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SUPREME COURT COPY

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VIA OVERNIGHT DELIVERY

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

RE: Case Reference: No. S222732
Dynamex Operations West, Inc. v. Superior Court

Our Clients: Plaintiffs and Real Parties in Interest, Charles Lee and Pedro Chevez, individually and on behalf of all others similarly situated,

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Plaintiffs and Real Parties in Interest, Charles Lee and Pedro Chevez ("Plaintiffs"), submit this response to the Court's December 28, 2017 request for supplemental briefing.

The Court asked the parties and their amici to address whether "the pertinent wage order's suffer-or-permit-to-work definition of 'employ' [is] properly construed as embodying a test similar to the 'ABC' test that the New Jersey Supreme Court, in *Hargrove v. Sleepy's LLC* (N.J. 2015) 106 A.3d 449, 462-65 ("*Hargrove*"), held should be used under the New Jersey Wage and Hour Law, which also defines 'employ' to include 'to suffer or to permit to work' (N.J. Stat. § 34:11-56a1)."

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The short answer is "yes." We begin with this Court's analysis of the historical record in *Martinez v. Combs* (2010) 49 Cal.4th 35, 52, which "shows unmistakably that the Legislature intended the IWC's wage orders to define the employment relationship in actions under [Labor Code section 1194]." In giving real-world meaning to the IWC's expansive definitions of "employ" – which, of course, is the principal reason review was granted in this case – this Court can and should consider the practical tests that other jurisdictions have used to distinguish bona fide independent contractors and employees under similar definitions of "employ."

A. This Court Has Previously Looked To A Range Of Sources In Determining How Best To Vindicate The Worker Protection Goals Of The Labor Code And Wage Orders

The seminal case distinguishing between "employees" and "independent contractors" in the context of a worker-protection statute, *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal. 3d 342, is almost thirty years old. In that case, which arose under California's Workers Compensation Act, this Court recognized that the right-to-control analysis required by the Act must be applied with deference to the purposes of that protective legislation. In particular, the nature of the work being performed and the overall arrangement between the parties must be examined to determine whether extending the Act's protections to those workers is consistent with the "history and fundamental purposes" of the statute." (*Id.* at 353, 354.)

Many other provisions of the Labor Code are also remedial and are also designed to protect employees, thus requiring similar analysis. As this Court noted in *Martinez,* "past decisions ...teach that in light of the remedial nature of the legislative enactments authorizing regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Id.* at 61 (citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal. 3d 690, 702).)

While this Court has said the wage orders do not incorporate the federal definition of employment, the *Borello* court found some elements of the federal courts' "economic realities test" to be applicable to the definition of employ for the

remedial purposes of worker-protection statutes under the common law prong, when applied to statutory claims establishing minimum workplace standards (like the Workers Compensation Act):

> "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. (*Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979) 603 F.2d 748, 754 [Fair Labor Standards Act].)
>
> As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. (See discussion, ante, at pp. 350-351.) We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law."

Id. 354, 356.

The approach taken in *Borello* makes perfect sense. As this Court explained, the traditional "common law" test of independent contractor was focused on protection of the principal (when sued under a respondeat superior theory for torts committed by an alleged agent) in contrast to the focus of many labor statutes that are designed to protect workers. "The common law and statutory purposes of the distinction between 'employees' and 'independent contractors' are substantially different. While the common law tests were developed to define a master's respondeat superior liability for injuries caused by his servant, 'the basic inquiry in compensation law involves which injuries to the

employee should be insured against by the employer.'" (*Borello, supra,* at 352 (citing *Laeng v. Workers Compensation Appeals Board* (1972) 6 Cal.3d 771, n.7).)

This Court in *Laeng* concluded, importantly, that "in each context the determination of the presence or absence of a sufficient 'employment' relationship must ultimately depend on the *purpose* for which the inquiry is made." *Id.* (emphasis added).

This Court recently reaffirmed this principle in *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 235: "As we explained in [*Borello*], the common law test of employment is not always appropriate beyond the tort context in which it was originally developed. [Citation omitted.] Outside of tort, rather than 'rigidly' applying the common law test, we look to the 'history and fundamental purposes' of the statute at issue to determine whether the Legislature intended the test to apply."

An inherent concern with respect to the use of so-called "independent contractors" is that the hirer is using this purported status for purposes of "evasion and subterfuge"[1] – primarily to avoid the costs of employment. In the instant case, Dynamex unilaterally "converted" a large number of drivers from employees into "independent contractors" with a simple announcement of their changed status, unaccompanied by any corresponding change of duties or workplace structure. As traditional "control" by direct-line supervisors has become less prevalent (with technology, production metrics, and more sophisticated employer "systems" replacing it), answering the core question of whether a worker is actually in business for herself – or is, instead, part of someone else's business – has been an increasingly effective way of getting to the point of what matters. The three criteria of the ABC test are particularly useful tools for conducting that analysis, but as a supplement to existing standards, not a replacement.

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[1] [W]e have repeatedly enforced definitional provisions the IWC has deemed necessary in the exercise of its ...authority to make its wage order effective, to ensure that wages are actually received, and to prevent evasion and subterfuge." (*Martinez* at 61, 62 (citing *Cal Drive-In Restaurant Assn. v. Clark* (1942) 22 Cal.2d 287, 302-03.)

B. A Test That Incorporates The ABC Criteria Could Provide A Useful And Predictable Standard For Distinguishing Independent Contracting From Employment

Both New Jersey and California presume an employment relationship when work is performed. Title 43 of the New Jersey Code, Pensions and Retirement and Unemployment Compensation, N.J.S.A. 43:21-19(i)(6) provides: "Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter...unless and until it is shown to the satisfaction of the division that..." Similarly, California Labor Code § 3357 provides that "[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." Under both the New Jersey statute and California law, the principal bears the burden of proving that the worker is not its employee. (*Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1292-93; *Anaheim General Hospital v. Workmen's Compensation Appeals Bd.* (1970) 3 Cal.App.3d 468, 472; *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 84.) *See also Robinson v. George* (1940) 16 Cal.2d 238, 242 where this Court wrote "[t]he rule, as stated by plaintiff, is that the fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary."

As remedial statutes, both the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law are to be liberally construed. (*Hargrove, supra,* 106 A. 3D 458) Similarly, this Court has held that the IWC Wage Orders are to be liberally construed with an eye to promoting the protection and benefit of employees. (*Martinez*, 49 Cal.4th at 61 (citing *Industrial Welfare Com., supra,* at, 701).)

Given the similarities in the purpose and intent of both New Jersey and California law, particularly the worker-protective purposes underlying them, we believe that a test that incorporates the criteria of the ABC test found in N.J.S.A. 43:21-19(i)(6) could provide a useful tool to guide the determination by a trier of fact as to whether a worker is an employee or independent contractor under the Wage Order definition, as set forth in *Martinez, supra,* at 64:

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

The ABC test has particular value with respect to the "suffer or permit" and common law prongs. In defining "employee" under the Wage Payment Law and in defining "employ" under the Wage and Hour Law (the two statutes at issue in *Hargrove*), the New Jersey Legislature expressly defined the employment relationship in terms of whether a putative employer "suffer[ed] or permit[ted]" an individual's work. (*Hargrove, supra,* at 457-59.) The New Jersey Supreme Court "borrowed" the ABC test from the State's Unemployment Compensation Act, which has similar goals to those two wage statutes (providing baseline economic protection to workers who are dependent on an employer for their work and wages), and thus provides a practical analytical framework for defining the scope of employer responsibility under those two statutes. Just as the ABC test provided a workable mechanism for courts considering whether a terminated worker should be eligible for unemployment compensation benefits in New Jersey, so does that test enable courts to determine which workers should be entitled to the protections of the State's wage and overtime laws under a suffer-or-permit standard, which is similarly designed to protect those who are most economically dependent upon an owner that benefits from their services.

To sustain its burden under the ABC Test under N.J.S.A. 43:21-19(i)(6), a principal must prove:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under this contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

These same three factors can be used by courts in California to determine whether, under the second and third prongs of *Martinez*, a business owner or other putative employer is required to extend Wage Order and Labor Code protections to particular workers. If those workers are truly independent contractors, rather than employees under the common law, or persons for whom the owner is responsible under the suffer-or-permit test, they should bear the indicia of independent, self-regulating business people who are free from all material rights of control, who operate outside the owner's usual course of business, and who are customarily engaged in their own separate business of profession.

Part A of the ABC test is particularly useful in considering the third *Martinez* prong, whether the principal has "engaged the worker, creating a common law employment relationship." It encompasses both the instance where the employer expressly disavows any control in a contract but exercises actual control in fact and where the contract provides a right to control but the employer does not take advantage of that right. (*See, e.g., Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531-32.)

All three parts of the ABC test are helpful with regard to the "suffer or permit" prong of *Martinez*, where the "basis of liability is the defendant's knowledge of and failure to prevent the work from occurring." (*Martinez, supra,* at 70.) Those criteria go directly to whether a principal "had the power" to prevent a worker from working outside the protections of statutory law. By considering the degree of control exercised by a putative employer, the relationship of the work to the putative employer's core business, and the nature of the worker's trade and business practice, the ABC test's three factors can help courts identify those circumstances in which the putative employer had the means to prevent the existence of unlawful working conditions, as well as the obligation to ensure that the core protections of state employment law are extended to those whom the IWC and Legislature perceived as most vulnerable.

Plaintiffs submit that the second consideration in Part B of the ABC test (work performed outside all the places of business of the hirer) would be of limited value as a consideration, however, because in today's modern economy, many

people work remotely such that their services are typically performed outside of the principal's places of business.

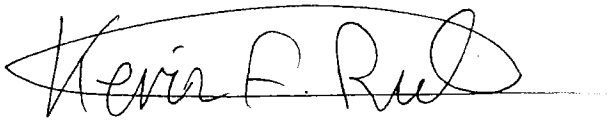
Part C of the test goes to the heart of the central question in any independent contractor analysis: is the worker self-employed, providing services to a hirer, or is she working for someone else? As the New Jersey Supreme Court summarized the question: "When the relationship ends and the individual joins the ranks of the unemployed, this element of the test is not satisfied." *Schomp v. Fuller Brush Co.*, 124 N.J.L. 487, 491-92 (Sup. Ct. 1940). aff'd (E. & A. 1941)126 N.J.L. 368.

C. Conclusion

This Court has made it clear that the Legislature intended the Wage Orders to define the employment relationship for claims for unpaid wages. As this Court has stated, "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." (*Martinez, supra,* at 65.)

This Court's review of the lower courts' rulings in this case will likely identify the applicable tests for determining whether an employment relationship exists under non-common law prongs of the Wage Order definitions, to wit, "suffer or permit" and "exercises control over wages, hours or working conditions." Just as the Court has looked to other jurisdictions and the Restatement of Agency in setting forth the *Borello* factors, so too is it appropriate to consider the factors set forth in New Jersey's ABC test to assist California courts, employers, and workers in determining when a putative employer is liable for failing to protect the fundamental statutory rights of members of its workforce under the "suffer or permit to work" standard of the Wage Orders.

Very truly yours,



Kevin F. Ruf

PROOF OF SERVICE VIA FEDEX

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 January 16, 2018, I served the following document:

LETTER RESPONSE TO THE SUPREME COURT OF THE STATE OF CALIFORNIA REGARDING SUPPLEMENTAL BRIEFING

on counsel for the parties in this action, addressed as stated below:

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By Fedex: By placing true and correct copies thereof in an individual FedEx envelope which I deposited at a FedEx delivery center.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 16, 2018, at Los Angeles, California.

Harry H. Kharadjian