No. S222732
In the
SUPREME COURT
of the
STATE OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner,
vs.
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,
CHARLES LEE, et al.,
Real Parties in Interest.

California Court of Appeal, Second Appellate District,
Division Seven, Case No. B249546
Los Angeles County Superior Court, Case No. BC 332016

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST CHARLES LEE, ET AL., AND BRIEF OF AMICI CURIAE CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION; NATIONAL EMPLOYMENT LAW PROJECT; LOS ANGELES ALLIANCE FOR A NEW ECONOMY; LA RAZA CENTRO LEGAL; LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER; ASIAN AMERICANS ADVANCING JUSTICE-LA; ASIAN AMERICANS ADVANCING JUSTICE-ALC; THE IMPACT FUND; ALEXANDER COMMUNITY LAW CENTER; UCLA CENTER FOR LABOR RESEARCH; WOMEN'S EMPLOYMENT RIGHTS CLINIC; AND WORKSAFE

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE,
CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, rule 8.520, subdivision (f), proposed amici curiae California Rural Legal Assistance Foundation, National Employment Law Project, and Los Angeles Alliance for a New Economy (LAANE) (collectively, "Amici") respectfully request leave to file the attached amicus brief in support of real parties in interest, Charles Lee, et al. This brief is timely filed within thirty days of the filing of the reply brief. No party or counsel for any party, other than counsel for Amici, has authored or funded the preparation of the proposed brief in whole or in part.

Amici are civil rights organizations, legal service organizations, and policy practitioners who represent the interests of low-wage workers and others who depend, and whose families depend, on employment status for basic labor protections. Amici seek leave to file the attached brief to emphasize that the arguments advanced by petitioner Dynamex Operations West, Inc., if accepted by this Court, would adversely affect the ability of Amici's clients to vindicate their rights as employees and to ensure that their dependents and survivors receive benefits based on that status. The statements of interest of the proposed Amici are attached as Exhibit A.

Counsel for Amici have read the parties' briefs and are familiar with their content and the arguments before the Court. The proposed amicus brief will assist the Court in deciding the matter because it offers the unique perspective of advocates for low-wage earners and explains the reasons why employment status based on the three alternative definitions in the Industrial Welfare Commission (IWC) Orders should be enforced.

The brief offers historical background on the origins of the employer definitions established by the IWC, which reach beyond common law principles in order to maximize coverage. The brief also explains (1) the plenary authority of the IWC to regulate wages and other conditions of employment, as recognized in *Martinez v. Combs* (2010) 49 Cal.4th 35; (2) why the "suffer or permit" standard is applicable to all cases under Labor Code section 1194, regardless of the number of putative employers involved; and (3) why the three IWC definitions of employer should apply under Labor Code section 2802.

Amici respectfully urge the Court to permit the filing of the proposed brief, to affirm the decision below as to the Labor Code section 1194 claims for unpaid wages, and to remand with instructions to apply the IWC definitions to the claims under Labor Code section 2802.

Dated: December 3, 2015

Respectfully submitted,

Della Barnett

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INTRODUCTION

In the United States, the social safety net depends almost entirely on employment. Only employees have standing to enforce most workplace rights and protections; only employees can claim employment-based benefits. From the payment of wages, to relief from the effects of disability, illness, unemployment, discrimination, and old age, workers rely on employment status for their economic security. This system is based on the societal acknowledgement that employees, while integral to every aspect of commerce and production, can be exploited by employers who, by virtue of the ownership and control of business operations, dictate terms and conditions unless they are required to comply with minimum standards.

Misclassification of workers as non-employees erodes this employment-based system of protections and leaves workers and their families without benefits to which they are entitled. It creates working relationships designed to pass economic risk on to individuals who share none of the profit from the product or service that their labor is integral to producing. These relationships are not the subject of arm's length negotiations, designed to promote entrepreneurism, or different in any essential way from employment in the traditional sense. They are simply a way of avoiding the duties and responsibilities associated with employment by calling it something else.

Misclassification has adversely affected our State, frustrated enforcement efforts, and converted billions of tax dollars into increased profits for those businesses willing to engage in this subterfuge.

This State long ago declared a policy of vigorous enforcement of minimum labor standards, to ensure that employees do not work under unlawful conditions and to protect law-abiding employers from unscrupulous competitors. (Lab. Code, § 90.5, subd. (a);[1] *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.) The first wage orders were promulgated by the Industrial Welfare Commission (IWC) in the early 1900s and have been revised and expanded over the last century. Throughout, the IWC has defined the term "employer" to include not only (1) those who meet the common law definition, but also (2) those who, directly or indirectly, control wages, hours, or working conditions, and (3) those who "suffer or permit" a person to work. (See *Martinez v. Combs* (2010) 49 Cal.4th 35, 57-59, 64 (*Martinez*).) Each of these alternative definitions has independent vitality.

Dynamex insists that its employment relationship with its drivers can be evaluated only under the common law—to the exclusion of the other wage order definitions. This ignores the fact that the common law is among those definitions only because the IWC put it there, along with two other alternatives. The IWC's "suffer and permit" definition in particular, the most encompassing of the three, was intended to cover relationships far beyond those deemed employment at common law. (*Martinez, supra*, 49 Cal.4th 35, 65.)

With respect to real parties' wage claims, this case asks a simple question: Do the IWC's definitions of employment, as interpreted in *Martinez*, apply to cases involving a single employer? The answer is yes. The plain language of the wage orders makes no

[1] All sections refer to the Labor Code unless otherwise specified.

distinction in the number of employers potentially liable, and the vast majority of cases involve a single employer. Under Dynamex's proposed interpretation, the wage orders would be rendered "effectively meaningless" in most cases. (*Martinez, supra,* 49 Cal.4th 35, 65.) Restricting single employer cases to the common law finds no textual support, would create a distinction that does not exist, and would essentially return workers to pre-*Martinez* days, when the Court believed that only the common law controlled wage claims. (See *Martinez,* at p. 50, fn. 12 & pp. 62-66, abrogating *Reynolds v. Bement* (2005) 36 Cal.4th 1075 (*Reynolds*).) Sections 1194 and 2802 should be applied in harmony with this interpretation, in order to provide workers with maximum protection of their right to minimum wages.

ARGUMENT

I. MISCLASSIFICATION DEPRIVES WORKERS OF MINIMUM BENEFITS, REDUCES GOVERNMENT REVENUES, AND CREATES UNFAIR COMPETITION FOR LAW-ABIDING EMPLOYERS.

Mischaracterizing workers as non-employees undercuts law-abiding competitors, deprives governmental entities of substantial tax revenue, and leaves some of the most vulerable workers in our communities unprotected.[2] The artifice places workers outside of the capacious scope of the protections guaranteed by the Labor Code and IWC Orders

[2] U.S. Department of Labor, Wage and Hour Division, The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors (July 15, 2015) p. 1 <http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm> (as of Nov. 30, 2015).

and violates the underlying purposes of our State's Labor Code—to eliminate detrimental labor conditions and to prevent unfair competition. (§ 90.5, subd. (a).)[3]

A. The Magnitude of the Problem

The U.S. Department of Labor estimates that up to 3.4 million employees nationwide have been wrongly classified as "independent contractors,"[4] and up to 30 percent of all employers may be liable for back taxes and back wages as a result.[5] For generations, some unscrupulous employers have used labels like "independent contractor" to avoid minimum labor standards. This phenomenon has now become an issue of widespread concern.[6]

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[3] See also, e.g., Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship* (2012) 14 U. Pa. J. of Bus. L. 605.

[4] U.S. Government Accountability Office, Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification (May 8, 2007) p. 10 <http://www.gao.gov/products/GAO-07-859T> (as of Nov. 30, 2015). See also Robert B. Fitzpatrick, *FLSA Developments: Misclassification as Independent Contractors, Unpaid Interns* (American Law Institute 2010).

[5] deLalith De Silva, et al., Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, Planmatics, Inc., Prepared for the U.S. Department of Labor Employment and Training Administration (Feb. 2000) p. iii <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf> (as of Nov. 30, 2015) (Planmatics).) This report also shows that workers would benefit tremendously from increased scrutiny; up to 95 percent of workers who claimed they were misclassified as independent contractors were reclassified as employees following review. (*Id.* at p. 54; see also U.S. General Accounting Office, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention (August 2009) <http://www.gao.gov/products/GAO-09-717> [as of Nov. 30, 2015]; Robert B. Fitzpatrick, *FLSA Developments: Misclassification as Independent Contractors, Unpaid Interns* (2010) American Law Institute.)

[6] Carré, (In)Dependent Contractor Misclassification (June 8, 2015) Economic Policy Institute, pp.8-9 <http://www.epi.org/publication/independent-contractor-

Businesses have developed three main strategies for fissuring the workplace: hiring employees of a leasing company to perform core work; subcontracting parts of the work to separate companies; and classifying the labor force as independent operators performing specific tasks.[7] Dynamex used the third option in its effort to divorce itself from the normal responsibilities of an employer, simply relabeling its workers as independent contractors. Misclassification of employees as independent contractors is illegal in this State. (§ 226.8(a) [making willful misclassification of an individual as an independent contractor unlawful].)

States that have studied the problem have found find high rates of misclassification, often in industries with high employee costs (such as workers' compensation) or in scattered workplaces.[8] Four common industries in which misclassification occurs are trucking, construction, home health care, and high tech.[9]

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misclassification> (as of Nov. 30, 2015) ((In)Dependent Contractor). This assessment is primarily based on state studies of misclassification within each state.

[7] "Multiple motivations underlie fissuring. In some cases, it reflects a desire to shift labour costs and liabilities to smaller business entities or to third-party labour intermediaries, such as temporary employment agencies or labour brokers. Employers have incentives to do so for obvious reasons. As has been documented in numerous studies, shifting employment to other parties allows an employer to avoid mandatory social payments (such as unemployment and workers compensation insurance, or payroll taxes) or shed liability for workplace injuries by deliberately misclassifying workers as independent contractors." (Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience* (July 2011) 22 Economic and Labour Relations Review 33, 37 <http://web.law.columbia.edu/sites/default/files/microsites/career-services/David%20Weil%20Enforcing%20Labour%20Standards%20in%20Fissured%20Workplaces.pdf> (as of Nov. 30, 2015). The author, David Weil, is currently the Administrator of the Wage and Hour Division of the U.S. Department of Labor.

[8] (In)Dependent Contractor, *supra*, at p. 2.

[9] Planmatics, *supra*, at pp. 34, 38-51.

Misclassification also occurs at high rates in agriculture. (Goldstein, et al. *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment* (1999) 46 UCLA L. Rev. 983, 988 (*Enforcing Fair Labor Standards*) [noting that "agriculture and garment manufacture are the industries with the longest continuously documented and most intensively litigated history of labor law violations based on schemes involving intermediaries"].)

Among California construction workers, it is estimated that 19 percent were misclassified in 2011, more than double the number of employees who were misclassified ten years earlier.[10] As another example, surveys estimate as many as 82 percent of port truck drivers are misclassified as independent contractors.[11] The figure could be as higher in Los Angeles.[12] Similar findings have been reported in other sectors of the economy, such as package delivery. (See *infra* at p. 11.)

Much misclassification cannot survive challenges under the common law test of employment. As this Court has explained, "[a] business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it

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[10] Liu & Flaming, Sinking Underground: The Growing Informal Economy in California Construction (Sept. 1, 2014) Economic Roundtable, p. 11 <http://economicrt.org/publication/sinking-underground/> (as of Nov. 30, 2015). The misclassification rate in other states and cities are similar: 19.5 percent in Illinois (2006); 17.8 percent in New York City (2007); 14.8 percent in New York state (2007); 16.8 percent in Indiana (2010); 14–24 percent in Massachusetts (2004); 14 percent in Maine (2005); 11–21 percent in Tennessee (2010); and 38 percent in Austin, Texas (2009). (*Ibid.*)

[11] (In)Dependent Contractor, *supra*, at p. 11.

[12] *Ibid.* For an example of a case involving port truck driver misclassification, see *Garcia v. Seacon-Logix, Inc.* (2015) 238 Cal.App.4th 1476 (affirming judgment in favor of drivers).

lacks 'control' over the exact means by which one such step is performed by the responsible workers." (*S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 342, 357 (*Borello*) [rejecting misclassification of field employees as share farmers]; see also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522 [affirming reversal of trial court's denial of class treatment in case involving alleged misclassification of newspaper delivery workers as independent contractors].) However, because employers in misclassification cases have tried to defeat class certification by focusing on the multi-factor *Borello* test at common law, the importance of the alternative tests has become more apparent.

B. The Effect of Misclassification on Workers

Misclassified workers suffer economic loss because they are not deemed eligible for any benefits or protections for which employee status is a qualification. They are denied minimum wages and overtime, the right to complain about unsafe working conditions, protections against discrimination and sexual harassment, and the right to organize free from retaliation.[13] They lose Social Security and Medicare payments credited to them, and their dependents and survivors are ineligible for such benefits. They lose access to paid vacations, health insurance, pensions, and other optional benefits that might be provided to recognized employees. They are ineligible for unemployment

[13] Erin Johansson, *Fed Up with FedEx: How FedEx Ground Tramples Workers' Rights and Civil Rights,* American Rights at Work (October 2007) p. 6 <http://www.jwj.org/fed-up-with-fedex> (as of Nov. 30, 2015) (*Fed Up with FedEx*).

benefits, paid sick leave, and workers' compensation benefits.[14] Misclassified workers pay higher taxes because they are responsible for paying both the employer share and the employee share of FICA and FUTA taxes, or 15 percent of their gross wages, while employees pay only 7.65 percent.[15] The sum of these losses is enormous. The United States Government Accountability Office has estimated that workers annually lose in excess of $2.72 billion because of misclassification.[16] All of these losses to workers inure to employers' benefit, reducing labor costs by an estimated 15 to 30 percent.[17]

The adverse effect of misclassification can be seen from the experience of FedEx drivers, who have struggled for many years to reestablish their status as employees:

> FedEx Ground entices people to deliver as independent contractors with a pitch that conjures up the American Dream: "Independent Contractors at FedEx Home Delivery own their own business and work in partnership with FedEx.

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[14] This is an important consideration in this case because of the high rate of injuries. In 2014, the California industrial accident rate for couriers and messengers was 50 percent higher than the average for the transportation industry and twice the statewide average for all private employers. (California Department of Industrial Relations, Incidence rates of nonfatal occupational injuries and illnesses by selected industries and case types, California, 2014 <http://www.dir.ca.gov/oprl/Injuries/2014/2014Table1.pdf> (as of Nov. 30, 2015) pp. 1, 3 ["Total recordable cases" of non-fatal work injuries for couriers/messengers, the transportation industry, and private industry].)

[15] A sophisticated worker can claim a refund on his or her taxes for the employer's share, although it is not a commonly understood mechanism. (See Instructions for Form SS-8 (Rev. May 2014) Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding <https://www.irs.gov/pub/irs-pdf/iss8.pdf> [as of November 30, 2015].)

[16] U.S. Government Accountability Office, Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification (May 8, 2007) p. 1 <http://www.gao.gov/products/GAO-07-859T> (as of Nov. 30, 2015).

[17] National Employment Law Project,1099'd: Misclassification of Employees as "Independent Contractors" (April 2010) p. 1 <http://nelp.org/content/uploads/2015/03/1099edFactSheet2010.pdf> (as of Nov. 30, 2015); *Fed Up with FedEx*, *supra,* at p. 6.

> This opportunity requires an entrepreneurial spirit.... Come build your business and be your own boss as you partner with FedEx Home Delivery." . . . .
>
> It isn't long before new drivers discover their lack of independence. From the start, they are unable to negotiate the terms of their work as they are all required to sign the Operating Agreement, which is "presented on a take-it-or leave-it basis." FedEx Ground gives itself "unilateral control over the termination" of the agreement. Under it, drivers are given a Primary Service Area and must deliver all packages assigned to them within that area, as well as any other area the company assigns. FedEx Ground has the right to reconfigure that route at any time.[18]

Courts have encountered similar realities in other sectors of the transportation industry. (See *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 9 (*Estrada*) [FedEx's Operating Agreement was " 'a brilliantly drafted contract creating the constraints of an employment relationship with [the drivers] in the guise of an independent contractor model,' " quoting the trial court's finding]); *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2014) 754 F.3d 1093, 1101-1102 [Affinity controlled the drivers' rates, schedules, and routes, along with " 'every exquisite detail' " of the drivers' appearance, quoting *Estrada* in which FedEx similarly controlled its drivers]; see also *JKH Enterprises, Inc. v. Dept. of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1066 [JKH's classification of its drivers as independent contractors was a "subterfuge"].)

C. Effect on Government Revenues

Widespread misclassification not only hurts workers, but also deprives federal, state, and local governments of billions of dollars of revenues in payroll and other taxes. It undermines the fiscal integrity of unemployment and workers' compensation

[18] *Fed Up with FedEx, supra*, at pp. 8-9.

programs,[19] contributing to budget deficits and increasing the tax burden on law-abiding employers and other taxpayers.[20] According to a recent survey of state and federal efforts to address this problem, misuse of the independent contractor label alone has resulted in a loss of up to 30 percent of employment-related taxes to state and federal governments.[21]

California bears a large share of these losses. In 2013, California assessed $156 million in unpaid unemployment contributions caused by misclassification of more than 120,000 employees.[22] The true figures for lost tax dollars are far higher than the reports

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[19] See National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (July 2015) p.1 <http://nelp.org/content/uploads/Independent-Contractor-Costs.pdf > (as of Nov. 30, 2015).

[20] See U.S. Government Accountability Office, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention (Aug. 2009) p. 39 (describing negative impact of misclassification on federal and state revenues and employee rights) <http://www.gao.gov/assets/300/293679.pdf> (as of Nov. 30, 2015); see also Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification* (2009) 9 U.C. Davis Bus. L.J. 111, 111-119 (discussing studies from various states).

[21] Ruckelshaus, NELP Summary of Independent Contractor Reforms: New State and Federal Activity (November 2011) National Employment Law Project, p. 1 <http://nelp.3cdn.net/85f5ca6bd2b8fa5120_9qm6i2an7.pdf> (as of Nov. 30, 2015); see also Inomata, *Complying with Employment Regulations, Leading Lawyers on Analyzing Legislation and Adapting to the Changing State of Employment Law, Perils of Misclassification of Workers as Independent Contractors* 1 (September, 2012) 2012 WL 3279180.

[22] California's Employment Development Department's (EDD) "Tax Audit Program conducted 6,749 audits and investigations, resulting in assessments totaling $155,808,394, and identified 102,479 unreported employees." (EDD, Annual Report, Fraud Deterrence and Detection Activities: A Report to the California Legislature (June 2014) p. 18 <http://www.edd.ca.gov/About_EDD/pdf/Fraud_Deterrence_and_Detection_Activities_June_2014.pdf> [as of Nov. 30, 2015].) The Compliance Development Operations (CDO) within the EDD Tax Branch, which includes several programs that concentrate on the underground economy, conducted 1,876 joint inspections, which led to 919 payroll tax

indicate because they include only employers who have been caught, surely a small fraction of the total.[23]

D. Effect on Law-Abiding Businesses

Misclassification plagues our economy because its value is so great that it is often worth the risk of getting caught. Businesses that require workers to sign independent contractor or individual franchise agreements or to accept pay "off-the-books" can underbid their law-abiding competitors, particularly in labor-intensive sectors.[24] Given these enormous incentives, and the ease with which employers have been able to morph

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audits. (*Id.* at pp. 21-22.) These audits identified 18,024 previously unreported employees, assessed over $35 million in payroll tax assessments and nearly $4 million on fraud cases. (*Ibid.*)

[23] See National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (July 2015), pp. 2, 3-6 < http://nelp.org/content/uploads/Independent-Contractor-Costs.pdf > (as of Nov. 30, 2015).

The California Division of Labor Standards Enforcement (DLSE) estimates that $7 billion of payroll taxes are lost each year from misclassification, which further weakens the state's safety net. California Department of Industrial Relations, Labor Commissioner's Office, Worker Misclassification, <http://www.dir.ca.gov/dlse/worker_misclassification.html> (as of Nov. 30, 2015). Misclassification of port drivers, about 90 percent of whom are treated as independent contractors, alone costs the government about $563 million in unpaid employer taxes. ((In)Dependent Contractor, *supra*, at pp. 2, 11.)

[24] See *Fed Up with FedEx, supra,* at p. 7 ("John Kendzierski, president of Professional Drywall Construction Inc., testified before a recent House Committee hearing on how contractors who misclassify their employees avoid payroll expenses that 'add over 25 percent to the cost of labor, putting us "legitimate" contractors at a competitive disadvantage when competing for the same work. This also causes insurance and other rates to rise because there is less money being contributed in total therefore burdening the contractor who pays the appropriate taxes and fees.' ").

into non-employers in recent years, the day may come when, "no one will ever again be employed by the people for whom they perform services."[25]

What happened to the workers in this case is a paradigm of the problem. One night they went to bed as employees of Dynamex, with all the rights and protections that status afforded them. The next day they woke up as "independent contractors," with no safety net or labor rights whatsoever. Dynamex made its unilateral decision class-wide, re-categorizing all of its drivers in a single stroke. There was no negotiating, no arm's length discussions or assumption of the risk in return for a personal stake in the profits of the business. As seen above, this single stroke well may have saved Dynamex 30 percent of its direct personnel expenses by shifting these costs to the drivers. Shifting costs of equipment and maintenance by refusing to reimburse work expenses saved Dynamex even more. Nationally and throughout the State, the competitive advantage of this strategy is overwhelming employers who play by the rules.

II. THE INDUSTRIAL WELFARE COMMISSION EXERCISED ITS PLENARY AUTHORITY TO DEFINE WHO IS AN EMPLOYER AND CHOSE TO INCLUDE THREE ALTERNATIVE DEFINITIONS.

The Legislature has delegated virtually unfettered authority to the IWC to determine all matters concerning the adequacy of wages, hours, and working conditions. This authority is exercised through the various wage orders and necessarily includes both the power to set minimum labor standards and "the power to adopt rules to make the

[25] Conferees Debate Use of "Contingent" Workers (1993) 143 Lab. Rel. Rep. 527, 528 (1993) (quoting Gregory Hammond, former General Counsel to the Nat. Staff Leasing Assn.).

minimum wage effective." (*Martinez, supra*, 49 Cal.4th 35, 64.) This, in turn, includes the power to define the employment relationship as necessary " 'to insure the receipt of the minimum wage and to prevent evasion and subterfuge . . . .' " (*Ibid.*, quoting *Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d. 287, 302.)

> The Legislature and the voters have repeatedly demanded the courts' deference to the IWC's authority and orders. In the original 1913 act, the Legislature narrowly confined the scope of judicial review of the commission's orders, making its findings of fact conclusive in the absence of fraud and declaring that the minimum wage fixed by the commission was "presumed to be reasonable and lawful." (Stats. 1913, ch. 324, § 12, p. 636; see now Lab. Code, §§ 1185 [IWC's orders "shall be valid and operative"], 1187 [IWC's findings of fact are conclusive in the absence of fraud].)

(*Martinez,* at p. 60.) The IWC's authority thus extends beyond the simple setting of minimum wages and overtime rules. It includes the power to define terms necessary to enforce its Orders (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702 (*Industrial Welfare Com.*)), including the definitions of "to employ," "employer," and "employee." (*Martinez,* at p. 64.) As a result of the exercise of this plenary authority, the Court construes the wage orders' language broadly in light of the remedial nature of the statutory scheme.[26] (*Id.* at p. 61.)

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[26] "Because of the quasi-legislative nature of the IWC's authority, the judiciary has recognized that its review of the commission's wage orders is properly circumscribed. . . . 'A reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision . . . .' " (*Industrial Welfare Com. supra*, 27 Cal.3d 690, 702, quoting *Rivera v. Div. of Industrial Welfare* (1968) 265 Cal.App.2d 576, 594.)

A. The Wage Orders Provide Three Alternative Bases for Establishing that a Person or Entity is an Employer.

California labor law applies several formulations to define the concept of employment, depending on the context. In the context of minimum labor standards, the IWC established three definitions: (1) "to suffer or permit to work;" (2) "to exercise control over the wages, hours or working conditions;" and (3) "to engage," meaning to have the right to control work details, often referred to as the "common law" test. (*Martinez*, *supra*, 49 Cal.4th 35, 64; see also, e.g., Cal. Code Regs., tit. 8, § 11090, subd. (2)(D), (F).) The three definitions determine who is an "employer" and liable for compliance with standards set by the IWC. (*Martinez,* at p. 64.)

The IWC definitions trump any label the parties themselves may place on their relationship.[27] Individuals and entities who meet any of the three IWC definitions are bound by, and their workers are protected by, the standards set in the wage orders. Whether workers are called "independent contractors," "freelancers," "partners," "associates," "sharegrowers," "unpaid interns," "volunteers," or some other descriptor, they are employees of all persons and entities that fall within any of the three IWC employer definitions. Thus, if Dynamex (a) suffered or permitted its drivers to work, (b) exercised direct or indirect control over the drivers' wages, hours, or working conditions, or (c) engaged the drivers, using the factors set forth in *Borello*, then the drivers were employees. (*Martinez, supra*, 49 Cal.4th 35, 64.)

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[27] The right to minimum wages and overtime pay cannot "in any way be contravened or set aside by a private agreement, whether written, oral, or implied." (§ 219, subd. (a).)

Dynamex argues that the "common law" test should be the exclusive definition of employer whenever a defendant claims its workers are independent contractors. Its position is contrary to the express language of the wage orders and the Court's construction of that language in *Martinez*. The three employment standards are stated independently and must be independently assessed in each case.[28] The IWC chose to include the common law as one possible definition but did not give it a preeminent place.

B. The IWC Never Set the "Common Law" Standard as the Sole Definition of Employer for Any Particular Type of Employment Relationship

Because the IWC included the common law in the first wage order and in each succeeding order, this definition remains as one of three alternative methods of determining employment. (*Martinez, supra*, 49 Cal.4th 35, 64.) Had the IWC not included "engage" in the "to employ" definition, the common law would not apply to wage and hour cases at all. The *Martinez* Court recognized the utility of keeping the common law standard because "the IWC . . . could not have intended to withhold protection from the regularly hired employees who undoubtedly comprise the vast majority of the state's workforce." (*Ibid.*) However, the Court was at pains to point out this did not give the common law special status over the other two standards. To do

[28] See, for example, *Futrell v. Payday Cal., Inc.* (2010) 190 Cal.App.4th 1419, in which the court considered all three definitions of employer before determining that a payroll company was not an employer if it does nothing more than collect payroll information and issue checks.

otherwise "would substantially impair the commission's authority and the effectiveness of its wage orders." (*Id.* at p. 65.)[29]

While it may be useful in other contexts, the "independent contractor" concept is peripheral to California wage and hour law, where the touchstone for liability is simply whether the principal is an employer. If labor was performed for an "employer" within one or more of the IWC definitions, liability for compliance with minimum labor standards attaches. The concept of independent contractor was developed in the context of tort liability, not the payment of wages. It arose because of issues concerning third-party liability, as this Court explained in *Borello*:

> 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. The principal's supervisory power was crucial in that context because "... [t]he extent to which the employer had a right to control [the details of the service] activities was ... highly relevant to the question whether the employer ought to be legally liable for them...." (1 C. Larson, The Law of Workmen's Compensation (1986) § 43.42, pp. 8–20; see also 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed.1988) § 3.01[2], p. 3–4.) Thus, the "control of details" test became the principal measure of the servant's status for common law purposes.

(*Borello, supra,* 48 Cal.3d 342, 350; see also *Secretary of Labor v. Lauritzen* (7th Cir. 1987) 835 F.2d 1529, 1544 (conc. opn. of Easterbrook, J.) ["The reasons for blocking vicarious liability at a particular point have nothing to do with the functions of the [minimum wage law]"].)

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[29] Adopting Dynamex's argument that the common law is the sole test in single employer cases would essentially revive the now rejected holding in *Reynolds, supra,* 36 Cal.4th 1075, 1087, that the common law was the sole basis for determining employment in wage and hour cases.

The question here is whether Dynamex employed plaintiffs under any of the three IWC employer definitions, which were intended to extend liability to all those who have the power to correct substandard working conditions "despite the absence of a common law employment relationship." (*Martinez, supra*, 49 Cal.4th 35, 69.) In answering this question, the common law does not stand alone as the benchmark. If the Court were to limit the definition of employer solely to the common law where several purported employers are involved, then the IWC's other two definitions would be "render[ed] . . . effectively meaningless" in the majority of cases. (*Id.* at p. 65.)

C. The Suffer or Permit Definition was Intended to Cover All Employment Relationships in Which the Principle Had the Ability to Ensure Compliance with Minimum Labor Standards.

The origins of the "suffer and permit" definition demonstrate that the IWC was intent on expanding the definition of employer to include all who can ensure minimum labor standards. In fact, "language consistently used by the IWC to define the employment relationship, beginning with its first wage order in 1916 ('suffer, or permit'), was commonly understood to reach irregular working arrangements that fell outside the common law . . . ." (*Martinez, supra*, 49 Cal.4th 35, 65.)

One major advantage of the "suffer or permit" standard over the common law, for example, it is that it is "not only consistent with the possibility of multiple employers . . ., but generates findings that the owner of the business in which the work and violations took place was an employer without becoming entangled in intractable disputes over jointness." (*Enforcing Fair Labor Standards, supra*, 46 UCLA L. Rev. 983, 1132-1133.)

Martinez recognized that the IWC borrowed the first "definition of 'employ'—'to engage, suffer, or permit to work'—in 1916 from the language of early 20th-century statutes prohibiting child labor." (*Martinez, supra,* 49 Cal.4th 35, 69; see also *id.* at pp. 57-58 [the language "was already in use throughout the country" when it was adopted by the IWC].) Nothing in these statutes from which the IWC borrowed its language suggests that "suffer or permit" applied to multiple employer situations alone.

On the contrary, the "suffer or permit" concept has traditionally been used to hold *any* employer responsible for a violation of the law where that employer had the power to prevent the violation and failed to do so. (See *Martinez, supra,* 49 Cal.4th 35, 69-70 ["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."].) The focus of the "suffer or permit" definition was on the work being performed under prohibited conditions. Many of the early cases interpreting "suffer or permit" illustrate the development of this concept; all involved a single employer: *Curtis & Gartside Co. v. Pigg* (1913) 39 Okla. 31, 134 P. 1125, 1130 (single employer liable for the injuries of minor worker who was suffered or permitted to perform work prohibited by statute); *Pinoza v. Northern Chair Co.* (1913) 152 Wis. 473, 140 N.W. 84, 86 (same); *State v. Rose* (1910) 125 La. 462, 51 So. 496, 497 (construing a criminal provisions prohibiting child labor as against an individual direct employer); and *Commonwealth v. Beatty* (Pa.Super. 1900) 15 Pa.Super. 5, 6–7 (construing criminal statute prohibiting employment of a woman under certain circumstances, as against an individual employer).

Each of these cases imposed liability on an individual employer who suffered or permitted work in a manner that was prohibited by law. That is exactly the analysis that the real parties are seeking in this case.

The "suffer or permit" test was soon expanded beyond child labor and became common in many state laws protecting workers against other egregious, and potentially catastrophic, forms of exploitation. Early lawmakers recognized that ensuring the basic survival of workers and their families through the payment of wages required a broader safety net than other workplace protections. "Because minimum-wage legislation was designed to ensure virtually universal coverage of women and children, independent-contractor status was not allowed to circumvent broad application." (*Enforcing Fair Labor Standards*, *supra,* 46 UCLA L. Rev. 983, 1076.)

This broad interpretation of "suffer or permit" became widely accepted. (*Daly v. Swift & Co.* (1931) 90 Mont. 52, 300 P. 265, 268; *Vida Lumber Co. v. Courson* (1926) 216 Ala. 248, 112 So. 737, 738; *Brilliant Coal Co. v. Sparks* (1919) 16 Ala.App. 665, 81 So. 185, 187.) In the landmark New York case, *People v. Sheffield Farms–Slawson–Decker Co.* (N.Y.App.Div. 1917) 180 A.D. 615, 618, affd. (1918) 225 N.Y. 25, 121 N.E. 474, a business engaged in the sale of milk was convicted of child labor violations because its drivers had hired minors to guard their trucks. Although the company did not "employ" the minors directly, then-Judge Cardozo held it was nonetheless liable under the "suffer or permit" standard:

> He must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. He breaks the command of the statute if he

> employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated "his own power to prevent." What is true of employment, must be true of the sufferance of employment . . . .[p] The employer, therefore, is chargeable with the sufferance of illegal conditions by the delegates of his power.

(*Id.* at p. 476, internal citation omitted.) As the United States Supreme Court later described the "suffer or permit" standard, "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." (*United States v. Rosenwasser* (1945) 323 U.S. 360, 362.)

In California, from the first wage order in 1916, the IWC elected to define employer using the "suffer and permit" standard. It did not limit the application of the definition to multiple employer relationships, as Dynamex would have it. Rather the IWC has used "suffer or permit" to define all employment relationships that were subject to the wage orders' protections. Application of the wage orders does not depend on whether the employer "engaged" the worker, but on whether the employer vis-a-vis its relationship with the worker fit within one or more of the three employer definitions, including the expansive "suffer or permit" standard. (*Martinez, supra*, 49 Cal.4th 35, 64-65.) Under the "suffer or permit" standard, an employer cannot escape its duty merely by delegating it to another who exercises direct control over the worker or by creating "irregular working arrangements" to avoid liability. (*Id.* at pp. 58, 65.)

If the principal who benefitted from the work had the power to prevent the substandard treatment, the risk of nonpayment of wages should fall on the beneficiary of the labor, not on the worker. The former is usually in a far better position to either spread or eliminate the risk that the worker will not get paid. It can charge more for the product

the worker produced, or write off the loss. None of these options is available to the worker, who may be one paycheck away from economic crisis.[30]

III. DYNAMEX'S QUARREL WITH THE POLICY UNDERLYING THE SUFFER OR PERMIT STANDARD CANNOT BE RESOLVED BY THIS COURT; IT IS IN THE PURVIEW OF THE IWC OR THE LEGISLATURE.

Dynamex describes a parade of unintended consequences that it insists could arise under the "suffer or permit" definition, predicting the "dramatic impact the Court of Appeal's decision is sure to have on California small businesses." (Opening Br. at p. 20.) It claims that janitorial contractors, pool cleaners, gardeners, and Uber drivers are "service providers who have never been conceived to be 'employees.' " (*Id.*) There are obvious responses to this parade, such as Uber customers do not have the power to ensure that drivers' jobs meet minimum labor standards; Uber does. Generally, the answer is simply that the facts of a case will determine the result.

Essentially Dynamex rests its arguments on what it considers good policy, not on the plain language of Wage Order 9, the existence of the "suffer or permit" standard, or its application to these facts. This policy argument is addressed to the wrong branch of government. As the Court has long recognized, the wage orders have "the same dignity as statutes." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027;

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[30] See *Report on the Economic Well-Being of U.S. Households in 2013*, Board of Governors of the Federal Reserve System (2013) <http://www.federalreserve.gov/econresdata/2014-economic-well-being-of-us-households-in-2013-executive-summary.htm> (as of Nov. 30, 2015) (reporting that only slightly more than half of U.S. workers are able to save any portion of their income and that about one-fifth were spending more than they earned).

Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 799-801; *Cal. Drive-in Restaurant Assn. v. Clark, supra*, 22 Cal.2d 287, 292.) Dynamex's dire predictions, if they had any merit, should be addressed to the Legislature. While there may be some exposure for businesses on rights covered by the wage orders, it would be due solely to compliance with laws adopted a century ago.

IV. AN EMPLOYER UNDER ANY OF THE THREE IWC DEFINITIONS IS OBLIGATED TO REIMBURSE EMPLOYEES FOR ACTUAL AND NECESSARY BUSINESS EXPENSES UNDER SECTION 2802.

Dynamex contends that the common law should be the sole definition of employment where workers claim a right to reimbursement under section 2802. From this, Dynamex argues that the IWC's "suffer or permit" and "exercise control" definitions should be written out of existence since the use of different tests for different rights could create an anomaly. But the anomaly would arise only under Dynamex's own proposal.

If section 2802 were limited to workers who meet the common law standard, employees under the other two IWC standards could find themselves entitled to minimum wages under the wage orders, only to see this right diminished because their earnings are offset by unreimbursed expenses. Conceivably the record in this case may show employees whose expenses are so great that their wages evaporate entirely, a result the Legislature could not possibly have intended. The solution is not to use the common law test for section 2802 claims, but for the Court to interpret the term "employer" in section 2802 as the word has been more broadly defined by the IWC. Consistent with the Labor Code's policy of "vigorous enforcement," the Court must choose the option that provides workers with the greatest protection. (§ 90.5, subd. (a).)

In 1973, the California Constitution was amended to reaffirm the broad scope of the IWC's authority to "provide for minimum wages and for the general welfare of employees." (Cal. Const., art. XIV, § 1.) The Legislature's response was to expand the role the IWC plays in setting minimum labor standards, to include review and updating of " 'adequate and reasonable wages, hours, and working conditions appropriate for all employees in the modern society.' " (*Industrial Welfare Com., supra,* 27 Cal.3d 690, 702, quoting § 1173, enacted Stats. 1973, ch. 1007, § 1.5, p. 2002.)

As this Court explained in *Martinez*, the wage orders, including their definitional provisions, are the expression of this " 'broad statutory mandate.' " (*Martinez, supra*, 49 Cal.4th 35, 61, quoting *Industrial Welfare Com., supra,* 27 Cal.3d 690, 702.) While *Martinez* addressed the IWC definitions only in the context of wage claims under section 1194, the same deference to the IWC's standards should apply whenever the Legislature has not expressed a contrary rule.[31] The remedial nature of the IWC's authority means its promulgations "are to be liberally construed with an eye to promoting such protection." (*Industrial Welfare Com.,* at p. 702.)

As this Court has recognized, the IWC's authority is so broad that its discretion will be upheld unless there is a direct conflict with a statute or with a prior interpretation of a statute by a court. (*Industrial Welfare Com., supra*, 27 Cal.3d 690, 702-703, 724-725; *Cal. Drive-In Restaurant Assn. v. Clark, supra,* 22 Cal.2d 287, 292 [resolution of conflicting statute and wage order].) In *California Drive-In Restaurant Assn,* the Court

[31] The Legislature has shown its ability to change the IWC standards on occasion. (See, e.g., § 515.5 [exempting some computer programmers from overtime rules].)

denied a challenge to a wage order provision that prohibited an employer from retaining tips of covered employees despite a statute that allowed employers to do so if they gave notice to customers. The Court's reasoning was based on the proposition that statutes and wage order are of equal dignity and then found that the two provisions could be reconciled. (*Id.* at p. 292.)

This means that where a potential conflict exists between the application of a statute, such as 2802, and the protections afforded by the IWC, the two provisions should be read in harmony, if at all possible. (See *IWC v. Superior Court, supra,* 27 Cal.3d 690, 723-725.) In this case, the Court should not adopt the common law as the exclusive of employment under 2802 because that definition is not required by statute or prior statutory interpretation, yet it could, in some cases, "render the commission's [other two] definitions effectively meaningless." (*Martinez, supra*, 49 Cal.4th 35, 65.) Failing to interpret section 2802 consistently with the wage orders could lead to minimum wages being guaranteed under the "suffer or permit" or "exercise control" test, only to be taken away as work expenses under the common law test. This would potentially create the very harm the Legislature granted the IWC the power to prevent. The only interpretation that preserves the worth of the wages set by the IWC in all cases, while "prevent[ing] evasion and subterfuge" (*id.* at 62), is to read the word "employer" in section 2802 as it is defined by the IWC. Then the goals of the Legislature in granting plenary power to the

IWC are preserved; and there is no inconsistency in the enforcement of its mandate.[32] If the Legislature disagrees, it can enact a corrective statute.[33]

This Court implicitly recognized the erosion-of-wages problem in *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554. There, the Court ruled that while an employer can pay employees a lump sum for wages and expenses, it must identify how much it is paying paid for wages and how much for expenses. The expense payments must fully reimburse employees. (*Id.* at p. 484.) If employers must fully reimburse employees, they must do so in all cases.

The few courts that have addressed the definition of "employer" under section 2802 have held that because the Legislature did not explicitly define "employee," the common law definition should apply. (*Estrada, supra*, 154 Cal.App.4th 1, 10; *Arnold v. Mutual of Omaha* (2011) 202 Cal.App.4th 580, 586, 588.) However, both cases relied on *Reynolds*, *supra*, 36 Cal.4th 1075, 1086-1087, and *Martinez* rejected the proposition from *Reynolds* that the common law necessarily applies unless the Legislature "clearly

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[32] Another example of the court stretching to reconcile an IWC Order with a statute is *Cal. Labor Federation, AFL-CIO v. Industrial Welfare Com.* (1998) 63 Cal.App.4th 982. In that case, the court ruled that the IWC acted within the scope of its authority when it eliminated its former rule requiring overtime pay after eight hours in a day and replaced it with a rule requiring overtime pay after only 40 hours in a workweek. The court held that the IWC acted within its power even though the amendments effectively rendered certain statutory provisions moot, and even though the Legislature previously had declined to eliminate the eight-hour overtime rule by statute.

[33] If the Legislature disagrees with an IWC Order, it can amend or overturn it. In 1999, in the wake of the *Cal. Labor Federation* case cited in the previous footnote, the Legislature enacted the Eight Hour Day Restoration Act, amending the Labor Code to correct what the Legislature believed was the IWC's erroneous policy and to restore the eight-hour overtime rule. (Stats.1999, ch. 134, § 14.)

and unequivocally" defines employer. (*Martinez, supra*, 49 Cal.4th 35, 63-64, internal quotation marks and citations omitted.) Further, *Estrada* pre-dated *Martinez*, and *Arnold* did not address it. Accordingly, these cases provide no support for Dynamex's argument.

Amici do not challenge the general rule that where a statutory scheme is silent on the definition of employer, the common law should be applied.[34] Here, however, the IWC has promulgated a three-part definition of employer pursuant to plenary authority delegated by the Legislature. In effect, the Legislature has, by delegation, provided a definition of employer that should apply whenever wages are at issue. The general rule favoring the common law in the absence of a statutory definition should not apply where the IWC has chosen a broader approach.

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[34] For example, in *Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 297, this Court adopted the common law definition of employer and employee to determine a health care licensee's liability to a licensing agency for its employee's conduct. Similarly, in *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500, this Court used the common law definition to determine who was eligible for membership under the Public Employee Retirement Law. In both cases, the word "employee" was not defined in the underlying statute, nor was it defined anywhere else.

CONCLUSION

In order to give the broadest possible protection to minimum labor standards and to maintain the strength of our employment-based social safety net, the three employment definitions embodied in the IWC wage orders must all remain viable and given the broadest possible application. Amici respectfully request that the Court affirm the decision of the court below as to the Labor Code section 1194 claims for unpaid wages, and remand with instructions to apply the IWC definitions to the claims under Labor Code section 2802.

Dated: December 3, 2015

Respectfully submitted,

CALIFORNIA RURAL LEGAL ASSISTANCE FOUDATION

NATIONAL EMPLOYMENT LAW PROJECT

LOS ANGELES ALLIANCE FOR A NEW ECONOMY (LAANE)

Della Barnett
California Rural Legal Asst. Foundation

CERTIFICATE OF WORD COUNT

I certify that this brief complies with the type-volume limitation of Cal. Rule of Court 8.204(c)(1). This brief is printed in 13-point Times New Roman font and, exclusive of the portions exempted by Cal Rule of Court 8.204(c)(3), contains less than 14,000 words.

Dated: December 3, 2015

Della Barnett
California Rural Legal Assistance Foundation

EXHIBIT A

STATEMENTS OF INTEREST OF PROPOSED AMICI

CRLAF: The California Rural Legal Assistance Foundation (CRLAF) is a non-profit legal services provider which advocates for the rural poor. Since 1986, CRLAF has engaged in litigation, community education and outreach, and legislative and administrative advocacy in the areas of immigration, labor, housing, education, health, worker safety, pesticides, citizenship, and environmental justice. A large proportion of CRLAF's clients are farm workers, a group frequently misclassified as independent contractors, or employees of independent contractors. As a result, farm workers suffer high rates of unpaid or uncollectible wages and other violations of basic employment rights. CRLAF has litigated and participated as *amicus* in numerous cases addressing issues affecting low-wage workers. Based on its longstanding work on behalf of farmworkers and other rural poor, CRLAF believes that misclassification is a significant problem and that enforcement of the Industrial Wage Commission's three alternative definitions of employment will provide increased protection to workers and their families.

LAANE: Founded in 1993, the Los Angeles Alliance for a New Economy (LAANE) is recognized as a national leader in the effort to address the challenges of working poverty, inadequate health care and polluted communities. Over the past several years, LAANE's Campaign for Clean and Safe Ports has made great strides in the effort to transform a low-road port trucking industry that fuels poverty jobs and a growing ecological crisis. LAANE's current efforts involve combating the misclassification of thousands of low-wage truck drivers as independent contractors in the Los Angeles—Long Beach port complex, the largest in the nation.

Much like the commercial drivers in the case before this Court, port truck drivers are systemically misclassified as independent contractors, and thereby denied basic employee protections embodied in California law. Legal claims for rights under the Industrial Welfare Commission (IWC) Wage Order 9-2004 and section 2802 of the Labor Code have flooded the California Labor Commissioner's office and the courts; these drivers' status as employees is also at the heart of these cases. This Court's decision will clarify and assist in the vigorous enforcement of cases where commercial drivers are misclassified as independent contractors, an issue of utmost importance to LAANE, its campaign partners, and thousands of port truck drivers.

NELP: The National Employment Law Project (NELP) is a non-profit organization with almost 40 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, especially the most vulnerable ones, receive the full protection of labor and employment laws; and that employers are not rewarded by skirting those most basic rights. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers to minimum wage and overtime protection as well as adequate working conditions. With offices in New York City, California, the Midwest, Washington state and Washington, D.C., NELP provides technical support and assistance to wage and hour advocates from the private bar, public interest bar, labor unions and community worker organizations. NELP works to ensure that all workers receive the basic workplace protections guaranteed in our nation's labor and employment laws; this work has given us the opportunity to learn about job conditions around the country and to appreciate the critical need for enforcement of wage and hour laws through private litigation due to the lack of public enforcement of these laws. A decision of this Court that the definitions in the various wage orders control would greatly assist these efforts.

ADVANCING JUSTICE - LA: Asian Americans Advancing Justice – Los Angeles (Advancing Justice - LA) is the nation's largest legal services and civil rights organization devoted to Asian American, Native Hawaiian, and Pacific Islander communities. Since its founding in 1983, Advancing Justice - LA has worked on numerous cases and policy initiatives to advance the rights of low-wage and immigrant workers. Accordingly, Advancing Justice - LA has a strong interest in the outcome of this case.

ALEXANDER COMMUNITY LAW CENTER: Katharine & George Alexander Community Law Center (formerly the East San Jose Community Law Center) was founded in 1993 as a volunteer effort at Santa Clara University to help day laborers collect wages they were due. The program received grant support to provide a full range of employment and immigration services in the fall of 1994. Today, the Alexander Community Law Center focuses on workers' rights and tax matters, consumer law, immigration law, and serves about 1,000 clients on-site per year. It also reaches out to about 1,200 individuals through its mobile workshops on Consumer Rights, Workers' Rights and Tenant-Landlord Rights, given throughout the community. The Alexander Community Law Center often counsels workers who have been misclassified and who have an interest in this case.

IMPACT FUND: The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The

Impact Fund has been counsel in a number of major civil rights class actions, including cases challenging wage-and-hour violations, employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

LA RAZA CENTROL LEGAL: La Raza Centro Legal provides free legal services to the Latino immigrant community throughout the Bay Area. La Raza's Workers' Rights Unit represents hundreds of low-wage workers each year through the Labor Commissioner's Berman process. The majority of La Raza's clients work in low-wage industries where workers are often misclassified as independent contractors or employees of a labor contractor.

LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER (LEGAL AID): The Legal Aid Society, founded in 1916, is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, Legal Aid has addressed the employment issues of its low-wage worker clients through a combination of direct services, community education, impact litigation, administrative representation, and policy advocacy. Each year, Legal Aid assists thousands of workers in a range of low-wage industries – many of whom have been wrongfully misclassified as independent contractors and have suffered wage and hour violations. Legal Aid has also filed amicus curiae briefs on issues pertaining to low-income workers, including cases before this Court. See, e.g., *Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094.

UCLA LABOR CENTER: The UCLA Center for Labor Research and Education conducts research and leadership programs for students and workers on legal and policy issues that impact low-wage workers. Part of our research and policy work focuses the misclassification issues impacting the workforce. The California Supreme Court case of *Dynamex v. Superior Court* will have an impact in our research and policy work that focuses on the misclassification of low-wage workers.

WERC: The Women's Employment Rights Clinic (WERC) is a clinical program of Golden Gate University School of Law focused on the employment issues of low-wage workers. WERC advises, counsels and represents clients in a variety of employment-related matters, including individual and systemic claims for wage and hour violations. WERC represents workers who have been misclassified and the outcome of this case will impact low-wage workers.

WORKSAFE: Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is

also a Legal Support Center funded by the State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California'S most vulnerable low-wage workers. Millions of low-wage and immigrant workers often toil long hours in harsh and hazardous work environments in California. Many of these workers are denied basic rights with regard to their workplace health and safety as a result of employer misclassification. Worksafe considers it vitally important these employees not be misclassified as independent contractors and as a result left outside the protections of occupational safety and health laws.

PROOF OF SERVICE

I, Claudia Bogusz, declare as follows:

I am employed with the law offices of CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, whose address is 2210 K Street, Suite 201, Sacramento, California 95816. I am over the age of eighteen years and I am not a party to this action.

On December 4, 2015, I served the following documents: APPLICATION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, et al., on the party(ies) listed below, addressed as follows:

SEE ATTACHED SERVICE LIST

___ By facsimile machine (FAX) by transmitting a true copy thereof via an electronic facsimile machine at the fax number(s) listed above.

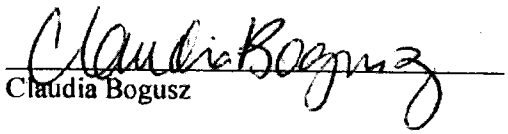
____ By Federal Express overnight delivery service by placing a true copy thereof in a Federal Express sealed envelope to the addressee(s) listed herein and placing the envelope in the firm's daily overnight delivery processing center for pick up by a Federal Express agent.

XX By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid to the addressee(s) listed herein and placing the envelope in the firm's daily mail processing center for mailing in the United State mail at Sacramento, California.

___ By personal service by delivering a true copy thereof to the addressee(s) listed herein at the location listed herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 4, 2015 at Sacramento, California.



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