U.S. Court of Appeals No. 17-15673
U.S.D.C. Case No. 14-cv-02096-RS

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GUADALUPE SALAZAR, et al.,

Plaintiffs-Appellants,

vs.

McDONALD'S CORP., et al.,

Defendants-Appellees.

AMICI BRIEF OF THE EMPLOYERS GROUP AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES MCDONALD'S CORP., ET AL.

On Appeal from The United States District Court
For The Northern District of California
Case No. 14-cv-02096-RS
The Honorable Richard Seeborg, Judge Presiding

ROBERT R. ROGINSON, California State Bar No. 185286
robert.roginson@ogletree.com
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
400 South Hope Street, Suite 1200
Los Angeles, CA 90071
Telephone: 213.239.9800
Facsimile: 213.239.9045

Attorneys for *Amici Curiae*
EMPLOYERS GROUP and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

STATEMENT OF COMPLIANCE WITH RULE 29

This brief is submitted pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure. All current parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except Amici Curiae, their counsel, or their members contributed money to fund the preparation or submission of this brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

California Statutes

Other Authorities

INTERESTS OF AMICI CURIAE

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly three million employees. The Employers Group's membership includes franchisors and franchisees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. It also provides on-line, telephonic, and in-company human resources consulting services to its members.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is distinctively able to assess both the impact and implications of the issues presented in employment cases such as this one. The Employers Group has been involved as *amicus* in many significant employment cases, including *Duran v. U.S. Bank National Association*, 59 Cal. 4th 1 (2014); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012); *Reid v. Google, Inc.*, 50 Cal. 4th 512 (2010); *McCarther v. Pacific Telesis Group*, 48 Cal. 4th 104 (2010); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal.

4th 272 (2009); *Arias v. Superior Court*, 46 Cal. 4th 969 (2009); *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993 (2009); *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralphs Grocery Co., Inc.* 42 Cal. 4th 217, (2007); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007); *Smith v. Superior Court*, 39 Cal. 4th 77 (2006); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005); *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264 (2006); *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005); *Miller v. Department of Corrections*, 36 Cal. 4th 446 (2005); and *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004).

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country. In particular, the Chamber has many members located in California and others who conduct substantial business in the State and have a significant interest in the sound and equitable development of California employment law. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the business community.

Each California business has a critical interest in understanding and identifying whom it is deemed to employ. This important interest extends to franchisors and franchisees operating in California, which business model has existed in this country for over 150 years and has contributed to the growth and prosperity of California employers and workers. Indeed, the rise of the franchise model has been attributed to the post-World War II growth in population, personal income, retail spending and automobile use. *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474, 489 (2014) (*Patterson*).

In *Martinez v. Combs*, 49 Cal. 4th 35 (2010) (*Martinez),* the California Supreme Court held that, in determining which of several possible employers were subject to suit by employees for unpaid minimum wages under Cal. Labor Code section 1194, the persons who may be liable as joint employers should be determined under the definitions of "employer" set by the Industrial Welfare Commission (IWC). The District Court properly interpreted *Martinez* in determining that plaintiffs could not establish that McDonald's was their employer under any of the three tests set forth in *Martinez*. The District Court properly considered and applied *Patterson* and, contrary to plaintiffs' contention, did not create a franchisor exemption to the definition of "employer" under California's wage and hour laws.

Amici agree with and support McDonald's Corp.'s position that the District Court correctly concluded that California law limits liability for wage and hour violations to employers exercising control over the working conditions of the affected workers and that the District Court correctly rejected Plaintiff's ostensible agency theory of liability in this case as not supported by California's employment laws.

The case is of paramount importance to *amici curiae* because an adverse ruling from this Court could likely: (1) have a tremendously disruptive effect on franchisors and franchisees operating in California and their ability to rely upon the long established legal principles governing the franchise business model; (2) destabilize employment relationships between thousands of California franchise employers and the thousands, perhaps millions, of California workers employed by those franchises; and (3) generate a tidal wave of disruptive and meritless class action lawsuits.

Amici urge this Court to affirm the District Court's Judgment entered below.

LEGAL ARGUMENT

I. CALIFORNIA RECOGNIZES FRANCHISING AS A LONGSTANDING BUSINESS MODEL WHICH IS ESSENTIAL TO A FUNCTIONING BUSINESS ENVIRONMENT AND TO CALIFORNIA'S ECONOMIC PROSPERITY.

Franchising is a system of marketing and distribution in which the franchisee has the right to use the franchisor's brand name and its proven system of operation in accordance with the franchisor's established standards and practices. As one article in the Franchise Law Journal explained:

> Simply put, franchising is a means of establishing a network of independently owned businesses, operating under an independent contractor relationship, which are licensed to sell products or services under a common brand name. It is a system of marketing and distribution in which an independent business (the franchisee) is granted—in return for a fee—the right to market the goods and services of another (the franchisor) in accordance with the franchisor's established standards and practices.

David Kaufman, Felicia Soler, Breton Permesly, Dale Cohen, "A Franchisor is not the Employer of its Franchisees or their Employees," 34, No. 4 Franchise LJ 439, 452 (Spring 2015) (internal citations omitted) (hereinafter, "Kaufmann").

One of the most important aspects of the franchise model is the shared desire for brand standardization. Brand standardization allows the franchisee to take advantage of the franchisor's reputation and the perceived quality of its services. "[I]t is the consistency of [a] system's operation, service, and product quality that

attracts customers and induces loyalty: customers become loyal if the experiences they enjoy at diverse units of these chains routinely meet their expectations." *See* Roger Blair, Francine Lafontaine, The Economics of Franchising (Cambridge U. Press), 117 (2005) (internal citations omitted). "A customer dissatisfied with one Kentucky Fried outlet is unlikely to limit his or her reaction to the particular outlet; instead, the adverse reaction will likely be directed to all Kentucky Fried stores." *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 380 (5th Cir. 1977).

The franchise model allows entrepreneurs the opportunity to open new businesses associated with brands that are already recognized by the public. *See Patterson*, 60 Cal. 4th at 490 ("The franchise arrangement puts the franchisee in a better position than other small businesses").

It also involves providing the franchisee with the operational systems necessary to maintain consistent quality across all of the franchises. It gives the franchisee the benefit of the franchisor's best management and operations practices, improving the franchisee's chances of success and minimizing the risk that a franchisee will damage the brand. That is one of the primary reasons for the success of the franchise model. As the California Supreme Court observed:

> Under the business format model, the franchisee pays royalties and fees for the right to sell products or services under the franchisor's name and trademark. In the process, the franchisee also acquires a business plan,

> which the franchisor has crafted for all of its stores. [citations omitted] This business plan requires the franchisee to follow a system of standards and procedures. A long list of marketing, production, operational, and administrative areas is typically involved. [citations omitted] The franchisor's system can take the form of printed manuals, training programs, advertising services, and managerial support, among other things. [citations omitted].

Patterson, 60 Cal. 4th at 490. The franchise relationship also takes advantage of economies of scale. Franchisees often buy supplies from the franchisor, taking advantage of the franchisor's ability to make bulk purchases, as well as the franchisor's proven methods of operation, products, and services.

The California Supreme Court identified and acknowledged the benefits the franchise business model provides to the parties:

> The business format arrangement allows the franchisor to raise capital and grow its business, while shifting the burden of running local stores to the franchisee. [citations omitted] The systemwide standards and controls provide a means of protecting the trademarked brand at great distances. [citations omitted] 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, the dress of franchise employees, and the design of the stores themselves.

Patterson, 60 Cal. 4th at 490. As the California Supreme Court recognized:

> [T]he economic effects of franchising are profound. Annually, this sector of the economy, including the fast food industry, employs millions of people, carries

> payrolls in the billions of dollars, and generates trillions of dollars in total sales.

Id. at 489.

II. THE DISTRICT COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE ITS INTERPRETATION OF CALIFORNIA LAW COMPORTS WITH CALIFORNIA AUTHORITY.

A. The District Court Correctly Interpreted California Law When It Concluded McDonald's Was Not an Employer Under Any of *Martinez*'s Three Prongs.

The District Court properly concluded that plaintiffs could not establish an employment relationship with McDonald's under any of the three tests articulated in *Martinez*. Plaintiffs contend the District Court erred by applying the holding in *Patterson* to implicitly overrule or narrow *Martinez* and in so doing effectively carved-out a special franchisor exemption to the definition of "employer" under California's wage and hour laws. Appellant's Opening Brief (AOB), 15, 16. Plaintiffs' contentions are misplaced and without merit. The District Court correctly interpreted *Patterson*, a California Supreme Court case assessing the franchise business model, in applying *Martinez* to the facts in this case.

To "identify the persons who may be liable as employers, in actions under section 1194," *Martinez* examined the historical backdrop of the IWC's wage orders and authority. *Martinez*, 49 Cal. 4th at 51. The California Supreme Court concluded that the IWC defined employers to include those who: (1) "suffer or permit [workers] to work"; (2) "exercise[ ] control over the wages, hours, or

working conditions" of workers; or (3) constitute employers under the "common law employment relationship" test. *Id.* at 57-60, 64-65. Characterizing these as "three alternative definitions," the Court held that these tests governed "in actions under section 1194," and determined that the plaintiffs had failed to show that the merchants were their employers under either alternative to the common law test. *Id.* at 64- 66, 68-77. Under *Martinez*, only "employers" have a duty to pay wages, and the IWC wage orders govern who is an "employer" under the California wage orders and Labor Code. "That only an employer can be liable… seems logically inevitable as no generally applicable rule of law imposes on anyone other than an employer a duty to pay wages." *Id.* at 49. As such, in order to be found to be an employer under California law, an entity must meet one of the three tests articulated by the California Supreme Court in *Martinez*.

The IWC first adopted the two alternatives to the common law test (*i.e.*, the IWC's third test) in 1916 and 1947 to bring within its regulatory jurisdiction those entities which controlled workers but which were not considered employers under the common law at the time. *See Martinez,* 49 Cal. 4th at 57-59, 69. The California Supreme Court's 1989 decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations,* 48 Cal. 3d 341 (1989) revisited and expanded the traditional common law test of employment that had once governed independent contractor status in California and applied an even more expansive

definition of control than under the traditional common law test. It is therefore unsurprising that today, following further development of the common law after the IWC's adoption of alternative tests in 1916 and 1947, those tests are not meaningfully different in application from the modern-day common law test explained in *Borello*.

Under *Borello*'s common law test, "the foremost consideration" is "the extent of the hirer's right to control the work." *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 531-532 (2014) (*Ayala*). In *Martinez*, the California Supreme Court analyzed the two alternatives to the common law test, the "suffer, or permit to work" test, and the "exercises control" test. *Martinez*, 49 Cal. 4th at 69-74. The Court's application of these two alternative IWC tests was based on the very same consideration—the right of control—that would determine whether defendants were plaintiffs' employers under *Borello*'s common law test.

1. The District Court Correctly Concluded That Plaintiffs Cannot Satisfy The "Suffer and Permit" Test.

Plaintiffs contend that the "suffer, or permit to work" test is satisfied because McDonald's "'suffered or permitted' the *violations* at issue, both by directly causing those violations and because McDonald's could have prevented or remedied them." AOB, 12 [emphasis added.] Plaintiffs misstate the test.

The IWC's "suffer, or permit to work" test historically applied to a "proprietor who knows that persons are *working* in his or her business without

having been formally hired, or while being paid less than the minimum wage," but who "clearly suffers or permits that work by failing to prevent it, while having the power to do so." *Martinez, supra,* 49 Cal. 4th at 69 [emphasis added]. This test originated in the context of child labor statutes, and was crafted by the IWC ... to address those situations where a purported employer's intent to hire someone may be subject to some sort of subterfuge or denial. Otherwise, an unscrupulous employer might claim a child was not employed to do the work which caused the injury, but that he did it of his own choice and at his own risk. *Id.*

In present-day application, the thrust of the "suffer, or permit to work" test is the extent of the hirer's right to control the work (see *Martinez, supra,* 49 Cal. 4th at 69-70), just as that factor is the "foremost consideration" under the common law test. *Ayala*, 59 Cal. 4th at 531-32. As the California Supreme Court explained in *Martinez,* an employer "suffers or permits... work by failing to prevent it," but only "while having the power to do so." *Id.* Thus, neither of the merchants who benefitted from plaintiffs' work in *Martinez* "suffered or permitted plaintiffs to work because *neither had the power to prevent plaintiffs from working."* *Id.* at 70 [emphasis added]. Rather, plaintiffs' employer, not the merchants who purchased strawberries from plaintiffs' employer and thereby benefited from plaintiffs' labor, had "the exclusive power to hire and fire [plaintiffs], to set their wages and hours, and to tell them when and where to report to work." *Id.*

In focusing on the right of control, the California Supreme Court rejected any interpretation of the "suffer, or permit to work" test that would create employer status based on mere knowledge that plaintiffs were working and that plaintiffs' work benefited defendants. *Id*. To the contrary, the Court held that "the concept of a benefit is neither a necessary nor a sufficient condition under the 'suffer or permit' standard." *Martinez*, at 70. Rather, "the basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring," "*while having the power to do so*." *Id.* at 69-70 [emphasis added].

There is no support for plaintiffs' contention that this test is satisfied because McDonald's failed to stop alleged *violations* of the law from occurring. As McDonald's soundly explains, *Martinez* establishes that in order to qualify as an employer under the "suffer, or permit" standard, the entity must have the capacity to prevent the employee's *work itself*. To the extent plaintiffs believe their interpretation *ought* to be the law because such an interpretation affords workers greater protections, their arguments are best addressed to the California Legislature rather than a federal court.

2. The District Court Correctly Concluded That Plaintiffs Cannot Satisfy The "Exercises Control" Test.

Similar to their contentions under the "suffer, or permit to work" test, plaintiffs contend they satisfy the "exercises control" test because "McDonald's

itself *controlled the working conditions* that resulted in many of the *violations* alleged by plaintiffs." AOB, 18. [emphasis added]. That is incorrect.

The "exercises control over the wages, hours, or working conditions" test in the IWC wage orders focuses on *actual* control of the work, and thus is narrower than *Borello*'s common law test, which focuses on "the hirer's *right* to control the work." *Ayala, supra,* 59 Cal. 4th at 531-532.

In *Martinez,* this Court rejected the argument that the IWC's "exercises control" test could be met where a defendant's financial domination over plaintiffs' employer allowed it to exercise "*indirect* control over his employees' wages and hours." *Martinez, supra,* 49 Cal. 4th at 71 [emphasis added]. *Martinez* held that because the defendants could not compel the plaintiffs to work, lacked the right to hire, fire, train, and supervise them, and did not set their hours or break times, the defendants were not the plaintiffs' employers under the "exercises control" test. *Id.* at 71-74. Rather, plaintiffs' employer "alone controlled plaintiffs' wages, hours and working conditions." *Id.* at 71. The fact-intensive analysis in *Martinez* into the defendants' right of control over how the plaintiffs did their jobs illustrates that the IWC's "exercises control" test is subsumed by—and certainly no broader than—*Borello*'s common law test.

Here, plaintiffs' argument that the test is met turns largely, if not completely, on the indirect control which they contend results from the franchise agreement.

This is not sufficient under *Martinez*. As McDonald's forcefully explains in its brief, the record demonstrates that McDonald's did not exercise control over the plaintiffs' wages, hours, and working conditions as those terms have been interpreted by the California courts.

3. The District Court Correctly Concluded That Plaintiff Cannot Satisfy The Common Law Test.

Plaintiffs contend that under the third test articulated in *Martinez*, the common law test, what matters is not how much a control over the workers a company exercises, but how much control it retains the right to exercise. That retained right of control, plaintiffs argue, can be established either by the parties' course of conduct or by the contracts that govern their relationship. AOB, 54-55. According to plaintiffs, the common law test is satisfied in this case because McDonald's "retained virtually unlimited contractual rights of control" of the franchisee's operations through its franchise agreement. AOB, 12-13 [emphasis added.] Plaintiffs posit "[t]he contracts here reserved McDonald's broad rights to adopt and enforce whatever policies and standards it deemed appropriate." AOB, 56. Plaintiffs' contentions fail.

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." *Borello, supra,* 48 Cal. 3d at 350. Here, plaintiffs seek to elevate the role franchising agreements play in

governing the franchise relationship as equating to retained control over the employees sufficient to trigger joint employment status. In doing so, plaintiffs overstate the District Court's consideration of *Patterson* in interpreting the common law test, contending that the District Court improperly concluded that in *Patterson* the California Supreme Court "implicitly overruled (or narrowed) *Martinez*. AOB, 15. The District Court did no such thing. Rather, the District Court properly considered that California Supreme Court's well-developed analysis of the franchise business model in *Patterson*, correctly recognizing that the principle focus under the common law remains on identifying who has the right to control the manner and means of accomplishing the results desired. Applying the standard to the record in this case, the District Court properly concluded that the franchisee, not McDonald's, controlled the workplace environment.

B. The District Court Correctly Interpreted California Law When It Rejected Plaintiff's Ostensible Agency Theory.

Plaintiffs advance the novel, but untenable theory that McDonald's is a joint employer by virtue of an ostensible agency relationship. The District Court correctly rejected this argument. Such an interpretation is not supported by the long-standing enforcement history of the California Division of Labor Standards Enforcement ("DLSE"), the state agency responsible for the interpretation and enforcement of the IWC wage orders and California's wage and hour laws.

Further, plaintiffs' interpretation is at odds with other, recent efforts by the California Legislature to impose joint liability in specific circumstances.

The Labor Commissioner is the chief of the Division of Labor Standards Enforcement of the Department of Industrial Relations for the State of California. Cal. Labor Code §§ 79, 82. By statute, the Labor Commissioner is authorized to enforce the State's minimum labor standards, including various laws governing the payment of wages and the regulations of the IWC. Cal. Labor Code §§ 90.5, 95(a), 1193.5, 1193.6. Plaintiffs do not cite a single ruling, decision, opinion, or enforcement policy by the DLSE in which the DLSE has relied upon the ostensible agency theory to hold a franchisor liable as the employer of a franchisee's employees. While the Labor Commissioner has broadly interpreted the term employer under existing case law, there are no known instances, including within its own enforcement manual, in which the Labor Commissioner has asserted or relied upon the ostensible agency relationship theory advanced by plaintiffs to hold an entity liable as a joint employer. [1,2]

---

[1] See DLSE Enforcement Policies and Interpretations Manual, (Revised) Section, 37.1.2. (July 2017) ("Employer." Initially, it is important to note that there may be more than one entity responsible for the payment of wages or other benefits. The broad definition of "employer" for purposes of wage and hour law (see Section 2.2 of this Manual) potentially allows more than one person to be liable for unpaid wages and penalties. Courts have found joint liability for unpaid wages against multiple employers in various contexts. *Real v. Driscoll Strawberry Association* (9th Cir. 1979) 603 F.2d 748, 754 (wage claim against joint employer decided under the Federal FLSA wage and hour laws); *Bonnette*

Plaintiffs' misplaced reliance upon the ostensible agency theory is also belied by several recent enactments by the California Legislature imposing joint liability in particular circumstances. *See* Cal. Labor Code § 2810.3 (imposing joint liability on a "client employer" unless a specific exclusion applies); Cal. Labor Code § 238.5 (imposing joint liability on individuals or business entities that contract for services in the property services or long-term care industries); Cal. Labor Code § 218.7 (imposing joint liability on a direct contractor on private construction projects for any unpaid wages, fringe, and other benefits owed to a wage claimant by a subcontractor at any tier). Despite the California Legislature's recent interest in imposing joint employer liability under specified circumstances,

---

v. California Health and Welfare Agency (9th Cir. 1983) 704 F.2d 1465, 1470 (wage claim decided in favor of employees against joint employer under the Federal F.L.S.A. wage and hour laws); *Michael Hat Farming Co. v. Agricultural Labor Relations Bd*. (1992) 4 Cal.App.4th 1037, 6 Cal.Rptr.2d 179. ("It is established that some farming operations have multiple, joint agricultural employers", *citing Rivcom Corp. v. Agricultural Labor Relations Bd*. (1983) 34 Cal.3d 743, 768-769). Under California law, the language of the Industrial Welfare Commission Orders' "employer" definition is more protective than the federal Fair labor Standards Act definition. "The language of the IWC's 'employer' definition has the obvious utility of reaching situations in which multiple entities control different aspects of the employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work." *Martinez v. Combs* (2010) 49 Cal.4th 35, 59.)

[2] No deference is owed to DLSE's Enforcement Manual, because it was not promulgated in conformity with Administrative Procedures Act. *Tidewater Marine Western v. Bradshaw,* 14 Cal. 4th 557, 573 (1996).

amici are not aware of any California law that refers to an ostensible agency theory in establishing joint liability for wage order violations.

Lastly, the language in the IWC wage orders upon which plaintiffs now rely for this new theory of joint liability has not changed in decades. During that time, franchisees and franchisors have operated in similar fashion to the circumstances set forth in this case pursuant to franchise agreements imposing standards and other procedures designed to protect the trademarked brand of the franchisor. *Patterson*, 60 Cal. 4th at 488-489. And yet, during that time, except for Plaintiffs' contention here that McDonald's is liable under an ostensible agency theory, neither the DLSE, nor the Legislature, nor has any California court relied upon an ostensible agency theory to impose joint liability upon a franchisor for a franchisee's employees. The most plausible explanation for why franchisors have been left alone is that they are not jointly liable. *Cf. Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 400 (9th Cir. 2011) ("[W]hile it is possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing[, the] more plausible hypothesis is that the ... industry has been left alone because DOL believed its practices were lawful.")

In sum, the District Court correctly rejected plaintiffs' ostensible agency theory. Plaintiffs' theory has not been recognized or relied upon by California's

enforcing agency, courts, or legislature to impose joint liability for California's wage and hour laws. The Court should not do so now.

III. REVERSAL OF THE DISTRICT COURT'S JUDGMENT WOULD HAVE A DESTABILIZING IMPACT ON CALIFORNIA'S BUSINESSES, WORKERS AND ECONOMY.

In one of the largest economies in the world, California's businesses and workers, enforcing agencies and indeed all California residents depend upon and benefit from predictable and fair laws regulating building models and employment relationships. By this appeal challenging the longstanding laws about what it means to be an employer, plaintiffs seek to destabilize California businesses and upend one of the most successful and common business models in California. By burdening the franchisor with the obligations of the franchisee to its employees, plaintiffs seek to strip the franchise model of its viability. The consequences to the California economy would likely be significant.

In Kaufmann's 2015 article, the authors warned that classification of workers at franchised locations as employees of the franchisor could doom the franchise model and immediately undermine the rights of many existing franchisees. Treating franchisees like the franchisor's employees "would cripple or even eradicate franchising as we know it; destroy the investments and profitability of both franchisors and franchisees; and stifle or eliminate one of the most dynamic

and fertile engines of economic growth and opportunity in the United States over the past half-century." Kaufmann, 34, No. 4 Franchise L.J. at 502.

Kaufmann also points out that franchise agreements for many franchise systems provide franchisor buy-back rights that may need to be exercised to avoid the calamitous consequences of serving as both franchisor and employer. *Id.* at 501. *See also* James D. Woods, Chris Johnson, How Changes in Joint Employer Liability Could Impact Franchisors and Franchisees: An Economic Perspective, Franchising World, p. 15, 16 (Special Edition 2015) ("many franchisors could be faced with a decision to buy back or shut down locations."). Further, franchise renewal rights are usually based on the terms then being offered by the franchisor. If franchisors are held to be joint employers, they may be forced to "dramatically increase franchisee payments" to the franchisor. Kaufmann, p. 499.

In addition to benefitting the parties to the franchise agreement and their employees, the franchise model provides consumers with reliable, economically efficient products and services. A failure to affirm the District Court's judgment would not only disregard California law, but also would threaten the benefits the franchise model provides to the businesses, workers, economy and people of California.

CONCLUSION

For all the foregoing reasons and those set forth in Defendants'-Appellees' answering brief, this Court should affirm the District Court's judgment entered below.

Respectfully submitted,

Dated: January 26, 2018

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Robert R. Roginson
Robert R. Roginson

Attorneys for *Amici Curiae* Employers Group and Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(5) and Ninth Circuit Rule 32-1, I hereby certify that this brief contains 4,692 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as established by the word count of the computer program used for preparation of this brief.

This brief complies with the typeface requirements of Federal Rule of Civil Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point size Times New Roman font.

Dated: January 26, 2018

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Robert R. Roginson
Robert R. Roginson

Attorneys for *Amici Curiae* Employers Group and Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, 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 CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Robert R. Roginson
Robert R. Roginson

32769758.1