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January 17, 2018

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

Re: *Dynamex Operations West, Inc. v. Superior Court*, No. S222732

Dear Chief Justice and Associate Justices:

The undersigned amici, each of which previously filed briefs in support of Real Parties in Interest, submit this response to the Court's December 28, 2017 request for supplemental briefing.

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

Amici's brief response is that California courts applying the IWC Wage Orders' suffer-or-permit test *may* consider the ABC test's three criteria in determining whether a putative employer has "suffered or permitted" work to be performed under unlawful conditions. Principally, that is because the three ABC criteria (which describe the principal attributes of truly independent contractors) help identify working relationships

in which a putative employer is likely *not* to be aware that work is being performed under unlawful conditions (suffer) and is likely *not* able to prevent those unlawful conditions (permit). In addition, as amici further explain below, California courts may also consider the ABC criteria in determining whether a putative employer has "engaged" an employee under California's common law test (in the context of a claimed violation of a California worker-protection law), because the three ABC criteria are among the leading "secondary considerations" identified in the California common law and the Restatement (Second) of Agency for evaluating a putative employer's right to control the work of another.[1]

In *Hargrove*, the New Jersey Supreme Court applied the three ABC criteria to determine whether a group of workers (delivery drivers in that case, as here) were "independent contractors" rather than "employees" for the purposes of New Jersey's Wage Payment Law, N.J.S.A. 34:11–4.1 to 4.14, and Wage and Hour Law, N.J.S.A. 34:11–56a to 56a38 – both of which laws include "suffer or permit" language (as does the second prong of California's test for determining employee status under *Martinez v. Combs* (2010) 49 Cal.4th 35).[2] As the New Jersey Supreme Court explained:

> The "ABC" test presumes an individual is an employee unless the employer can make certain showings regarding the individual employed, including:

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[1] The ABC test is also consistent with California law insofar as it establishes a threshold rebuttable presumption that "an individual is an employee unless the employer can make certain showings regarding the individual." *Hargrove*, 106 A.3d at 458; *see Robinson v. George*, 16 Cal.2d 238, 242 (1940) (even under California common law, "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"); *Narayan v. EGL, Inc.* (9th Cir. 2010) 616 F. 3d 895, 900 (citing cases) ("[U]nder California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee.").

[2] *Martinez* summarized the Wage Orders' disjunctive three-prong test for determining employment status as follows:

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

49 Cal.4th at 64.

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under this contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> [N.J.S.A. 43:21–19)(i)(6).]
>
> "[T]he failure to satisfy any one of the three criteria results in an 'employment' classification." *Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor*, 125 N.J. 567, 581, 593 A.2d 1177 (1991).

Hargrove, 106 A.3d at 458.

Under New Jersey's wage-and-hour law, then, a worker who performs services for another's benefit is presumed to be an employee rather than an independent contractor; and a putative employer can only overcome that presumption of employee status by affirmatively demonstrating, by a preponderance of the evidence, that: (A) the worker performed those services free from the putative employer's actual control or direction or its right to control or direct; *and* (B) the worker performed services of a different type than the putative employer usually performs in the normal course of its business, or the worker performed those services at a physical location outside the putative employer's places of business; *and* (C) the worker is customarily engaged in his or her own independent business or trade. New Jersey classifies all workers as employees entitled to the protections of State worker-protection law, unless the employer proves that all three ABC criteria are satisfied.

Similar versions of this three-part test for determining whether a worker is an employee rather than an independent contractor are in effect in many states,[3] although

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[3] *See, e.g.,* Alaska Stat. §23.20.525(a)(8); Ark. Code Ann. §11-10-210(e); Conn. Gen. Stat. §31-222(a)(1)(B)(ii); Del. Code Ann. tit. 19, §3302(10)(K); 820 Ill. Comp. Stat.

Massachusetts omits the second part of B (working off-premises) – a reflection of the modern reality that many employees now telecommute or otherwise work off-site.[4]

The New Jersey Supreme Court in *Hargrove* did not identify an express textual linkage between the ABC test in New Jersey's Unemployment Compensation Law and the "suffer or permit" language in the Wage Payment Law's definition of "employee" or the Wage and Hour Law's definition of "employ." *See* 106 A.3d at 457-59. Nonetheless, it concluded that the ABC test and the "suffer or permit" standard serve the same overarching purpose – to further the goals of the underlying statutory schemes by defining the employment relationship more broadly than under traditional master-servant common law definitions, and thus to extend statutory protections enacted for the benefit of workers to those who lack true economic independence in the workplace. *See Gilchrist v. Division of Employment Security* (1957) 48 N.J. Super. 147, 152-55.

The IWC sought to achieve these same goals in extending liability to entities that "suffer or permit" work in California. *See Martinez*, 49 Cal.4th at 53, 57-58 (explaining that the "suffer or permit" definition of "employ" reaches "irregular working arrangements the proprietor of a business might otherwise disavow with impunity" under the strict common law standard); *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 262 ("[W]e liberally construe the Labor Code and wage orders to favor the protection of employees.") (citations omitted).

As this Court explained in *Martinez*, the IWC's "engage, suffer, or permit" standard was derived from various states' child labor laws in the early 20th century, and was designed to extend workplace protections in circumstances where a business owner who would not be deemed a "master" in the traditional master-servant tort context failed to exercise reasonable care to prevent unlawful child labor, despite having the means to identify and prevent or stop the unlawful use of underage workers. 49 Cal.4th at 57-58, 70 (*quoting People v. Sheffield Farms-Slawson-Decker Co.* (N.Y. App. Div. 1917) 180 A.D. 615, 167 N.YU.S. 958, 961, *aff'd*, 225 N.Y. 25, 121 N.E. 474, 477) ("The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist."); *id.* at 58-59 (*quoting Purtell,* 99 N.E. at 902) (preventing work that is being performed in a manner that is "'contrary to the statute.'"); *id.* at 69

115/2; Md. Code Ann., Lab. and Employ. §8-205; Neb. Rev. Stat. §48-604(5), §48-1229(1); Nev. Rev. Stat. §612.085; N.H. Rev. Stat. Ann. §282-A:9(III); N.M. Stat. §51-1-42(F)(5); Tenn. Code Ann. §50-7-207(e)(1); Vt. Stat. tit. 21 §1301(6)(B), §341(1).

[4] *See* Mass. Gen. Laws ch. 149 §148B(a).

("Statutes so phrased were generally understood to impose liability on the proprietor of a business who knew child labor was occurring in the enterprise but failed to prevent it, despite the absence of a common law employment relationship."); *see also Curtis & Gartside Co. v. Pigg* (Okla. 1913) 31 Okla. 31, 1913 Okla. LEXIS 450 at 12-13). Under the Wage Order's "suffer or permit" standard, as under New Jersey's ABC test, where a putative employer is aware of work being performed for its benefit and has the ability either to stop the work from being performed or to stop it from being performed under unlawful conditions, that putative employer is deemed to be the legally responsible "employer."[5]

Each of the ABC criteria (the degree of control exercised by a putative employer, the nature of the work being performed in relation to the company's core business, and the separate, independent existence of the worker's own business) bear on the extent to which a company is likely to be aware of, and to be able to curtail, a particular practice for "suffer or permit" purposes. Those criteria are therefore useful for identifying circumstances in which a putative employer is most likely *not* able through reasonable care to identify and prevent unlawful work or working conditions, *i.e.*, circumstances where the putative employer cannot be said to have suffered or permitted a legal violation. These common-sense limitations help clarify when workers are true independent contractors under the suffer-or-permit prong – as Dynamex itself acknowledges. *See* Dynamex's Opening Merits Brief at 3, 25 (asserting that true independent contractors can be identified by such factors as their performance of services outside the company's control or direction, on matters distinct from the core business of the company, under an independent business model that enables them to perform the same service for other companies that retain them). Because the three ABC criteria offer a practical, common-sense mechanism for identifying employment relationships outside the scope of the IWC's Wage Orders (especially when the second criterion is modified to

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[5] *See Martinez*, 49 Cal.4th at 69 ("A proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so."). Case law from the early 20th century makes clear that owners can be held liable under the "suffer or permit" standard for claims by workers who are not their employees. *See, e.g., Daly v. Swift & Co.* (1931) 90 Mont. 52, 300 P. 265, 266, 268 (injury to minor who was assisting independent contractor father on premises); *Vida Lumber Co. v. Courson* (1927) 216 Ala. 248, 112 So. 737, 738 (non-employee son of employee); *Commonwealth v. Hong* (1927) 261 Mass 226, 227, 158 N.E. 759 (underage after-hours dancers employed by restaurant's independent contractor).

acknowledge the rise of telecommuting and other practices in which work that is core to an employer's enterprise often takes place outside its physical place of business, *see supra* at 4 & n.4), this Court could appropriately conclude that the ABC criteria can usefully inform California courts' analysis of whether a putative employer has suffered or permitted work to be performed in violation of the Labor Code or Wage Orders.

The three ABC criteria are also useful for determining whether a putative employer has a sufficient right of control for purposes of satisfying *Martinez*'s "common law" definition of "employ" as applied to disputes arising under California worker-protection statutes. Indeed, the New Jersey Supreme Court's analysis of the derivation of the ABC criteria largely focuses on how those criteria have been used to identify the type and degree of a putative employer's right to control – which is the primary focus of California's "common law" test.

In *Hargrove*, the New Jersey Supreme Court separately analyzed each of the three criteria included in the State's ABC test, and concluded that each of them derives from the common law right-to-control test, as modified to further the goals of the State's worker-protection statutes – just as a worker-protective construction is required when applying common law agency principles to the third prong of *Martinez* in the statutory wage-and-hour context. *See, e.g.,* Real Parties' Answering Brief at 21-22; SEIU et al. Amicus Br. (Dec. 7, 2015) at 7-8 & n.5, 24-28 & n.12; Supp. Br. of Amici Curiae Supporting Plaintiffs-Real Parties in Interest (Feb. 21, 2017) at 11.

With respect to Part A of the ABC test (whether a worker "has been and will continue to be free from control or direction over the performance of . . . service, as a matter of "contract . . . and in fact), the New Jersey Supreme Court explained that the employer must show that "it neither exercised control over the worker, nor had the ability to exercise control in terms of the completion of the work" – *i.e.,* that it neither exercised control nor retained a right of control. 106 A.3d at 459 (*citing Schomp v. Fuller Brush Co.*, 124 N.J.L. 487, 491, 12 A.2d 702 (Sup.Ct. 1940), aff'd, 126 N.J.L. 368, 19 A.2d 780 (E. & A. 1941)). This is the principal inquiry under the third *Martinez* prong, whether the entity has "engaged" a worker, "creating a common law employment relationship." 49 Cal.4th at 64; *see, e.g., Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal.4th 522, 531-33 (2014) (question is how much control the putative employer "retains the *right* to exercise") (emphasis in original).[6]

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[6] While this Court in *Ayala* held that the right to control the work "is the foremost consideration" under the common-law right-to-control test, it also explained that a "range of secondary indicia drawn from the Second and Third Restatements of Agency that may

With respect to Part B (whether a worker performs services that are "either outside the usual course of the [employer's] business [or are] performed outside of all the places of business of the [employer's] enterprise"), the Court explained that this factor, too, is one that "the common law recognizes . . . as a factor to consider," even though it is "not outcome definitive" under the traditional common law master-servant tort context (*i.e.,* in tort cases like *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, in which the issue is the master's respondeat superior liability for the tortious conduct of its servant). *See Hargrove*, 106 A.3d at 459 (*citing* Restatement (Second) of Agency §220(e), (h)); *see also* SEIU et al. Amicus Brief (Dec. 7, 2015) at 26-28.

Finally, *Hargrove* makes clear that Part C (whether a worker is "customarily engaged in an independently established trade, occupation, profession or business") "is also derived from the common law," and requires the employer to demonstrate that the worker is part of an "enterprise that exists and can continue to exist independently of and apart from the particular service relationship" at issue, and is "one that is stable and lasting – one that will survive the termination of the relationship." 106 A.3d at 459 (*quoting Gilchrist*, 48 N.J. Super. at 158, and *citing Trauma Nurses, Inc. v. Bd. of Review* (App. Div. 1990) 242 N.J. Super. 135, 148, 576 A.2d 285 and *Schomp*, 124 N.J.L. at 491-92).

Because each part of the ABC test derives from the factors traditionally used to evaluate an individual's employment status under the common law, those criteria may also be used when applying the common law standard in the context of statutory claims arising under the worker-protective provisions of the IWC Wage Orders and related Labor Code provisions. *Cf. Borello*, 48 Cal.3d at 350-55 (requiring modification of common law test when applied to workers compensation statute dispute). Just as the

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in a given case evince an employment relationship" are also relevant, *including several factors that are closely related to the ABC test* (in particular, "whether the one performing services is engaged in a distinct occupation or business," "the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision," and "whether or not the work is a part of the regular business of the principal"), plus several related factors as well ("the skill required in the particular occupation," "whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work," "the length of time for which the services are to be performed," "the method of payment, whether by the time or by the job," and "whether . . . the parties believe they are creating the relationship of employer-employee."). *Ayala*, 59 Cal.4th at 532.

ABC criteria comprise logical, reasonable grounds for distinguishing truly independent contractors from economically dependent employees for the purposes of the Wage Order's "suffer-or-permit" standard, so too can those criteria provide a reasonable limiting principle for *Martinez*'s alternative "common law" definition of "employ."

Respectfully submitted,

By: _____

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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 January 17, 2018, I served the following documents:

SUPPLEMENTAL LETTER 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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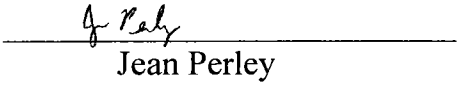
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed January 17, 2018, at San Francisco, California.



Jean Perley