Littler | WPI WORKPLACE POLICY INSTITUTE

January 15, 2020

Office of the Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-7303

RE: Petition for Review of *Gonzales v. San Gabriel Transit, Inc.*
Case No. S259027

To the Honorable Justices of the Supreme Court of California:

Pursuant to California Rule of Court 8.500(g), the undersigned *amici* write in support of the Petition for Review filed by Defendant/Respondent San Gabriel Transit, Inc. in the above-captioned matter (the "Petition"). The Petition asks this Court to decide whether California state law and federal due process concerns prohibit the retroactive application of its decision in *Dynamex Operations West. Inc. v. Superior Court*, 4 Cal.5th 903 (2018) ("*Dynamex*").[1]

I. Interests of *Amici*

Littler Mendelson's Workplace Policy Institute ("WPI") facilitates the employer community's engagement in legislative and regulatory developments that affect their workplaces and business strategies. WPI harnesses the deep subject matter expertise of Littler, the largest law firm in the world with a practice devoted exclusively to the representation of employers in employment and labor law matters.

The California Association for Health Services at Home ("CAHSAH") is a California non-profit mutual benefit corporation whose mission is to promote quality home care and enhance the effectiveness of its members. CAHSAH comprises and represents hundreds of members located throughout the state, as well as dozens of affiliates providing health and supportive services and products in the home. Among its purposes, CAHSAH's seeks to foster economic growth in the home care and hospice community in California. Many CAHSAH members utilize the services of independent contractors in the treatment of their clients and patients.

The California Restaurant Association ("CRA") serves the California restaurant industry by promoting, protecting, and working to improve the interests of restaurateurs and operators of like industries in the State. Its members include eating and hospitality establishments owned

[1] Although this Court has agreed to take up this matter by way of a question certified to it by the U.S. Court of Appeals for the Ninth Circuit in *Vazquez v. Jan-Pro Franchising, Int'l,* Case No. S258181, *Amici* respectfully submit that it is equally important to grant the Petition insofar as until the Court renders a decision in *Vazquez*, *Gonzales* remains binding on lower state courts. Also, while the question presented in *Vazquez* concerns the retroactivity of *Dynamex* as a matter of state law, the instant Petition also raises questions of federal due process.

and operated by parties who prepare and serve food to the public. CRA strives to improve the business environment for its members by advocating on a slate of national, state, and local issues affecting their businesses. CRA also represents its members by litigating issues of widespread concern in the restaurant industry.

HR Policy Association ("HRPA") represents the chief human resource officers of more than 375 of the largest corporations doing business in the United States and globally (who collectively employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce). Since its founding, one of HRPA's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation's largest private sector employer, supporting 42 million working Americans, and contributing $2.6 trillion to annual GDP.

The Restaurant Law Center is a public policy organization created with the purpose of providing the restaurant and foodservice industry's perspective on legal issues significantly impacting it. The restaurant industry is a labor-intensive industry comprised of over one million restaurants and foodservice outlets which employing almost 15 million people.

As recognized by the U.S. Circuit Court of Appeals for the Ninth Circuit, the question of whether *Dynamex* is given retroactive effect "could lead to substantially greater liability for California businesses" including large and small businesses, franchisors, and gig-economy companies, to name but a few. *Vazquez v. Jan-Pro Franchising, Int'l.*, 939 F.3d 1045, 1049 (9th Cir. 2019). The status of *Amici's* members' workers—many of whom face potential uncertainty as to whether they are classified as statutory employees for purposes of California wage and hour law—is likewise inextricably entwined with the scope of *Dynamex*, and the question of whether the case applies to them retroactively.

Dynamex has potential application to two million independent contractors in California, roughly ten percent of the state's workforce. As trade associations representing thousands of California employers, given the profound economic consequences to our members that these questions entail, our interest as *amici* in getting clarity and certainty as to the temporal scope of *Dynamex* so that our members may conduct their businesses accordingly is manifest.

II. The Court Should Hold That *Dynamex* Applies Prospectively from the Date of Its Issuance.

Should this Court grant the Petition, we submit that its answer to the question it presents—whether California law and federal due process restrictions prohibit the retroactive application of *Dynamex*—must be in the affirmative. That is to say, the Court should make

clear that *Dynamex* does not apply retroactively, but rather is prospective in its application only, and applies to contractual relationships entered into on or after the date of its filing on April 30, 2018. To do less would be to ignore the "considerations of fairness and public policy" which require that a court's decision "be given only prospective application." *Woods v. Young*, 53 Cal.3d 315, 330 (1991).

"Although as a general rule judicial decisions are to be given retroactive effect, there is a recognized exception when a judicial decision changes a settled rule on which the parties below have relied." *Williams & Fickett v. Cty. of Fresno*, 395 P.3d 247, 262 (1989). This Court has squarely held that where a case articulates a new rule in the context of labor and employment law, such a rule should be made prospective based on "the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive ... retroactivity's effect on the administration of justice, and the purposes to be served by the new rule." *Claxton v. Waters*, 34 Cal. 4th 367, 378-79 (2004).

The Court's *Dynamex* decision presents the paradigm of such an instance. Prior to *Dynamex*, the question of whether a worker was properly classified as an independent contractor had been governed for almost thirty years by the standard this Court set forth in its seminal decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), which was upended by *Dynamex*. Indeed, in its request that this Court answer the question certified to it in *Vazquez*, the Ninth Circuit Court of Appeals noted that *Dynamex* "enunciated a new test" for determining whether a given worker was a statutory employee for purposes of California's wage orders. 939 F.3d at 1049. Similarly in *Dynamex* itself, this Court, after engaging in a lengthy exposition of prior case law relating to independent contractor status, employee classification, and joint employment liability, recognized that it was now taking up "the issue we did not reach" in prior cases. 4 Cal.5th at 941.

"The circumstance most strongly militating against full retroactivity of our present holding is its unforeseeability to counsel." *Estate of Propst v.* Stillman, 50 Cal. 3d 448 (1990). There is no question that *Dynamex* adopted a wholly new standard for classification as an employee upon which no party could reasonably have been required to rely prior to its decision. To the contrary, to the extent *Borello* was applied consistently and without significant question for almost three decades, reliance upon it by parties and counsel is wholly reasonable and foreseeable.

* * *

For the foregoing reasons, *Amici* request that this Court grant the Petition and adopt the analysis and reasoning set forth above to conclude that its *Dynamex* decision is prospective only in its application, and applicable only to contractual relationships entered into on or after the date of its issuance.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I am employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 333 Bush Street, 34th Floor, San Francisco, California 94104. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On October 15, 2019, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

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GONZALES V. SAN GABRIEL TRANSIT, INC.

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Executed on January 15, 2020, at San Francisco, California.

Rita R. Fix

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The following Appellate Document has been submitted.

Case Type: Civil

Case Number: S259027

Case Name: Gonzales v. San Gabriel Transit, Inc.

Name of Party: Amici

Type of Document(s):
Letter Brief

Name of Attorney or Self-Represented Party Who Prepared Document: Bruce J. Sarchet

Bar Number of Attorney: 121042

List of Attachment(s):

S259027_S259027_LB_Amici.pdf

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File original + 10 copies w/ Clerk of CA Supreme Court

Fix, Rita

From: cmoran@dtrac.firstlegal.com on behalf of Cynthia Moran <cmoran@dtrac.firstlegal.com>
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