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Case No. S____________________

SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

CHARLES LEE et al.,
Real Parties in Interest.

PETITION FOR REVIEW

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN, CASE NO. B249546

LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC 332016
MICHAEL L. STERN, JUDGE

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Required By Bus. & Prof. Code § 17209

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TABLE OF CONTENTS

PAGE

I. WHY REVIEW SHOULD BE GRANTED 2

II. STATEMENT OF FACTS 5

A. The Parties and the Complaint 5

B. The Class Is Certified and Decertified 6

C. The Class Is Recertified Based on *Martinez* 6

D. The Court Denies Dynamex's Second Motion to Decertify Based on *Borello* 8

E. Dynamex Filed a Petition for Writ of Mandate 8

F. The Court of Appeal Published Its Opinion Affirming the Trial Court 10

III. ARGUMENT 12

A. The Holding and Rationale of *Martinez* was Clearly Limited to Determining Who Could Be Held Liable as the "Employer" of Undisputed Employees 13

B. *Martinez* Also Demonstrates That the Wage Order Definitions of "Employer" and "Employ" Should Not Be Interpreted to Displace the Common Law Independent Contractor Test 15

1. In *Martinez*, This Court Applied the Common Law Test to Determine Independent Contractor Status 16

2. As *Martinez Shows*, The Wage Order Definitions Were Not Meant to Distinguish Employees from Independent Contractors 17

3. The IWC Lacks Power to Regulate Independent Contractors 18

TABLE OF CONTENTS
(CONTINUED)

PAGE

C. Applying the Holding of *Martinez* to Determinations of Independent Contractor Status Would Have Extreme and Bizarre Consequences 21

D. The Common Law Test for Determining Independent Contractor Status Should Continue to be Applied to Claims Encompassed by the Wage Orders 27

IV. CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Arreola v. One More Productions
(Cal. Ct. App., Feb. 5, 2014, G047467) 2014 WL 462996 4

Arzate v. Bridge Terminal Transp., Inc.
(2011) 192 Cal.App.4th 419 4

Ayala v. Antelope Valley Newspapers, Inc.
(2014) 59 Cal.4th 522 .... passim

Bradley v. Networkers Int'l, LLC
(2012) 211 Cal.App.4th 1129 4

Brown v. Mission Filmworks
(Cal. Ct. App., Dec. 6, 2012, B239005) 2012 WL 6055939 4

Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.
(1999) 19 Cal.4th 1182 .... 11, 13

Duran v. U.S. Bank National Assn.
(2014) 59 Cal.4th 1 10

Kaewsawang v. Sara Lee Fresh, Inc.
(Cal. Ct. App., May 3, 2012, B231778) 2012 WL 1548290 4

Martinez v. Combs
(2010) 49 Cal.4th 35 .... passim

Metropolitan Water Dist. v. Superior Court
(2004) 32 Cal.4th 491, 9 Cal.Rptr.3d 857, 84 P.3d 966 27

Peabody v. Time Warner Cable, Inc.
(2014) 59 Cal. 4th 662 18

Rippon v. Bowen
(2008) 160 Cal.App.4th 1308 20

S.G. Borello, Inc. v. Dep't of Indus. Relations
(1989) 48 Cal.3d 341 .... passim

Sotelo v. MediaNews Group, Inc.
(2012) 207 Cal.App.4th 639 4

Tieberg v. Unemployment Ins. App. Bd.
(1970) 2 Cal.3d 943 22

Weseman v. Hertle
(Cal. Ct. App., Mar. 7, 2014, F065375) 2014 WL 904522 4

STATUTES

Cal. Labor Code § 201 .... 13, 26

Cal. Labor Code § 202 .... 13, 26

Cal. Labor Code § 203 .... 13, 26

Cal. Labor Code §1173 19

Cal. Bus. and Prof. Code §17200 5

Cal. Lab. Code § 1194 .... passim

Cal. Lab Code § 2802 26

OTHER AUTHORITIES

California Constitution 18, 19, 20, 27

ISSUES PRESENTED

1. To what extent, if at all, should the legal standard articulated by this Court in *Martinez v. Combs* be extended to distinguish between employees and independent contractor status in California wage and hour cases?

2. Alternatively, does *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* remain the controlling precedent for determining whether individuals are independent contractors or employees?

I.
WHY REVIEW SHOULD BE GRANTED

The question of law raised by this petition is one that even this Court has recognized needs to be decided, when the time is right and the issue is properly presented by the facts of the case. The time is right now. This case fairly presents the issue.

Just six months ago, in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, the Court addressed the propriety of class certification in a wage and hour case that turned on whether the plaintiffs were employees or independent contractors. Initially, in that case, the Court solicited supplemental briefing on the possible relevance of the Industrial Welfare Commission (IWC) wage order definition of employee status, as discussed in *Martinez v. Combs* (2010) 49 Cal.4th 35 and other cases. Ultimately, the Court resolved the case by applying only the common law test because that was the test applied by the trial court and the Court of Appeal. The Court advised: "Accordingly, we leave for another day the question what application, if any, the wage order tests for employee status might have to wage and hour claims such as these . . . ." (*Ayala, supra,* at p. 531.)

The "another day" has come. Like *Ayala*, this case involves the central legal issue of whether putative class members are employees for

purposes of the provisions under which they sue. But this time, contrary to *Ayala*, the trial court chose the wage order/*Martinez* test favored by the Plaintiffs rather than the long-established common law test in *S.G. Borello & Sons, Inc. v. Dep't of Indus' Relations* (1989) 48 Cal.3d 341, upon which Dynamex relied. Dynamex petitioned the Court of Appeal for review. The Court of Appeal issued an order to show cause to address the very issue raised by this Petition: "whether the superior court erred in ruling a class may be certified under the IWC definition of employee as construed by the Supreme Court in *Martinez* or, as Dynamex contends, may proceed only under the common law test discussed in *Borello*." (Order to Show Cause, issued July 10, 2013, Perluss, P.J., Zelon, J., and Segal, J.) Following briefing by both parties, the Court of Appeal affirmed the use of the wage order/*Martinez* test.

Both the trial court and the Court of Appeal erred in extending the analysis of *Martinez* to the facts here. *Martinez* is a joint employer case that only specifically defines who qualifies as an "employer." It does not address who is an "employee." Nor does *Martinez* address how to distinguish between an employee and an independent contractor. Indeed, the *Martinez* court engaged in an extensive analysis of the Industrial Welfare Commission's authority. This analysis demonstrates why the IWC's definition of "employer" *cannot* be applied to misclassification determinations. As a result, the common law test followed in *Borello* and *Ayala* should continue to define the distinction between an "employee" and an "independent contractor" for purposes of California wage and hour laws.

The issue raised by this Petition has wide application to every independent contractor relationship in California. Although the Court of Appeal dismissed Dynamex's arguments as "overblown rhetoric," its extension of *Martinez* would effectively eliminate independent contractor status in California. The expansive phrases used by the Court in its

opinion—"suffer or permit" and "control over wages, hours, or working conditions"—would sweep in virtually every arm's length independent contractor relationship in California, and convert it to an employment relationship.

This Court's intervention is also necessary to secure uniformity of decision regarding the correct test for independent contractor status in wage and hour cases. Other appellate courts have not subscribed to the broad reading given to *Martinez* by the Court of Appeal here. Two other published appellate opinions identify *Martinez* as potentially relevant to the determination of employee status for wage claims, and yet both chose to apply the common law test. (See *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 660-62 [First Appellate District]; *Bradley v. Networkers Int'l, LLC* (2012) 211 Cal.App.4th 1129, 1145-47 [Fourth Appellate District].) One other published opinion and several other unpublished decisions, including decisions from other divisions within the Second District, have addressed this question without any mention of *Martinez* at all. (See *Arzate v. Bridge Terminal Transp., Inc.* (2011) 192 Cal.App.4th 419 [Second Appellate District, Division Eight].)[1]

Everyone involved—Plaintiffs, Dynamex, the trial court, the Court of Appeal, and this Court—all believe that the issue set forth in this Petition raises an important issue of law that should be reviewed. The question of

[1] Unpublished decisions that applied *Borello* to California wage claims after *Martinez* include: *Kaewsawang v. Sara Lee Fresh, Inc.* (Cal. Ct. App., May 3, 2012, B231778) 2012 WL 1548290, at *3-4 [nonpub. opn.][Second Appellate District, Division Five]; *Weseman v. Hertle* (Cal. Ct. App., Mar. 7, 2014, F065375) 2014 WL 904522, at *1 [nonpub. opn.][Fifth Appellate District]; *Brown v. Mission Filmworks* (Cal. Ct. App., Dec. 6, 2012, B239005) 2012 WL 6055939, at *2 [nonpub. opn.][Second Appellate District, Division Eight]; and *Arreola v. One More Productions* (Cal. Ct. App., Feb. 5, 2014, G047467) 2014 WL 462996, at *5 [nonpub. opn.][Fourth Appellate District].

whether an individual is an independent contractor or an employee is frequently at the center of wage and hour class action cases in California. The issue has become ripe for review. Petitioner Dynamex Operations West, Inc. respectfully requests that the Court grant this Petition and review the Second District's opinion in this matter. A copy of the Second District's opinion is attached hereto as "Exhibit A" and will be cited as "Op."

II.
STATEMENT OF FACTS

A. The Parties and the Complaint.

Petitioner Dynamex Operations West, Inc. ("Dynamex") is a nationwide courier and delivery company and the defendant in an action now pending in Respondent Superior Court, entitled *Charles Lee and Pedro Chevez v. Dynamex Operations West, Inc.*, L.A.S.C. Case No. BC 332016. Plaintiffs and Real Parties in Interest Charles Lee and Pedro Chevez ("Plaintiffs") are two former same-day delivery drivers who contracted with Dynamex. (See Op. at p. 2.) Plaintiffs assert five causes of action, all of which are based on the premise that they and other class members were misclassified as independent contractors and should have been classified as employees: 1) unfair business practices in violation of California's Business and Professions Code §17200; 2) unlawful business practices in violation of California's Business and Professions Code §17200; 3) failure to pay overtime compensation; 4) failure to provide properly itemized wage statements; and 5) failure to fully compensate for business expenses. (See pp. 1724-1744; Vol. 6; Tab 20.)[2]

[2] Page citations are to the Appendix of Exhibits submitted with Dynamex's Petition for Writ of Mandate, Prohibition, or Other Appropriate Writ, filed June 24, 2013.

B. <u>The Class Is Certified and Decertified.</u>

In 2006, Respondent first denied certification of a class, holding that individualized issues predominated because: "there are <u>huge variations</u> in the duties of Drivers as well as the relationship between the Drivers and defendant and the relationship between the clients and Drivers." (See p. 1657:5-9; Vol. 6; Tab 16.) However, after that denial was overturned on other grounds, Respondent allowed Plaintiffs to file two amended complaints redefining the class. Respondent later granted certification, only to subsequently enter a stipulated order "conditionally" certifying the class pending the results of a questionnaire to putative class members. (See pp. 1709-1744; Vol. 6; Tabs 19-20.)

On December 23, 2010, Dynamex filed its first motion to decertify. (See pp. 2072-2936; Vol. 7-10; Tabs 32-36.). Dynamex explained that a class was not ascertainable because, among other reasons, the questionnaires proved that individualized inquiries were necessary to determine employment status under the common law test referred to in *S.G. Borello, Inc. v. Dep't of Indus. Relations* (1989) 48 Cal.3d 341. (See pp. 4719-4749; Vol. 16; Tab 39.) Respondent initially granted the decertification motion. Plaintiffs asked to again change the class definition. (See pp. 5975-5979; Vol. 20; Tab 53.) Respondent then vacated the decertification order, and continued Dynamex's decertification motion to allow Plaintiffs to file a *third* motion for class certification. (See pp. 6015-6016; Vol. 21; Tab 55.)

C. <u>The Class Is Recertified Based on *Martinez*.</u>

On February 24, 2011, Plaintiffs filed their third motion for class certification. (See pp. 6017-6266; Vol. 21; Tabs 56-60.) This time, Plaintiffs argued that this Court's then-recent decision in *Martinez v. Combs* (2010) 49 Cal.4th 35 enunciated new tests for employment status. Plaintiffs argued that all that was necessary for a driver to be an employee was that

Dynamex knew the driver was providing services or that Dynamex negotiated the rates paid to the driver. (See pp. 6020-6048; Vol. 21; Tab 57.)

On May 18, 2011, Respondent granted Plaintiffs' third certification motion and denied Dynamex's motion to decertify. (See pp. 6541-6567; Vol. 22; Tab 71.) In doing so, Respondent first noted that, if *Borello* remained the controlling standard, a class could not be certified: "the main factor in determining whether an employment agreement exists—control—does require individualized inquiries." (See pp. 6564:22-23; Vol. 21; Tab 71.) Respondent also observed that this need for individualized inquiries existed with respect to the secondary factors referenced in *Borello*, including the opportunity for profit or loss and the method of payment. (See pp. 6563:19-6564:2, 6564:9-15; Vol. 21; Tab 71.)

Nevertheless, Respondent accepted Plaintiffs' argument that *Martinez* indicated a "redefinition of the employment relationship." Specifically, the court ruled that a driver was an employee of Dynamex if Dynamex either: (i) "suffered or permitted" the driver to work or (ii) exercised "control over the wages, hours or working conditions" of the drivers. (See pp. 6561:10-6562:4; Vol. 21; Tab 71.) Therefore, under the "redefinition," all that Plaintiffs needed to show in order to prove employee status was that Dynamex either (i) "knew or should have known" they were providing services—which included all "drivers with whom it entered into an agreement"—or (ii) had the authority to negotiate the amount it would pay the drivers for their services. (See pp. 6561:16-6562:4; Vol. 21; Tab 71.)

Dynamex disagreed with Respondent's interpretation of *Martinez*. Respondent noted that *Martinez* addressed only who could be held liable as an "employer" for the payment of wages. Unfortunately, at the time of Respondent's ruling there were very few published cases upon which

Respondent could rely to support its interpretation of *Martinez*. (See pp. 6604-6606; Vol. 23; Tab 74.)

D. **The Court Denies Dynamex's Second Motion to Decertify Based on *Borello*.**

Subsequent California decisions made it clear that Respondent had seriously misread *Martinez*. Relying on this new authority, on December 28, 2012, Dynamex filed a second decertification motion. (See pp. 6586-6644; Vol. 22-23; Tabs 73-76.) Dynamex argued, among other things, that several opinions published after Respondent's grant of certification had addressed the independent contractor/employee distinction without applying the "suffer or permit" or "exercise control over the wages, hours, or working conditions" standards described in *Martinez*. These decisions demonstrated that Respondent had erred in interpreting the *Martinez* definition of "employer" to also define *employee* status. Dynamex argued Respondent should follow *Borello* and decertify the class, as Dynamex had already ruled that the common law test could not be applied without individualized inquiries. (See pp. 6604-6606; Vol. 23; Tab 74.)

On April 22, 2013, Respondent denied Dynamex's second Motion to Decertify the Class. Respondent declined to provide a written decision for its conclusion, instead simply stating: "my conclusion is that there is no new law or facts that argue for decertification." (See pp. 6913:3-5; Vol. 24; Tab 82.) However, Respondent recognized the novel approach it had taken in its application of *Martinez* and thus vacated the trial date and invited Dynamex to seek appellate review, recognizing that: "It's hard to read the cases cited without some realization that the courts of appeal love to decide these issues." (See pp. 6919:7-9; Vol. 24; Tab 82.)

E. **Dynamex Filed a Petition for Writ of Mandate.**

On June 24, 2013, Dynamex filed its Petition for Writ of Mandate in the Second Appellate District of the Court of Appeal of the State of

California (hereinafter "Petition for Writ"). As relevant to this Petition, Dynamex argued that Respondent had abused its discretion by denying Dynamex's decertification motion based on its erroneous interpretation of *Martinez*. In particular, Dynamex argued that: 1) the *Martinez* opinion established new tests for evaluating joint employer status *only*; 2) *Martinez* could only apply to cases involving acknowledged employees; 3) *Martinez* tests could not be applied to threshold determination of whether workers were properly classified as employees or independent contractors; and 4) that Respondent's reliance on *Martinez* was therefore erroneous and an abuse of discretion. (Petition for Writ, Memorandum of Points and Authorities, pp. 4-20.)

On July 10, 2013, the Second District issued an Order to Show Cause why Respondent's denial of the decertification motion should not be reversed. (Order to Show Cause, issued July 10, 2013, Perluss, P.J., Zelon, J., and Segal, J.) On October 7, 2013, Plaintiffs filed their Return to Dynamex's writ petition. Plaintiffs correctly identified the holding of the *Martinez* opinion: "*Martinez* then held that the IWC Wage Order 14-2001, provided the *definition of employer* for claims under Labor Code Section 1194." (Return to Writ Petition with Supporting Memorandum of Points & Authorities, filed Oct. 7, 2013, p. 25 [emphasis added].) However, Plaintiffs then surmised that by construing the term "employ" within the IWC Wage Orders' definition of "employer," *Martinez* "made very clear that the IWC has broad authority to regulate who is an employee." (See Return at p. 25.) Based on their interpretation of *Martinez*, Plaintiffs argued that Respondent was correct in ruling that Dynamex's "authority to negotiate each driver's rate of pay" and its entry into "agreements" with drivers were enough—standing alone—to demonstrate that the drivers were employees of Dynamex. (Return at pp. 30-33.)

In its Reply, Dynamex argued that, as acknowledged by both Plaintiffs and Respondent, the question addressed in *Martinez* was "who may be held liable as employers?" — is a question that assumes the existence of an admitted employee. (Petitioner's Reply in Support of Petition for Writ of Mandate, Prohibition, or Other Appropriate Writ, filed Nov. 15, 2013, pp. 6-7.) Dynamex further argued that, because the classification of the admitted employees in *Martinez* was not in dispute, *Martinez* could not be interpreted to redefine who qualifies as an employee. (Reply at p. 7.) Finally, Dynamex argued that application of the *Martinez* joint-employer test to employee classification decisions would effectively abolish independent contractor status in California. One cannot contract with a person to perform services without knowing that person is performing the work, or without explicitly or implicitly negotiating the rate of pay for the work. (Reply at pp. 8-10.)

The Second District requested supplemental briefing from the parties regarding the application, if any, of this Court's decisions in *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1 and *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522. The parties differed as to their responses, but those responses were both focused on issues not germane to this Petition. (See, generally, letter briefs submitted August 8, 2014.)

F. <u>The Court of Appeal Published Its Opinion Affirming the Trial Court.</u>

On October 15, 2014, the Second District issued its written opinion in this matter and certified it for publication. (See, generally, Op.) The Second District acknowledged that Respondent had found that individualized inquiries would dominate application of the common law test for distinguishing independent contractors from employees. (*Id.* at pp. 7-8 [citing *Ayala, supra,* 59 Cal.4th at p. 529].) The opinion also acknowledged that "when a statute refers to an 'employee' without defining

the term, courts have generally applied the common law test of employment to that statute." (*Id.* at p. 15.) It also acknowledged that, in *Martinez*, this Court analyzed the legislative history of Labor Code section 1194 and the language used in the IWC Wage Orders to define "employer" because "Labor Code section [1194] does not specify *who is liable* under its terms." (*Id.* at p. 9 [emphasis added].)

The Second District's opinion relied on this Court's decision in *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 for the rule that "language in a judicial opinion is to be understood in accordance with the facts and issues before the court." (*Id.* at p. 16.) However, in a footnote two sentences later, the Court dismissed Dynamex's attempts to limit *Martinez* to joint-employer contexts by stating "[a]lthough that was the precise factual context in which the issue arose in *Martinez*, nothing in the case supports a limitation of this nature." (*Id.* at p.16, fn.14.) The Second District also referred to Dynamex's assertions that Respondent's interpretation of *Martinez* would effectively eliminate independent contractor status in California as "overblown rhetoric." (*Id.* at p. 12.) But, like Respondent, the Second District's opinion did not explain how anyone could maintain an independent contractor relationship without knowing work was being performed or exercising control over the amount paid for that work. (See, generally, *id.*)

The Second District therefore concluded that *Martinez* could properly be applied to distinguish employees from independent contractors and approved of the manner in which Respondent applied *Martinez* in this case. (*Id.* at p. 16.) In fact, the Second District's opinion appears to hold that *Martinez* can be applied to determine who is an employee for the purposes of any claims falling within the scope of the IWC Wage Orders. (*Id.* at p. 16-18.)

The Second District's Opinion became final on November 14, 2014. Dynamex did not file a petition for rehearing.

III.
ARGUMENT

The Second District fundamentally erred when it held that this Court's analysis in *Martinez* (a joint employer case)—and the Court's interpretation of the term "employer" under the IWC Wage Orders—could be applied to distinguish independent contractors from employees. *Martinez* defines only who qualifies as an "employer." It does not address who is an "employee." Furthermore, the *Martinez* Court's own analysis of IWC Wage Orders demonstrates that the IWC's definition of "employer" cannot be reverse-engineered to distinguish employees from independent contractors. In fact, the IWC cannot unilaterally expand the scope of who qualifies as an "employee" in California.

The IWC's "suffer or permit" standard makes perfect sense when there is an admitted employee. Equally sensible in that context is the "exercise control over wages, hours or working conditions" standard. Both presume that an employment relationship exists. These two standards then test whether multiple parties should be liable to the admitted employee. But the tests have no value when there is no admitted employee. Everyone—employee and contractor alike—is "suffered or permitted" to work by the person requesting services. Likewise, both employees and contractors do not perform work unless wages and/or timing of the work are discussed in advance.

It is no exaggeration to say that affirmance of the Court of Appeal here would effectively eliminate independent contractor relationships in California. Even if it did not, it would lead to bizarre results. For example, the same worker could be defined as an employee for purposes of some provisions of the Labor Code, such as Section 1194 (which mirrors IWC

Orders on minimum wage and overtime), but not for others sections *within the same Division of the Code*, such as Sections 201-203 regarding the payment of wages upon termination (which sections are not incorporated into IWC Orders).

With all these considerations in mind, Dynamex respectfully petitions this Court to hold that the common law test referred to in *Borello* and *Ayala* continues to define the distinction between an "employee" and an "independent contractor" for purposes of the IWC's Wage Orders and any Labor Code sections that do not otherwise define "employee."

A. The Holding and Rationale of *Martinez* was Clearly Limited to Determining Who Could Be Held Liable as the "Employer" of Undisputed Employees.

Both the trial court and the Second District determined that this Court's opinion in *Martinez v. Combs* established two new tests that differentiate between employees and independent contractors. However, the factual background of *Martinez* demonstrates that its holding pertains solely to determining who can be held liable as a joint employer of persons who are undisputedly employees. And, as the Second District stated in the opinion that is challenged via this Petition: "language in a judicial opinion is to be understood in accordance with the facts and issues before the court; an opinion is not authority for propositions not considered." (Op. at p. 16 [citing *Chevron U.S.A., supra,* 19 Cal.4th at p. 1195].)

In *Martinez*, it was undisputed that the six plaintiffs were all employees of former defendant Munoz. (*Martinez, supra,* 29 Cal. 4th at p. 42 ["Plaintiffs are seasonal agricultural workers whom Munoz employed . . . ."].) Munoz filed for bankruptcy and thus could not pay them. (*Id.*) The Plaintiffs also sued the merchants with whom Munoz contracted, based on the allegation that they were "joint employers" and should be liable for the unpaid wages. (*Id.* at pp. 42, 48-50 [noting "[p]laintiffs contend the . . .

Wage Order . . . defines defendants *as their employers*;" and plaintiffs "contended defendants Apio and Combs, *together with Munoz, jointly employed* plaintiffs"][emphasis added].)

None of the defendants in *Martinez* claimed the plaintiffs were independent contractors. Therefore, the *Martinez* opinion contains no analysis regarding whether the plaintiffs were misclassified as independent contractors. To the contrary, they were all admitted employees. Significantly, the term "independent contractor" is not once used in the *Martinez* opinion in reference to the plaintiffs. As discussed below, the only time the terms "contractor" or "independent contractor" appear is during this Court's analysis of whether Munoz himself was an employee of the merchants with whom he contracted (this Court concluded he was not). (See *id.* at p. 73.)

That the analysis in *Martinez* was solely focused solely on whether the merchants were joint employers of the plaintiffs is also abundantly clear from the framing of the issues addressed. Most telling, this Court described the question presented as: "How then do we define the employment relationship, and thus *identify the persons who may be liable as employers*, in actions under section 1194?" (*Id.* at p. 51 [emphasis added].)

Martinez does contain a thorough analysis of the Wage Orders' definition of the term "employ." (*Id.* at pp. 57-60.) But, that analysis was squarely in the context of defining the scope of the term "employer," which is (somewhat circularly) defined in the Wage Orders to include "any person . . . who directly or indirectly . . . employs . . . any person." That defining the term "employer" was the true focus of the opinion is evident from this Court's explicit rationale for interpreting the Wage Order definitions. Specifically, the Court noted it was necessary to look beyond the language of Labor Code section 1194—not because section 1194 fails to define "employee," which is true—but because:

(a) Labor Code section 1194 "has . . . given an employee a cause of action for unpaid minimum wages *without specifying who is liable*" but "*only an employer* can be liable [because] no generally applicable rule of law imposes on anyone other than an employer a duty to pay wages" (*id.* at p. 49 [emphases added]);

(b) "the concept of *joint employment* [has] avoided judicial scrutiny in the context of wage claims brought under state law" (*id.* at p. 50 [emphasis added]); and

(c) "[a]lthough we have recognized that a person, by exercising significant control *over the employees of another, may come to share the employer's legal obligations*, our decisions on this point have concerned statutory schemes other than the wage laws." (*Id.* at p. 50 [emphases added].)

In sum, although the *Martinez* opinion frequently states that it is analyzing the "employment relationship," the factual background and issues addressed in *Martinez* demonstrate that it focused solely on determining who can be held liable as being on the "*employer*" side of that relationship. *Martinez* does not speak that who is an "employee" for purposes of California's wage laws.

B. *Martinez* Also Demonstrates That the Wage Order Definitions of "Employer" and "Employ" Should Not Be Interpreted to Displace the Common Law Independent Contractor Test.

Although *Martinez* did not address the question of what test should be used to distinguish between independent contractors and employees, the decision contains a revealing discussion of independent contractor status. That discussion makes clear that the "suffer and permit" and "control over wages, hours, or working conditions" definitions cannot and should not be applied to employee misclassification claims.

1. In *Martinez*, This Court Applied the Common Law Test to Determine Independent Contractor Status.

Clearly, there is nothing in *Martinez* to suggest that the Wage Order definition of "employer" should be used to displace the common law independent contractor test described in *Borello* and *Ayala*. Indeed, this Court chose the common law test—not the Wage Order definition of employer—when analyzing whether Munoz was an independent contractor or an employee of the produce merchants. The plaintiffs had argued that Munoz was himself an employee of the merchants and, by extension, that the plaintiffs were therefore employees of the merchants. In response, this Court opined that "Munoz was not [the merchants'] employee" because, unlike the employees in *Borello,* he "held himself out in business, invested substantial capital and equipment, employed over 180 workers, sold produce through four unrelated merchants, enjoyed an opportunity for profit or loss dependent on his business acumen and market conditions, and had indeed made a profit in prior years operating in the same manner." (*Martinez, supra,* 49 Cal.4th at p. 73.) There was no question that the merchants "suffered or permitted" Munoz to provide services and that they "engaged" him by negotiating his rate of pay (i.e., exercised control over his wages). If this Court had intended the result reached here by the courts be law, it would have found Munoz to be an employee of the merchants. Instead, this Court applied only the common law test, and found Munoz to be an independent contractor. (*Id.*) Limiting itself to the common law test would have made no sense if the *Martinez* Court had indeed intended to announce the "suffer or permit" and "exercise control" standards as two new tests for determining employee status.

2. As *Martinez* Shows, The Wage Order Definitions Were Not Meant to Distinguish Employees from Independent Contractors.

The *Martinez* analysis of the history behind the IWC's definition of "employer" illustrates that the subsumed definitions of "suffer or permit" and "control over wages, hours, or working conditions" were not intended to distinguish employees from independent contractors.

With respect to the "suffer or permit" standard, *Martinez* explained that the standard arose from situations in which a child was not formally "employed" but was nevertheless "permitted" to provide labor, such as a child "paid by coal miners to carry water" or "a boy hired by his father to oil machinery." (*Martinez, supra,* 49 Cal.4th at pp. 58, 69.) The "suffer or permit" language allowed for the imposition of criminal sanctions against the employers of the coal miners and fathers for employing children in their businesses. It also imposed civil liability against those same employers for injuries suffered by the child employees. (See *id.* at p. 58.) Under that definition, "[a] proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so." (*Id.* at p. 69.) As such, the standard was meant to encompass persons—admitted employees—working in "irregular working relationships the proprietor of a business might otherwise disavow." (*Id.* at p. 58.) It was not even contemplated that child laborers could be independent contractors. The "suffer or permit" standard was created to determine who was the *employer* of the children.

The "control over wages, hours, or working conditions" standard was also not meant to distinguish independent contractors from employees. Instead, as explained in *Martinez*, that standard was implemented to address "situations in which multiple entities control different aspects of the

employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work." (*Id.* at p. 59 [emphasis added].) Specifically, the IWC intended the definition to identify as "employers" both "temporary employment agencies and employers who contract with such agencies *to obtain employees*." (*Id.* [quoting IWC Statement as to the Basis for Wage Order No. 16 Regarding Certain On-site Occupations in the Construction, Drilling, Mining, and Logging Industries (Jan. 2001), at p. 5][emphasis added].) In other words, this standard was meant to identify who shared control over an admitted employee. No thought was given to replacing the common law test for distinguishing independent contractors from employees.

In sum, neither of the definitions of "employ" that are subsumed within the IWC's definition of "employer" (and that were relied upon by Respondent and the Second District) were ever intended to distinguish independent contractors from employees. As such, neither the *Martinez* opinion, nor the Wage Orders' definition of "employer," shed any light on that question of status. The Second District's reliance on *Martinez* as determinative of independent contractor status was therefore erroneous.

3. The IWC Lacks Power to Regulate Independent Contractors.

As *Martinez* correctly explains, the initial authority that was conferred by the Legislature on the IWC was broad.[3] But, that authority was not so broad as to give the IWC the power to *redefine the scope* of its own authority. Rather, the IWC's power is limited by the California Constitution and California Labor Code. (See *Martinez, supra,* 49 Cal.4th at p. 61 ["an administrative agency may not, under the guise of its rule

[3] As this Court has previously noted, the "Legislature defunded the IWC in 2004, however its wage orders remain in effect." (*Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal. 4th 662, 667, fn. 3.)

making power, abridge or enlarge its authority or exceed the powers given to it by statute"].) The IWC's authority is limited to "employees." It has no authority over independent contractors.

As this Court explained in *Martinez*, "the scope of IWC's delegated authority is, and always has been, over wages, hours and working conditions. For the IWC to adopt a definition of 'employer' that brings within its regulatory jurisdiction an entity that controls any one of these aspects of the employment relationship makes eminently good sense." (*Martinez, supra,* 49 Cal.4th at p. 59.) Although not explicitly stated in *Martinez* (because it was unnecessary in an opinion addressing only who qualifies as an "employer") the "wages, hours and working conditions" over which the IWC has authority are limited to *employees only*—as the use of the term "wages" would suggest. This limitation is made explicit in the California Constitution and the California Labor Code.

The California Constitution was amended in 1914 to confirm the authority of the Legislature to establish the IWC. That amendment framed the original scope of the IWC's authority as being to "provide for the establishment of a minimum wage for women and minors and . . . provide for the comfort, health, safety and general welfare of *any and all employees*." (*Id.* at p. 54, fn. 20 [quoting former Cal. Const., art. XX, § 17 1/2][emphasis added].) Although the IWC's authority was later expanded to include male employees as well, that authority was and is still limited to "provid[ing] for minimum wages and for the general welfare *of employees* . . . ." (See *Id.* at p. 54 & fn. 20 [quoting Cal. Const., art. XIV, § 1][emphasis added].) The California Labor Code also clearly identifies the scope of the IWC's authority as being limited to "*employees* in this state." (See Cal. Labor Code §1173 [emphasis added].)

As *Martinez* explained, this grant of authority empowered the IWC to adopt rules and regulations within its mandate to protect "employees."

This Court has upheld IWC regulations that exclude restaurant servers' tips from the definition of minimum wage; that define "hours worked" as including time during which an employee is "subject to the control of an employer," even if not actually working; and that exempt outside sales employees from entitlement to overtime wages, but only if they work more than half of their time away from the employer's place of business. (*Martinez, supra,* 49 Cal.4th at p. 62.) However, the common link among these judicially-upheld regulations is that they define the hours and wages *of employees*. All the regulations assume the existence of "employees." None of them tackle the different question of who is—and who is not—an employee for purposes of California wage and hour laws.

The IWC could never presume to redefine the constitutional limits on its own authority. As noted above, the constitutional limit of the IWC's authority was defined in 1914 to extend only to "any and all employees." Although not explicitly defined in the California Constitution, the term "employees" was clearly an understood term in 1914. The standards of "suffer or permit" and "exercise control over wages, hours, or working conditions" appeared for the first time in IWC Wage Orders issued in the years 1916 and 1947, respectively. (*Id.* at pp. 50, 57, 59 [citing IWC former wage order No. 1, "Fruit and Vegetable Canning Industry" (Feb. 29, 1916) sections 1–5 (IWC, approved minutes for Feb. 14, 1916, meeting); IWC former wage order No. 1R, "Wages, Hours, and Working Conditions for Women and Minors in the Manufacturing Industry" (June 1, 1947) section 2(f)].) Those standards cannot be interpreted to modify the earlier adopted constitutional limitation of IWC jurisdiction to "employees." To hold otherwise would be to find that the IWC has unilaterally amended the California constitution, something it clearly lacks the authority to do. (See *Rippon v. Bowen* (2008) 160 Cal.App.4th 1308, 1313 ["Article XVIII of the California Constitution allows for amendment of the Constitution by the

Legislature or initiative, and revision of the Constitution by the Legislature, or a constitutional convention. There is no other method for revising or amending the Constitution."].)

C. <u>Applying the Holding of *Martinez* to Determinations of Independent Contractor Status Would Have Extreme and Bizarre Consequences.</u>

Under the Second District's interpretation of *Martinez*, if a person or company "suffers or permits" an individual to perform work or "exercises control over the wages, hours, or working condition" of a worker, that worker is an employee, not an independent contractor. (Op. at pp. 4, 10-11, 14.) Under this interpretation, it is not an exaggeration to say that an independent contractor relationship would no longer be permissible in California. Instead, all persons who perform services would automatically be considered employees.

Although the Second District referred to these same arguments in Dynamex's briefing below as "overblown rhetoric," neither the Second District, nor Respondent attempted to explain how the independent contractor relationship can continue to exist in California, under a "suffer or permit" definition of employment. It cannot. The terms "suffer" and "permit" are extremely broad. As explained in the *Martinez* opinion, these terms both essentially mean *to know that work is being performed and fail to prevent such work.* (See *Martinez, supra,* 49 Cal.4th at p. 58 ["The standard thus meant that the employer 'shall not . . . *permit* by acquiescence, nor *suffer* by a failure to hinder."].) By definition, one cannot hire an independent contractor to perform work without "suffering and permitting" that work to be done. Applying the Second District's ruling to the misclassification question would, in virtually every circumstance, mean that a person who is asked to provide services would

become an employee for the purposes of claims arising under the Wage Orders.

Even if the "suffer or permit" standard were ignored, the "exercise control over wages, hours or working conditions" standard would have the same effect. It is hard to imagine how one could contract with another to perform services without "exercising control" over that person's compensation *or* hours *or* working conditions. The "exercise control" test is far broader than the common-law control test, which depends primarily on the "right to control the manner and means of accomplishing the result desired." (*Ayala, supra,* 59 Cal. 4th at p. 531; *Borello, supra,* 48 Cal.3d at p. 350 [quoting *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946].) All service recipients either explicitly or implicitly authorize the remuneration their service providers receive, even if just by agreeing to pay what the provider requests. Similarly, it would be extremely rare for a service recipient to not have some say in the "hours" worked by an independent contractor. For example, certainly a homeowner hiring a plumber to fix a leaking toilet would define to some extent when that work is to be performed. By directing the plumber to start "as soon as possible, before the bathroom floods!" or informing the contractor that work cannot begin before 8 a.m. each day, the homeowner exercises control over the "hours" worked. Even if the plumber then takes over and makes all decisions about how, when and at what cost the toilet is fixed, the plumber would still come within the Second District's approved test for defining "employee."

Adoption of the Second District's test would cause a fundamental shift in the California economy. Virtually every sole proprietor would be converted to an "employee" (albeit an employee of many successive "employers"). Every plumber, landscaper, artist, consultant, private sector court reporter, and hundreds of other categories of service providers—all of

whom have long been considered independent contractors under the common law definition—would now be "employees" of the persons and businesses for whom they perform services. If these standards in fact apply to any claim falling within the scope of the IWC Wage Orders—as the Second District in this case implied—that means individuals and companies who, for example, hire a roofer to replace the roof on their home or business could now be held liable to the roofer or penalized by the California Labor Commissioner for, among other things, doing any of the following:

(1) failing to provide tools and equipment necessary for the performance of the roofer's work, unless the roofer is paid at least twice the minimum wage, in which case the roofer could be required to provide hand tools and equipment customarily required by the trade (Wage Order No. 9, Section 9(B));

(2) failing to pay the roofer one and one-half (1½) times the painter's regular rate of pay for all hours worked in excess of eight (8) hours, up to and including 12 hours, in any workday and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek and double (2 times) the roofer's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek (*Id.*, Section 3(A)).

(3) deducting any amount from the compensation provided to the roofer for damage to the rest of the structure—unless the breakage was caused by a dishonest, willful, or *grossly* negligent act of the roofer (*Id.*, Section 8);

(4) failing to keep records of all of the following information—in English—for at least 3 years following the termination of the relationship (*Id.*, Section 7(A)):

(a) The full name, home address, occupation, and social security number of the roofer.

(b) Time records showing when the roofer began and ended each work period.

(c) The total amount paid to the roofer each "payroll period," including accounting for the value of board, lodging, or other compensation actually furnished to the roofer.

(d) Total hours worked by the roofer in the "payroll period" and the applicable rates paid for those hours.

(e) Records showing meal periods, split shift intervals and total daily hours worked by the roofer.

(5) failing to provide suitable lockers, closets or the equivalent for the safekeeping of the roofer's outer clothing during work periods (*Id.*, Section 13(A));

(6) failing to provide suitable resting facilities for the roofer (*Id.*, Section 13(B));

(7) failing to provide a suitable seat to the roofer during times when the roofer could perform work from a seated position (*Id.*, Section 14);

(8) failing to maintain a temperature of not less than 68° in the "toilet rooms," resting rooms, and change rooms used by the roofer (*Id.*, Section 15(C));

(9) failing to provide a clock within a reasonable distance of the roofer's work area (*Id.*, Section 7(D));

(10) failing to provide the roofer with meal and rest periods (*Id.*, Sections 11 and 12);

(11) failing to pay the roofer an extra hour of pay if the roofer works a split shift on any given day (*Id.*, Section 4(C));

(12) failing to pay the roofer minimum wage (*Id.*, Section 4); and

(13) failing to provide the roofer on a semimonthly basis or at the time of each "payment of wages" with a detachable or separate itemized statement showing (*Id.*, Section 7(B)):

(a) All deductions from the amounts paid to the roofer;

(b) The inclusive dates of the period for which the roofer is being paid;

(c) The name of the roofer or the roofer's social security number; and

(d) The name of the "employer."

In other words, instead of negotiating a specified price for performance of a specific service, with the opportunity for profit or loss belonging to the independent contractor, all persons providing services in California would receive an hourly wage (unless they are exempt "employees"). And, all persons requesting work to be done—regardless of the scope or duration of that work—must now become or hire payroll experts and employment lawyers to ensure they do not violate California wage and hour laws.

The Second District appears to believe—without explaining how—that the "suffer and permit" and "control over wages, hours or working conditions" standards could somehow be implemented without forcing most independent contractors to become employees. Even if that were true—which it is not—strange and inconsistent statutory interpretations would still result. To illustrate, the Second District states that its new standards apply only to claims "falling within the scope of [the] Wage Order[s]." (Op. at pp. 12, 16.) If *Martinez*, in fact, defined who qualified as an employee, such a limitation might have surface appeal because the *Martinez* opinion only addressed definitions contained in the Wage Orders. However, followed to its logical conclusion, such a limitation would result in the application of different tests to determine whether a worker was an

employee or independent contractor for claims arising under the same division, part, and even chapter of the Labor Code.

For example, a worker could be an employee under the "suffer or permit" standard for the purposes of Labor Code section 1194 (which provides a private right of action for recovery of minimum and overtime wages), but not be an employee for claims under Labor Code sections 201-203 (which require the immediate payment of outstanding wages upon termination), because Sections 201-203 are not encompassed in the Wage Orders. Thus, differing definitions of employee would be applied even though Section 1192 and Sections 201-203 *all appear in the same Division* of the Labor Code—Division 2, entitled "Employment Regulation and Supervision." Dozens of other Labor Code sections in Division 2 are likewise not covered by IWC Orders. Individuals could be treated as employees for some sections of the Labor Code, but as independent contractors under other sections. Besides being inconsistent with common sense, this result would engender massive confusion in the courts and administrative agencies.

Even more confusingly, as the Second District detailed in its opinion, the "suffer or permit" standard would only be applied to *some* expense reimbursement claims brought under Section 2802, such as claims for reimbursement for uniforms or for tools and equipment. But other expense reimbursement claims, such as for gas mileage, would still be subject to the common law definition. In other words, a worker would be defined as an employee for some business expenses, and as an independent contractor for other expenses. Operating a business under those rules would be a procedural nightmare.

Such bizarre results were never contemplated by the rationale of the *Martinez* opinion.

D. The Common Law Test for Determining Independent Contractor Status Should Continue to be Applied to Claims Encompassed by the Wage Orders.

Putting aside both *Martinez* and the Wage Order definition of "employer," we are left with the fact that the California Constitution, Labor Code section 1194, and many other sections of the Labor Code use the term "employee" without defining it. As this Court has previously stated, when a statute refers to an "employee" without defining the term, courts have generally applied the common law test of employment to that statute. (See *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500, 9 Cal.Rptr.3d 857, 84 P.3d 966.) That is what should continue to be done in this case. Fortunately, *Borello* and its progeny provide clear guidance on the common law. Under *Borello*, the California courts and administrative agencies have successfully distinguished between employees and independent contractors for 25 years.

IV.
CONCLUSION

For these reasons, Dynamex respectfully urges the Court to grant this Petition and resolve the important questions of law it presents.

DATED: November 24, 2014

LITTLER MENDELSON, P.C.

By:____________________________
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DATED: November 24, 2014

SHEPPARD MULLIN RICHTER &
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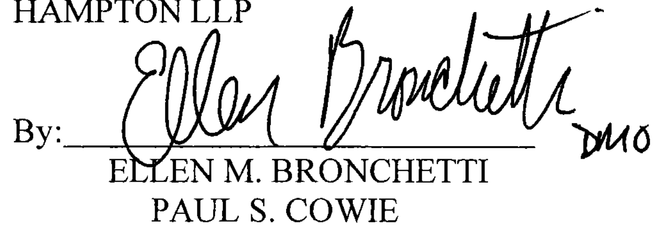

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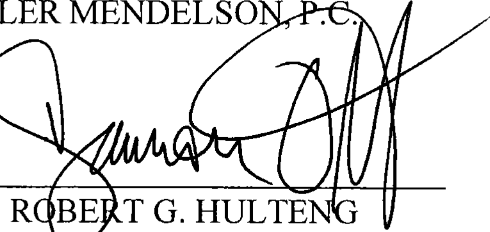
CERTIFICATE OF WORD COUNT

Pursuant to CRC 8.204(c) and 8.486(a)(6), the text of this petition, including footnotes and excluding the cover information, table of contents, tables of authorities, signature blocks, and this certificate, consists of 7,586 words in 13-point Times New Roman type as counted by the word-processing program used to generate the text.

DATED: November 24, 2014

LITTLER MENDELSON, P.C.



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Filed 10/15/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DYNAMEX OPERATIONS WEST, INC., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CHARLES LEE et al., Real Parties in Interest.	B249546 (Los Angeles County Super. Ct. No. BC332016)

ORIGINAL PROCEEDINGS in mandate. Michael L. Stern, Judge. Petition granted in part and denied in part.

Littler Mendelson, Robert G. Hulteng, Damon M. Ott; Sheppard Mullin Richter & Hampton, Ellen M. Bronchetti and Paul S. Cowie, for Petitioner Dynamex Operations West, Inc.

No appearance for Respondent.

Pope, Berger & Williams, A. Mark Pope; Glancy Binkow & Goldberg, Kevin Ruf; Boudreau Williams and Jon R. Williams for Real Parties in Interest, Charles Lee and Pedro Chevez.

Charles Lee and Pedro Chevez were hired by Dynamex Operations West, Inc. (formerly Dynamex, Inc.) (Dynamex), a nationwide courier and delivery service, as drivers to make deliveries of packages, letters and parcels to Dynamex customers. Prior to 2004 Dynamex had classified its California drivers as employees and compensated them subject to this state's wage and hour laws. In 2004 Dynamex converted the status of all drivers from employee to independent contractor. This lawsuit was filed in April 2005 alleging that drivers, as a practical matter, continued to perform the same tasks as they had when classified as employees with no substantive changes to the means of performing their work or the degree of control exercised by Dynamex and, as a consequence, the reclassification of Dynamex drivers violated California law. The plaintiff, Charles Lee, sought to represent approximately 1,800 drivers engaged by Dynamex as independent contractors. After its initial denial of class certification was reversed by this court, respondent superior court certified the proposed class in 2011.

Over the course of the next two years, Dynamex twice moved to decertify the class. When its second motion was denied, Dynamex filed this petition for a writ of mandate, arguing the superior court had improperly adopted the definition of "employee" found in Industrial Welfare Commission (IWC) wage orders[1] to ascertain the status of class members (see *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*)), and had failed to use the common law test for distinguishing between employees and independent contractors discussed in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*). According to Dynamex, if the *Borello* common law test, rather than the IWC standard approved in *Martinez*, is applied, the class must be decertified because the predominance of individual issues relevant to that test would make it infeasible to litigate the plaintiffs' claims as a class action.

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[1] The IWC is the state agency empowered to regulate wages, hours and working conditions through wage orders governing specific industries and occupations. (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 795.)

We issued an order to show cause why respondent superior court should not be compelled to vacate its order denying the motion to decertify the class. We now grant the petition in part. We conclude the superior court correctly allowed plaintiffs to rely on the IWC definition of an employment relationship for purposes of those claims falling within the scope of Wage Order No. 9-2001 (Wage Order No. 9). (Cal. Code Regs., tit. 8, § 11090.) With respect to those claims falling outside the scope of Wage Order No. 9, the common law definition of employee will control. As to those claims, we grant the petition to allow the superior court to reevaluate whether, in light of the Supreme Court's recent decision in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522 (*Ayala*), class certification remains appropriate by focusing its analysis "on differences in [the defendant's] right to exercise control" rather than "variations in how that right was exercised." (*Id.* at p. 528.)

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Motions To Certify and To Decertify the Class*

Lee and his co-plaintiff, Pedro Chevez, are former same-day delivery drivers who were engaged by Dynamex as independent contractors. The operative second amended complaint alleges Dynamex's classification of drivers as independent contractors rather than employees violated provisions of Wage Order No. 9, as well as various sections of the Labor Code,[2] and it had engaged in unfair and unlawful business practices under Business and Professions Code section 17200.

Lee's first motion for class certification, filed in November 2006, was denied on two grounds—the inascertainability of the class and a lack of common issues. We reversed that ruling. (*Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325.) Based on the Supreme Court's intervening decision in *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, we concluded the trial court had improperly denied Lee's "motion to compel Dynamex to identify and provide contact information for potential putative class members," a ruling that "improperly interfered with Lee's ability to

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[2] Statutory references are to the Labor Code unless otherwise indicated.

establish the necessary elements for class certification . . . ." (*Lee v. Dynamex, supra,* 166 Cal.App.4th at p. 1329.)

In June 2009 Lee filed a second motion for class certification, which was granted. The certified class contained four subclasses and several limited exclusions involving drivers who had hired other drivers to perform services for Dynamex, worked for other companies while also driving for Dynamex or transported certain hazardous items or transported freight in interstate commerce. Because of the lack of records sufficient to identify members of the class, the parties agreed to send questionnaires to each putative class member seeking information as to class membership. The trial court entered a stipulated order that the class was only "conditionally" certified pending the questionnaire process.

According to Dynamex, the questionnaire responses proved the unworkable nature of the proposed class. In December 2010 it moved to decertify the class on the grounds no records existed to identify class members; individualized inquiries were necessary to determine employment status; and contradictions in sworn testimony demonstrated the need for cross-examination to avoid a violation of its due process rights. The trial court granted the motion but allowed the plaintiffs to change the class definition one more time. The court subsequently vacated the order decertifying the class and continued the motion to allow plaintiffs to file a third motion for class certification. Relying on the Supreme Court's then-recent decision in *Martinez, supra,* 49 Cal.4th 35, Lee and Chevez contended drivers met the test for employment so long as Dynamex knew the drivers were providing services or negotiated the rates paid to the drivers: In other words, adherence to the common law rule described in *Borello* was not necessary to certification of the proposed class. The superior court agreed and certified the class.[3]

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[3] The certified class was defined as "Persons classified as independent contractors who performed pick-up or delivery services for Dynamex Operations West, Inc. ["DYNAMEX"], in the State of California between April 15, 2001 and the present time using their personally owned or leased vehicles with Gross Vehicle Weight Ratings of less than 26,000 lbs." Subclass 1 was defined as "Drivers who used vehicles with Gross Vehicle Weight Ratings (GVWR) of 10,000 lbs or less to perform services for

In December 2012 Dynamex renewed its motion to decertify the class on the ground intervening law had demonstrated the error of the court's reliance on *Martinez*. The superior court denied the motion to decertify.

2. *The Petition for Writ of Mandate*

On June 24, 2013 Dynamex petitioned this court for a writ of mandate directing the superior court to vacate its ruling denying the motion to decertify the class and to enter a new order decertifying the class. In response to our invitation to file a preliminary opposition to the petition, real parties in interest Lee and Chevez submitted a letter stating they strongly disagreed with Dynamex's legal arguments but supported its request that we issue an order to show cause and review the issues presented in the writ petition at this time. Accordingly, on July 10, 2013 we issued an order to show cause to determine whether the superior court erred in ruling a class may be certified under the IWC definition of employee as construed by the Supreme Court in *Martinez* or, as Dynamex contends, may proceed only under the common law test discussed in *Borello*.

Lee and Chevez filed their written return on October 8, 2013; Dynamex filed a reply on November 15, 2013. Pursuant to California Rule of Court, rule 8.200(a)(4), on July 7, 2014 this court requested that the parties file supplemental letter briefs addressing the effect, if any, of the Supreme Court's recent decisions in *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1 (*Duran*) and *Ayala, supra,* 59 Cal.4th 522. Supplemental briefs were received in August 2014,[4] and oral argument was heard on October 3, 2014. We now grant the petition in part.

DYNAMEX." Subclass 2 was defined as "Drivers who used vehicles with Gross Vehicle Weight Ratings (GVWR) in excess of 10,001 lbs and less than 26,000 lbs to perform services for DYNAMEX." The class excluded drivers who had not returned questionnaires; provided services for Dynamex while employed or subcontracted to another person or entity; provided services for Dynamex through their own employees or subcontractors; performed services for Dynamex and unrelated delivery services; or performed services for Dynamex and their own personal customers.

[4] Dynamex argued in its letter brief that *Ayala* was irrelevant to the issues raised in its petition but that *Duran*, which involved the manageability of individual issues in evaluating class certification, supported its argument the superior court had erred in

DISCUSSION

1. *Standard of Review*

To prevail on a motion to certify a class, "[t]he party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."'" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021; accord, *Ayala, supra,* 59 Cal.4th at pp. 529-530.) "'The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious."'" (*Brinker*, at p. 1023.) Nonetheless, "a court may 'consider[] how various claims and defenses relate and may affect the course of the litigation' even though such 'considerations . . . may overlap the case's merits.'" (*Id.* at p. 1024.)

We review a trial court's ruling on a certification motion, as well as a decertification motion, for abuse of discretion and generally will not disturb it "'"unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions."'" (*Ayala, supra*, 59 Cal.4th at p. 530; see *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 973-974.) As in *Ayala,* "the central legal issue" presented here is "whether putative class members are employees for purposes of the provisions under which they sue." (*Ayala*, at p. 530.) "If they are employees, [Dynamex] owes them various duties that it may not have fulfilled; if they are not, no liability can attach." (*Id.* at p. 530.)

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denying its decertification motion. Lee and Chevez, on the other hand, insisted *Duran* provided little guidance since it primarily concerned the use of statistical sampling in the trial of a class action lawsuit, but that *Ayala* has direct application to this case.

2. *Common Law Principles for Identification of an Employee Relationship*

"Under the common law, '"[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."' [Citations.] What matters is whether the hirer 'retains all *necessary* control' over its operations. [Citation.] '"[T]he fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it."' [Citations.] Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.'" (*Ayala, supra,* 59 Cal.4th at p. 531, quoting, inter alia, *Borello*, *supra,* 48 Cal.3d at p. 350.) Secondary indicia of employment status under the common law include "'(a) whether the one performing services is engaged in a distinct occupation or business; (b) 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; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.'" (*Ayala,* at p. 532, quoting *Borello* at p. 351.)

In *Ayala* the Supreme Court revisited the common law definition of an employee relationship in the same context as is at issue in this case—that is, whether a class may be certified in a wage and hour action alleging the defendant had misclassified its employees as independent contractors. The trial court had denied the plaintiffs' motion to certify the putative class of newspaper carriers hired by the Antelope Valley Press to deliver its newspaper after finding common issues did not predominate. (*Ayala, supra,* 59 Cal.4th at p. 529.) The trial court reasoned *Borello*'s common law test for an employment

relationship would require "heavily individualized inquiries" into the newspaper's control over the carriers' work. (*Ayala*, at p. 529.) While the case was pending before it, the Supreme Court directed the parties to submit supplemental briefs discussing the relevance of *Martinez* and IWC Wage Order No. 1-2001, subdivision 2(D)-(F) to the issues in the case. (*Ayala,* at p. 531.)[5] Although raising the question presented here, that is, in evaluating whether common issues predominate on the certification question a class plaintiff may rely on the applicable IWC wage order to determine employee status or is instead limited to the common law test, the Supreme Court reversed the trial court's ruling without resolving it. Because the plaintiffs had proceeded under the common law definition, the Court limited its discussion to whether plaintiffs' claims were susceptible to proof on a classwide basis under that test. Finding the trial court should have focused on "differences in [the defendant's] right to exercise control," rather than "variations in how that right was exercised" (*id.* at p. 528) in concluding individual issues predominated, the Court reversed the order denying class certification and remanded the case for reconsideration of the motion under the correct legal standards (*id.* at p. 540).

3. *Martinez and the IWC Definition of an Employment Relationship*

In *Ayala* the Court found it unnecessary to discuss the statutory context of the plaintiffs' claims,[6] focusing instead on how a court should approach the question of

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[5] The order for supplemental briefing also cited *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, 660-662, and *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1146-1147, cases we discuss below.

[6] Responding to Justice Chin's reservations, the Court stated: "'As Justice Chin's concurrence notes, *Borello* recognized 'the concept of "employment" embodied in the [Workers' Compensation] Act is not inherently limited by common law principles' (*Borello, supra,* 48 Cal.3d at p. 351) and identified a handful of other considerations that might 'overlap those pertinent under the common law' (*id.* at p. 354; see *id.* at pp. 351-355 [discussing additional considerations relevant in light of the remedial purposes of the statutory scheme there at issue]). Strictly speaking, however, those further considerations are not part of the common law test for employee status. The concurrence's assertion they are relevant here (conc. opn. of Chin, J., *post*, at pp. 548-550) rests on the legal assumption they play a role in deciding employee status for wage claims, an assumption we decline to embrace, leaving for another day resolution of its validity. (See *Martinez*[, *supra,*] 49 Cal.4th at pp. 64, 73.)" (*Ayala, supra,* 59 Cal.4th at p. 532, fn. 3.)

certification when an applicable standard (there, the common law test for an employment relationship) appears to implicate individualized factual issues that might make litigation of the case as a class action unmanageable. (See *Ayala, supra,* 59 Cal.4th at pp. 537-538.) In *Martinez*, on the other hand, the Court discussed at length the impact of the IWC regulatory scheme on whether an employment relationship had arisen between a group of farm laborers and the merchants who bought the produce from the farmer who employed the laborers. (See *Martinez, supra,* 49 Cal.4th at pp. 52-57.) Although the Court concluded the produce merchants were not joint employers of the farm laborers, it made clear IWC wage orders are to be accorded the same weight as statutes and the applicable wage order defines the employment relationship for wage and hour claims within its scope. (*Id.* at pp. 52, 61.)

The farm laborers in *Martinez* sued the produce merchants under section 1194, which creates a private right of action on behalf of employees seeking to recover unpaid wages.[7] Because this Labor Code section does not specify who is liable under its terms, the Supreme Court analyzed the legislative history associated with its adoption. In short, section 1194 was part of 1913 legislation that also created the IWC, which was empowered to issue wage orders governing specific industries and occupations. (*Martinez, supra,* 49 Cal.4th at pp. 54-56; see also *Brinker Restaurant Corp. v. Superior Court, supra,* 53 Cal.4th at p. 1026 ["[n]early a century ago, the Legislature responded to the problem of inadequate wages and poor working conditions by establishing the IWC and delegating to it the authority to investigate various industries and promulgate wage orders fixing for each industry minimum wages, maximum hours of work, and conditions of labor"].) Since 1913, the Court observed, "the Legislature has 'restated the commission's responsibility in even broader terms' [citation], charging the IWC with the

[7] Section 1194, subdivision (a), provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

'continuing duty' to ascertain the wages, hours and labor conditions of 'all employees in this state,' to 'investigate [their] health, safety, and welfare,' to 'conduct a full review of the adequacy of the minimum wage at least once every two years' [citation], and to convene wage boards and adopt new wage orders if the commission finds 'that wages paid to employees may be inadequate to supply the cost of proper living' [citations]." (*Martinez,* at p. 55.) The Court concluded, "[A]n examination of section 1194 in its full historical and statutory context shows unmistakably that the Legislature intended to defer to the IWC's definition of the employment relationship in actions under the statute." (*Id.* at p. 64.)[8]

The IWC wage orders share common definitions and schemes, including the definition of employment: Like all other wage orders, Wage Order No. 9, applicable to the transportation industry, defines the word "employ" as "to engage, suffer, or permit to work." (Cal. Code Regs., tit. 8, § 11090, subd. 2(D).) An employer is defined as any person "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." (*Id.*, § 11090, subd. 2(F).) This is the same language examined by the Supreme Court in *Martinez.* (See *Martinez, supra,* 49 Cal.4th at p. 64.) Parsing this language in light of the IWC's statutory purposes, *Martinez* concluded that "[t]o employ, then, under the IWC's definition, has three alternative definitions. It means: (a) to exercise control over the

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[8] The Legislature defunded the IWC in 2004; however, its wage orders remain in effect. (*Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 667, fn. 3.) There are currently 18 wage orders. Sixteen relate to specific industries or occupations: manufacturing; personal service; canning, freezing and preserving; professional, technical, clerical, mechanical and the like; public housekeeping; laundry, linen supply and dry cleaning; mercantile; product handling after harvest (covering commercial packing sheds); transportation; amusement and recreation; broadcasting; motion picture; preparation of agricultural products for market (on the farm); agricultural; household; and construction, drilling, logging and mining. There is also one general minimum wage order, and one order implementing the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. (See Cal. Code Regs., tit. 8, §§ 110al.00-11170; *Brinker Restaurant Corp. v. Superior Court, supra,* 53 Cal.4th at p. 1026; *Martinez*, *supra*, 49 Cal.4th at p. 57.)

wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Ibid.*)

As is evident from the *Martinez* Court's analysis, it is not inappropriate to rely on the common law standard to determine whether an employment relationship exists for purposes of liability under section 1194. However, *Martinez* recognized that limiting plaintiffs to that test in actions under section 1194 and "ignoring the rest of the IWC's broad regulatory definition would substantially impair the commission's authority and the effectiveness of its wage orders." (*Martinez, supra,* 49 Cal.4th at p. 65.) "One cannot overstate the impact of [this] holding on the IWC's powers. Were we to define employment exclusively according to the common law in civil actions for unpaid wages we would render the commission's definitions effectively meaningless." (*Ibid.*)

Borello in many ways foreshadowed *Martinez's* embrace of the IWC definition. There, in holding that cucumber sharefarmers were not independent contractors excluded from coverage under the Workers' Compensation Act, the Supreme Court explained, "The distinction between independent contractors and employees arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him." (*Borello, supra,* 48 Cal.3d at p. 350.) As a matter of fairness to the employer, his or her liability was premised on the extent to which the employer had the right to control the details of the employee's service. (*Ibid.*) In the wake of 20th century industrialization, versions of this "control" test were imported into legislation designed to protect workers as an express or implied limitation on coverage. (*Ibid.*) Courts struggling to apply this limited test to "the infinite variety of service arrangements" eventually embraced the cluster of secondary indicia discussed above to guide resolution of these questions. (*Ibid.*, citing, inter alia, Rest.2d Agency, § 220; *Tieberg v. Unemployment Ins. Appeals Board* (1970) 2 Cal.3d 943, 949-950; *Empire Star Mines Co. v. California Employment Com.* (1946) 28 Cal.2d 33, 43.) *Borello*, however, recognized that the control test arose to meet the needs of employers and was not focused on protection of their employees: To accommodate this conceptual distinction, the Court instructed that the common law "'control-of-work-details' test for determining whether a person rendering services to

another is an 'employee' or an excluded 'independent contractor' must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the 'history and fundamental purposes' of the statute." (*Borello,* at pp. 353-354.)

Martinez, in effect, fills the gap between the common law employer-focused approach and the need for a standard attuned to the needs and protection of employees. As the Court recognized, the IWC wage orders provide an employee-centric test gauged to mitigate the potential for employee abuse in the workplace: "[T]he scope of the IWC's delegated authority is, and has always been, over wages, hours and working conditions. [Citations.] For the IWC to adopt a definition of 'employer' that brings within its regulatory jurisdiction an entity that controls any one of these aspects of the employment relationship makes eminently good sense." (*Martinez, supra,* 49 Cal.4th at p. 59.) "For a court to refuse to enforce such a provision in a presumptively valid wage order [citation] simply because it differs from the common law would thus endanger the commission's ability to achieve its statutory purposes." (*Id.* at p. 65.)

4. *The Trial Court Did Not Err in Allowing Certification Based on the IWC Definition of Employee as to Claims Falling Within the Scope of Wage Order No. 9*

Dynamex contends the superior court's ruling is an outlier and insists no other court has resorted to the first two prongs of the IWC definition of employee in certifying a class in a wage and hour case. Under this "extreme view," Dynamex asserts, "independent contractors will no longer exist in California."

Contrary to Dynamex's overblown rhetoric, the decisions it cites as rejecting application of *Martinez* in fact confirm its broad sweep. In *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, for instance, the court applied the IWC definition of employment because "*Martinez* governs our determination of the issues in the current case. [Citations.] *Martinez* teaches that, in actions under section 1194 to recover unpaid wages, an IWC wage order governing a subject industry defines the employment

relationship, and thus who may be held liable—as an employer—for unpaid wages." (*Futrell,* at p. 1429.) Although utilizing the IWC definition, the court affirmed summary judgment in favor of the payroll company because it did not exercise control over the plaintiff's wages, hours or working conditions; did not have the power to cause or prevent him from working; and did not control any aspect of his job performance. (*Id.* at pp. 1431-1435; see also *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1187-1190 [applying *Martinez* to find defendant was not an employer even though no wage order involved]; *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 945-952 [applying *Martinez* to find public agency exercised effective control over provider wages; trial court erred in determining as a matter of law public agency was not an employer for purposes of IWC wage order].)

Similarly, in *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, a wage and hour class certification appeal, the appellate court recognized "the trial court should not have limited itself to the test for a common law employment relationship because [the plaintiffs'] third cause of action, for violation of minimum wage and overtime laws, comes under Labor Code section 1194." (*Id.* at pp. 661-662.) The *Sotelo* court concluded this error was harmless in light of the trial court's determination "that, even assuming that putative class members were employees, common issues did not predominate in the third cause of action." (*Id.* at p. 662.) Echoing *Sotelo*'s analysis but reaching the opposite conclusion, the court in *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129 found common issues of fact warranted certification of a class of telecommunications workers under either the *Borello* or *Martinez* standard. With respect to seven causes of action—six of which were not based on section 1194—the court interpreted *Martinez* to apply to all claims brought under an IWC wage order. (*Bradley,* at p. 1146.) Presaging the opinion in *Ayala*, the court explained: "Under [class certification] analysis, the focus is not on the particular task performed by the employee, but on the global nature of the relationship between the worker and the hirer, and whether the hirer or the worker had the right to control the work. The undisputed evidence showed Networkers had consistent companywide policies applicable to all employees

regarding work scheduling, payments, and work requirements. Whether those policies created an employer-employee relationship, as opposed to an independent contractor relationship, is not before us. The critical fact is that the evidence likely to be relied upon by the parties would be largely uniform throughout the class." (*Bradley*, at p. 1147.)[9]

Other decisions cited by Dynamex arose in contexts not subject to IWC wage orders and thus outside the scope of *Martinez*. *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, for example, was a tort action that applied the common law test to the question whether the tortfeasor was an employee or independent contractor of the defendant. In *Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1394 a stuntman sued Disney for injuries he had received on the set. The court affirmed summary judgment in favor of Disney after finding the plaintiff was an employee and that workers' compensation was his exclusive remedy. Neither of these cases involved a wage and hour claim within the scope of an IWC work order.[10]

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[9] Dynamex cites several federal decisions that apply *Borello*'s common law test in determining whether an employee relationship exists in a misclassification lawsuit without discussing the impact of *Martinez*. (See, e.g., *Alexander v. FedEx Ground Package System, Inc.* (9th Cir. 2014) 765 F.3d 981 [2014 U.S. App. Lexis 16585]; *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2014) 754 F.3d 1093.) We, of course, are not bound by federal interpretations of California law.

[10] Dynamex also cites *Monarrez v. Automobile Club of Southern California* (2012) 211 Cal.App.4th 177, notwithstanding that review had been granted by the Supreme Court on February 13, 2013 (S207726), more than four months before it filed its writ petition in this court. (See Cal. Rules of Court, rules 8.1105(e)(1) [unless otherwise ordered, an opinion is no longer considered published if the Supreme Court grants review], 8.1115(a) [with limited exceptions, a Court of Appeal opinion that is not certified for publication "must not be cited or relied on by a court or a party in any other action"].) In any event, *Monarrez*, like *Bowman*, was a tort action; the issue was whether a tow truck company assisting the plaintiff, who was injured by a hit-and-run driver while being aided by the tow truck operator, was the actual or ostensible agent of the Automobile Club of Southern California or whether it was an independent contractor. The Supreme Court ordered briefing in *Monarrez* deferred pending its decision in *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, which held the defendant franchisor was entitled to summary judgment on plaintiff's claim that it was vicariously liable for tortious conduct by a supervising employee of a franchisee.

Dynamex also cites *Arnold v. Mutual of Omaha Ins. Co.*(2011) 202 Cal.App.4th 580 (*Arnold*) to demonstrate courts have rejected *Martinez*. In *Arnold* a nonexclusive insurance agent for Mutual of Omaha sued the company seeking unpaid employee entitlements under the Labor Code. (*Id.* at p. 582.) Mutual of Omaha moved for summary judgment on the ground she was an independent contractor rather than an employee under the common law test. (*Id.* at p. 583.) The agent contended section 2750 defined "employee" for purposes of her rights under section 2802.[11] The appellate court rejected that argument and affirmed the trial court's order granting summary judgment, relying in part on the application of the common law test to a claim under section 2802 in *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1,[12] as well as its own conclusion that "section 2750 does not supply . . . a definition of 'employee' that is clearly and unequivocally intended to supplant the common law definition of employment for purposes of section 2802." (*Arnold,* at p. 587.) As the court noted, "when a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Id.* at p. 586.)

According to Dynamex, *Arnold* "referenced *Martinez* elsewhere in its opinion, but then determined that 'the trial court correctly determined the common law [*Borello*] test

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[11] Section 2802, subdivision (a), provides: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

Section 2750 provides: "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."

[12] *Estrada*, decided by our colleagues in Division One of this court, was written nearly three years before the Supreme Court's decision in *Martinez.* Applying *Borello*, *Estrada* concluded the plaintiff FedEx drivers were employees rather than independent contractors: The court referred to the result as the "if it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck" test. (*Estrada v. FedEx Ground Package System, Inc., supra,* 154 Cal.App.4th at p. 9.) We have little doubt, if decided today, the *Estrada* court would follow *Martinez* and find the FedEx drivers were employees within the meaning and scope of Wage Order No. 9.

of employment was applicable for purposes of Section 2802.' The *Arnold* Court was clearly aware of *Martinez.*" However, the sole "reference" to *Martinez* in *Arnold* is the court's citation of *Reynolds v. Bement* (2005) 36 Cal.4th 1075 as "disapproved" by *Martinez* "on another ground." There is no discussion of *Martinez* or the IWC definition because the plaintiff apparently did not contend she was covered by a wage order. Indeed, IWC wage orders exempt from coverage "persons employed in administrative, executive, or professional capacities"—persons like the plaintiff—with respect to certain mandates, including the right to reimbursement of particular expenses. (Cal. Code Regs., tit. 8, § 11040, subds. 1(A), 8 & 9.)[13] Absent an applicable wage order, *Arnold* is not authority for the contention the common law standard of employment governs claims in this case, which do involve a controlling wage order. (See *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 [language in a judicial opinion is to be understood in accordance with the facts and issues before the court; an opinion is not authority for propositions not considered].)

In sum, Dynamex has failed to convince us the superior court erred as a matter of law in denying its motion to decertify the class with respect to claims falling within the scope of Wage Order No. 9. The court properly applied *Martinez* in determining plaintiffs were employees within the meaning of that wage order.[14]

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[13] Wage Order No. 4-2001 regulates wages, hours, and working conditions in professional, technical, clerical, mechanical and similar occupations but contains the same exemption for "persons employed in administrative, executive, or professional capacities" found in every wage order.

[14] Dynamex contends, both in its briefs and at oral argument, that the holding in *Martinez* should be limited to determining whether an entity is a joint employer—that is, whether an individual who is unquestionably an employee of one entity may hold another entity liable for wages or other employment benefits not provided by the primary employer. Although that was the precise factual context in which the issue arose in *Martinez*, nothing in the case supports a limitation of this nature; and, as the foregoing discussion demonstrates, no other court has adopted it.

5. *The Trial Court Should Reevaluate in Light of Ayala Whether Class Certification Remains Appropriate for Any Claims Falling Outside Wage Order No. 9*

Lee and Chevez's second amended complaint contains five causes of action, all of which are alleged to fall within the scope of Wage Order No. 9: (1) unfair business practices under Business and Professions Code section 17200 arising from violations of various Labor Code and wage order provisions; (2) unlawful business practices under the same section; (3) failure to pay overtime compensation in violation of section 1194 and other provisions; (4) failure to provide accurate wage statements in violation of section 226; and (5) failure to fully compensate for business expenses in violation of section 2802. The trial court did not distinguish among these claims in granting the motion for class certification.

Notwithstanding the legal conclusion alleged in their pleading, it is by no means clear at this point in the litigation whether all of Lee and Chevez's claims under section 2802 (and the related claims for unfair or unlawful business practices), if proved, would be violations of Wage Order No. 9. To be sure, the wage order contains several provisions that arguably relate to the section 2802 claim: Employers may not deduct from the employee's wages or require reimbursement for "any cash shortage, breakage, or loss of equipment" (Cal. Code Regs., tit. 8, § 11090, subd. (8)); the employer must provide and maintain uniforms worn by the employee as a condition of employment (*id.*, § 11090, subd. 9(A)); and necessary tools and equipment shall be provided and maintained by the employer (*id.,* § 11090, subd. 9(B)). To the extent the reimbursement sought by Lee and Chevez in their section 2802 claim are confined to these items, the IWC definition of employee must be applied pursuant to *Martinez*, as discussed in the preceding section of our opinion.

Claims for reimbursement for the rental or purchase of personal vehicles used in performing delivery services, even if viable under section 2802, appear to be outside the ambit of Wage Order No. 9. (See *Estrada v. FedEx Ground Package System, Inc., supra,* 154 Cal.App.4th at pp. 21-25.) If so, the determination whether a class is properly

certified to pursue those claims must be made under the common law definition of employee as discussed in *Ayala* and *Borello*. That evaluation is most appropriately made by the superior court in the first instance.

DISPOSITION

The petition is granted in part. Let a peremptory writ of mandate issue directing respondent superior court to reevaluate in light of *Ayala, supra*, 59 Cal.4th 522 and *Duran, supra*, 59 Cal.4th 1, if relevant, whether class certification remains appropriate for any claims falling outside Wage Order No. 9. In all other respects the petition is denied. The parties are to bear their own costs in this proceeding.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 650 California Street, 20th Floor, San Francisco, California 94108.

On **November 24, 2014**, I served the foregoing document as described below on the interested parties in this action as follows:

PETITION FOR REVIEW

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Court of Appeal Case No.
B249546

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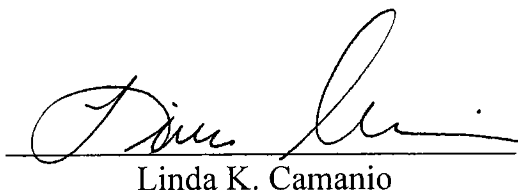
X **BY MAIL:** Following ordinary business practices at the Los Angeles, California office of Littler Mendelson, PC, I placed the sealed envelope for collection and mailing with the United States Postal Service on that same day. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, such correspondence would be deposited with the United States

Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business.

X **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 24, 2014, at Los Angeles, California.



Linda K. Camanio

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