NO. S258191

IN THE SUPREME COURT OF CALIFORNIA

GERARDO VAZQUEZ, GLORIA ROMAN, and JUAN AGUILAR, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

JAN-PRO FRANCHISING INTERNATIONAL, INC.
Respondent.

Review of Certified Question from the Ninth Circuit
(Ninth Circuit Case No. 17-16096)
On Appeal from N.D. Cal. Case No. 3:16-cv-05961
Before the Honorable William Alsup

RESPONDENT JAN-PRO FRANCHISING INTERNATIONAL, INC.'S ANSWERING BRIEF

JEFFREY M. ROSIN
O'HAGAN MEYER PLLC
111 HUNTINGTON AVENUE
SUITE 2860
BOSTON, MA 02199-7733
TELEPHONE: (617) 843-6800
FACSIMILE: (617) 843-6810
E-MAIL:
JROSIN@OHAGANMEYER.COM

JASON H. WILSON (SBN 140269)
EILEEN M. AHERN (SBN 216822)
AMELIA L. B. SARGENT (SBN 280243)
WILLENKEN LLP
707 WILSHIRE BLVD., SUITE 3850
LOS ANGELES, CA 90017
TELEPHONE: (213) 955-9240
FACSIMILE: (213) 955-9250
E-MAIL:
JWILSON@WILLENKEN.COM

Attorneys for Respondent
JAN-PRO FRANCHISING INTERNATIONAL, INC.

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INTRODUCTION

Respondent Jan-Pro Franchising International, Inc. ("JPI") respectfully requests this Court decertify the question, "Does the Court's decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 ("*Dynamex*") apply retroactively?" and return the case to the Ninth Circuit for further proceedings in accordance with California law.

This Court should not answer this important question here because the opinion in *Vazquez v. Jan-Pro Franchising Int'l, Inc*. (9th Cir. 2018) 923 F.3d 575, 594-596, *vacated and reinstated in part*, (9th Cir. 2019) 939 F.3d 1045, 1050 ("*Vazquez*") is contrary to now-established California law. JPI ultimately will seek correction of the errors in *Vazquez* before the Ninth Circuit by petitioning for rehearing or rehearing *en banc.* If *Vazquez* is corrected, this Court's opinion would be rendered advisory, running afoul of Rule 8.548(a)(1)'s requirement that certified questions "determine the outcome" of the matter. If *Vazquez* is not corrected, a decision on *Dynamex's* retroactivity here risks being misinterpreted as condoning the Ninth Circuit's errors, sowing confusion regarding the meaning of the plain language of *Dynamex's* ABC Test and its applicability to non-hiring franchisors.

JPI is a national franchisor of a commercial cleaning brand trademarked as "Jan-Pro®." Petitioners each owned a Jan-Pro® cleaning franchise (called "unit franchises"), which they purchased—not from JPI—but from Regional Master Franchisors having the exclusive contractual right to sell Jan-Pro® cleaning franchises in certain territories. By its plain language, *Dynamex's* ABC Test applies only to a "hiring entity." Because JPI is not a "hiring entity" with respect to Petitioners, the *Vazquez* court never should have applied *Dynamex's* ABC Test to JPI in the first instance.

Using the ABC Test to determine whether JPI was a "joint

employer" of the Petitioners contravenes not only *Dynamex*, but multiple California appellate court opinions, and thus is clearly erroneous under California law. *Martinez v. Combs* (2010) 49 Cal.4th 35 ("*Martinez*") provides the correct test to assess a non-hirer's potential liability as a joint employer. This has been confirmed by two recent California appellate decisions: *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, *as mod. on denial of reh'g.* May 18, 2018, *review den.* July 11, 2018 ("*Curry*"), and *Henderson v. Equilon Enterprises, LLC* (2019) 40 Cal.App.5th 1111, *review den.* Feb. 11, 2020 ("*Henderson*") (both holding the ABC Test is the wrong test to apply to the question of joint employer liability). (*Henderson*, which brought more clarity to the issue, was decided after *Vazquez* was decided.)

Vazquez (and Petitioners) wrongly assume *Dynamex* partially overturned *Martinez sub silentio* by "expand[ing] the definition" of "to employ" for all California wage order cases. (*See Vazquez*, *supra*, 923 F.3d at p. 593; *see also* Opening Brief of Petitioners ("Pet. Br.") at p. 37.) But *Dynamex's* ABC Test did ***not*** supplant *Martinez's* standards in the context of tiered or joint employment—including when misclassification claims are alleged. *Dynamex* and *Martinez* are entirely reconcilable, and the *Vazquez* panel erred in applying the ABC Test to JPI, rather than the Industrial Welfare Commission ("IWC") wage order standards as set forth in *Martinez*.

Compounding these errors, and contrary to this Court's analysis in *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474 ("*Patterson*"), which *Vazquez* dismissed as "extensive dicta," the Ninth Circuit identified precisely the unique features of a franchise relationship—control over the franchise to maintain brand standards and quality, and a common system of marketing the Jan-Pro brand®—as hallmarks of an employment relationship under *Dynamex's* ABC Test. In other words, *Vazquez's* application of the

ABC Test to a non-hiring franchisor construed the defining characteristics of a franchise as evidence of an employment relationship, defying *Patterson* and threatening the existence of the franchise business model.

Finally, the *Vazquez* decision now conflicts with an intervening Ninth Circuit opinion, *Salazar v. McDonald's Corp.* (9th Cir. 2019) 944 F.3d 1024 ("*Salazar*"), which properly applied *Martinez* and *Patterson* to determine a non-hiring franchisor's liability in a California wage-and-hour dispute. (JPI has alerted the Ninth Circuit to *Henderson* and *Salazar* via Federal Rule of Appellate Procedure 28(j) letters.) And, its analysis conflicts with, and risks preemption by, federal franchise and trademark law.

This Court should not resolve whether *Dynamex* is retroactive in a case where the ABC Test should not apply at all. Other immediate opportunities to address retroactivity exist where applying the ABC Test in the first instance is not disputed—for example, in *Gonzales v. San Gabriel Transit, Inc.* (2019) 40 Cal.App.5th 1131, *review granted* Jan. 15, 2020, S259027.

Should this Court nevertheless wish to determine *Dynamex's* retroactivity on this flawed record, *Dynamex* should not be held retroactive because considerations of fairness outweigh the benefits of retroactive application. First, JPI relied on the prior law, including federal and state franchise regulations, as well as the prior multifactor test for determining misclassification claims that focused on the right to control the manner and means by which the work is completed, such as that articulated in *S.G. Borello & Sons v., Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 ["*Borello*"]. Applying such a test, the California Unemployment Insurance Appeals Board has previously held that Jan-Pro® unit franchisees such as Petitioners are properly independent contractors under California law. Second, this Court's wholesale importing of the ABC Test from other

jurisdictions was wholly unforeseeable, and would therefore be unfair and inequitable to apply retroactively. Finally, a retroactive application of civil penalties pursuant to a test not first adopted by the Legislature would violate JPI's due process rights.

STATEMENT OF RELEVANT FACTS

A. Franchising is a Critical Component of the U.S. Economy.

"Franchising . . . has become a ubiquitous, lucrative, and thriving business model. This contractual arrangement benefits both parties." (*Patterson*, *supra*, 60 Cal.4th at p. 477.) "The franchisor, which sells the right to use its trademark and comprehensive business plan, can expand its enterprise while avoiding the risk and cost of running its own stores. The other party, the franchisee, independently owns, runs, and staffs the retail outlet that sells goods [or services] under the franchisor's name. By following the standards used by all stores in the same chain, the self-motivated franchisee profits from the expertise, goodwill, and reputation of the franchisor." (*Ibid.*) "The goal—which benefits both parties to the contract—is to build and keep customer trust by ensuring consistency and uniformity in the quality of goods and services[.]" (*Id.* at p. 490.)

A franchise benefits not only the franchisor (who can expand with less risk) and the consumer (who obtains uniform goods); it "puts the franchisee in a better position than other small businesses . . . [by] giv[ing] him access to resources he otherwise would not have, including the uniform operating system itself." (*Id.* at pp. 490-91 [citation omitted].) Today franchising remains "one of the best hopes for the small entrepreneur to become an independent businessperson and still compete with big business." (Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship* (2008) 28 Franchise L.J. 23, 28.)

Franchising is a critical component of the U.S. economy. A 2016

report authored by PricewaterhouseCoopers studying franchising in the United States found that "[f]ranchised businesses directly provided nearly 9.0 million jobs, met a $351 billion payroll, produced $868 billion of output, and added over $541 billion of gross domestic product ("GDP")." (PricewaterhouseCoopers LLP, The Economic Impact of Franchised Businesses: Vol. IV, 2016, (September 12, 2016), p.E-1 <https://www.franchisefoundation.org/sites/default/files/research/files/Economic%20Impact%20of%20Franchised%20Businesses_Vol%20IV_20160915.pdf> [as of May 27, 2020].) As of 2018, there were over 77,000 franchise establishments in California, employing over 755,000 people. (IHS Markit Economics, *Franchise Business Economic Outlook for 2018* at (January 2018), p. 28 <https://www.franchise.org/sites/default/files/Franchise_Business_Outlook_Jan_2018.pdf> [as of May 27, 2020].)

California law defines a franchise as:

> [A] contract or agreement, either express or implied, whether oral or written, between two or more persons by which:
>
> (1) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and
>
> (2) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and
>
> (3) The franchisee is required to pay, directly or indirectly, a franchise fee.

(Corp. Code, § 31005, subd. (a); *see also* Bus. & Prof. Code § 20001, subds. (a)-(c) [same]; 16 C.F.R. § 436.1(h) [federal counterpart worded in similar language].)

A franchise agreement traditionally results in a business-to-business relationship between a franchisor and franchisee, in which the franchisee has the obligations incumbent upon an independent business owner, such as hiring its own employees. (*See, e.g.*, *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284 [7-Eleven® franchisee properly an "independent contractor"].) "The franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain." (*GTE Sylvania Inc. v. Continental T.V., Inc.* (9th Cir. 1976) 537 F.2d 980, 999, *aff'd.* (1977) 433 U.S. 36.) Any business relationship meeting the legal definition of a franchise will be deemed a franchise, and must comply with extensive statutory requirements as a result. Even the Girl Scouts of America has been found to be a franchise. (*Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.* (7th Cir. 2011) 646 F.3d 983.)

California was one of the first states to enact comprehensive state regulation of franchise operations with the California Franchise Investment Law ("CFIL") in 1970. (Davis, et al., Cal. Antitrust and Unfair Competition Law (rev. 2017) Cal. Franchise Legislation, § 4.08; *see* Corp. Code, §§ 31000-31516 ("CFIL").) In 1980, California followed the CFIL with the California Franchise Relations Act ("CFRA"), which regulates franchise termination, nonrenewal, and transfers. (*See* Bus. & Prof. Code, §§ 20000-20043.)

In addition to California law, franchises are regulated by the Federal Trade Commission ("FTC") Rules on Franchising, 16 C.F.R. §§ 436.1-11, violations of which can result in an action under Section 5 of the Federal Trade Commission Act for an unfair or deceptive act or practice. (16 C.F.R. § 436.9.) And as trademark holders, franchisors must exert control over their trademarks under the Lanham Act and state law, or risk

forfeiture. (*See* 15 U.S.C. §§ 1064, 1115(b)(2); *see also* Bus. & Prof. Code, §§ 14230, subds. (c)(1), (d), 14272.)

B. Jan-Pro's Three-Tier Franchise System Means JPI Lacks Privity with the Unit-Franchisees, Which Petitioners Concede Raises the Issue of Joint, Not Direct, Employer Liability.

The Jan-Pro® business model operates pursuant to a three-tiered franchising system.[1] At the top is JPI, the Master Franchisor. JPI owns the "Jan-Pro®" logo and sells exclusive rights to use the "Jan-Pro®" trademark to Regional Master Franchisees. When those Regional Master Franchisees acquire their rights, they become subfranchisors of their regions, and are commonly referred to as Regional Master Franchisors.

Here, JPI contracted with two entities to become Regional Master Franchisors for their respective territories in California: Connor-Nolan of Silicon Valley, Inc. ("CNI"), ER0179-0199 (CNI Regional Master Franchise Agreement)[2], and New Venture of San Bernardino, LLC ("New Venture"), ER 0234-0257 (New Venture Master Franchise Agreement). Through these agreements, CNI and New Venture obtained the exclusive right to sell franchises and develop the goodwill and use of the Jan-Pro® mark in their respective regions, which Regional Master Franchisors generally do by selling cleaning franchises to "unit franchisees" and

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[1] This three-tier system is common in franchising. The Corporations Code defines a "subfranchise" to mean "any contract or agreement between a franchisor and a subfranchisor whereby the subfranchisor is granted the right, for consideration given in whole or in part for that right, to sell or negotiate the sale of franchises in the name or on behalf of the franchisor." (Corp. Code § 31008.5.) Subfranchises are subject to the same regulations as franchises.

[2] "ER" citations are to the appellate Excerpts of Record filed in the Ninth Circuit, which were provided to the Court pursuant to Cal. Rule of Court 8.548. (*Vazquez*, *supra*, 939 F.3d at p. 1050.)

marketing for customers to offer unit franchisees accounts and promised books of business. As franchisors, they provide various support services to unit franchisees, including training, billing, and collections support.

Unit franchise buyers may choose to buy cleaning franchise packages promising anywhere from $5,000 to $200,000 in annual billings. Unit franchise buyers may also grow from their initial size franchise purchase, choose to maintain their business at the initial level, or downsize. In general, the larger their operations, the more employees they will need.

The three petitioners, Gerardo Vazquez, Gloria Roman, and Juan Aguilar, each purchased a Jan-Pro® cleaning franchise. Vazquez purchased an "FP20" franchise plan (i.e., promising accounts equaling an expected yearly $20,000 in gross revenue) in 2007 from New Venture. ER 0373-0391 (Vazquez Franchise Agreement). Roman purchased an "FP5" franchise plan (promising $5,000 in gross revenue) in 2004 from CNI. ER 0357-371 (Roman Franchise Agreement). Aguilar and his business partner, Cesar Lazaro, purchased an "FP5" franchise plan together, also from CNI. ER 0339-0351 (Aguilar Franchise Agreement); ER 1220 (Aguilar Dep. 23:5-24:4) (Lazaro as business partner).

JPI has no contractual relationship with the unit franchisees. (*Vazquez*, *supra*, 939 F.3d at p. 1047 ["Jan-Pro is not party to any contract with unit franchisees. Jan-Pro contracts with the master franchisors, who then contract with unit franchisees. Unit franchisees may hire their own employees and may act in individual or corporate capacities."].) CNI and New Venture are the Petitioners' franchisors under their franchise agreements. Petitioners never sought to join CNI or New Venture in this case. *See* ER0042 n.1 [noting that all disputes with such Regional Master Franchisors were required to be arbitrated].

Petitioners concede that their claims against JPI must be assessed as joint employer liability, admitting that "at the heart of this case," is the

issue of joint employment—"where the worker does not contract directly with the alleged employer." Pet. Br. at p. 17. In their Oct. 25, 2019 letter to this Court, Petitioners explained:

> This case raises the joint employment issue, since the defendant, Jan-Pro Franchising International, Inc. ("Jan-Pro"), does not contract directly with the plaintiffs. Instead, the plaintiffs perform their work for Jan-Pro through intermediate entities which Jan-Pro calls "master franchisees". One of Jan-Pro's defenses in this case has been that it does not directly contract with the plaintiffs and thus could not be the liable entity. However, Plaintiffs have contended that Jan-Pro is legally responsible for the wage violations they allege, since it is the cause of these violations and, under the "ABC" test adopted in *Dynamex*, Jan-Pro is their employer.

(Ltr. of Shannon Riordan to Office of the Clerk, re: *Vazquez v. Jan-Pro Franchising Internat. Inc.*, S258191 (Oct. 25, 2019), at p. 2.) Petitioners claim JPI is liable for employee misclassification here based on the theory that the ABC Test supplants the joint employer inquiry. Petitioners further concede this position conflicts with *Curry, Henderson*, and the Ninth Circuit decision in *Salazar.* (*Id.*)

C. The Petitioner-Unit Franchisees Each Employed Their Own Employees.

The Petitioners claim that they personally, as franchise owners, were misclassified as independent contractors, and that they should be classified as employees instead. As employees, they argue, they should have been paid minimum wage and overtime, and their franchise fees were unlawful. Among their claims' other flaws, being employees individually inherently conflicts with the fact that all three Petitioners hired their own employees.

The Petitioner-Unit Franchisees' agreements contemplate that they could hire their own employees. *See* Aguilar Franchise Agreement, ER 0342 at ¶ 5(B) ["Franchisee shall use its best efforts to hire qualified and

competent employees . . . ."]; ER 0346 at ¶ 11 [franchisee to withhold taxes for employees and pay unemployment and workers compensation premiums]; *see also* Roman Franchise Agreement at ER 0360 at ¶ 5(B), 0364 at ¶ 11 [same]; Vazquez Franchise Agreement at ER 0378 at ¶ 5(B), 0381 at ¶ 11 [same].

Here, each Petitioner in fact did hire employees at various times to perform cleaning services for their clients, as they testified in their depositions. Roman testified she frequently employed and paid others to perform the cleaning on her accounts, whom she would train on client preferences. ER 1296-1297 (Roman Dep. 35:1-18; 36:2-40:7). Vazquez employed his mother to assist him cleaning, paying her half of what he received from the accounts. ER 1364 (Vazquez Dep. 47:25-48:23). And Aguilar testified that after about two or three years cleaning the accounts between himself and his business partner, they hired other employees to assist them. ER 1232-1233 (Aguilar Dep. 72:11-21; 75:16-76:9). As of his 2009 deposition, Aguilar did not regularly perform any cleaning services except to cover for his employees, instead focusing on managerial and customer service work for his unit franchise's clients, and working full-time at another job. ER 1235-1236 (Aguilar Dep. 80:22-83:1, 86:16-87:12).

This critical fact distinguishes Petitioners from the putative class in *Dynamex*, which expressly excluded any independent contractor that hired its own employees. (*Dynamex*, *supra*, 4 Cal.5th 903 at p. 914 [class certified of drivers "who . . . did not themselves employ other drivers"].)

RELEVANT PROCEDURAL HISTORY

A. The District Court Correctly Granted Summary Judgment for JPI.

In December 2008, the three Petitioner-Unit Franchises joined a putative wage-and-hour class action in Massachusetts. (*See Depianti et al.*

v. Jan-Pro Franchising Internat., Inc. (2013) 465 Mass. 607, 609.) In 2011, a Georgia appellate court applied Massachusetts' version of the ABC Test, codified at Mass. Gen. Laws, ch. 149, §148B, to Giovanni Depianti, a Massachusetts-based Jan-Pro® unit franchisee, and found that he was properly classified as an independent contractor. (*Jan-Pro Franchising Internat., Inc. v. Depianti* (2011) 310 Ga.App. 265.) This opinion became final when the Georgia Supreme Court denied review and was confirmed by the U.S. District Court in Massachusetts, *Depianti et al. v. Jan-Pro Franchising Int'l, Inc.* (D. Mass. 2014) 39 F.Supp.3d 112, 129. The First Circuit affirmed, *Depianti v. Jan-Pro Franchising Int'l, Inc.* (1st Cir. 2017) 873 F.3d 21, 32.[3]

After the Georgia courts and District Court in Massachusetts ruled in JPI's favor with respect to the Massachusetts-based unit franchisee, other named plaintiffs abandoned or dismissed their claims, leaving only the three California-based Petitioner-Unit Franchisees. On September 22, 2014, they moved to sever and transfer their claims to California, in part because California law governing Petitioners' claims differed from Massachusetts law (i.e., no ABC Test existed under California law). (Respondent's Request for Judicial Notice filed concurrently ("RJN"), Ex. A, at pp. 5-6 [Plaintiff's Motion to Sever and Transfer Out-of-State Claims,

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[3] Petitioners misleadingly suggest that the Massachusetts Supreme Court has determined franchised cleaning workers to be "employees under the Massachusetts ABC test" by citing to *Awuah v. Coverall North America, Inc.* (2011) 460 Mass. 484. Pet. Br. p. 12, n. 5. But in that proceeding, Coverall conceded the workers at issue were employees. (*Awuah*, *supra*, 460 Mass. at p. 486 n. 3 ["Our answers to the certified questions are premised on the plaintiffs' agreed-on employee status; the answers have no application to properly classified independent contractors operating under franchise agreements."].) Moreover, that case presented dramatically different facts than this one, including the lack of a three-tier system.

Depianti v. Jan-Pro Franchising Int'l, Inc. (D.C. Mass. Sept. 22, 2014, No. 08-10663) ECF No. 197].) Over JPI's objection, the Petitioners' case was transferred to the Northern District of California, where the parties proceeded to brief summary judgment.

In granting JPI summary judgment, the district court noted that there was "no binding decision" on the standard to determine "whether a franchisor is an employer of a franchise." ER 0044. (Now, of course, there is *Henderson*.) However, the district court correctly anticipated California law: Looking to the then-recently decided district-court decision in *Salazar v. McDonald's Corp.* (N.D. Cal. Aug. 16, 2016, No. 14-02096 [nonpub. opn.]) 2016 WL 4394165, Judge Alsup applied the three alternative definitions of "to employ" drawn from the IWC wage orders as articulated in *Martinez v. Combs* (2010) 49 Cal.4th 35. The district court concluded: (1) JPI did not "exercise control" over the Petitioners' wages, hours, or working conditions, (2) JPI did not "suffer or permit" them to work because it "lacked the power to prevent" the Petitioners from working, and (3) applying "the gloss of *Patterson* when considering the common-law definition of employment" in the franchise context, JPI was not an employer under the common law. ER 0042-0048. Petitioners appealed.

B. While the Appeal was Pending, This Court Decided *Dynamex*.

After the appeal was briefed, this Court decided *Dynamex*. In *Dynamex*, a class of individual delivery drivers sued Dynamex Operations West, Inc., a nationwide package and document delivery company. The certified class consisted of "Dynamex drivers who, during a pay period, did not themselves employ other drivers and did not do delivery work for other delivery businesses or for the drivers' own personal customers." (*Dynamex*, *supra*, 4 Cal.5th at p. 914.) To determine whether the drivers were properly classified for their wage order claims, the trial court had

applied the definition of "to employ" as articulated by *Martinez*: "(a) to exercise control over the wages, hours, or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Id.* at pp. 914-915 [citing *Martinez*, *supra*, 49 Cal.4th at p. 64].) The appellate court affirmed that the trial court "properly relied on the alternative definitions of the employment relationship set forth in the wage order when assessing those claims in the complaint that fall within the scope of the applicable wage order." (*Id.* at pp. 924–25.) Dynamex petitioned for review.

In affirming the trial and appellate courts, this Court came to two conclusions. The first was "that the suffer or permit to work standard"—the second *Martinez* definition—"properly applies to the question whether a worker should be considered an employee or, instead, an independent contractor[.]" (*Dynamex*, *supra*, 4 Cal.5th at p. 943.) This standard could apply beyond the question of defining an "employer" because "the origin and history of the suffer or permit to work language" in remedying the issue of child labor demonstrated it "was intended to apply beyond the joint employer context." (*Id.* at p. 944.)

The second conclusion in *Dynamex* was that "in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the 'ABC' test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors." (*Dynamex*, *supra*, 4 Cal.5th at p. 916.) This imported into California law a wholly new standard that until that point other states had adopted only through legislative action. (*See* Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Contractor and Misclassification Statutes* (2015) 18 U. Pa. J.L. & Soc. Change 53, 58 [tracing "dramatic

boom of legislating activity" in 22 states].) This Court made clear that the ABC Test did not redefine the scope of the "suffer or permit" standard for joint employment, which was established in *Martinez*—instead, it held that the "suffer or permit" standard may also be applied, separately, to the question of worker classification using the ABC Test.

The precise wording of the ABC Test adopted in *Dynamex* requires that the "**hiring entity**" establish

> (A) that the worker is free from the control and direction of the **hirer** in connection with the performance of the work, both under the contract for the performance of such work and in fact;
>
> (B) that the worker performs work that is outside the usual course of the **hiring entity**'s business; and
>
> (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the **hiring entity**.

(*Dynamex*, *supra*, 4 Cal.5th 903, at pp. 916-917 [emphasis added].)

Petitioners claim that this Court "expressly stated it was adopting the Massachusetts version of the ABC test[.]" Pet. Br. at p. 29. Not so. The *Dynamex* opinion stated its ABC Test "tracked" the Massachusetts version regarding Prong B—that is, while some states consider whether the putative employee worked on-site or wholly off-site, the Massachusetts and California versions disallow working off-site as a determinative factor. (*Id.* at p. 956, n. 23.) Other than this similarity, however, the test adopted in *Dynamex* is worded differently from the Massachusetts version, including in one critical respect—which is dispositive here. Unlike the ABC Test articulated in *Dynamex*, the Massachusetts law does not refer to a "hiring entity." Massachusetts' ABC Test reads:

> [A]n individual performing any service . . . shall be considered an employee . . . unless:--
>
> (1) the individual is free from control and direction

> in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> (2) the service is performed outside the usual course of the business of the employer; and,
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(Mass. Gen. L., ch. 149, § 148B, subd. (a).)

By contrast, the ABC Test in *Dynamex* (and in the subsequent legislation codified at various points in the Labor Code and Unemployment Insurance Code) specifically assigns the burden of proving appropriate classification to a "hiring entity," and its prongs require an examination of a worker's relationship to a "hirer." Under the test's plain language, courts must make a predicate factual determination that a defendant is a "hiring entity" before applying the ABC Test.

C. Reversing the District Court, the Ninth Circuit Misapplied *Dynamex* to the Joint Employment Issue Here, Then Withdrew Its Opinion and Certified the Question of Retroactivity.

The *Vazquez* panel's subsequent opinion erroneously determined that *Dynamex* supplanted *Martinez* for determining joint employer liability. While in *Dynamex* this Court applied the "suffer or permit" standard to the limited issue of worker misclassification (based on that standard's "history and origin," separate and apart from its use in the wage orders), the Ninth Circuit instead held that *Dynamex* "***expanded*** the definition of 'suffer or permit' for California wage order cases" in general, for all purposes—thus replacing *Martinez*'s holding and the IWC definitions with a completely new standard. (*Vazquez*, *supra*, 923 F.3d at p. 593 [emphasis added].) That was error.

The panel also dismissed this Court's analysis in *Patterson* regarding the reasons the franchise business model must be considered in any liability analysis as "extensive dicta." (*Vazquez*, *supra*, 923 F.3d 575 at p. 594.) It not only held that the ABC Test was the appropriate test to determine whether a ***non-hiring*** franchisor was liable for misclassification of a franchisee's workers, but—completely contrary to *Patterson*—it identified precisely those statutorily-mandated features of a franchise relationship as hallmarks of an employment relationship under the ABC Test. (*Vazquez*, *supra*, 923 F.3d at pp. 597-99.)

Without acknowledging the very different wording of the two states' ABC tests, the panel concluded that "*Dynamex* embraced the Massachusetts version of the test," and that "by judicial fiat, California incorporated Massachusetts's employment classification statute into its labor laws." (*Vazquez*, *supra*, 923 F.3d at p. 593.) Disregarding that the test requires a factual determination that a defendant was the "hiring entity," the panel stripped the phrase of its plain meaning by literally re-writing it as "putative employer"—the standard used in applying the Massachusetts statute. (*Ibid.*)

Viewing this case through that mistaken framing, the *Vazquez* panel then buttressed its opinion with reasoning exclusively from inapposite out-of-state authority, *see Vasquez*, *supra*, 923 F.3d at pp. 595-99, while bypassing established California law. Most notably, the panel minimized the relevant (and binding) California appellate decision in *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289. *Curry* dealt with the question of whether Equilon Enterprises, LLC (a/k/a Shell), a non-hiring franchisor, was liable as a joint employer for a franchisee's alleged wage and hour violations. The appellate court applied the *Martinez* test, expressing doubt that this Court in *Dynamex* intended the ABC Test to supplant the IWC definitions in determining joint employer liability. (*See Curry*, *supra*, 23

Cal.App.5th at pp. 300-301; *see also id.* at p. 316 [determining worker was not an "employee" of Shell].) Though the *Curry* court analyzed the prongs of the ABC Test out of an abundance of caution, it ultimately determined that the ABC Test "is meant to serve policy goals that are not relevant in the joint employment context. Therefore, it does not appear that the Supreme Court intended for the 'ABC' test to be applied in joint employment cases." (*Id.* at p. 314.)[4]

The *Vazquez* panel remanded the application of the ABC Test to the district court, noting that "[t]he district court had no opportunity to consider whether Plaintiffs are employees of Jan-Pro under the *Dynamex* standard[.]" (*Vazquez*, *supra*, 923 F.3d at p. 593.) But it offered "observations and guidance" suggesting JPI could not satisfy Prong B of the ABC Test as a matter of law. (*Id.* at p. 594.) Specifically, the *Vasquez* panel described Prong B of the ABC Test (whether the work is outside the usual course of the hiring entity's business), as "most susceptible to summary judgment" on the limited record before the district court. (*Id.* at p. 596.) The panel suggested the district court should "consider[] whether the work of the employee is necessary to or merely incidental to that of the hiring entity, whether the work of the employee is continuously performed for the hiring entity, and what business the hiring entity proclaims to be in." (*Id.* at p. 597.) The panel went on to analyze these considerations itself, concluding, first, that "Jan-Pro's business ultimately depends on someone performing the cleaning," second, that "Jan-Pro's business model relies on

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[4] As discussed further below, a different appellate court subsequently agreed with *Curry*'s approach in *Henderson*—in which the Plaintiff (represented by counsel for the Petitioners here) argued that the ABC Test applied to joint employer liability ***because of*** the *Vazquez* decision. The *Henderson* court, like the *Curry* court before it, rejected this argument, and this Court denied review of *Henderson* on Feb. 11, 2020.

unit franchisees continuously performing cleaning services," and finally, that "Jan-Pro's websites and advertisements . . . promote Jan-Pro as being in the business of cleaning."[5] (*Id.* at p. 598). Of course, these observations are applicable to any franchise, where a franchisee's workers are "necessary," "continuously used," and operate in the same business brand as the franchisor.

JPI petitioned for rehearing or rehearing *en banc*, arguing that the decision conflicted with *Patterson*, and that further, a retroactive application of *Dynamex* violated due process. The panel granted rehearing and withdrew its opinion, *Vazquez v. Jan-Pro Franchising, Int'l* (9th Cir. July 22, 2019) 930 F.3d 1107, and subsequently certified the question of whether *Dynamex* applies retroactively to this Court, *Vazquez v. Jan-Pro Franchising, Int'l* (9th Cir. Sept. 24, 2019) 939 F.3d 1045. But the Court reiterated its incorrect conclusion, *inter alia*, that "if *Dynamex* does apply, the district court's reliance on *Patterson* and the 'special features of the franchise relationship' was misplaced." (*Id.* at p. 1048.) That same day, it published a one-paragraph *per curiam* opinion "re-establish[ing] the remaining holdings from our now-withdrawn opinion in the matter." (*Vazquez v. Jan-Pro Franchising Int'l* (9th Cir. Sept. 24, 2019) 939 F.3d 1050.) JPI petitioned for rehearing again, which was denied.

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[5] The *Vazquez* panel reached these conclusions despite the fact that the appellate court in Georgia, examining *the exact same record*, concluded under Prong B of Massachusetts' test that JPI's business was "establishing a trademark and cleaning system that was then licensed to regional franchisees," and ***not*** providing cleaning services or "compet[ing] with unit franchisees for cleaning contracts." (*Jan-Pro Franchising Internat., Inc. v. Depianti* (2011) 310 Ga.App.265, 268-69.) The Massachusetts district court examined this conclusion at length and found it "consistent with Massachusetts law." (*Depianti et al. v. Jan-Pro Franchising Int'l, Inc.* (D. Mass 2014) 39 F.Supp.3d 112, 126, *aff'd Depianti v. Jan-Pro Franchising Int'l, Inc.* (1st Cir. 2017) 873 F.3d 21.)

ARGUMENT

A. This Court Should Rescind Certification Because Whether *Dynamex* is Retroactive Will Not "Determine the Outcome" of this Matter.

California Rule of Court 8.548(a) provides:

> On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if:
>
> (1) The decision could determine the outcome of a matter pending in the requesting court; and
>
> (2) There is no controlling precedent.

(Cal. Rules of Court, rule 8.548(a).) Here, a decision on *Dynamex*'s retroactivity would not "determine the outcome" of the matter because applying the ABC Test to JPI is clear error. Assuming the Ninth Circuit maintains this error in its final order, JPI will petition for rehearing or rehearing *en banc*, or seek relief at the district court.

1. A Plain-Language Reading of the ABC Test Comports with This Court's Reasoning in Dynamex *as well as Established Canons of Construction.*

As set forth above, the ABC Test adopted by this Court in *Dynamex* requires that the "**hiring entity**" establish

> (A) that the worker is free from the control and direction of the **hirer** in connection with the performance of the work, both under the contract for the performance of such work and in fact;
>
> (B) that the worker performs work that is outside the usual course of the **hiring entity**'s business; and
>
> (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the **hiring entity**.

(*Dynamex*, *supra*, 4 Cal.5th 903 at pp. 916-917 [emphasis added].)

The plain language thus indicates that the ABC Test applies to a

business that has "hired" an individual worker to provide a service or perform a task—and ***not*** to entities who did ***not*** hire such individual workers. The test uses the phrase "hiring entity" or "hirer" four times: It places the burden of proof on the "hiring entity," and each its three prongs require analyzing certain aspects of the relationship between a worker and his or her "hirer" or "hiring entity." (*See id.*) While "hiring entity" is an undefined term, the plain meaning of "hiring entity" is simply, one who hires a worker.

This plain-language reading makes logical sense in light of the remedial and protective purpose of the California wage orders that this Court articulated in *Dynamex*. The central question of misclassification is whether "a worker should be considered an individual who is 'employ[ed]' by an 'employer' (and therefore an employee covered by the wage order) or, instead, an independent contractor who has been hired, but not 'employed,' by the hiring business (and thus not covered by the wage order)." (*Dynamex*, *supra*, 4 Cal.5th 903 at p. 944.) That is, the inquiry focuses on whether a business that hired a worker has properly classified that worker as an employee or independent contractor.

The choice of the phrase "hiring entity" thus was deliberate—indeed, this Court told us it carefully considered the wording of ABC Tests from other jurisdictions, none of which contain the phrase "hiring entity," and yet chose those words for California's version of the ABC Test. (*Dynamex*, *supra*, 4 Cal.5th at p. 956 n. 23.) In particular, this Court devoted close attention to the version of the test from Massachusetts—which does ***not*** use the phrase "hiring entity" (*Ibid.*)—and made the deliberate decision to word California's test differently. As discussed *infra*, California courts already have recognized the ABC Test is ill-suited to define who might be considered a ***non-hiring*** employer (i.e., a joint employer), as opposed to whether a worker is misclassified by its hiring

entity. (*See, e.g.*, *Henderson*, *supra*, 40 Cal.App.5th at p. 1129 ["[T]he Dynamex ABC Test was not intended to apply to joint employer claims."].)

Canons of statutory construction further support a plain-language reading. In the wake of *Dynamex*, the legislature codified the ABC Test verbatim into various points in the Labor Code and Unemployment Insurance Code in 2019 California Assembly Bill No. 5 ("AB-5"), California 2019-2020 Regular Session (Sept. 19, 2019), including the requirement that the ABC Test apply to only to "hiring entit[ies]."[6] (*See, e.g.*, Lab. Code, § 2750.3.) "Hiring entity" in that legislation must be given its "usual and ordinary meaning, while construing [it] in light of the statute as a whole and the statute's purpose." (*Pineda v. Williams-Sonoma Stores, Inc*. (2011) 51 Cal.4th 524, 529 [citations omitted].) The Legislature's adopting the phrase without explanation or definition weighs in favor of attributing to it only its plain meaning—indeed, to interpret the test as articulated by *Dynamex* and the test as codified by AB-5 differently would lead to absurd results.

The plain-language reading also counsels against applying the ABC Test to the Petitioner-Unit Franchisee's claims here, because the Petitioners are ***themselves*** "hiring entities" who hired their own employees, and not "[workers who] should be considered . . . individual[s] . . . 'employ[ed]' by an 'employer' (and therefore an employee covered by the wage order)[.]" (*Dynamex*, *supra*, 4 Cal.5th 903, at p. 944.)

2. The ABC Test's Application to the Joint Employer Inquiry Here Was Error.

The ABC Test's required predicate factual determination that a

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[6] The Legislature did not change the text of the ABC Test, but limited its application with respect to certain professions and business-to-business transactions.

defendant is a "hiring entity" harmonizes the ABC Test with existing precedent governing joint employer liability. For example, in a franchise context, imagine a case where an individual worker claims he or she has been misclassified. That individual worker performs services for a local franchise of a national franchisor. For purposes of the misclassification claim, the relevant "hiring entity" might be the local franchise, in which case, it would be subject to the ABC Test; whereas the non-hiring national franchisor would be subject to the "joint employer" inquiry established by *Martinez*. This reconciles *Dynamex's* ABC Test with *Martinez* and its progeny.

The *Vazquez* panel neither determined that JPI was a "hiring entity," nor suggested the district court was required to do so before analyzing the three prongs of the ABC Test. Instead, it literally read the phrase "hiring entity" out of the test altogether by equating it to "putative employer": "Under *Dynamex*, a 'hiring entity' (the putative employer) 'suffers or permits' a putative employee to work if it cannot overcome the 'ABC Test.'" (*Vazquez*, *supra*, 923 F.3d 575 at p. 593.)

But the ABC Test must be read according to its plain meaning: It applies to "hiring entities," and not non-hiring entities like JPI, a national franchisor. The *Vazquez* panel's misreading of the ABC Test not only strips the phrase "hiring entity" of its plain meaning, but, as discussed *infra*, would result in the test's application to any "putative employer"—erroneously supplanting *Martinez* in the joint employer context.

a. <u>*Dynamex* Did Not Alter *Martinez*'s Holding.</u>

The *Vazquez* panel's decision (and Petitioners) wrongly assume that *Dynamex* altered *Martinez'*s holding. Pet. Br. pp. 37, 40-42. The *Vazquez* panel thus erred in applying *Dynamex's* ABC Test rather than the IWC wage order standards as set forth in *Martinez*, where the ABC Test does not apply to joint employment relationships—including when misclassification

claims are alleged, and absent any determination that JPI was a "hiring entity."

The IWC was granted broad powers to regulate labor and working conditions in California, promulgating those standards in a series of industry- and occupation-specific wage orders codified at Cal. Code Regs., tit. 8, §§ 11010-11160. Although the wage orders use and define the terms "employ" and "employment," no California case had considered their scope until this Court in *Martinez v. Combs*. (*Martinez*, *supra*, 49 Cal.4th at p. 50.) There, plaintiff-strawberry pickers, asserting a joint employment theory, sought to recover unpaid minimum wages from merchants who had contracted with their direct employer (the grower). This Court recognized that in the Labor Code provisions under which plaintiffs were proceeding, "the Legislature has . . . given an employee a cause of action for unpaid minimum wages without specifying who is liable. That only an employer can be liable, however, seems logically inevitable as no generally applicable rule of law imposes on anyone other than an employer a duty to pay wages." (*Id.* at p. 49.) This Court therefore held that in such actions, "the IWC's wage orders do generally define the employment relationship, and thus who may be liable." (*Id.* at p. 51.)

Parsing the wage orders' history and definitions, and considering the IWC's broad authority and legislative purpose, this Court carefully concluded that "[t]o employ, then, under the IWC's definition, has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." (*Martinez*, *supra*, 49 Cal.4th 35 at p. 64.) Thus, this Court clarified the wage order definitions of "employer" within the confines of legislative intent and IWC authority, and concomitantly, who may be liable for violation of those wage orders.

In *Dynamex*, dovetailing with the analysis in *Martinez*, this Court reasoned, "the suffer or permit to work standard does not apply only to the joint employer context, but also can apply to the question whether . . . a worker who is not an 'admitted employee' of a distinct primary employer should nonetheless be considered an employee . . ."—specifically, where that worker allegedly is misclassified as an independent contractor in the direct employer context. (*Dynamex*, *supra*, 4 Cal.5th at pp. 944-45.) This Court thus held that the "suffer or permit" standard may be applied ***separately*** to the question of worker classification using the ABC Test. But it made clear that the ABC Test did not redefine the scope of the "suffer or permit" standard used in the joint employment context set forth in *Martinez*. (*Id.*) And for good reason—as discussed below, the ABC Test simply does not make sense in a joint employment framework.

The panel in *Vazquez*, however, mistook this Court's holding in *Dynamex*, and concluded that this Court had "expanded the definition of 'suffer or permit' for California wage order cases" as a general matter. (*Vazquez*, *supra*, 923 F.3d at p. 593; *see also* Pet. Br. at p. 37.) Not so—such a reading would compel the conclusion that this Court partially overturned *Martinez*. But as multiple appellate courts already have found, the opinions in *Dynamex* and *Martinez* are entirely reconcilable—because the ABC Test does not apply to a joint employment context, even where misclassification is alleged.

b. <u>The California Appellate Decisions in *Curry* and *Henderson* Conclude the ABC Test Is Inapplicable to Joint Employment.</u>

Two recent California appellate decisions have read *Dynamex* properly and held "the Dynamex ABC test was not intended to apply to joint employer claims." (*Henderson*, *supra*, 40 Cal.App.5th at p. 1129; *see also Curry*, *supra*, 23 Cal.App.5th at p. 314 [concluding "it does not appear

that the Supreme Court intended for the 'ABC' test to be applied in joint employment cases."].)

Both *Henderson* and *Curry* involve a worker's wage-and-hour claims against non-hiring franchisor (or licensor), Equilon Enterprises LLC (d/b/a Shell Oil Products US ["Shell"]).[7] In *Curry*, the plaintiff was recruited to manage a Shell-branded gas station operated by a limited liability company called ARS. ARS's contract and lease with Shell to run the gas stations assigned daily personnel management and operations to ARS. (*Curry*, *supra*, 23 Cal.App.5th at pp. 294-95.) In *Henderson*, the plaintiff managed a Shell-branded gas station operated by Danville Petroleum, Inc., which contracted with Shell under the same agreement at issue in *Curry*. (*Henderson*, *supra*, 40 Cal.App.5th at p. 1115.) Both plaintiffs alleged Shell was liable for their various wage-and-hour claims as a joint employer.

Both the *Curry* and *Henderson* courts, post-*Dynamex*, properly applied the same analysis—the standard prescribed by *Martinez*. As the *Curry* court explained: "The high court concluded 'the IWC's wage orders do generally define the employment relationship, and thus who may be liable.'" (*Curry*, *supra*, 23 Cal.App.5th at p. 301 [analyzing the three "to employ" standards set forth in *Martinez*]; *see also Henderson*, *supra*, 40 Cal.App.5th at p. 1117-1119 [same].)

Curry and *Henderson* rejected using the ABC Test to define whether Shell was the plaintiff's employer (although *Curry* analyzed the ABC Test out of an abundance of caution). Their reasoning rested on both policy and analytical grounds. The *Henderson* court concluded unequivocally "that the ABC Test in *Dynamex* ***does not fit analytically with*** and was not

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[7] Petitioners agree the Shell entities were "akin to franchises." Pet. Br. p. 39 n. 26.

intended to apply to claims of joint employer liability." (*Henderson*, *supra*, 40 Cal.App.5th at p. 1125 [emphasis added].) For example, it reasoned, Prong B questions whether "the worker performs work that is outside the usual course of the hiring entity's business." (*Dynamex*, *supra*, 4 Cal.5th at p. 917.) But in a joint employment context, a worker

> already performs work that furthers the interests of the primary employer and is protected by wage and hour laws. Thus, asking whether that employee's work is 'outside the usual course of business' of a secondary employer makes little sense if one wants to determine whether the secondary employer has suffered or permitted the employee to work for them. The relevant inquiry is instead whether the secondary entity has the power to control the details of the employee's working conditions, or indeed, the power to prevent the work from occurring in the first place.

(*Henderson*, *supra*, 40 Cal.App.5th at p. 1129 [quoting *Martinez*, *supra*, 49 Cal.4th at p. 70]; *see also Curry*, *supra*, 23 Cal.App.5th at p. 314 ["In the joint employment context, the alleged employee is already considered an employee of the primary employer; the issue is whether the employee is also an employee of the alleged secondary employer."][8].)

This analysis applies equally where misclassification is alleged in a joint employer framework, even though *Curry* and *Henderson* are not misclassification cases. Even where a worker is misclassified, a primary entity exists to whom the worker directly renders services. The ABC Test focuses on this primary entity by placing the burden of proving a worker is not an employee on the "hiring entity"—the entity analogous to a primary employer in a misclassification context. If an entity-defendant is (1) a "hiring entity", and (2) has misclassified the worker under the standards set

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[8] The *Curry* Court also concluded, under the ABC Test's Prong B, that Shell (as a franchisor/licensor) was not in the business of operating fueling stations. (*Curry*, *supra*, 23 Cal.App.5th at p. 315.)

forth in the ABC Test, then that entity necessarily becomes the "primary employer" and the worker is "an admitted employee . . . subject to the protection of applicable labor laws and wage orders." (*Henderson*, *supra*, 40 Cal.App.5th at p. 1128; *see also Curry*, *supra*, 23 Cal.App.5th at p. 313 [under joint employment theory, worker is "already considered an employee of a primary employer"].)

As discussed above, Petitioners concede that this is a joint employment case that is contrary to *Henderson* and *Curry.* Pet. Br. pp. 38-40. And counsel for Petitioners, who also represented the *Henderson* plaintiff, repeated this concession in the Petition to this Court to review the *Henderson* decision. There, counsel acknowledged that in the *Vazquez* opinion, "the Ninth Circuit agreed that the ABC Test from *Dynamex* applies in the 'tiered' or joint employer context (and rejected the reasoning in *Curry*, 923 F.3d at 599)." (*See* RJN, Ex. B, at p. 9 [Petn. For Review, *Henderson v. Equilon Enterprises, Inc.* (Nov. 18, 2019, No. S259202)].)

This Court need not address whether *Dynamex* applies in a joint employment context, as California law (articulated by *Henderson* and *Curry*) is clear and settled that it does not. But for this reason, the Ninth Circuit's contrary, erroneous opinion should compel this Court to decline to answer the certified question and return the case for further proceedings under settled California law.

3. The Ninth Circuit Erred in Rejecting Patterson.

In addition to misinterpreting *Martinez* and *Dynamex*, and disregarding *Curry*, the *Vazquez* panel erroneously rejected the application of this Court's binding precedent in *Patterson*, *supra*, 60 Cal.4th 474.

In *Patterson*, this Court recognized franchising's fundamental attributes affect how to analyze franchisor liability:

> [a] franchisor, which can have thousands of stores located far apart, imposes comprehensive and meticulous

> standards for marketing its trademarked brand and operating its franchises in a uniform way. To this extent, the franchisor controls the enterprise. However, the franchisee retains autonomy as a manager and employer. It is the franchisee who implements the operational standards on a day-to-day basis, hires and fires store employees, and regulates workplace behavior. Analysis of the franchise relationship . . . must accommodate these contemporary realities.

(*Patterson*, *supra*, 60 Cal.4th at p. 478.) Understanding that "[f]ranchising is different," *id.* at p. 488, and that legal analysis of the franchise relationship "must accommodate" the businesses' realities, *id.* at 478, is referred to as the "*Patterson* gloss." The *Patterson* gloss is a lens through which to assess indirect franchisor liability, so that the very attributes of a franchise are not mistakenly conflated with a franchisor's "control" over the franchisee sufficient to justify assessing liability. For example, as a matter of course, franchisors will provide a formatted business plan, operations manual, and training; will require a consistency of uniforms, supplies, and décor; and will also have oversight to ensure quality and its standards are followed.

Here, the district court in *Vazquez* "applie[d] the *Martinez* standard, with the gloss of *Patterson* when considering the common-law definition of employment, and f[ound] that plaintiff unit franchisees [did] not raise[] a genuine dispute of material fact preventing the award of summary judgment for Jan-Pro[.]" ER 0044.

Reversing the district court, however, the *Vazquez* panel rejected the *Patterson* gloss as "extensive dicta," and, relying on superficial policy distinctions, held that *Patterson's* relevance was limited to tort cases, and

that it has no bearing on determining employee status in wage order cases.[9] (*Vazquez*, *supra*, 923 F.3d 575 at p. 594.) It accordingly held that no *Patterson* gloss was applicable.[10] (*Id.*) This was error.

Indeed, a different panel of the Ninth Circuit recently properly applied *Patterson* in a California wage order case (the very type of case in which the *Vazquez* panel held *Patterson* did not apply) in *Salazar*, *supra*, 944 F.3d 1024. There, the Court analyzed whether McDonald's Corporation was a joint employer of its franchisee's employee in a wage-and-hour dispute—using the test set forth in *Martinez* with a *Patterson* gloss. Applying the IWC's first definition of "to employ" identified in *Martinez*, "control over the wages, hours, or working conditions," the *Salazar* Court's analysis tracked *Patterson's* requirements—i.e., by "accommodat[ing]" the "realities" of the "franchise relationship"—and holding: "[a]ny direct control that McDonald's asserts over franchisees' workers is geared toward quality control." (*Id.* at pp. 1029-30.) This was appropriate for a franchisor policing its trademarks, and did not indicate the kind of "day-to-day" control of an employer. (*Ibid.*) Citing *Patterson*, it

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[9] The Ninth Circuit also asserted that this Court had "[r]ecogniz[ed] this conceptual difference," in *Dynamex* when it "favorably cited two Massachusetts decisions that applied the ABC test in the franchise context." [*Vazquez*, *supra*, 923 F.3d at p. 595; *see also* Pet. Br. p. 29.) Not so. The cases were cited for the proposition that Prongs B or C could be susceptible to summary judgment. Neither case examined joint employment, and therefore *Dynamex* cannot be taken to mean that the unique aspects of franchising have no place in analyzing joint employer liability. And neither case examined whether a franchisor was a "hiring entity" (a phrase unique to California law).

[10] Notably this holding also contravened the Georgia and Massachusetts decisions *in this same case* under *Massachusetts law* that applied a *Patterson*-like gloss in "recogniz[ing]" the "inherent[] . . . overlap" between a franchisor's business model and a franchisee's business, which the *Vazquez* panel rejected. (*Jan-Pro Franchising Internat., Inc. v. Depianti* (2011) 310 Ga.App. 265, 269].)

reasoned, "[f]ranchisors like McDonald's need the freedom to 'impose[ ] comprehensive and meticulous standards for marketing [their] trademarked brand and operating [their] franchises in a uniform way.'" (*Ibid.* [citing *Patterson*, *supra*, 60 Cal.4th at p. 478].)

Applying the second IWC definition of "to employ," "to suffer or permit to work," the *Salazar* court looked to the Court of Appeal's binding decision in *Curry*. Consistent with *Martinez*, *Curry* had treated this prong as "the defendant's knowledge of and failure to prevent the work from occurring" and held that "the responsibility for hiring, firing, and assignment of daily tasks belonged to the lessee/operator," and not the franchisor, Shell. The *Salazar* court found this instructive and consistent with *Patterson*'s guidance that "[a] franchisor . . . becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees." (*Salazar*, *supra*, 944 F.3d at p. 1030 [citing *Patterson*, *supra*, 60 Cal.4th at pp. 497-98].)

Finally, applying the third IWC definition of "to employ," "to engage, thereby creating a common law employment relationship," the *Salazar* court again properly looked to *Patterson*, noting "*Patterson* established a connection between the 'control' and 'common law' definitions of employer in the franchise context." (*Salazar*, *supra*, 944 F.3d at p. 1032.) Relying on *Patterson*'s conclusions that a "the 'means and manner' [of control]" exercised by "comprehensive [franchise] system alone'" cannot constitute the kind of "control" needed to support employer liability, but "[i]nstead, in the franchise context, a franchisor also must 'retain[ ] or assume[ ] a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees,'" to be

liable, *ibid*. [quoting *Patterson*, *supra*, 60 Cal.4th at p. 478], the Court concluded McDonald's could not be classified as an employer of its franchisees' workers because its "exercise of control over the means and manner of work performed at its franchises is geared specifically toward quality control and maintenance of brand standards . . . ." (*Id*.)

As can be gleaned from *Salazar's* application of *Patterson* in a wage and hour action in the franchise context, because Prong A of *Dynamex*'s ABC Test requires that the worker be "free from the control" of the franchisor in connection with the "performance of work" (*Dynamex*, *supra*, 4 Cal.5th at pp. 916-917), applying the ABC Test to the franchise relationship would overturn the franchise model itself, where "exercise of control over the means and manner of work performed . . . geared specifically toward quality control and maintenance of brand standards . . ." is a defining characteristic of the franchise relationship. (*See Salazar*, *supra*, 944 F.3d at p. 1032.)

Rather than confront the conflict with *Patterson* (and, as discussed below, state and federal regulations and trademark law) in applying the ABC Test to a franchising relationship, the *Vazquez* panel, while acknowledging Prong A's requirements and the disjunctive nature of the ABC Test, nonetheless erroneously concluded that "[t]he ABC Test . . . eschew[s] reliance on control over the performance of the worker as a necessary condition for an employment relationship . . ." and thus "the franchise context does not alter the *Dynamex* analysis, and the district court need not look to *Patterson* . . . ." (*Vazquez*, *supra*, 923 F.3d at 595.)

Exacerbating this fundamental error, the *Vazquez* panel offered additional "guidance" on applying Prong B of the ABC Test to franchisors, including that the franchisor may be liable if the franchisees are "necessary . . . to the [franchisor's] business," "are continuously used by the [franchisor]," or if "the [franchisor] describes itself" as in the same business

as the franchisee. (*Vazquez*, *supra*, 923 F.3d at p. 598.) But under any franchise model, a franchisee's workers are "necessary," "continuously used," and operate in the same business brand as the franchisor. That is exactly what the franchise model allows when it provides for licensing the franchisor's trademark in exchange for a franchise fee. (*Patterson*, *supra*, 60 Cal.4th at p. 478 [franchisor "controls the enterprise" to the extent it "imposes comprehensive and meticulous standards for marketing its trademarked brand and operating its franchises in a uniform way"].) Under the panel's guidance, in nearly every instance a franchisor would be an "employer" of a franchisee and its workers. Such a result is particularly problematic where, as here, the Petitioners themselves are franchisees that employ their own workers.

4. The Ninth Circuit's Analysis Conflicts with Federal Law.

The *Vazquez* panel's holding also conflicts with, and thus is preempted by, federal law. Federal law defines a "franchise" similarly to California law:

> (h) Franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:
>
> (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;
>
> (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and
>
> (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required

> payment or commits to make a required payment to the franchisor or its affiliate.

(16 C.F.R. § 436.1(h) [definition of "franchise"].)

Failing to apply the plain-language meaning of "hiring entity" to a non-hiring franchisor, the panel's "guidance" that, for example, under Prong B a court could consider dispositive whether a franchisee holds itself out as the same brand of service as the franchisor, contravenes the very definition of a franchise—which allows the franchisee the use of the trademark "to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor[]." (16 C.F.R. § 436.1(h)(1).) Similarly, the *Vazquez* panel's refusal to apply *Patterson* to the ABC Test makes Prong A (that the worker is "free from control" of the hirer) conflict directly with the federal requirement that a franchisor "will exert or has authority to exert ***a significant degree of control*** over the franchisee's method of operation." (16 C.F.R. § 436.1(h)(2) [emphasis added].)

The Lanham Act likewise requires a trademark holder to exert control over, and police the use of, their marks—including those licensed to franchisees—or risk their marks' abandonment. (*See* 15 U.S.C. § 1064 [abandonment as grounds for cancellation]; *id.* at § 1115(b)(2) [abandonment as defense to infringement].) If a franchisee's mere shared use of a franchisor's trademark, or a franchisor's control over their mark and brand, are sufficient to establish an employment relationship under the ABC Test, then the both the federal definition of a franchise and the trademark law policing requirements are frustrated and in conflict with the ABC Test. A franchisor cannot maintain valid trademarks without becoming an employer under California law, frustrating the very purpose of the franchise business model. (*See, e.g.*, *Patterson*, *supra*, 60 Cal.4th at p. 477 [among other things, recognizing franchising allows a franchisor to

"expand its enterprise while avoiding the risk and cost of running its own stores"].)

Challenged on these grounds (as JPI will do if the *Vazquez* decision stands), *Dynamex* and AB-5 risk conflict or obstacle preemption by federal law. (*See Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc*. (2007) 41 Cal.4th 929, 936 [conflict preemption "will be found when simultaneous compliance with both state and federal directives is impossible"; obstacle preemption arises when "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [Citation.]"].) Nothing in *Dynamex* or AB-5's legislative history reflects an intent to make such a radical change in federal franchise and trademark law.[11] The better reading harmonizes the ABC Test with existing law in *Martinez* and *Patterson*.

5. The Ninth Circuit's Errors Should Compel the Court to Rescind Certification.

Ignoring the ABC Test's plain language, the *Vazquez* decision misinterprets *Dynamex* as a vast expansion of the IWC wage order definitions of an "employer," well beyond what this Court identified as the intent of the IWC wage orders in *Martinez* and contrary to *Curry* and *Henderson.* Further, it rejects *Patterson*, and creates a reading of California law inconsistent with, and possibly preempted by, franchise and trademark law. This is therefore an inappropriate record on which to decide retroactivity because a decision would not necessarily "determine the

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[11] That the International Franchise Association requested an explicit legislative carve-out to AB-5, which was not implemented, does not affirmatively indicate AB-5 therefore applies to franchises, as Petitioners suggest. Pet. Br. pp. 18-19. The ABC Test applies only to "hiring entities," which must be addressed on a case-by-case basis.

outcome" of the matter, and thus risks being purely advisory. (Cal. Rules of Court, rule 8.548(a).)

As demonstrated above, regardless of this Court's answer to the certified question, if the *Vazquez* panel were to issue a final order consistent with its earlier opinion, it will conflict with *Curry*, *Henderson*, and *Salazar*. Under such circumstances, JPI would petition for rehearing or rehearing *en banc* to attempt to right the panel's further error, or, if the petition is not granted, to urge the district court to ignore the mandate. (*See Gallagher v. San Diego Unified Port Dist.* (S.D. Cal. 2014) 14 F.Supp.3d 1380, 1389 [district court may ignore a clearly erroneous mandate].) This simply is not the appropriate case in which to decide such an important issue.

By contrast, this Court already has another case in "grant and hold" status on which it could decide retroactivity: *Gonzales v. San Gabriel Transit, Inc.* (2019) 40 Cal.App.5th 1131, *review granted* Jan. 15, 2020, S259027 [class action by alleged misclassified drivers for transportation services company]. JPI therefore respectfully urges this Court to decline to answer the certified question and to respond to the Ninth Circuit by indicating that certification is rescinded with instructions consistent with the points and authorities set forth above.

B. In the Alternative, Considerations of Fairness Dictate *Dynamex* Should Apply Prospectively Only.

Assuming *arguendo* that the ABC Test applies to misclassification claims against non-hiring franchisors, which JPI disputes, *Dynamex* should not apply retroactively.

While judicial decisions generally operate retroactively, *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79, "compelling and unusual circumstances [can] justify[] departure from the general rule." (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 983.) Here, "considerations of fairness and public policy are so compelling in [this]

particular case that, on balance, they outweigh the considerations that underlie the basic rule [of retroactivity]." (*Id.*)

The unprecedented change that *Dynamex* ushered in should apply only prospectively. First, JPI, and franchisors generally, relied "on the old standards" regarding employee classification—that is, both the common-law "control" standard *and* the statutory franchising scheme regulating franchising with the understanding that it did not create a vast network of direct employment relationships. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 153 [fairness inquiry includes "reliance on old standards by parties or others similarly affected"].) Second, because the ABC Test was adopted wholesale from outside California, it was an unforeseeable change in the law. (*Ibid.* ["considerations of fairness" include "the ability of litigants to foresee a coming change in the law"].) Finally, applying *Dynamex* retroactively violates JPI's due process rights.

1. JPI, and Franchisors Generally, Relied on the Prior Law.

"[T]here is a recognized exception [to the rule of retroactivity] when a judicial decision changes a settled rule on which the parties below have relied." (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1282.) Courts have found exceptions to retroactivity "where a . . . statute has received a given construction by a court of last resort, and contracts have been made or property rights acquired in accordance with the prior decision . . . ." (*Peterson v. Superior Court*, *supra*, 31 Cal.3d at p. 152 [citing *Los Angeles County v. Faus* (1957) 48 Cal.2d 672, 681].) "Under those circumstances it has been the rule to give prospective, and not retrospective, effect to the later decision." (*Los Angeles County v. Faus*, *supra*, 48 Cal.2d at p. 681; *accord Newman*, *supra*, 48 Cal.3d at p. 989 ["The most compelling example of such reliance occurs when a party has acquired a vested right or entered into a contract based on the former rule,

and we are more reluctant to apply our decisions retroactively in those cases."].)

Here, JPI entered into franchise agreements with its Regional Master Franchisors based upon settled prior law that *Dynamex* changed, and therefore, *Dynamex* should apply prospectively only. Specifically, in assessing potential liability for employment-based claims, including for misclassification, JPI, and franchisors generally, relied on (1) a robust federal and state statutory scheme regulating franchises and their trademarks, which mandate a franchisor maintain control over the enterprise and its marks; (2) fifty years' of caselaw assessing franchisor liability in a way that allows for the federal- and state-mandated control of the enterprise and trademarks without also creating direct employer liability; (3) the prior versions of tests for worker classification, which focus precisely on the amount of "control" a potential employer has over a worker. That JPI's reliance was reasonable is bolstered by a prior decision by a California administrative body that, under California law, Jan-Pro® unit franchisees were properly classified as independent contractors.

1. A franchise contract does not create an employment relationship between a franchisor and franchisee. As discussed above, under the federal regulations at 16 C.F.R. § 436.1(h), a franchise consists of a contractual "commercial relationship" pursuant to which the "franchisee will obtain the right to operate a business." (16 C.F.R. § 436.1(h)(1); *see also* Corp. Code, § 31005, subd. (a) [similarly worded state regulation], Bus. & Prof. Code, § 20001, subds. (a)-(c) [same].) The franchisor, in turn, "will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation." (*Id.* at § 436.1(h)(2).) This does not convert a franchisee into an employee of the franchisor—it is an independent business operator. (A contrary reading creates a conflict in the

law, as discussed above.) Nor does the franchisor employ a franchisee's employees, which would frustrate the entire purpose of a franchise, to allow a business enterprise to expand its brand ***without*** undertaking the obligations and expenses of direct employment across vast geographical regions. (*See, e.g.*, *Patterson*, *supra*, 60 Cal.4th at p. 477 ["The franchisor . . . can expand its enterprise while avoiding the risk and cost of running its own stores."].) State law regulating franchises tracks the federal definitions.

2. Under at least fifty years' of precedent in this state, franchisor liability for a franchisee's workers—whether tort-based or labor-based—has been analyzed using a standard focused on "control" that allows for the fact that the franchising relationship requires a degree of control over the enterprise and the trademarks under federal and state law. (*See e.g.*, Corp. Code § 31005, subd. (a); *see also* Bus. & Prof. Code, § 20001, subds. (a)-(c) [same]; 16 C.F.R. § 436.1(h) [federal counterpart worded in similar language].)

Under longstanding and settled California law, only an unusual amount of control over day-to-day operations exposes franchisors to employer liability. In *Patterson*, this Court, the state's "court of last resort" (*see Peterson v. Superior Court*, *supra*, 31 Cal.3d at p. 152), reviewed the history of franchisor liability in this state stretching back to *Nichols v. Arthur Murray, Inc*. (1967) 248 Cal.App.2d 610, which identified the "right to control" as the proper test to determine franchisor liability for a franchisee's actions—and not just control sufficient to obtain the "desired result of the enterprise . . . but [over] the manner and means by which such result is achieved." (*Patterson*, *supra*, 60 Cal.4th at pp. 492-493 [citing cases dating back to 1940].) This Court compiled decisions over the decades holding that franchisors generally "lacked sufficient control of their franchisees' day-to-day operations, including employment matters," to be

held vicariously liable for the actions of their franchisee or franchisee's employees. (*Id.* at p. 494 [citing cases].)

This Court also analyzed *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, involving the liability of a 7-Eleven® franchise in selling clove cigarettes to a minor, allegedly causing his death. (*Patterson*, *supra*, 60 Cal.4th at pp. 494-96.) This Court approved of *Cislaw*'s analysis affirming a franchisee's independent contractor status, because the franchisee controlled the "manner and means" of day-to-day operations. (*Id.* at p. 496.) The decision confirmed the nature of franchising must be accounted for when assessing a franchisor's control over a franchisee: "Analysis of the franchise relationship . . . must accommodate these contemporary realities [of the business model]," which allows a franchisor to "impose[] comprehensive and meticulous standards for marketing its trademarked brand and operating its franchises in a uniform way" without assuming liability. (*Id*. at p. 478.)

Thus, even before *Patterson*, California jurisprudence has been remarkably consistent in assessing franchisor liability in light of a franchise's characteristics—and franchisors, including JPI, assessed their potential liability in reliance on this settled law. In fact, JPI's reliance on this schema is even more pronounced given its three-tiered structure. Only the Regional Master Franchisors have the contractual right to sell franchises in their regions. (New Venture Franchise Agreement, Section 3, ER0234 [grant of exclusive territorial license to sell franchises]; CNI Regional Franchise Agreement, Section 3, ER0179 [same].) JPI is thus a further step removed from the day-to-day operational "control" an ordinary franchisor may exert over a franchisee.

3. Franchisors justifiably relied on this jurisprudence in assessing this state's control-based tests for worker misclassification, as articulated in the common law and later by this Court in *S.G. Borello &*

Sons v., Inc. v. Dept of Industrial Relations (1989) 48 Cal.3d 341 ("*Borello*"). In the prior multi-factor analysis that Petitioners claim the ABC Test replaced, "control" was the most important factor. In *Borello*, this Court held that

> the "control-of-work-details" test [in the Workers Compensation Act] for determining whether a person rendering service to another is an "employee" or an excluded "independent contractor" must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the "history and fundamental purposes" of the statute.

(*Borello*, *supra*, 48 Cal.3d at pp. 353-54.) And of all the factors, "the right to control work details was the 'most important' or 'most significant.'" (*Id.* at p. 350.)

This Court reemphasized that "control" was the predominant factor in *Ayala v. Antelope Valley Newspapers, Inc*. (2014) 59 Cal.4th 522, 531 ("*Ayala*"). In articulating what test to apply to newspaper carriers' claims that they were misclassified as independent contractors, this Court reiterated:

> Under the common law, "'[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.'" [Citations.] What matters is whether the hirer "retains all necessary control" over its operations. [Citations.] "'[T]he fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it.'" [Citations.] Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because "[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities." [Citations.]

(*Ayala*, *supra*, 59 Cal.4th at p. 531 [collecting cases].) Citing *Borello*, this

Court reinforced that "control over how a result is achieved lies at the heart of the common law test for employment." (*Id.* at p. 533 [citing *Borello*, *supra*, 48 Cal.3d at p. 350].)

Having the right to control "how a result is achieved," *Ayala*, *supra*, 59 Cal.4th at p. 533, with respect to any given task for which a worker is hired, harkens back specifically to the longstanding principle of franchisor liability discussed by this Court in *Patterson*, where it is not enough if a franchisor merely dictates the "desired result of the enterprise" but must also control "'the manner and means' by which ***such result is achieved***." (*Patterson*, *supra*, 60 Cal.4th at p. 493 [emphasis added] [citations omitted].) Thus, a franchisor's control over certain aspects of the enterprise, as mandated by federal and state regulations, is simply not enough under the misclassification test as articulated in common law, *Borello*, or *Ayala*, to create an employment relationship.

JPI's reliance on the prior law was particularly well-justified given that the California Unemployment Insurance Appeals Board ("CUIAB") had previously affirmed that Jan-Pro® unit franchisees were properly independent contractors under California's multifactor common law test. (RJN, Ex. C [*Connor-Nolan Inc. v. Employment Development Department* (Calif. Unemployment Ins. App. Bd., Nov. 17, 2014) Case No. 4764599 (T), *as reinstated by* Case Nos. AO-418191 and AO-418192 (July 23, 2018) ["CUIAB Decision"]). In 2013, CNI (one of the two Regional Master Franchisors at issue here) appealed two findings by the Employment Development Department ("EDD") that its unit franchisees were employees and assessing insurance and tax contributions, penalties, and interest. (*See id.*)

After a hearing, the CUIAB determined that CNI's franchisees were

properly independent contractors, not employees.[12] The CUIAB considered "the primary factor of the right to control the manner and means by which the work is completed," as well as ten additional "secondary factors" from *Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943 [a misclassification case involving television writers]. Applying these factors in light of this state's franchisor liability jurisprudence discussed above, the CUIAB reasoned: "Applying the Court's holdings in both *Cislaw* and *Patterson*, compliance with the franchisor's operational system does not establish the control necessary for an employment relationship to exist." (*Id.* at p. CUIAB17.)

That the unit franchisees were integral to the franchised business was not dispositive, as the CUIAB elaborated:

> It is difficult, if not impossible to identify any franchised business that is not an integral part of a franchisor's business. That is the very nature of a franchise. The right to use the franchisor's mark in the operation of the business, either by selling goods or performing services identified with the mark or by using the mark, in whole or in part, is an integral part of franchising. To require the services provided by the [unit franchisees] to be substantially different from [CNI's] business for the [unit franchisees] to be considered an independent contractor is simply disregarding the nature of a franchised business. In fact, this Petitioner [CNI], and any other franchisor is foremost in the business of selling franchisees.

(*Id.* at p. CUIAB19.)

Though this decision is obviously not binding as legal precedent, the fact that a California-based judge applied California law to uphold Jan-Pro® unit franchisees' independent contractor status obviously gave JPI comfort that its franchise model complied with California law.

The Petitioner-Unit Franchisees' theory here, which the *Vazquez*

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[12] Petitioner Gloria Roman was part of the audit class the CUIAB found to be properly classified as an independent contractor.

panel adopted, is that their franchise agreements with the Regional Master Franchisors should be nullified and replaced by a direct employment relationship with a completely different party—JPI—through application of the brand-new ABC Test. But JPI relied on statutory and caselaw governing franchises in executing its contracts with the Regional Master Franchisors, including a decision explicitly upholding the unit franchisees' independent contractor status, and has no direct contractual relationship with the Petitioners. Because JPI relied to its detriment on the legal regime that Petitioners claim the ABC Test sweeps away, *Dynamex* should apply only prospectively.

2. The ABC Test was an Unforeseeable Change in the Law.

Ordinarily, "[c]ourts decide controversies—and they decide them in light of preexisting law." (*Newman*, *supra*, 48 Cal.3d at p. 980.) Because the ABC Test was not "preexisting law" in California, it should apply prospectively only.

Although "the origin and history of the suffer or permit to work language in *Martinez* itself makes it quite clear that this standard was intended to apply beyond the joint employer context," and so could determine worker classification, *Dynamex*, *supra*, 4 Cal.5th at p. 944, to determine *how* to apply that standard, this Court concluded "it is appropriate to look to a standard, commonly referred to as the 'ABC' test, ***that is utilized in other jurisdictions***," *id.* at p. 916 [emphasis added]. It is no secret this Court imported the ABC Test to be used instead of existing California law: This Court outlined the many justifications that it believed made the ABC Test superior to "[a] multifactor standard . . . like . . . the [preexisting] *Borello* standard," which, like any multifactor test, had significant disadvantages. (*Id.* at p. 954.) Thus, this Court acknowledged point blank in *Dynamex* that the ABC Test was the creation of new law in

California.

Petitioners claim the ABC Test merely "reorganized" the *Borello* factors. Pet. Br., pp. 23-24. This is wrong. The *Borello* factors consider the control a potential employer has over the details of the work balanced against numerous other factors. (*See Borello*, *supra*, 48 Cal.3d at pp. 354-55.) By contrast, the ABC Test's three prongs are disjunctive. Prong A apparently broadens employment liability for non-hiring franchisors from looking at the "manner and means" of a franchisor's control over a franchisee, *see Patterson*, *supra*, 60 Cal.4th at p. 493, to a bare factual inquiry of whether a franchisee is entirely "free" from a franchisor's control—a factor that will never be met because a franchise must exert control over the enterprise and its trademarks. Prongs B and C of the ABC Test require no showing of control at all. Indeed, as the *Vazquez* decision clearly states, Prong B alone is "most susceptible to summary judgment" on the limited record before the district court—which would never have been the case under *Borello*. (*Vazquez*, *supra*, 923 F.3d at p. 596.) Accordingly, now, two factors that, under *Borello*, were previously only weighed against each other, with "control" being the most important (see *supra*), are completely dispositive on their own.

Petitioners' claim that the ABC Test is merely a restatement of *Borello* is disingenuous at best: Elsewhere they have conceded that that *Dynamex's* ABC Test "entirely upended" the previous legal regime. (RJN, Ex. D at p. 4 [Plaintiff-Appellants' Motion to Remand, *Vazquez v. Jan-Pro Franchising Int'l* (9th Cir. May 9, 2018, No. 17-16096) ECF No. 37 [conceding the district court's analysis "which focuses on the degree of control that Defendant had over Plaintiffs, has been entirely upended by *Dynamex*"].) And Petitioners' counsel has admitted in another appeal before the Ninth Circuit that *Dynamex* created a "sea change" in the law of misclassification that "drastically altered" the legal landscape. (RJN, Ex. E,

at pp. 2, 28 [Opening Br. of Plaintiff-Appellants, *Haitayan v. 7-Eleven, Inc.* (9th Cir. Oct. 10, 2018, No. 18-55462) ECF No. 10].)

Most, if not all, other states have adopted the ABC Test through legislation. (*See* Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Contractor and Misclassification Statutes* (2015) 18 U. Pa. J. L. & Soc. Change 53, 58 [tracing "dramatic boom of legislating activity" in 22 states through 2012].) In the legislative context, a "change in the law does not apply retroactively to impose liability for actions not subject to liability when performed." (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 470.) "'[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . . For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" (*Id.* at p. 475 [citing *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265].)

Here, it speaks volumes that just over one year later, with the enactment of AB-5, the Legislature imported the new ABC Test from *Dynamex* wholesale. This is an overt acknowledgement that the ABC Test was new law. Under these "compelling and unusual circumstances," a "departure from the general rule" that judicial decisions operate retroactively is warranted. (*Newman*, *supra*, 48 Cal.3d at p. 983.)

3. Applying Dynamex Retroactively Violates JPI's Due Process Rights.

Finally, due process mandates *Dynamex* should operate prospectively. There is no question that, under Petitioners' reading here, the ABC Test will expand civil penalties for franchisors where none existed

before. "[T]he basic protection against 'judgments without notice' afforded by the Due Process Clause . . . is implicated by civil penalties." (*BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 574 n. 22; *see also Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 281 ["Retroactive imposition of punitive damages would raise a serious constitutional question."].) And "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 352.)

The *Vazquez* panel issued an order "reinstating" its holding that application of *Dynamex* here would not offend due process. Citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.* (1984) 467 U.S. 717, the *Vazquez* panel determined that "[t]he decision to impose retroactive liability" satisfies "the Fourteenth Amendment's due process guarantee" when it "'is itself justified by a rational legislative purpose.'" (*Vazquez*, *supra*, 923 F.3d at p. 589.) But this is precisely the issue with *Dynamex*—California did not initially adopt the ABC Test through the legislative process. And it was not adopted through ordinary judicial development of the common law. (*Cf. id.* [citing Seventh Circuit authority that common law developments require "even more deference"].) This Court adopted the ABC Test wholesale from other jurisdictions. Thus, looking to a rational legislative purpose to justify the retroactive expansion of civil penalties under the ABC Test under *Dynamex* improperly relies on the Legislature's *ex post facto* adoption of AB-5.

For these same reasons, this case is distinguishable from other California cases assessing retroactive civil penalties for employer liability. Generally, this Court has "declined to restrict [its] decisions to prospective application when doing so 'would, in effect, negate the civil penalties, if any, that the Legislature has determined to be appropriate in this context,

giving employers a free pass as regards their past conduct' and hence 'would exceed our appropriate judicial role.'" (*Frlekin v. Apple Inc*. (2020) 8 Cal.5th 1038, 1057 [citing *Alvarado v. Dart Container Corp. of Calif.* (2018) 4 Cal.5th 542, 573].) But here, the Legislature did not determine civil penalties for misclassification should be appropriately assessed under the ABC Test until ***after*** this Court's decision in *Dynamex*. Thus, the justification that this Court would exceed its judicial role for failing to enforce a preexisting Legislative determination cannot apply.

JPI contends that the ABC Test does not apply here, or to franchisors generally, if they are not "hiring entities." But if this Court disagrees, then JPI respectfully posits that its reliance on prior law, the unforeseeability of this Court's adoption of the ABC Test, and due process concerns present sufficient "compelling and unusual circumstances justifying departure from the general rule" of retroactivity. (*Newman*, *supra*, 48 Cal.3d at p. 983.)

CONCLUSION

JPI respectfully requests this Court decertify the question of whether *Dynamex* applies retroactively, or, in the alternative, determine that *Dynamex* does not apply retroactively.

Respectfully submitted,

Dated: May 27, 2020

WILLENKEN LLP

/s/ Jason H. Wilson

Jason H. Wilson
Attorneys for Respondent
JAN-PRO FRANCHISING
INTERNATIONAL, INC

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.204(c)(1).)

I, the undersigned appellate counsel, certify that this brief consists of 13,983 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.204(c)(1), relying on the word count of the Microsoft Word 2016 computer program used to prepare the brief.

Respectfully submitted,

Dated: May 27, 2020

WILLENKEN LLP

/s/ Jason H. Wilson

Jason H. Wilson
Attorneys for Respondent
JAN-PRO FRANCHISING
INTERNATIONAL, INC

NO. S258191

IN THE SUPREME COURT OF CALIFORNIA

GERARDO VAZQUEZ, GLORIA ROMAN, and JUAN AGUILAR, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

JAN-PRO FRANCHISING INTERNATIONAL, INC.
Respondent.

Review of Certified Question from the Ninth Circuit
(Ninth Circuit Case No. 17-16096)
On Appeal from N.D. Cal. Case No. 3:16-cv-05961
Before the Honorable William Alsup

PROOF OF SERVICE

JEFFREY M. ROSIN
O'HAGAN MEYER PLLC
111 HUNTINGTON AVENUE
SUITE 2860
BOSTON, MA 02199-7733
TELEPHONE: (617) 843-6800
FACSIMILE: (617) 843-6810
E-MAIL:
JROSIN@OHAGANMEYER.COM

JASON H. WILSON (SBN 140269)
EILEEN M. AHERN (SBN 216822)
AMELIA L. B. SARGENT (SBN 280243)
WILLENKEN LLP
707 WILSHIRE BLVD., SUITE 3850
LOS ANGELES, CA 90017
TELEPHONE: (213) 955-9240
FACSIMILE: (213) 955-9250
E-MAIL:
JWILSON@WILLENKEN.COM

Attorneys for Respondent
JAN-PRO FRANCHISING INTERNATIONAL, INC.

PROOF OF SERVICE

I am over the age of 18 and am not a party to the within action. I am employed by Willenken LLP and my business address is 707 Wilshire Boulevard, Suite 3850, Los Angeles, California 90017.

On May 27, 2020, I served a true copy of the document titled **RESPONDENT JAN-PRO FRANCHISING INTERNATIONAL, INC.'S ANSWERING BRIEF** on the interested parties in this action as follows:

Shannon Liss-Riordan Lichten & Liss-Riordan, P.C. 729 Boylston Street, Suite 2000 Boston, MA 02116	Attorneys for Plaintiff/Appellants/Petitioners *VIA TRUEFILING E-SERVICING*
Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004	National Employment Law Project: Amicus curiae *VIA TRUEFILING E-SERVICING*
Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004	Equal Rights Advocates: Amicus curiae *VIA TRUEFILING E-SERVICING*
Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004	Dolores Street Community Services: Amicus curiae *VIA TRUEFILING E-SERVICING*
Catherine Ruckelshaus National Employment Law Project 90 Broad Street, Suite 1100 New York, NY 10004	Legal Aid at Work: Amicus curiae *VIA TRUEFILING E-SERVICING*

Catherine Ruckelshaus
National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 10004

Worksafe, Inc.: Amicus curiae

VIA TRUEFILING E-SERVICING

James F. Speyer
Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017

International Franchise Association: Amicus curiae

VIA TRUEFILING E-SERVICING

Bradley Alan Benbrook
Benbrook Law Group, PC
400 Capitol Mall, Suite 2530
Sacramento, CA 95814

National Federation of Independent Business Small Business Legal Center: Amicus curiae

VIA TRUEFILING E-SERVICING

Adam G. Unikowsky
Jenner & Block LLP
1099 New York Avenue, NW Suite 900
Washington, DC 20001-4412

Chamber of Commerce of the United States of America: Amicus curiae

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James F. Speyer
Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017

California Chambers of Commerce: Amicus curiae

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Catherine Ruckelshaus
National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 10004

National Employment Law Project: Amicus curiae

VIA TRUEFILING E-SERVICING

Kevin F. Ruf
Glancy Prongay & Murray
1925 Century Park East, Suite 2100
Los Angeles, CA 90067

National Employment Law Project: Amicus curiae

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Aaron D. Kaufman Leonard Carder, LLP 1330 Broadway, Suite 1450 Oakland, CA 94612	National Employment Law Project: Amicus curiae *VIA TRUEFILING E-SERVICING*
Kevin F. Ruf Glancy Prongay & Murray 1925 Century Park East, Suite 2100 Los Angeles, CA 90067	California Employment Lawyers Association: Amicus curiae *VIA TRUEFILING E-SERVICING*
Aaron D. Kaufman Leonard Carder, LLP 1330 Broadway, Suite 1450 Oakland, CA 94612	California Employment Lawyers Association: Amicus curiae *VIA TRUEFILING E-SERVICING*
Paul Grossman Paul W. Cane, Jr. Paul Hastings LLP 101 California Street, 48th Floor San Francisco, CA 94111	California Employment Law Council and Employers Group: Amicus curiae *VIA TRUEFILING E-SERVICING*

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On April 17, 2020, the Judicial Council of California mandated electronic service of documents in most civil cases. The temporary rule reduces service by mail by requiring attorneys to use electronic service when requested to do so. Pursuant to the temporary emergency, Rule 12 has been added as an Appendix I, Emergency Rules Related to COVID-19, of the California Rules of Court.

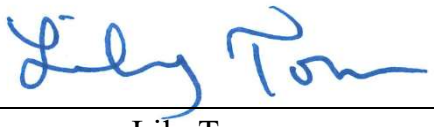
In the absence of an email address, the following parties were served via U.S. mail by placing a true and correct copy of the foregoing document in an addressed sealed envelope and depositing it in the United States mail, first-class postage fully prepaid, to the following:

Office of the Clerk
U.S. Court of Appeals for the
Ninth Circuit
James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Ninth Circuit Court of Appeals

VIA U.S. MAIL

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 27, 2020 at Los Angeles, California.



Lily Tom