Case No. S222732

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.

ON REVIEW FROM 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

PETITIONER DYNAMEX OPERATIONS WEST, INC.'S REPLY BRIEF ON THE MERITS

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I.

INTRODUCTION

Plaintiffs concede that affirmation of the decision of the Court of Appeal would make it "harder" to operate as an independent contractor in California (Answering Brief, p. 61, fn. 5.) This is a dramatic understatement. Plaintiffs fail to offer a single example of an independent contractor relationship that could survive intact under the approach adopted by the Court of Appeal here.

As Dynamex explained in its Opening Brief, this Court's decision in *Borello* should continue to be the standard for differentiating between employees and independent contractors. The test adopted by the Court of Appeal addresses a different question: whether two entities are joint employers of undisputed employees. It does not provide any guidance when employee status is disputed.

If the Court of Appeal's tests were applied to disputes over employee status, the negative impact on California's economy will be profound. Most long-standing and legitimate independent contractors in the State would be converted, against their will, to employees covered by the Wage Orders. And yet they would remain independent contractors for purposes of other provisions of the California Labor Code. This new "two test" environment will create uncertainty in the economy, and confusion within the courts and agencies that must enforce the law.

Plaintiffs offer no justification for abandonment of the flexible *Borello* standard that has traditionally been applied by this Court to disputes over employee status. The Court should reaffirm that *Borello*

governs this case.

II.

ARGUMENT

A. The Court Of Appeal Test Is Not Suitable When Employee Status Is Disputed

This case is only at the class certification stage. The issue to be decided is whether common policies or practices allow for class treatment of the wage and reimbursement claims advanced by the Plaintiffs. If upheld, the Court of Appeal decision here not only answers that question in the affirmative, but effectively decides the merits of the case as well. It is obvious that Dynamex "suffers or permits" drivers to perform transportation services (i.e., Dynamex is aware of and takes no action to prevent performance of the services). If the Court of Appeal is right, then all the drivers are automatically employees under the Wage Orders. Not only is a class certifiable, but there's no need for a trial on the merits. All issues are tidily decided by effectively eliminating independent contractor relationships in California.

Defendant submits that the issue to be decided at the class certification stage is a fundamentally different one. This is not the juncture of a case where the merits can be determined. California law acknowledges the status of "independent contractor." The California Labor Code specifically provides (at sections 3353 and 3357) that independent contractor is a legitimate legal status. The California courts have consistently acknowledged that legitimate independent contractors do exist in this State. The question to be answered at the class certification stage is whether or not it is appropriate to decide, on a class basis, whether a group

of individuals are all employees or are all independent contractors. It is not appropriate at the class certification stage to shortcut the process and jump to a merits determination. The Court of Appeal test effectively resolves the merits, since it does not allow any result other than a finding that all class members are employees.

The Industrial Welfare Commission Orders were enacted to protect admitted employees. In this Court's decision in *Martinez v. Combs* (2010) 49 Cal.4th 35 ("*Martinez*"), the Court analyzed the historic origins of the IWC Orders. The Orders were enacted to protect vulnerable and dependent individuals, primarily children. The IWC Orders established that any person or entity who "suffered or permitted" a child to perform work, whether it be "to oil machinery" or "carry water" through a mine tunnel, must answer as the child's employer. (*Id.* at p. 58.)

However, not all individuals providing services in California are similarly dependent. There are many individuals who operate independent businesses, buy their own equipment, and decide when and how they will work. When a lawsuit asserts that such individuals are truly employees, the trial court must make an initial determination—at the class certification stage—as to whether or not there is sufficient commonality among the group to make a one-size-fits-all decision on their status. If it is possible that some of the individuals are true independent contractors, and some are employees, then class certification is not appropriate. A class can be certified if common policies or practices allow a universal determination that all class members must be independent contractors, or all must be employees.

Status is very much disputed in this case. In fact, the status of the Drivers—are they independent contractors or employees?—is the ultimate

merits issue here. The question in a certification motion is not whether the Drivers are independent contractors, but instead whether class treatment can yield an answer on their status. The *Martinez* standard is of no use in this regard since it presumes employment exists. *Martinez* addresses the question of who is the employer of admitted employees; it does not assist in evaluating disputed employees. As a result *Martinez* has no utility when employee status is disputed. In short, misapplying *Martinez* to determine employee status, and not just employer status, invalidates the separation that must be maintained between a class certification determination and a merits determination.

On the other hand, if this Court's decision in *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations* (1989) 48 Cal.3rd 341 ("*Borello*") remains applicable for determining employee status—as Defendant submits it must—then a traditional class certification analysis is possible. The issue to be decided is whether Dynamex retains a sufficient right to control the drivers, taking into account the multi-factored *Borello* test, to justify class treatment. This approach is necessary when employment status is disputed. And this approach accepts the reality that lawful independent contractor relationships can exist in California. Use of *Borello* allows the Court to make the nuanced and fact-specific decision as to whether there are sufficient common issues to warrant class-wide determination of a dispute over status.

The arguments made by Plaintiffs in their Answering Brief presume that none of the drivers providing services to Dynamex could possibly be independent contractors. But, of course, that is not the issue before this Court. Rather, the much narrower question the Court must decide is what standard should be used at the class certification stage to decide whether a

case should move forward on a class basis. Only the *Borello* test allows that analysis to take place. The Court of Appeal test obviates the need for any class certification analysis whatsoever. So long as status is disputed, the *Martinez* test cannot control class certification. Dynamex urges this Court to reaffirm the principles of *Borello*, and to order that they be applied to evaluating class certification here.

B. The *Borello* And *Martinez* Standards Address Distinct Legal Issues.

Plaintiffs contend that both the *Martinez* and *Borello* tests remain viable and may be applied depending upon the circumstances (Answering Brief, p. 3.) They go on, however, to argue that the *Borello* test need not be applied in this case, because all issues implicate the Wage Orders, and can therefore be resolved under *Martinez*.

Plaintiffs are right in one respect. Both *Borello* and *Martinez* are fully viable, and have direct application to employment in California. In fact, the *Martinez* case itself provides the perfect example of how these two standards can be harmonized. The six plaintiffs in *Martinez* were admitted employees of a produce broker (Munoz). In turn, Munoz worked exclusively for several produce merchants. The issue before the Court in *Martinez* was whether those six admitted employees could bring their claims against the produce merchants, as well as their direct employer, Munoz. (*Martinez, supra*, 49 Cal.4th at p. 48.)

The Court's analysis in *Martinez* provided the answer. Applying the broad IWC definition of an employer, the Court found that the produce merchants did not "suffer or permit" the work done by the six employees and thus could not be held responsible under the Labor Code as their

employer. (*Id.* at pp. 69-75.)

By way of analogy, if the facts of this case were different, the "suffer or permit" standard might make perfect sense here. Assume that a small local trucking company (Munoz Trucking) engaged Lee and Chevez as admitted employee drivers. That local trucking company agreed to work exclusively for Dynamex. Lee and Chevez decide to bring an overtime claim against their direct employer, Munoz Trucking. The issue would then be whether these two admitted employees of Munoz Trucking could also bring their wage claims against Dynamex (in addition to Munoz Trucking). Under that fact pattern, the *Martinez* test would squarely apply.

The factual scenario at issue in this appeal is obviously quite different. Indeed, it is directly comparable to the second question faced by this Court in *Martinez*. The six plaintiffs in that case advanced the further argument that Munoz (the produce broker) was himself an employee of the produce merchants (thereby also making the plaintiffs their employees). Unlike the six plaintiffs, however, Munoz was not an admitted employee of anyone. His status was disputed. And because there was a dispute about Munoz's status as an employee or independent contractor, this Court turned to *Borello* for the appropriate analysis. (*Id.* at p. 73.) In doing so, the Court noted that Munoz had a separate business with his own equipment, employed other people, could work for other companies, and had an opportunity for profit or loss. Accordingly, the Court found Munoz to be an independent contractor, not an employee of the produce merchants. (*Id.*)

Thus, the teaching of *Martinez* is clear. When there is no dispute about the fact that an employment relationship exists, then *Martinez* provides the tools to determine which persons or entities qualify as "an employer" under the Wage Orders. However, when status is disputed—i.e.,

where the threshold question is whether the claimants are employees or independent contractors—then the *Borello* analysis must be followed.

This is the critical distinction that the Court of Appeal dismissed. The *Martinez* analysis becomes apt once there is an admission—or conclusive finding of fact—that a wage claimant is an employee. But if the status of the claimant is disputed, then *Martinez* does not yet come into play. The Court of Appeal put the cart before the horse (or, to be more thematically appropriate, the trailer before the tractor). The Court of Appeal applied a standard that assumes that an employment relationship exists.

When employment status is strongly contested, as it is in this case, the *Borello* test must be followed. Again, that is precisely what this Court did in the *Martinez* case; it applied the Wage Order definition to determine the "employer(s)" of the acknowledged employees, and applied the *Borello* test to resolve Munoz's disputed status as an employee or independent contractor). And here, in a case still at the class certification phase, status remains very much in dispute. Accordingly, it is the *Borello* test that must control.

C. ***Ayala* Reflects The Adaptability And Continued Viability Of *Borello***

Plaintiffs' Answering Brief cites extensively to this Court's *Ayala* decision. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522.) There is irony in Plaintiffs' reliance on *Ayala*, for two reasons. First, *Ayala* illustrates why the *Borello* standard remains viable. Second, *Ayala* would become superfluous if the Court of Appeal decision was upheld in this case.

In *Ayala*, this Court discussed the primary role of control in distinguishing between employees and independent contractors. Specifically, the *Ayala* court explained that the focus must be on the right of the hiring party to exercise control. (*Ayala*, *supra*, 59 Cal.4th at pp. 533-34.) The Court then proceeded to evaluate the specific facts supporting the relationship between a daily newspaper and the carriers who made deliveries. In doing so, the Court made it clear that both primary and secondary factors must be weighed, in order to determine whether common factors predominate. (*Id.* at pp. 538-40.)

The *Ayala* decision provides clear guidance to trial courts on how to evaluate class certification whenever there is a dispute over whether individuals are employees or independent contractors. It further presumes that some such cases will not be suited to class treatment. Indeed, one of the cases discussed in the *Ayala* decision, *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, 661, involved denial of class certification in a situation identical to the instant case: a dispute over whether delivery drivers are employees or independent contractors. Clearly, under *Ayala*, class certification of independent contractor disputes is far from certain; as *Borello* teaches, each case must be examined on its particular facts.

Under the approach taken by the Court of Appeal, *Ayala* would become irrelevant. The second prong of the Wage Order standard—"to suffer or permit"—makes an employee out of anyone who passively receives the benefits of labor despite having the power to stop it. (*Martinez*, *supra*, 49 Cal.4th at p. 69.) "Passive receipt" is a far different standard than "right to control." The first focuses on the benefits received from labor; the second tests the ability to direct the labor itself.

Any person or entity who contracts to have work performed is a

passive beneficiary of that work. If that is all that a plaintiff must show to prove employee status under the Wage Orders, then there is no longer any need for the analysis performed in *Ayala*. All passive beneficiaries who authorize work to be done will become employers of the persons doing the work. Under this approach, it does not matter how much—or how little—control these new "employers" have the power to exercise. All that counts is that they "suffer or permit" the work to be done.

Plaintiffs suggest that there are three prongs to the Wage Order test, and that, under the Court of Appeal's decision, *Ayala* remains relevant with respect to the third prong ("to engage"). Clearly, though, that is not the case. If the Court of Appeal test is adopted, class certification—as well as status itself—will be decided by the second prong ("suffer or permit"). The "right to control," which is central to Ayala, will not need to be reached. Effectively, *Ayala* would become a historical footnote.

Ayala should not be discarded. Rather, it—and *Borello*—should be reaffirmed as the appropriate standard to use when employee status is disputed.

D. *Borello* Is Responsive To Evolving Business Models

A principal theme in Plaintiffs' Answering Brief is that a completely new standard for evaluating independent contractor status is necessary to stem an alleged "rising tide of misclassification" in California (Answering Brief, p. 17.) There is no question that business models in California, and throughout the country, are rapidly evolving. The so-called "gig economy" is surging, based on a wide range of services that can now be summoned through a smart phone app. The resulting range of different business models provides a challenge to California employment agencies as well as

the courts.

Plaintiffs would respond to this still-evolving business phenomenon by effectively forcing all service providers to be employees. At the same time, Plaintiffs would convert many traditional independent contractor relationships (from plumbers to court reporters) to employment. The potential impact of Plaintiffs' theory, which is fully explored in Dynamex' Opening Brief, would reach to all corners of the California economy.

Plaintiffs overlook the fact that the best tool to deal with innovative new business models is already available. That tool is the nuanced, multi-factor test first enunciated by this Court in *Borello*, and subsequently refined by a series of appellate decisions in California. The *Borello* standard has proven to be as flexible as it is durable. Indeed, even Plaintiffs are forced to concede that "the common law *Borello* factors test has demonstrated incredible resiliency and adaptability to different scenarios and industries" (Answering Brief, p. 31.)

In *Borello*, this Court designed a test that draws from various sources. The *Borello* standard combines the common-law right to control test with the Restatement Second of Agency factors. (*Messenger Courier Assn. of Americas v. California Unemployment Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1074, 1089 ("*MCAA*").)

The Court then added elasticity to the test by stating that each service arrangement must be evaluated on the totality of its facts, and by acknowledging that the dispositive circumstances may vary from case to case. (*Borello*, *supra*, 48 Cal.3rd at p. 354.) Thus, while *Borello* supplies a list of relevant factual considerations, and vests one of those factors (right to control) with primacy, it left abundant room for courts and agencies to be adaptive in responding to different business models. And courts and

agencies have fully grasped this ability – and need – to be adaptive. (See, e.g., *MCAA*, 175 Cal.App.4th at p. 1092 (holding that employee status under California's Unemployment Insurance Code "must be interpreted in light of comparable, complementary and overlapping criteria developed in case law, as the Supreme Court authorized in *Borello* . . . .").)

Contrary to the claims made by the Plaintiffs in their Answering Brief, *Borello* has proven to be entirely successful in resolving disputes about independent contractor status. In a variety of different factual circumstances, summarized at pages 22-26 of Plaintiffs' Answering Brief, courts have applied the *Borello* analysis and have found employee status. Notably, in one of the cases relied upon by Plaintiffs, the Court found that some of the disputed individuals were independent contractors and some were employees. (*JKH Enterprises, Inc. v. Dept. of Indus. Relations* (2006) 142 Cal.App.4th 1046.) By citing to a long string of *Borello* progeny, Plaintiffs express their approval of the way in which the California courts have successfully utilized the *Borello* standard.

Indeed, Plaintiffs cite to only one case—*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72—as evidence that the *Borello* standard is somehow inadequate. (Answering Brief, pp. 27-30.) However, Plaintiffs' discussion of the *Cristler* case serves only to illustrate how well the *Borello* standard has served to distinguish between independent contractor and employee status.

In *Cristler*, the Fourth District Court of Appeal affirmed an instruction provided to the jury in a class action trial involving claims that drivers were employers, rather than independent contractors. (*Cristler*, *supra*, 171 Cal.App.4th at p. 87.) The appellate court concluded that the instruction provided by the trial court was consistent with *Borello*, as it

identified "right to control" as the primary factor, and also asked the jury to consider all of the secondary factors identified in *Borello*. (*Cristler*, *supra*, 171 Cal.App.4th at p. 87.) According to Plaintiffs, the Fourth District, as well as the trial court in *Cristler*, wrongly allowed the jury to consider "control over the details of the work performed." Plaintiffs note that, while control over the details is identified as a factor in *Borello*, *Borello* also concluded that control over the details of the work performed by cucumber pickers was unnecessary, leading the *Borello* court to look to evidence of systemic control. Because the jury instruction in *Cristler* asked the jury to evaluate control over the details rather than systemic control, Plaintiffs contend that the *Borello* standard is somehow inadequate.

Plaintiffs are wrong for three reasons. First, it was the *Borello* court that introduced the concept of systemic (or pervasive) control. Not only is *Borello* flexible enough to allow courts to look at the entirety of the control relationship, but in fact *Borello* specifically authorizes systemic control to be considered when appropriate. Second, virtually all of the *Borello* progeny cases cited by Plaintiffs *did* evaluate pervasive or systemic control, thus evidencing that the *Borello* test allows a weighing of the degree of control. Third, Plaintiffs ignore the fact that, while the *Borello* court deemed that examination of the control of details was unnecessary for cucumber pickers, no such finding was made by the *Cristler* court when it came to independent delivery personnel. To the contrary, based on the record before it, it appears that the *Cristler* court concluded that the jury should examine control over the details, because that inquiry was relevant for the delivery personnel who worked without direct supervision. This reflected the flexibility allowed—indeed, required—by *Borello*. Accordingly, Plaintiffs fail to make the case that *Borello* hasn't worked.

Rather, by citing to a string of decisions finding employee status under *Borello*, Plaintiffs effectively concede the contrary—namely, that *Borello* is a workable and realistic standard that yields correct results.

E. A Standard Based In The Common Law Allows For Evolution and Adaptation.

The *Borello* Court made an intentional decision to base the test for independent contractor status in the common law. The Court stated it was declining to adopt "detailed new standards" to decide whether a worker is an employee or an independent contractor. Rather, the Court built upon prior cases (including *Empire Star Mines Co. v. Cal. Emp. Comm'n* (1946) 28 Cal.2d 33 and *Tieburg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943), while also borrowing certain principles from the Restatement Second of Agency. By doing so, this Court intentionally chose flexibility, and made its approach adaptable to change.

The decision of the *Borello* court to embrace a common-law-based approach was specifically discussed by the Fourth District in *MCAA. (MCAA, supra,* 175 Cal.App.4th at pp. 1088-92.) In discussing the evolution of the *Borello* standard, the Court of Appeal cited to 58 Cal. Juris. 3rd (2004) Statutes, section 4, pp. 361-363, noting that

> the common law is not a codification of exact or inflexible rules for human conduct . . . but rather is the embodiment of broad and comprehensive unwritten principles inspired by natural reason and an innate sense of justice . . . Its most significant feature is its inherent capacity for growth and change . . . . The primary instruments of this evolution are the courts, which are responsible for renewing the common law when necessary and proper.

This is an apt summary of what the California and Federal courts have done with the *Borello* standard. As an example, in *Alexander v.*

FedEx Ground Package System, Inc. (9th Cir. 2014) 765 F.3d 981, the Ninth Circuit applied the *Borello* standard to find that a group of FedEx delivery drivers were employees. Relying on the *Borello* standard, the Ninth Circuit focused exclusively on the great degree of control that FedEx exercised overs its drivers. Requiring its drivers to be "clean shaven, hair neat and trimmed, [and] free of body odor," FedEx dictated the appearance and hygiene of its drivers. (*Id.* at p. 990.) FedEx specifically mandated that its drivers paint their vehicles a certain shade of white and to apply the distinctive FedEx logo on them. (*Id.*) FedEx also controlled the specific times a driver could work as FedEx structured drivers' workloads so that they would have to work between 9.5 to 11 hours every day. (*Id.*) Additionally, the Ninth Circuit found that FedEx told the drivers what packages to deliver, when to deliver them, and how to deliver them. (*Id.*)

The Ninth Circuit then briefly considered the secondary *Borello* factors, and concluded that they did not strongly favor either employee status or independent contractor status. (*Id.* at p. 997.) In the end, the Ninth Circuit came to its conclusion that FedEx's broad right of control over its drivers dictated a finding of employee status. (*Id.* at p. 997.)

In *Arnold v. Mutual of Omaha Ins. Co.* (2011) 211 Cal.App.4th 580, the Court of Appeal applied the same *Borello* factors and found that an insurance agent was an independent contractor for all purposes. The *Arnold* court gave significant weight to both the right of control as well as the secondary factors as enumerated in *Borello*. The *Arnold* court found that the plaintiff used her own judgment in determining whom she would solicit, the time, place, and manner she would solicit, and the amount of time she would spend doing so. (*Id.* at p. 589.) The plaintiff also could have worked for other companies while she worked for defendant. (*Id.*)

Additionally, there was little to no degree of supervision or monitoring of her activities. (*Id.*) When evaluating the secondary factors, the *Arnold* court found that the plaintiff engaged in a distinct occupation that required a specific license, purchased her own instrumentalities and tools, earned money based on commissions, and believed that she entered into an independent contractor relationship. (*Id.* at pp. 589-90.)

While applying the same test from the same case (*Borello*), not only did the *Alexander* and *Arnold* courts reach different conclusions, but the courts emphasized different factors, and then specifically evaluated each factual scenario to reach its conclusion. The *Alexander* court chose to underscore FedEx's heavy level of control over its drivers and gave little weight to the secondary factors—some of which supported a finding of independent contractor status. The *Arnold* court, on the other hand, found a lesser right to control, and then proceeded to a comprehensive examination of the secondary factors, which pointed to a finding of independent contractor status.

In *Narayan v. EGL, Inc.* (9th Cir. 2010) 616 F.3d 895, the Ninth Circuit again applied *Borello* in a different factual context. In addition to analyzing right to control, the Ninth Circuit heavily focused on the economic realities test, which is incorporated within *Borello*. In *Narayan*, the court underscored how the drivers supplied some of their equipment, but that the defendant provided other supplies as well. (*Id.* at p. 902.) The court also examined how the drivers could employ and contract with others to assist in performing their duties, but that the defendant had to approve all of these helpers. (*Id.*) Additionally, the Ninth Circuit examined how the drivers did not possess any high level of skill and how the length and indefinite nature of their tenure with defendant pointed towards an

employment relationship. (*Id.* at pp. 902-03.) Assessing all this under the multi-factor *Borello* test, the court held that the question of whether plaintiff drivers were employees precluded summary judgment. (*Id.* at p. 904.)

As these cases illustrate, *Borello*'s flexibility allows for nuanced examinations in a variety of industries and factual scenarios. The Ninth Circuit dealt with delivery drivers in *Alexander* and *Narayan*, but chose to emphasize different aspects of the *Borello* factors, because of the different ways in which the companies operated. *Alexander* focused on the pervasive control that FedEx possessed over its drivers while *Narayan* focused on the economic realities of the parties' relationship. The *Arnold* court synthesized the control analysis with consideration of the secondary *Borello* factors. The *Borello* approach to determining status continues to allow for evolution and adaptation, and should not be discarded.

F. Plaintiffs' Two-Test Approach Will Only Further Complicate Status Determinations And Result In Conflicting Determinations

Throughout their Answering Brief, Plaintiffs urge adoption of the "two-test approach" the Court of Appeal used. Plaintiffs argue that the "Wage Order test" must be used to determine employee status for claims "associated with" (or "covered under") a Wage Order, while the *Borello* standard must be used for Labor Code claims not "associated" with a Wage Order. (See, e.g., Answering Brief, pp. 49-50.)

As addressed above, use of the Wage Order test to determine employee—rather than employer—status for *any* purpose would be inappropriate, because the "suffer or permit" standard embodied in the test would effectively do away with independent contractor status. But even

ignoring this critical failing, the two-test approach must still be rejected because it would unnecessarily complicate status determinations, and without any good reason. Worse yet, a two-test approach would invariably lead to inconsistent determinations for claims brought by the same individual in the same action premised on the same misclassification theory.

Plaintiffs (and the Court of Appeal) concede that a two-test approach will sometimes require application of two different legal standards in the same case. Plaintiffs even give a name to such cases: "mixed scenarios." (Answering Brief, pg. 50.) Dynamex agrees that the Wage Order test will lead to a different determination than the *Borello* standard in certain cases. Plaintiffs appear to believe this would be a good thing; Dynamex submits that it would be disastrous.

Plaintiffs and the Court of Appeal both recognize that the "Wage Order test" is far broader than the *Borello* standard. (See, e.g., Answering Brief, pp. 53-55.) (acknowledging that the Wage Order test includes "a broad definition of employment" that is "foreign to the common law", and separately asserting it considers "passive control" to not be relevant under the *Borello* standard). Use of the two-test approach in these "mixed scenarios" will, therefore, undoubtedly result in "mixed determinations" (i.e., a finding of employee status for certain claims, and independent contractor status for others). For example, the same worker could be defined as an employee for purposes of Labor Code section 1194 (which mirrors IWC Orders on minimum wage and overtime), but not for sections 201-203, which govern the payment of wages upon termination (as none of the wage payment requirements are incorporated into—or "associated with"—the IWC Orders).

As addressed in Dynamex's Opening Brief, besides being inconsistent with common sense, use of a "two-test" approach—guaranteed to result in mixed determinations—will engender massive confusion in the courts and administrative agencies. It would also saddle companies, employers and would-be-contractors with an impossibly complex set of rules governing wage issues. A "two-test" system would practically guarantee legal violations for any party choosing a relationship other than employment. Plaintiffs advance multiple arguments designed to deflect this fatal criticism, but in their attempt only further demonstrate the unworkable nature of the two-test approach.

Plaintiffs contend that courts can handle "mixed scenarios" in class cases by using separate subclasses, such as a "wage order subclass" and a "common law subclass." (Answering Brief, p. 51.) But, like Plaintiffs' use of the seemingly innocuous term "mixed scenario" for what in reality is a legal morass, this proposed "solution" is nothing more than rebranding. It does nothing to prevent "mixed determinations." It simply proposed an administrative process, without addressing the substantive problem. Use of a two-test approach would increase the burden on courts and agencies. But the greatest burden would fall on the companies, employers and would-be-contractors forced to navigate a legal system that imposes starkly different legal standards to yield different answers to the same question: is this person an employee or independent contractor?

Plaintiffs also argue that all of the claims asserted in the present action are "covered under" Wage Order No. 9, meaning class certification (and eventually the merits of all of the claims) can be resolved using only the "Wage Order test." Whether Plaintiffs advance this argument to suggest "mixed scenario" cases are rare (and therefore not worth worrying

about), or to avoid sleeping in the very bed they seek to make, is unknown. It is, however, ultimately irrelevant. Contrary to Plaintiffs' contention, use of the two-test approach here would inevitably require application of both the "Wage Order test" and the *Borello* standard. Consequently, Plaintiffs fail to achieve either goal.

In an effort to prove all of their claims fall within the ambit of Wage Order No. 9, Plaintiffs offer a lengthy explanation of their claim for expense reimbursement, culminating with the contention that "a claim for failure to reimburse is enforceable under *both* [Labor Code] section 2802 and . . . Wage Order No. 9." (Answering Brief, p. 57 (emphasis in original).) Specifically, Plaintiffs contend that "Wage Order No. 9, subd. 9, complements Labor Code section 2802, and just like section 2802[, it] [sic] mandates that an employer must pay for the expenses an employee incurs in performing his or her job duties." (Answering Brief, p. 57.) Plaintiffs go on to state that the ability to seek reimbursement "under both section 2802 and . . . Wage Order No. 9." is "especially the case" with respect to "automobile expenses . . . ." (*Id.*) Beyond being impossibly broad, Plaintiffs' contention is simply wrong.

In *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 23-25 ("*Estrada*"), the Court of Appeal specifically examined the requirements imposed by Labor Code section 2802 and the Wage Orders with respect to employee-supplied vehicles. After reviewing the Labor Code, the Wage Order and multiple opinion letters issued by the Division of Labor Standards Enforcement (DLSE), the *Estrada* Court concluded that an employer may, as a condition of employment, lawfully require employees to provide their own trucks.

As part of this analysis, the *Estrada* Court also considered the extent

G. Plaintiffs Do Not Refute The Grossly Overbroad Nature of the Wage Order Test

Throughout this appeal Dynamex has repeatedly asserted that the Court of Appeal's "suffer or permit" test would effectively eliminate independent contractor status for any claims falling within the scope of the Wage Order. Dynamic prominently featured this argument in its briefing to the Court of Appeal below, and asserted it again in its Opening Brief, including by identifying a number of real-world examples illustrating the improper, yet unavoidable, impact the test would have upon otherwise bona fide independent contractors. Yet, in their Answering Brief, Plaintiffs' one opportunity to demonstrate the weakness of Dynamex's position to this Court, Plaintiffs offer no substantive response to this argument. None. It appears that Plaintiffs have no answer to Dynamex's primary and most critical argument.

Specifically, Plaintiffs fail to rebut Dynamex's contention that the "suffer or permit" standard would make employees of virtually all independent contractors deemed bona fide under the Borello standard (for purposes of the Wage Orders). Plaintiffs fail to address even one of the multiple examples Dynamex offered in its brief to illustrate how the Court of Appeal's test would preclude individuals from doing business as contractors, such as the court reporter made an employee of the law firm that retained him/her to report depositions, the pool cleaning person made an employee of the homeowner, and the plumber made an employee of every person unfortunate enough to need his/her services. And Plaintiffs fail to offer any alternative interpretation of the "suffer or permit" standard that would prevent it from destroying virtually all independent contractor relationships under the Wage Orders.

Plaintiffs do reference the Court of Appeal's rejection of Dynamex's argument as "unsupported rhetoric." That reference merely parrots the appellate court's finding and is, therefore, of no significance. (See Answering Brief, p. 16.) Neither Plaintiffs nor the Court of Appeal explain why the examples provided by Dynamex are "unsupported rhetoric." Notably absent from Plaintiffs' Answering Brief is a single example of an independent contractor relationship that would survive under the "suffer or permit" standard.

Plaintiffs' silence, in response to Dynamex's detailed critique of the practical implications of the Court of Appeal test, speaks louder than words. It is all but an express admission that the Court of Appeal's test is unworkable and unsalvageable. Plaintiffs have not once explained at any stage of this case how the Wage Order test could be applied without broadly sweeping every category of worker—including bona fide independent contractors—into the "employee" category. And now, in their last opportunity to provide such an explanation, Plaintiffs' communicate a message more definitive than words: the silence of concession.

H. The Remedial Purpose of the Wage Order Applies to Employees, But Not to Individuals Whose Status Is Disputed

Plaintiffs' Answering Brief is replete with references to the "remedial nature" of the Wage Orders, on which they rely for the proposition that those Orders necessitate liberal construction. Plaintiffs' contention is, in part, accurate, which is what makes it troubling. Remedial legislation should be liberally construed to afford all relief which the Legislature intended to grant, *but* the interpretation may not exceed the limits of the statutory intent. (*MCAA*, *supra*, 175 Cal.App.4th at p. 1094.)

And liberal construction cannot be used to justify an unreasonable interpretation; rather, "reason must have its just proportion." (*Id.*)

The Court of Appeal's use of the Wage Order test to determine "employee" status—rather than simply "employer" status—runs afoul of three limitations (as addressed in detail in the Opening Brief). Further, the remedial purpose of the Wage Orders does not carry over to individuals who are not employees, or to those whose status remains in dispute. The Court of Appeal test does not apply the Wage Order test: it expands that text to individuals who have not been shown to be employees. Plaintiff's reliance on the remedial purpose of the Wage Orders is therefore grossly misplaced.

III.

CONCLUSION

The standard proposed by the Court of Appeal would result in massive changes to California's economy. Few, if any, independent contractor relationships would survive. Against their wishes, many service providers would become employees of individuals or entities that never dreamed that they were employers.

If the Court of Appeal standard were adopted, it would essentially render moot this Court's decisions in *Borello* and *Ayala*. The flexibility and nuanced decision-making allowed by *Borello* would be lost. Dynamex urges the Court to reject the Court of Appeals standard, and to remand this case with instructions to evaluate class certification under *Borello*.

DATED: November 4, 2015 LITTLER MENDELSON, P.C.

By: _____
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DATED: November 4, 2015 SHEPPARD MULLIN RICHTER & HAMPTON LLP

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CERTIFICATE OF WORD COUNT

Pursuant to CRC 8.204(c) and 8.486(a)(6), the text of this Reply Brief on the Merits, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and this certification, consists of 6,476 words in 13-point Times New Roman type as counted by the word-processing program used to generate the text.

DATED: November 4, 2015 LITTLER MENDELSON, P.C.

By: _____
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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, Fl. 20, San Francisco, CA 94108, I served the within document(s):

- **PETITIONER DYNAMEX OPERATIONS WEST, INC.'S REPLY BRIEF ON THE MERITS**

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Continued on next page

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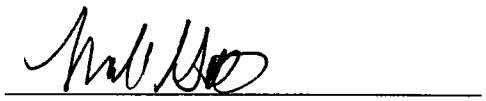
I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 4, 2015, at San Francisco, California.



Nicole Gostnell