UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18-17232

MANUEL MAGANA, on behalf of himself and all others similarly situated,

Plaintiff - Appellant,

v.

DOORDASH, INC.,

Defendant-Appellee

ON APPEAL FROM A DENIAL OF AN INJUNCTION IN
THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 18-cv-03395
The Honorable Phyllis J. Hamilton

BRIEF AMICUS CURIAE OF NATIONAL EMPLOYMENT LAW PROJECT, LEGAL AID AT WORK, AND WORKSAFE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4), Amici state that they are, respectively, tax-exempt non-profit corporations with no parent corporations and that no publicly held corporation owns ten percent or more of the stock of any Amicus.

TABLE OF AUTHORITIES

Cases

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amici curiae are organizations that advocate for workers' rights throughout California. Amici submit this brief not to repeat arguments made by the parties, but to ensure that the members of this Court appreciate the potential implications of the decision for working people across the nation. Workers engaged as "independent contractors" by companies like DoorDash lack protections of workplace laws that most workers take for granted. When subjected to political coercion by the very company that provides them with a job and could take it away, these workers are even more vulnerable. Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29.[1] Pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-2(a), Amici certify that all parties have consented to the filing of this brief.

The **National Employment Law Project (NELP)** is a fifty-year-old national legal, research and policy organization with a California office focused on ensuring that work delivers economic opportunity, security and a voice at work for all those at work in the country. For decades, NELP has focused on the ways in which various corporate decisions – outsourcing, using temp and staffing agencies,

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

and calling workers "franchisees" or "independent contractors" – can adversely affect income and wealth inequality, the segregation of workers by race and gender into poor quality jobs, the ability of workers to come together to negotiate over wages and working conditions, and the ability of law-abiding businesses to compete. NELP studies independent contractor misclassification and its effects on state and federal coffers, and has testified in the U.S. Congress and state legislatures on these issues, in addition to litigating and supporting cases brought by workers via amicus briefs in most federal circuits and the U.S. Supreme Court, federal government agencies, and state courts.

Legal Aid at Work (LAAW), formerly the Legal Aid Society – Employment Law Center, is a non-profit public interest law firm based in California and founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented or disadvantaged communities. LAAW represents low-wage clients in cases involving a broad range of issues, including wage theft, labor trafficking, retaliation, and discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. LAAW frequently appears in federal and state courts to promote the interests of low-wage workers both as counsel for plaintiffs and as *amicus curiae*. LAAW has a strong interest in ensuring that workers – especially those who have been misclassified as independent contractors

– receive all protections to which they are entitled under the law, and that the courts exercise their broad authority to control class action litigation and prevent the political coercion of class members.

Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the California State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California's most vulnerable low-wage workers. Millions of low-wage and immigrant workers often toil long hours in harsh and hazardous work environments in California, and Worksafe considers it vitally important that these employees not be misclassified as independent contractors and as a result left outside the protections of occupational safety and health laws.

SUMMARY OF ARGUMENT

Plaintiff Manuel Magana and putative class members ("drivers") are delivery drivers for Defendant DoorDash, Inc. ("DoorDash"). Plaintiff alleges, *inter alia*, that DoorDash has unlawfully failed to pay its drivers minimum wage and has willfully misclassified them as independent contractors. The California Supreme Court's landmark decision in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 964, 416 P.3d 1, 40 (2018) is core to the drivers' argument. Drivers filed this case after the *Dynamex* decision and bring this case under the standard laid out in *Dynamex*.

On August 2, 2018, DoorDash sent an email to its drivers asking them to contact state legislators. The email claimed that "a recent court decision" threatened drivers' "freedom and flexibility" and the ability "to choose when, where, and how you want to work." The email states DoorDash's preference – "[w]e at DoorDash support a legislative solution that preserves… independence" – and asks workers, "[i]f you agree… tell your legislator." The email then states, "It's easy. Make your voice heard by signing a letter to your state legislators," and links to a webpage where workers can quickly submit a letter to lawmakers. The webpage warns that "flexibility, quality of life, more control over [your] work, extra money on the side" are "all at risk." Decl. of Shannon Liss-Riordan in Supp.

of Pl.'s Mot. for Protective Order, Ex. A. The emails make no reference to the potential rights workers may accrue under *Dynamex*, the instant lawsuit, or even the name of the *Dynamex* case, making it difficult for a worker to even learn more about the alleged threat to "freedom." *Id.*

DoorDash's misleading communications to its workers including Mr. Magana are part of a large-scale coordinated industry lobbying strategy seeking to repeal and replace *Dynamex*. App-based service companies[2] like Uber, Lyft, Handy, and DoorDash have come under scrutiny for the large investments they have made in lobbying to deregulate their industry, while facing lawsuits for treating workers as independent contractors.[3] For example, a recent study of Uber and Lyft's lobbying efforts notes that in 2016, Uber and Lyft lobbyists at the state level outnumbered those engaged by Amazon, Microsoft, and Walmart combined.[4] These app-based companies have similarly launched a well-funded lobbying effort in California against *Dynamex*, including presenting misrepresentative corporate-friendly worker stories like those unlawfully sought by DoorDash.

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[2] These companies deliver services such as transportation, food delivery, or home cleaning through internet and phone applications, or "apps".

[3] National Employment Law Project, Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know it, available at https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/.

[4] National Employment Law Project, Uber State Interference: How TNC's Buy, Bully, and Bamboozle Their Way to Deregulation, available at https://www.nelp.org/publication/uber-state-interference/.

News outlets have widely reported on the aggressive corporate lobbying effort to modify the *Dynamex* standard.[5] The California Chamber of Commerce is coordinating efforts and in 2018, companies providing app-based services, including DoorDash, met with the Governor's office, the leaders of the Assembly and Senate, and then-Lieutenant Governor Newsom.[6] Industry groups have also coordinated multiple public letters with long lists of corporate and industry association signers, including DoorDash. In June 2018, a group of industry groups and companies sent a letter to the Governor and Legislature advocating that the

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[5]Josh Eidelson, "Gig Firms Ask California to Rescue Them From Court Ruling," Bloomberg, August 5, 2018, available at https://www.bloomberg.com/news/articles/2018-08-05/gig-firms-ask-california-dems-to-rescue-them-from-court-ruling ("Leading gig economy companies including Uber and Lyft are quietly lobbying California's top Democrats to override or undermine a court ruling that could make many of their contract workers into employees"); Antoinette Siu, "As gig companies beg for relief from pro-labor Supreme Court ruling, the lobbying is fast and furious," CALmatters, August 23, 2018, available at https://calmatters.org/articles/companies-beg-for-relief-from-pro-labor-gig-worker-ruling/ ("Lobbyists for ride-sharing companies and the California Chamber of Commerce are scrambling to delay until next year (and the next governor's administration) a far-reaching California Supreme Court decision"; Caitlin Vega, "What's the Real Story on Dynamex?", Labor's Edge: Views from the California Labor Movement, August 13, 2018, available https://calaborfed.org/whats-the-real-story-on-dynamex/ (stating that in the final weeks of session, the Chamber of Commerce and tech companies were lobbying the legislature to suspend Dynamex); Jamie Biesiada, "Push continues for legislation to help independent contractors in California," Travel Weekly, Sept. 19, 2018, available at https://www.travelweekly.com/Travel-News/Travel-Agent-Issues/Push-continues-for-legislation-to-help-independent-contractors-in-California (stating that the Chamber of Commerce's "I'm Independent" Coalition made "concerted effort" over several weeks at the end of August to lobby legislators and the governor's office to change the Dynamex decision).

[6] Eidelson, *supra* note 5.

Dynamex standard be "suspend[ed] or postpone[d]."[7] In July 2018, multiple app-based companies sent a letter to the Governor's Secretary of Labor and Cabinet Secretary lobbying against *Dynamex*, stating that the ruling "threaten[s] the livelihoods of millions of working Californians" and will "decimate businesses."[8]

As part of its campaign against *Dynamex*, the California Chamber of Commerce has created a public-facing website for the "I'm Independent" coalition. Although the website features stylized profiles and videos of individuals, for example, "Alexia" a "filmmaker," "Gerardo" who "work[s] as an independent contractor teaching music classes," and "Norman" an "independent contractor for a rideshare company," the website is a project of the California Chamber of Commerce and lists over 90 companies or industry groups as supporters. DoorDash is listed as part of this coalition.[9] These industry groups include very influential internet companies, like Google, Amazon, and Facebook, along with state associations representing employers in industries from agriculture to trucking.[10] DoorDash's email to drivers links to the "I'm Independent" website and

[7] Decl. of Shannon Liss-Riordan in Supp. of Pl.'s Mot. for Protective Order, Ex. E, also available at https://www.electran.org/wp-content/uploads/Dynamex-Coalition-Letter-1.pdf
[8] Eidelson, *supra* note 5.
[9] "About the Coalition," I'm Independent Coalition, available at https://imindependent.co/about-the-coalition/.
[10] Eidelson, *supra* note 5.

invites drivers to join this industry lobbying effort. Decl. of Shannon Liss-Riordan in Supp. of Pl.'s Mot. for Protective Order, ¶ 6.

Amici write to situate DoorDash's unilateral communication to its workers within the broader corporate lobbying strategy against *Dynamex*, and underscore the importance of California's protections for workers' political activity. Particularly following *Citizens United v. FEC*, 558 U.S. 310 (2010), companies are increasingly seeking to affect workers' individual political behavior. The type of coercive employer action exemplified in DoorDash's communications with putative class members is not only confusing and misleading as to this lawsuit and the underlying facts, these communications have a corrosive effect on our democratic processes. In addition, amici write to emphasize the importance of the *Dynamex* decision for working people in California. Employers unilaterally and unlawfully deprive these individuals of basic workplace standards by misclassifying them as "independent contractors." As a result, these workers are particularly vulnerable to political coercion in the workplace. In addition to harming workers, these unlawful misclassification practices create an atmosphere of unfair competition, hurting hurt law-abiding companies, and harm the public through robbing public coffers. Amici support the Plaintiff-Appellant's position that the District Court misapplied the legal standard for misleading and coercive

communications, requiring public injunctive relief, and erred in refusing to grant a protective order and corrective notice.

ARGUMENT

I. Political coercion in the workplace is a growing phenomenon and threatens the integrity of our democratic process.

As many academics and commentators have argued, political coercion in the workplace is a growing phenomenon, particularly following *Citizens United*.[11] Examples range from a major paper product manufacturer sending letters to workers indicating the candidates the firm had endorsed and warning workers "may suffer the consequences" if those candidates were not elected, to Ohio coal miners told they were required to attend a rally for a presidential candidate, and

[11] Harvard Law Review, *Citizens United At Work: How the Landmark Decision Legalized Political Coercion in the Workplace*. Harvard Law Review 128: 669-90 (2014) ("in overturning the ban on independent political expenditures by corporations and unions, *Citizens United* in effect decimated the protections from coerced political speech that employees once enjoyed"); Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post–Citizens United Environment*, 120 Yale L.J. Online (2010), 1. http://www.yalelawjournal.org/forum/addressing-political-captive-audience-workplace-meetings-in-the-post-citizens-united-environment[http://perma.cc/YYL4-4PCM];
Alexander Hertel-Fernandez & Paul Secunda, *Citizens Coerced: A Legislative Fix for Workplace Political Intimidation Post-Citizens United*, 64 UCLA L. Rev. Discourse 2, 8 (2016) (" political communications from employers to workers outside of partisan elections were always permitted by federal law… But *Citizens United* has undoubtedly expanded the rights employers possess in this area, and it has also emboldened employers to do more, knowing that the U.S. Supreme Court granted their activities full legal cover.")

they would not be paid for their participation.[12] Political coercion occurs when employers require or urge workers to take political action through appeals that affect workers' livelihood, for example, threats of layoff or termination, plant closure, or changes to hours and wages if certain candidates, issues, or policies are not successful. Prospective class members are far from alone in having an employer urge that their livelihoods are under threat if they do not take the employer's suggested action regarding a particular policy. One study estimates that as many as 14 million Americans have experienced political coercion in the workplace, defined as employers seeking to affect workers' political behaviors through appeals or threats related to workers' livelihood, such as threats of layoff or termination, plant closure, or changes to hours and wages.[13]

Affecting workers' political behavior is now a substantial part of corporate America's strategy for influencing our democracy. Managers now rank affecting employees' political behavior to be just as effective at changing public policy as lobbying, and even more effective than making Political Action Committee (PAC) contributions. *Id.* at 2. Among managers at businesses with PACs, 17 percent ranked PAC contributions as their most effective strategy, while 25 percent of

[12]Alexander Hertel-Fernandez, "Who Owns Your Politics? The Emergence of Employee Mobilization as a Source of Corporate Political Influence," New America, 1. July 2015. Available at https://www.newamerica.org/new-america/policy-papers/who-owns-your-politics/.
[13] Hertel-Fernandez, *supra*, at 2.

managers ranked mobilization of employees as being most effective.[14] As Mitt Romney urged to an association of small business owners, employers are now being told to "make it very clear to your employees" what is "in the best interest of your enterprise and therefore their job."[15]

These types of coercion are exacerbated by new technologies available to employers to monitor and reward employees' political activity. Employers now enjoy expanded ability to track activities using political recruitment software, to monitor employees' participation on social media sites, and monitor click-through response rates for emails and invitations; in other words, when a company sends an email like that sent to prospective class members, they are able to monitor who opens emails, who interacts with a page and sends a letter, and who indicates they will attend events.[16] Sixty-eight percent of firms that contact workers about politics use specialized software designed for the purpose.[17] Companies are thus able to monitor interaction and reward workers who support the company's political

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[14] Alexander Hertel-Fernandez, "U.S. companies are pressuring their workers on how to lobby and vote," Washington Post, March 21, 2018, available at https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/21/u-s-companies-are-pressuring-er-educating-their-workers-on-how-to-lobby-and-vote/?utm_term=.d7c363396c1c.

[15] Jessica Phelan, "Mitt Romney tells employer to 'make it very clear' to employees how to vote," PRI, October 18, 2012, https://www.pri.org/stories/2012-10-18/mitt-romney-tells-employers-make-it-very-clear-employees-how-vote-video.

[16] Hertel-Fernandez & Secunda, *supra* note 11, at 8.

[17] *Id.*

priorities. One manager reported that the firm monitored which workers had high participation rates, deeming them "champions," and invited these "champions" to become political ambassadors for the firm.[18]

The threat posed by this type of coercive employer conduct is substantial. Workers rely on their employers for their livelihoods, and "the specter of a job loss or other adverse employment consequence presents an incredibly potent threat to an individual's free expression."[19] As the Supreme Court long ago noted, "the economic dependence of the employees on their employers" makes working people "pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[20] As California has recognized, there is a "substantial public interest" in protecting "the fundamental right of employees to engage in political activity without interference or threat of retaliation from employers." *Ali v. L.A. Focus Publ'n*, 112 Cal. App. 4th 1477, 1487, 5 Cal. Rptr.

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[18] Hertel-Fernandez, *supra* note 12 at 13.

[19] Harvard Law Review, *Citizens United at Work: How the Landmark Decision Legalized Political Coercion in the Workplace*, 128 Harv. L. Rev. 669, 669–70 (2014) citing Lewis Maltby, Office Politics: Civic Speech Shouldn't Get Employees Fired, LEGAL TIMES (Aug. 29, 2005), http://workrights.us/wp-content/uploads/2011/02/ldlegaltimes.pdf[http://perma.cc/QEX4-FH4B] ("People need their jobs, and many will sacrifice their rights as citizens to continue to provide for themselves and their families."); *NLRB v. Gissel Packing Co.*, 395 U.S. 575,617 (1969). The author notes, "[i]ndeed, the Framers recognized the enormous power held by one who controls the livelihood of another; as Alexander Hamilton wrote, "[I]n the main it will be found that a power over a man's support is a power over his will."

[20] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

3d 791, 798 (2003). The ability of employers to pressure, control, or induce working people to modify their political activities is a tremendous threat to the integrity of the democratic process and "should be a major concern for anyone who cares about the quality of our democracy."[21]

II. California has long recognized the dangers of employer political coercion and is a leader in protecting workers from employer attempts to control their political activity.

California is a leader in recognizing the dangers of employer political coercion. The United States is "largely alone" among advanced industrial countries in not providing federal protections against political discrimination.[22] Among the few states which have regulated in this area, California's standard "is the most comprehensive and protective of employees."[23]

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[21] Alexander Hertel-Fernandez, *supra*, note 12, at pg. 19.

[22] Hertel-Fernandez & Secunda, *supra* note 11, at 14 (stating Australia, the European Court of Human Rights, Canada, Germany, Japan have such standards). In recent years many voices have called for new federal and state regulation in this area. Hertel-Fernandez & Secunda, *supra* note 11 (proposing political opinions and beliefs be added as a protected class in Title VII of the Civil Rights Act of 1964); Secunda *supra* note 11 (advocating for a federal version of the Oregon Worker Freedom Act, which prohibited adverse action based on refusal to attend a meeting were the primary purpose is to communicate the opinion of the employer about religious or political matters); Hertel-Fernandez, *supra* note 12 at 2 ("State and federal lawmakers need to take action to curb political intimidation in the workplace").

[23] Hertel-Fernandez & Secunda, *supra* note 11 at 14. (noting Wisconsin, Oregon, Montana and the District of Columbia also have protections against restraint of political rights in the workplace).

California law prevents companies from adopting or enforcing any policy that tends to control or direct the political activities of employees, and similarly provides that employers cannot coerce or influence employees through threat of discharge to follow any particular course or line of political action or political activity.[24] These statutes reflect the Legislature's recognition that employers hold economic power over citizens, and "employers [can] misuse their economic power to interfere with the political activities of their employees." *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 486 (1979).

California recognizes the right of citizens to engage in political activity without interference by employers as a "fundamental right." *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 487, 595 P.2d 592, 610 (1979) citing *Fort v. Civil Service Commission*, 61 Cal.2d 331 (1964); *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal.2d 481, 486 (1946). Not only is this a right of the individual, but there is a "substantial public interest" in ensuring that employees' right to engage in political activity is protected, and the statutory protection of political activity and political speech "inures to the public at large rather than

[24] California Labor Code § 1101 provides that:
"No employer shall make, adopt, or enforce any rule, regulation, or policy . . . (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

simply to the individual or proprietary interests of the employee or employer." *Ali v. L.A. Focus Publ'n*, 112 Cal. App. 4th 1477, 1487 (2003).

Here, DoorDash is engaged in an aggressive industry lobbying effort to affect legislation that directly impacts working people in general, and DoorDash's workers in particular. DoorDash's communications to drivers are part of this broader lobbying strategy and it is seeking to "misuse [its] economic to interfere with the political activities of [its] employees." *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 486 (1979). This type of political coercion is precisely the type of corporate misbehavior the California legislature intended to remedy.

III. *Dynamex* affects a disproportionately precarious workforce that is particularly vulnerable to the workplace political coercion that California has sought to remedy.

As the California Supreme Court emphasized in *Dynamex*, "the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally." *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 912–13, 416 P.3d 1, 4–5 (2018). When employers unlawfully misclassify working people, they deprive them of the core workplace protections that the state of California and the federal government intended as baseline

standards. They lose the entire span of protections that most take for granted: workers' compensation if they are injured on the job, unemployment insurance, minimum wage and overtime protections, and protections against discrimination and sexual harassment.[25]

Contrary to the industry's claim that independent contractor status is a "choice," often made by middle class professionals who seek additional income "on the side,"[26] the reality is that many workers are required to accept independent contractor status as a condition of taking a job. The take-it-or-leave it label imposed by the employer often does not reflect the reality, as few lower-paid workers like the drivers in DoorDash are really running a separate business of their own. *Dynamex* affects a disproportionately exploited and precarious workforce.

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[25] National Employment Law Project, *Independent Contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it*, May 2016, http://www.nelp.org/publication/independent-contractor-vs-employee/. The federal Department of Labor notes on its website that misclassified employees "often are denied access to critical and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces." U.S. Dep't of Labor, Wage and Hour Division, "Misclassification of Employees as Independent Contractors." https://www.dol.gov/whd/workers/Misclassification/.

[26] *See, e.g.*, "About," I'm Independent Coalition, available at https://imindependent.co/about/ (stating "we need the legislature to protect Californians' freedom and choice" and referring to "additional income to make ends meet").

Independent contractor misclassification is rampant in low-wage industries like janitorial service, home care, trucking, and hospitality.[27]

Occupations with high rates of misclassification are among the jobs with the highest numbers of workplace violations.[28] Anecdotal studies of working conditions for workers misclassified as independent contractors by their employers show elevated rates of wage theft and workplace injury.[29] An employer's insistence on labeling workers as contractors in itself deters workers from claiming rights under workplace laws that rely on individual complaints for enforcement, as workers tend to assume that their employer has classified them accurately.[30] Many

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[27] National Conference of State Legislatures, *Employee Misclassification Resources*, available at: http://www.ncsl.org/research/labor-and-employment/employee-misclassification-resources.aspx; see also, National Employment Law Project, *Independent Contractor v. Employee: Why Misclassification Matters*, (2016), at http://www.nelp.org/publication/independent-contractor-vs-employee/.

[28] *See* National Employment Law Project, *Holding the Wage Floor*, October 1, 2005, at http://www.nelp.org/content/uploads/2015/03/Holding-the-Wage-Floor2.pdf; National Employment Law Project, *Who's the Boss*, at https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

[29] National Employment Law Project, *Independent Contractor v. Employee: Why Misclassification Matters*, (2016) at http://www.nelp.org/publication/independent-contractor-vs-employee/.

[30] Workers who believe they are not eligible for workplace protections will likely not go to an enforcement body. The vast majority of DOL's Wage & Hour Division's (WHD) enforcement actions are triggered by worker complaints. *See, e.g.* U.S. Gov't. Accountability Office, GAO-08-962T, *Better Use of Available Resources and Consistent Reporting Could Improve Compliance* 7 (July 15, 2008) (72 percent of WHD's enforcement actions from 1997-2007 were initiated in response to complaints from workers); David Weil & Amanda Pyles, *Why*

workers incorrectly believe that they do not have an employer or are unable to ascertain who is responsible for workplace violations. When there is no clear line of accountability, work conditions are more likely to deteriorate: pay declines, wage theft increases, and workplace injuries rise. Real-life examples of these problem abound, in industries as varied as trucking and delivery, construction, and home care.[31]

Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace, 27 Comp. Lab. L. & Pol'y J. 59, 59-60 (2005) (finding that in 2004, complaint-derived inspections constituted about 78 percent of all inspections undertaken by WHD). Anecdotally, advocates report to NELP that misclassification is often used by employers in combination with non-compete and non-disclosure or confidentiality provisions to intimidate and discourage low-wage workers, who often speak little or no English, from complaining or joining together to improve wages and conditions.

[31] The port trucking industry is a particularly stark example of the extensive worker exploitation that can occur when employers misclassify workers as independent contractors. Port trucking employers have engaged in extensive safety violations and wage theft, including truck-leasing schemes that can leave workers having lost money after months of work. *See*, *e.g.*, National Employment Law Project, "The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports," at http://www.nelp.org/content/uploads/2015/03/PovertyPollutionandMisclassification.pdf; Brett Murphy, "Rigged: Forced into debt. Worked Past exhaustion. Left with nothing." USA Today, June 16, 2017, athttps://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/; Brett Murphy, "Asleep at the wheel: Companies risk lives by putting sleep-deprived port truckers on the road," USA Today, December 28, 2017, at https://www.usatoday.com/pages/interactives/news/rigged-asleep-at-the-wheel/. *See also* McClatchy DC, "Misclassified: Contract to Cheat," 2014, http://media.mcclatchydc.com/static/features/Contract-to-cheat/ (detailing the effects of misclassification within the construction industry); National Employment Law Project, "Independent contractor classification in home care," at

IV. *Dynamex* is a landmark case that benefits state and local government and law-abiding business owners.

The standard set forth in *Dynamex* is important not only to workers, but to the public at large. In addition to harming workers and creating a precarious workforce, employer misclassification harms the larger public through robbing state coffers, and harms law-abiding business owners through unfair competition. As noted by the court in *Dynamex*, businesses may obtain "unfair competitive advantage… over competitors that properly classify similar workers as employees," which deprives "federal and state governments of billions of dollars in tax revenue." *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 913 (2018).

A. Misclassification imposes significant costs to public coffers.

Federal, state, and local governments suffer hefty loss of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.[32] A 2009 report by the Government Accountability Office (GAO) estimates independent contractor misclassification cost federal

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http://www.nelp.org/content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf (detailing the effects of misclassification within the home care industry).

[32] U.S. Dep't of Labor, Wage and Hour Division, "Misclassification of Employees as Independent Contractors," at https://www.dol.gov/whd/workers/Misclassification/.

revenues $2.72 billion in 2006.[33] According to a 2009 report by the Treasury Inspector General for Tax Administration, misclassification contributed to a $54 billion underreporting of employment tax, and losses of $15 billion in unpaid FICA taxes and UI taxes.[34]

A growing number of states have been calling attention to independent contractor abuses by creating inter-agency task forces and committees to study the magnitude of the problem, and passing new legislation to combat misclassification, including California. The US Department of Labor has signed Memoranda of Understanding regarding misclassification in forty-five states; some of these states have created inter-agency task forces or commissions to work on the problem.[35] Along with academic studies and other policy research, the reports document the prevalence of the problem and the attendant losses of millions of dollars to state workers' compensation, unemployment insurance, and income tax revenues. A

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[33] U.S. General Accounting Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009), available at http://www.gao.gov/new.items/d09717.pdf.
[34] Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed* (February 4, 2009) available at http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf.
[35] United States Department of Labor, https://www.dol.gov/whd/state/statecoordination.htm;

2017 review of the findings from the twenty state studies of independent contractor misclassification demonstrates the staggering scope of these abuses.[36]

For example, in California, audits conducted by California's Employment Development Department between 2005 and 2007 recovered a total of $111,956,556 in payroll tax assessments, $18,537,894 in labor code citations, and $40,348,667 in assessments on employment tax fraud cases.[37]

Given the immense potential for cost to the public, independent contractor misclassification is an issue with uniquely bipartisan support. The US Department of Labor devotes resources to fighting misclassification throughout Republican and Democratic administrations[38] and as many as 30 states, spanning Republican and Democratic controlled state legislatures, have instituted laws, task forces, or committees aimed at combatting independent contractor misclassification.[39]

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[36] National Employment Law Project (NELP), *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, December 2017, http://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/.

[37] California Employment Development Department, *Annual Report: Fraud Deterrence and Detection Activities, report to the California Legislature* (June 2008), available at http://www.edd.ca.gov/pdf_pub_ctr/report2008.pdf.

[38] U.S. Dep't of Labor, Wage and Hour Division, "Misclassification of Employees as Independent Contractors." https://www.dol.gov/whd/workers/Misclassification/.

[39] NELP, *supra* note 36.

B. Misclassification harms law-abiding employers.

Employers that correctly classify workers as W-2 employees are often unable to compete with lower-bidding companies that reap the benefits of artificially low labor costs. As stated by the Treasury Inspector General, "worker misclassification… plac[es] honest employers and businesses at a competitive disadvantage."[40] This is especially a problem in delivery services, construction, janitorial, home care, and other labor-intensive low-wage sectors, where employers can gain competitive advantage by driving down payroll costs. Misclassification, especially when pervasive in an industry, skews markets and can drive responsible employers out of business. Law-abiding employers also suffer from inflated unemployment insurance and workers' compensation costs, as "free riding" employers that misclassify employees as independent contractors pass off costs to employers that play by the rules. A 2010 study estimated that misclassifying employers shifts $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums to law-abiding businesses annually.[41]

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[40] Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success*, February 20, 2018, available at https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf.

[41] National Employment Law Project, *Independent Contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it*, May 2016, http://www.nelp.org/publication/independent-contractor-vs-employee/ *citing* Douglas McCarron, "Worker Misclassification in the Construction

CONCLUSION

For the reasons set forth herein, the Court should reverse the District Court's refusal to enjoin DoorDash's misleading and coercive communications, and order corrective notice as requested by Plaintiff-Appellant.

Respectfully submitted,

Dated: April 18, 2019

NATIONAL EMPLOYMENT LAW PROJECT

/s/ Catherine Ruckelshaus
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Industry," BNA Construction Labor Report (April 7, 2011), https://web.carpenters.org/Libraries/PDFs_Misc/Construction_Labor_Report_--_McCarron_on_Misclassification_4-7-2011_sm.sflb.ashx.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations of Fed. R. App. P. 32(a) and Ninth Circuit Rule 32-1 because:

(1) Pursuant to Ninth Circuit Rule 32-1, this Amicus Brief contains 5,060 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32 because the brief has been prepared in 14-point Times New Roman, which is a proportionally spaced font that includes serifs.

Dated: April 18, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2019, I caused the foregoing document to be filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of this filing to all counsel of record.

Dated: April 18, 2019

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