No. 18-15386

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAEF LAWSON, individually and on behalf of other similarly situated individuals, and in his capacity as Private Attorney General Representative,
Plaintiff-Appellant,

v.

GRUBHUB HOLDINGS INC. and GRUBHUB INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of California, No. 3:15-cv-05128-JSC
(Hon. Jacqueline Scott Corley, U.S. Magistrate Judge, presiding)

BRIEF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS-APPELLEES

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DISCLOSURE STATEMENTS PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 26.1 AND 29

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby state that the associations represented on this brief have no parent corporations and have issued no stock.

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby state that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person—other than the *amici curiae* associations, their members, or their counsel—contributed money intended to fund preparing or submitting the brief.

AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Federation of Independent Business Small Business Legal Center and Civil Justice Association of California submit this *amici curiae* brief in support of Defendants-Appellees.

As an organization that represents California's small and independent businesses, amicus NFIB Legal Center has a significant interest in this appeal. The organization files here to emphasize the devastating consequences that retroactive application of the ABC test announced in *Dynamex Operations West, Inc. v. Super. Ct.*, 4 Cal. 5th 903 (2018), would have on smaller and medium-size businesses in California.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and

protect the rights of its members to own, operate and grow their businesses.

NFIB represents member businesses nationwide, including over 20,000 in California, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership reflects American small business.[1]

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center has filed in numerous employment law and labor cases, including *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. ___, 131 S. Ct. 2448 (2018), *Encino Motorcars, LLC v. Navarro*, 584 U.S. ___, 138 S. Ct. 1134 (2018), *Unite Here Local 355 v. Mulhall*, U.S. Sup. Ct. No. 12-99, *certiorari dismissed as improvidently granted*, 134 S. Ct. 594 (2013), *Christopher v. SmithKline*

[1] *Who NFIB Represents*, NAT'L FED'N INDEP. BUS., http://www.nfib.com/about-nfib/what-is-nfib/who-nfib-represents.

Beecham, 567 U.S. 142 (2012), *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008) and *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007).

The Civil Justice Association of California ("CJAC") is a 40-year-old association of businesses, professional organizations and financial institutions dedicated to making our civil liability laws more fair, economical, uniform and certain. Toward this end, CJAC regularly petitions the government for redress of grievances when it comes to determining who owes, how much, and to whom when some claim that the conduct of others occasions them harm. *See, e.g.*, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). The issue whether the *Dymanax* opinion should be given retroactive application to reverse the district court's decision in this case falls plainly within CJAC's principal objectives.

Reversing the District Court's decision in this case will threaten increased liability for countless California businesses involved in wage-and-hour disputes. Many of these firms are small

businesses that will face potentially catastrophic liability if the decision below is overturned. Given this looming danger for businesses dealing with employment issues, the NFIB Legal Center and CJAC believe that our brief provides a helpful perspective on the dispute between the parties over whether *Dynamex* applies retroactively.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *Dynamex* decision should not apply retroactively. In *Dynamex*, the California Supreme Court rejected an independent contractor classification test relied upon by California businesses for almost three decades, adopting a different standard known as the ABC test that presumes workers are employees instead of independent contractors for purposes of state wage orders.[2] That new standard replaced the prior test first articulated by the

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[2] The ABC test as announced in *Dynamex* applies only to Industrial Welfare Commission (IWC) wage order claims, as the California Supreme Court did not reject the more flexible, multifactor *Borello* test in all instances. "In our view, this . . . [ABC] standard is faithful to . . . the fundamental purpose of wage orders." *Dynamex*, 4 Cal. 5th at 964. Therefore, *Borello* still applies when a cause of action is predicated solely on the Labor Code, while the ABC test is properly limited to wage-order claims. *See, e.g.*, *Garcia v. Border Transp. Grp., LLC*, 28 Cal. App. 5th 558, 561 (2018).

California Supreme Court in 1989 in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989).

Retroactive application of the ABC test to the period prior to April 30, 2018, would put undue hardship on California businesses who reasonably assumed that *Borello* governed their independent contractor relationships. Under both federal law and California precedent, the question of retroactivity depends upon consideration of fairness and public policy. Given that *Borello* had long been understood as the applicable test by both businesses and individuals, as well as by California's Division of Labor Standards Enforcement, there are compelling grounds for prospective application of the ABC test pronounced by the *Dynamex* decision.

ARGUMENT

I. The California Supreme Court's Dramatic and Unforeseen Adoption of the ABC Test in *Dynamex* Justifies Its Prospective, Not Retroactive, Application.

Dynamex monumentally changed the law for determining how businesses will determine whether California workers are independent contractors or employees. Rather than applying the

Borello "balancing test," 48 Cal. 3d at 350–51, *Dynamex* instead announced that businesses need to prove that a worker satisfies the three prongs of the ABC test in order to properly classify the individual as a contractor.[3] No one foresaw this.

Upon issuance of the *Dynamex* decision, an immediate concern for businesses was whether the ABC test would apply retroactively.[4] In other words, would courts protect businesses for their adherence to the *Borello* standard for years, or even decades, or should courts hold businesses liable for potentially years of

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[3] *Dynamex* announced the ABC test as follows:

> The [new] ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (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 the work and in fact; and (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 that involved in the work performed.

4 Cal. 5th 903 at 955–56.

[4] *See, e.g.*, Harold M. Brody & Anthony J. Oncidi, *Do California's New Restrictions on Independent Contractors Apply Retroactively?*, THE NAT'L L. REV. (Aug. 17, 2018).

wage and hour violations under a new test adopted without warning? Obviously, retroactive application of *Dynamex* would create massive exposure for businesses that classified workers as independent contractors based on an eminently reasonably reliance on *Borello*. Amicus believes that public policy and fairness justify prospective application of the ABC test.

California's courts recognize an exception to the general rule of judicial retroactivity where the judicial decision changes a settled rule on which the parties below have relied and where considerations of public policy and fairness weigh in favor of prospective application. *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 983 (1989). These considerations include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, the effect on the administration of justice, and the purposes to be served by the new rule. *Williams & Fickett v. Cty. of Fresno,* 2 Cal. 5th 1258, 1282 (2017) (citing *Claxton v. Waters*, 34 Cal. 4th 367, 378–79 (2004)). While several California court decisions have found the ABC test should be applied retroactively, the state courts'

pronouncements on the issue does not forestall this court from considering whether due process concerns require scrutiny in a federal venue.[5]

Here, public policy and fairness justify prospective application of the ABC test. First, *Dynamex* is a clear break from precedent. As the District Court observed, "*Dynamex* upset a settled legal principle. Prior to *Dynamex*, the California and federal courts nearly unanimously applied *Borello* to decide whether a California worker had been misclassified as an

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[5] Federal courts likewise generally presume retroactive application of judicial decisions. Under certain circumstances, however, federal courts will apply decisions prospectively based on consideration of three factors referred commonly referred to as the *Chevron Oil* test:

> 1. whether the decision to be applied nonretroactively established a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
>
> 2. whether retrospective operation would further the new rule's operation; and
>
> 3. whether the equities cut in favor of prospective application.

Chevron Oil Co. v. Huson, 404 U.S. 97, 106–07 (1971). *See also, e.g.*, *Nunez–Reyes v. Holder*, 646 F.3d 684, 690–94 (9th Cir. 2011) (en banc).

independent contractor . . . there was nothing unsettled about whether the ABC test applied to the misclassification inquiry prior to *Dynamex*. It did not." *Lawson v. Grubhub*, Inc., 2018 WL 6190316, *4 (Nov. 28, 2018) (order ruling on motion for relief from judgment).

Additionally, the California Supreme Court's adoption of the ABC test did not logically evolve from prior state law. In fact, the opinion exhaustively detailed the court's interstate review of independent contractor classification standards before explaining why it picked from Massachsetts: "[i]n 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*, 4 Cal. 5th at 916.

In short, the court shopped various articulations of the ABC test and latched upon Massachusetts' interpretation, declaring its version of the ABC test most consistent with the broad purpose of

IWC wage orders. But even if legal soothsayers had predicted eventual adoption of the ABC test in California, nobody anticipated a California court would apply such a broad standard that had been legislatively adopted in Massachusetts. The *Dynamex* decision embodied the sort of action and public policy pronouncement one anticipates from a legislature, or an agency with delegated rulemaking powers, but not from a court.[6]

Moreover, *Dynamex* was not a logical outgrowth of prior case law. The court pronounced the ABC test as deriving from the "suffer or permit" standard first articulated in *Martinez v. Comb*s, 49 Cal. 4th 35 (2010). But *Martinez* held that the suffer-or-permit standard is one of several applicable tests under IWC wage orders and addressed only whether an entity could be considered a joint employer; it did not address worker misclassification. Moreover, *Martinez* said little about how the suffer-or-permit standard would apply and with no mention of an ABC test. Most notably,

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[6] Indeed the ABC test has generally been embraced by other states through legislative—not judicial—action. *See* Anna Deknatel, & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53 (2015).

the defendant in *Martinez* prevailed under the suffer-or-permit standard. This is a somewhat ironic result considering that, under *Dynamex*, the *Martinez* defendant would likely have lost under the ABC test's second prong for a misclassification determination.[7]

Dynamex changed a settled rule that the parties relied upon. This dramatic break from longstanding precedent provides justification for prospective application. This is only appropriate because the regulated community has relied in good faith on the standard previously articulated by the courts, and on the best available guidance from the state.

II. Retroactive Application of the ABC Test Would Have a Devastating Impact on Small Businesses.

A. Upheaval of Existing Law Presents Unique Challenges for Small Businesses.

Because California wage orders regulate the terms and conditions of employees in all industries and occupations,

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[7] The *Dynamex* decision provides very little guidance as to what constitutes the "usual course of business" under prong B; however, in so far as the picking of fruit may be deemed essential to the business model of a company selling fruit at market, there is a real risk a business might fail the ABC test under *Dynamex* even on the same facts on which the defendant prevailed in *Martinez*.

application of the ABC test in all instances will have far-reaching consequences. [8] The impact on small businesses will be particularly acute, however. Worker classification presents unique challenges for small businesses,[9] and a business that misclassifies workers, intentionally or not, will face expensive penalties.[10]

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[8] While more than 20 states already use some form of the ABC test, in most states the test has been used for only a particular inquiry such as unemployment insurance or workers' compensation determinations. In contrast, the *Dynamex* court specifically ruled that the ABC test should be broadly applied for inquiries under the California Wage Orders as to whether a worker is an employee or independent contractor.

[9] The question whether a worker is an employee or an independent contractor has no simple answer. Worker classification has vexed Congress, the IRS, state legislatures, and taxpayers for decades. *See* Karen R. Harned, Georgine M. Kryda, & Elizabeth A. Milito, *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93 (2010); John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always A Rose*, 8 HOFSTRA LAB. L.J. 337 (1991). Worker classification particularly confounds small firms, since small business owners often manage a variety of functions in operating the business including human resource management. Most small employers are solely responsible for all human-resource related activities, including hiring, firing, evaluating, training, and worker classification.

[10] Misclassifying workers can cause enormous disruption in a business along with disastrous economic fallout. If a worker should be classified as an employee, the business bears responsibility for paying federal social security and payroll taxes, unemployment insurance taxes and state employment

While small businesses obviously must contend with *Dynamex* prospectively, retroactive application of the decision could prove disastrous for small firms already struggling in California's challenging legal environment because it means they are to be saddled with massive unexpected and unforeseen liabilities.

As discussed previously, *Dynamex* castoff decades of legal precedent by abandoning the flexible *Borello* standard for the inflexible ABC test. The *Borello* test retained a common-law focus on "whether the person to whom services is rendered has the right to control the manner and means of accomplishing the result desired," *Borello*, 48 Cal. 3d at 350, as well as several other factors including:

> (1) right to discharge at will, without cause; (2) whether the one performing the services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether in the locality the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in a particular occupation; (5) whether the principal or the worker supplies the

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taxes as well as providing workers' compensation insurance. Small businesses are frequently penalized for making unintentional mistakes in interpreting the law. Bruntz, *A Rose is Not Always a Rose*, 8 HOFSTRA LAB. L.J. at 337 & 343 (discussing the penalties associated with retroactive tax classification).

> instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) method of payment, whether by the time or by the job; (8) whether or not the work is part of the regular business of the principal; and (9) whether or not the parties believe they are creating the relationship of employer-employee.

Id. at 351.

Businesses in California were familiar with courts' and agencies' application of the *Borello* test. When planning new business opportunities, owners and investors considered the *Borello* factors with an understanding that the hiring entity must focus on the right to control the manner and means of the work to be accomplished when classifying a worker.

In contrast to *Borello's* adaptable standard, the ABC test allows no flexibility. To satisfy the ABC Test, a business must establish each of the three ABC factors:

> A. that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the 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.

The ABC test is notoriously difficult to overcome, especially because prong B of the test requires a hiring entity to prove that the worker perform work outside usual course of the entity's business. Many employers in California using independent contractors have been confronted with the reality that the ABC test—particularly prong B—jeopardizes their current business model. As the California Supreme Court reasoned, services that would ordinarily be viewed by others as falling within the hiring entity's business rather than a worker's "own independent business" render that worker an employee and not a contractor.

The examples provided in *Dynamex* where a worker would satisfy prong B and be properly classified as a contractor were relatively clear cut: a retail store retaining a plumber or electrician to perform maintenance work at the facility, not a

service normally provided by the retailer. As for specialized technical work within an isolated function of an employer's business, the court said these are not among the types of jobs that would typically qualify, even though these have historically fallen within a gray area.

The impact on businesses is clear when one considers a real-world example in which California companies might have contracted with an independent worker. Take for instance the following example:

Joe is a freelance photographer. He has a dark room in his house where he maintains his own camera and developing equipment. He contracts work from several different magazines and gets paid per picture. Joe can take off from photography several months out of the year whenever he chooses. The fact that Joe controls his own hours, uses his own equipment and is not subject to the direct control of the magazine would likely result in a valid independent contractor classification under *Borello*. But *Dynamex* changed things dramatically for the magazine: if a court finds that photographs are a central focus of a magazine's content

and, therefore, Joe arguably performs work that is within the usual course of the hiring entity's business, application of the ABC test's prong B could mean that Joe is an employee.

Although some attorneys may have sensed that winds were shifting in states' approaches to contractor classification, the *Dynamex* decision shocked the California business community that had relied on the multi-factor *Borello* test for decades.[11] And while prospective application of the ABC test will be problematic enough for California businesses, retroactive application is untenable for small businesses, which operate without a dedicated human resource professional or in-house counsel. [12] These businesses had a settled expectation based on existing law. In the absence of any other standard for how to evaluate independent contractor status, *Borello* remained the only clear, articulated rule

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[11] Maura Dolan, *California's Top Court Makes It More Difficult for Employers to Classify Workers as Independent Contractors*, L.A. TIMES (Apr. 30, 2018), online at https://www.latimes.com/local/lanow/la-me-ln-independent-contract-20180430-story.html.

[12] Only twelve percent of small businesses have at least one employee whose exclusive task is personnel or human resources. NFIB RESEARCH FOUND., *National Small Business Poll* (2004), http://411sbfacts.com/pollresults_g.php?QID=00000000661&KT_back=1.

that a business, like Defendants-Appellees, could reasonably rely on in structuring its business model. The failure of an employer to properly classify its workers could result in liability for years of unpaid wages, and costly civil litigation including attorneys' fees and costs.[13] Unfortunately, the reality is that such actions are already occurring. In just one of California's 58 counties, at least seven class action lawsuits—including one by Plaintiff Lawson—based on *Dynamex* were filed within three months of the decision.[14]

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[13] California's Private Attorneys General Act, which provides for employees who have been subject to Labor Code violations to seek penalties on behalf of himself or herself, *see Williams v. Super. Ct.*, 3 Cal. 5th 531 (2017), guarantees a deluge of *Dynamex* litigation. Such PAGA representative actions are not subject to class certification requirements in California courts.

[14] *Marciano v. Doordash Inc.*, No. CGC-18-567869, 2018 WL 3329951 (Cal. Super. July 5, 2018); *Rimler v. Postmates Inc.*, No. CGC18-567868, 2018 WL 3329949 (Cal. Super. July 5, 2018); *Waxler v. Uber Technologies, Inc.*, No. CGC18-567423, 2018 WL 3057439 (Cal. Super. June 20, 2018); *Cortez v. Maplebear Inc. (d/b/a Instacart)*, No. CGC-18-566596, 2018 WL 2266685 (Cal. Super. May 16, 2018); *Lawson v. Deliv, Inc.*, No. CGC-18-566577, 2018 WL 2322391 (Cal. Super. May 15, 2018); *Talbot v. Lyft Inc.*, No. CGC-18-566392, 2018 WL 2149279 (Cal. Super. May 8, 2018); *Magana v. Doordash Inc.*, No. CGC-18-566404, 2018 WL 2216206 (Cal. Super. May 8, 2018); *Lee v. Postmates, Inc.*, No. CGC-18-566394, 2018 WL 2149278 (Cal. Super. May 8, 2018).

Since April 30, 2018, businesses could insulate themselves from prospective liability by changing their business model or reclassifying workers. But there is nothing a business can do to retroactively protect itself going back even a year ago. It is unreasonable for a firm that conducted business for nearly 30 years to now be told that its business practices were inappropriate all along and that it is now subject to hefty retroactive assessments, notwithstanding good faith reliance on past precedent. This is entirely unfair and would cause substantial hardship—potentially bankruptcy—on small businesses operating without any sort of employment insurance or any significant savings. For the same reasons that *Dynamex* cannot be applied retroactively against *Grubhub* under the precise circumstances presented in this case, the Court should make clear that it would be inappropriate to apply that case retroactively in most, if not all, classification cases. California businesses lacked fair notice that they could face significant liability for adherence to existing California law and "'considerations of fairness and public policy

preclude full retroactivity.'" *Moradi-Shalal v. Firemen's Fund Ins. Co.*, 46 Cal. 3d 287, 305 (1988).

B. Small Businesses Are Especially Vulnerable to Threats of Misclassification Lawsuits and Retroactive Application of the ABC test Would Exacerbate the Litigation Problem.

Today, people are generally more knowledgeable about their legal rights. *See* Tonya Layman, *Employee Lawsuits On Rise*, Atlanta Bus. Chron. (June 24, 2011) (citing experts on a more "sophisticated workforce"). [15] Although this is a positive development, it creates unintended consequences in an increasingly litigious society. Calculating individuals may seek to exert inappropriate leverage over employers. According to NFIB Research Foundation studies, approximately half of small business owners are "somewhat concerned" or "very concerned" about the possibility of being sued.[16] And the concern is legitimate. Indeed, in any given year, small business owners in the United

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[15] Online at http://www.bizjournals.com/atlanta/print-edition/2011/06/24/employee-lawsuits-on-rise.html?page=all.

[16] NFIB RESEARCH FOUNDATION, *NFIB National Small Business Poll, Liability* 1, 2 (2002), http://www.411sbfacts.com/files/liability[1].pdf.

States pay an estimated $35.6 billion to settle civil suits. U.S. Chamber Inst. for Legal Reform, *Tort Liability Costs for Small Business*, at 1 and 9 (2010).[17]

Employment disputes and labor litigation contribute to this liability cost,[18] since California's small business owners must contend with antidiscrimination laws, family, medical and other protected leave laws, wage-hour laws, privacy laws, workplace safety laws and labor laws. And these laws and regulations cost small businesses more; according to the Small Business Administration, workplace compliance costs small business nearly 36 percent more per employee than it costs large businesses.[19] The problem is compounded by the fact that small businesses

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[17] Online at https://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf. Small businesses bear a disproportionate burden of tort litigation costs (excluding medical malpractice), but earned only twenty-two percent of total revenue. *Id.*

[18] Paula Hannford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation,* 20 NAT'L CTR. FOR STATE COURTS 1 (2013), http://www.courtstatistics.org/~/media/microsites/files/csp/data%20pdf/csph_online2.ashx.

[19] Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* (Small Bus. Admin. Sept. 2010), online at https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf.

generally cannot afford human resources or legal departments to give them advice on the laws. *See* Damien M. Schiff & Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & P. 97, 98–102 (2012) (generally discussing the special challenges facing small business owners in regulated industries).

Disgruntled employees can threaten employers with wage claims knowing that a complaint—even an unsubstantiated one—can be extremely effective in corralling employers into settling even the most frivolous of claims. Retroactive application of *Dynamex* would provide attorneys and disgruntled employees additional leverage to extort settlements from small business owners.

CONCLUSION

Amici respectfully request that this Court affirm the District Court judgment.

Respectfully submitted,

Dated: January 16, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Ninth Circuit R. 29(d) because it contains 3,611 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and Century Schoolbook size 14 font.

Dated: January 16, 2019 Benbrook Law Group, PC

By: */s/ Bradley A. Benbrook*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 16, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 16, 2019 Benbrook Law Group, PC

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