labor Code and wage orders, we adopt the construction that best gives effect to the purpose of the Legislature and the IWC. Time and again, we have characterized that purpose as the protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours when the Legislature enacted key portions of the Labor Code.") (citations omitted).

As *Martinez* emphasized, the IWC's very purpose in adopting its three alternative definitions of employment was to extend legal protection to working relationships that might not constitute "employment" under the common law. 49 Cal.4th at 57-58 (explaining that the "suffer or permit" definition reaches "irregular working arrangements the proprietor of a business might otherwise disavow with impunity" under the common law standard). In holding that the IWC's definition of employment includes three alternative tests, only one of which involves common law standards, *Martinez* made it clear that courts and agencies should not presume (as some courts previously had) that the Legislature intended common law concepts alone to determine whether the legal protections provided by the Wage Orders and related Labor Code provisions extend to any particular individual, and that courts and agencies should instead focus on the "historical and statutory context" of the provisions at issue. *Compare Martinez*, 49 Cal.4th at 64 (concluding, as a matter of statutory construction, that Labor Code §1194 incorporates the Wage Orders' three-

pronged definition of employment); *with, e.g.*, *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1087 (concluding that the common law test defines employment for the purposes of §1194).

By relying solely upon the test of employment set forth in *Borello*, the Manual's discussion of the distinction between independent contractors and employees reflects the very presumption in favor of the common law that this Court rejected in *Martinez*. Nowhere in Chapter 28 does the DLSE purport to consider the "historical and statutory context" of the various Labor Code and Wage Order provisions that the DLSE administers in order to determine how employment should be defined for the purposes thereof. Nor does it explain why the Industrial Welfare Commission's definition of employment should not apply to misclassification cases involving the Wage Orders and closely related Labor Code provisions. Instead, that chapter simply describes the common law test of employment set forth in *Borello*.[2]

The Manual's failure to consider the effect of *Martinez* on the independent contractor-employee analysis and its reliance on the common law test set forth in *Borello* is not surprising, for an obvious reason: the DLSE has not revised or revisited Chapter 28 (or the other Manual provisions cited in the Court's supplemental briefing order) since *Martinez* was decided. Each of those provisions was last revised in *2002*, while the decision in *Martinez* issued in *2010*. *See* DLSE Enforcement Manual at 2-1, 28-1, 28-2, 28-3, 28-4; *see also id.* at Enforcement Manual Revisions chart (listing revised sections and omitting §2.2, §2.2.1, and chapter 28).

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[2] That the DLSE, when it last revised these sections of the Manual, may have wrongly presumed that the common law test alone applied to the misclassification question is not surprising: As *Reynolds* makes clear, many courts and agencies, including this one, applied a presumption in favor of the common law test before *Martinez* explained why that approach was improper.

Quite simply, the DLSE has not yet considered whether the portions of the Manual cited in the supplemental briefing order should be revised to account for *Martinez*'s holding that the Wage Orders and related Labor Code provisions extend protection to working relationships that do not constitute "employment" under the common law test set forth in decisions such as *Borello*—including where the hiring entity suffers or permits unlawful working conditions or exercises direct or indirect control over a worker's wages, hours, or working conditions. Because the Manual's provisions regarding independent contractors have not been revised since *Martinez*, they cannot and do not express any position regarding whether the definition of employment set forth in *Martinez* applies to cases involving the alleged misclassification of particular workers as non-employed "independent contractors," and they are irrelevant here.

CONCLUSION

Because the Manual does not and cannot purport to address the question presented in this case, the provisions of the Manual cited in the supplemental briefing order are irrelevant to the Court's consideration of that question. The Court must exercise its independent judgment in determining whether the "statutory and historical context" of the Wage Order and Labor Code provisions at issue, *Martinez*, Cal.4th at 64, establishes that the IWC's three alternative definitions of employment should be used to determine whether a particular individual is an employee or an independent contractor.

Respectfully submitted,

Dated: February 21, 2017 By: _____

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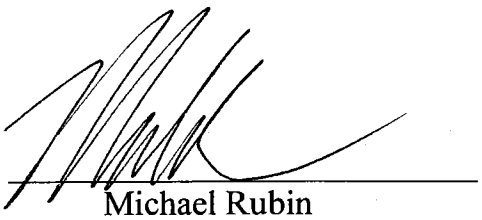
CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.520(d)(2) of the California Rules of Court that the attached SUPPLEMENTAL BRIEF OF AMICI CURIAE SUPPORTING PLAINTIFFS-REAL PARTIES IN INTEREST is proportionally spaced, has a typeface of 13 points or more, and contains 2,556 words, excluding the cover, the tables, the signature block, and this certificate. Counsel relies on the word count of the word-processing program used to prepare this brief.

DATED: February 21, 2017

By: 
Michael Rubin

PROOF OF SERVICE

CASE: *Dynamex v. Superior Court*

CASE NO: Supreme Court Case No. S222732

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On February 21, 2017, I served the following documents:

SUPPLEMENTAL BRIEF OF AMICI CURIAE SUPPORTING PLAINTIFFS-REAL PARTIES IN INTEREST

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

A. By U.S. First Class Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. I placed each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed February 21, 2017, at San Francisco, California.

Jean Perley