S.Ct. Case No.: S222732

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner and Defendant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
Respondent,

CHARLES LEE and PEDRO CHEVEZ, individually, and on behalf of all others similarly situated,
Plaintiffs and Real Parties in Interest.

After Decision by the Court of Appeal
Second Appellate District, Div. Seven (B249546)

Superior Court of Los Angeles County (BC332016)
Hon. Michael L. Stern

PLAINTIFFS' REPLY TO SUPPLEMENTAL BRIEFS REGARDING RELEVANCE OF DLSE ENFORCEMENT MANUAL

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TABLE OF AUTHORITIES

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The Department of Labor Standards Enforcement ("DLSE") has now confirmed that its DLSE Enforcement Manual should not be read as taking any position on the issues before this Court. *See* DLSE Supp. Br. at 6-7. The reason the sections of that Manual cited in the Court's supplemental briefing order make no reference to *Martinez v. Combs* (2010) 49 Cal.4th 35 is simply because those sections have not been updated or revisited since before *Martinez* was decided, and DLSE has not had occasion during its subsequent enforcement efforts to consider whether *Martinez* requires a different approach to analyzing misclassification cases arising under the Wage Orders and related provisions of the Labor Code.

DLSE's failure to update its Enforcement Manual (which, in any event, is meant only to summarize other sources of legal authority rather than to analyze or resolve disputed questions of law) or to consider the issue now before the Court simply means that the Court must use its own tools of statutory construction to determine what standards the IWC and Legislature intended courts to apply when considering whether a worker–or class of workers–are entitled to the protections of the Wage Orders and related Labor Code provisions. For the reasons plaintiffs and their supporting amici have shown, *Martinez*'s holding that an entity is an "employer" if it satisfies any of the three disjunctive tests under the Wage Orders was the proper standard for the trial court to apply to plaintiffs' class certification motion in this case. *See* 49 Cal. 4th at 66; *see also* Supplemental Brief of Amici

Supporting Plaintiffs[1] at 10-11 (describing three disjunctive tests and how they should be articulated to eliminate uncertainty as to their application).

Nothing in the relevant text of the Wage Orders, or in this Court's deep statutory analysis in *Martinez*, suggests that the IWC's definition of employment was intended to apply only to cases involving potential joint employment. The Wage Orders apply the same definitions of employment to *all* disputes since to be employed is a singular status. Under Dynamex's proposed construction, though, as well as the Court of Appeal's decision, a company could "employ" an individual and be that person's "employer" within the meaning of the Wage Orders (as interpreted by this Court in *Martinez*), yet have no duty to comply with the obligations imposed on the same employer under the Labor Code – simply because that individual is not deemed to be an "employee" under the common law test developed in *Borello* for Workers Compensation Act claimants. There is no logical reason why the IWC would have intended such an internally contradictory approach, and there is no textual or other evidence to support such an intent. If a person or entity for which a worker performs work is an "employer" that "employs" the worker under the Wage Order definitions, that worker should be deemed an "employee" entitled to all protections of the Wage Orders and related Labor Code provisions.

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[1] The amici supporting plaintiffs'/real parties' position here include the California Rural Legal Assistance Foundation, Service Employees International Union, United Food and Commercial Workers International Union, International Brotherhood of Teamsters, and the California Employment Lawyers Association.

Dynamex's proposed approach would undermine the purposes of the Wage Order and related Labor Code provisions in a range of cases involving workplace relationships that might not satisfy the narrow version of the common-law test articulated in *Borello*, but that would satisfy the broader tests set forth in the Wage Order, as recognized by *Martinez*. Dynamex advocates precisely the approach already rejected by this Court in *Martinez*. As this Court explained, "[w]ere we to define employment exclusively according to the common law in civil actions for unpaid wages we would render the commission's definitions effectively meaningless." 49 Cal.4th at 65.

Entities that fall squarely within the Wage Orders' definition of "employer," either because they have the right to control their workers' wages, hours, or working conditions or are "suffering or permitting" work to be performed under unlawful conditions for their benefit could still evade their obligations under the related Labor Code provisions by structuring their relationships with their workers in a manner that arguably does not satisfy the *Borello* standard (for example, by disclaiming their right to control the means through which the workers perform their assigned tasks). That result would be contrary to the established principle that the Wage Order definitions were intended to further the IWC's efforts, "in the exercise of its statutory and constitutional authority[,] to make its wage orders effective, to ensure that wages are actually received, and to prevent evasion and subterfuge." *Martinez*, 49 Cal.4th at 61-62.

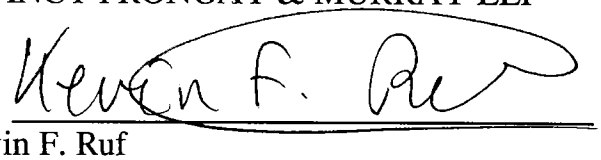
Further, applying a different definition of the employment relationship depending upon whether a dispute arises directly under the Wage Orders or under related Labor Code provisions would invite "evasion and subterfuge." For example, an "employer" that "employs" a worker within the meaning of the Wage Order definitions could contend that although that worker is entitled to the minimum wage established by the Wage Order, the worker is nonetheless an "independent contractor" under *Borello* and is not entitled to be reimbursed under Labor Code §2802 for expenses incurred for the employer's benefit. This scenario could have the perverse effect of bringing the worker's net wages -- after accounting for the unreimbursed expenses – below the Wage Order minimum wage.

Dynamex continues to assert that applying the three alternative definitions of employment recognized in *Martinez* to the misclassification context–in particular, the "suffer or permit" standard–would result in the elimination of all independent contractor relationships in California. But as already explained by plaintiffs and their supporting amici, a version of California's "suffer or permit" standard has long been applied in the context of federal employment statutes without eliminating all forms of independent contracting, in part because that standard focuses on whether the putative employer has the right to control whether work is being performed under unlawful conditions. *See, e.g.*, Amicus Brief of SEIU *et al.* at 15-17 (citing cases).

For all of these reasons, as well as those set forth in plaintiffs' Response Brief and in the briefs of plaintiffs' supporting amici, this Court should affirm the decision below but should also hold that the Wage Order definition mandated by *Martinez* applies to the Real Parties' cause of action for expense reimbursement under Labor Code Section 2802 and also that Wage Order 9, Section 9 ("Uniforms and Equipment"), requires the employer to reimburse its employees for all business expenses, including vehicle expenses.

Dated: March 7, 2017

GLANCY PRONGAY & MURRAY LLP

By: 

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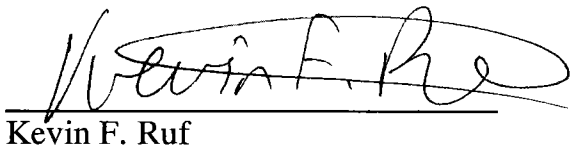
CERTIFICATION PURSUANT TO CALIFORNIA RULE OF COURT 8.204(c)(1)

The undersigned hereby certifies that the *foregoing* is proportionally spaced, has a typeface of Times New Roman 13-point, is double-spaced, and based upon the word court feature contained in the 2010 Microsoft Word computer program used to produce the brief, contains 1,076 words.



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PROOF OF SERVICE VIA U.S. MAIL

I, the undersigned, say:

I am a citizen of the United States and am over the age of 18 and not a party to the within action. My business address is 1925 Century Park East, Suite 2100, Los Angeles, California 90067.

On March 7, 2017, I served the following document:

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Executed on March 7, 2017, at Los Angeles, California. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Harry H. Kharadjian