COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13166

DHANANJAY PATEL; SAFDAR HUSSAIN; VATSAL CHOKSHI; DHAVAL PATEL; NIRAL PATEL,

Plaintiffs-Appellants,

v.

7-ELEVEN, INC.,

Defendant/Third Party Plaintiff-Appellee,

MARY CARRIGAN; ANDREW BROTHERS,

Defendants,

DPNEWTO1; DP TREMONT STREET INC.; DP MILK STREET INC.; DP JERSEY INC.,

Third Party Defendants.

On Certified Question from the United States Court of Appeals for the First Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* SUPPORTING 7-ELEVEN, INC.

KEVIN P. MARTIN
(BBO #655222)
WILLIAM E. EVANS
(BBO #706382)
CHRISTOPHER J.C. HERBERT
(BBO #703492)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
kmartin@goowinlaw.com
wevans@goodwinlaw.com
cherbert@goodwinlaw.com
Attorneys for Amici Curiae

November 17, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. App. P. 17(c)(1) and Supreme Judicial Court Rule 1:21, Amici Curiae, by their undersigned counsel, hereby disclose the following:

1. Parent Corporation(s) of Chamber of Commerce of the United States of America: None.

2. Publicly-Held Corporation(s) Owning More Than 10% of Chamber of Commerce of the United States of America: None.

3. Parent Corporation(s) of National Federation of Independent Business Small Business Legal Center: None.

4. Publicly-Held Corporation(s) Owning More Than 10% of National Federation of Independent Business Small Business Legal Center: None.

/s/ *Kevin P. Martin*
Kevin P. Martin

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ISSUE PRESENTED

1. Whether the three-prong test for independent contractor status set forth in M.G.L. c. 149, § 148B, applies to the relationship between a franchisor and its franchisee, where the franchisor must also comply with the FTC Franchise Rule.

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

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[1] Amici declare, in accordance with Mass. R. App. P. 17(c)(5), that: (1) no party, nor any party's counsel, has authored this brief in whole or in part; (2) no party, nor any party's counsel, has contributed money that was intended to fund preparing or submitting this brief; (3) no person or entity—other than the Amici, their members, or their counsel—has contributed money that was intended to fund preparing or submitting this brief; and (4) neither Amici nor their counsel represents or has represented one of the parties to this case in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

The National Federation of Independent Business Small Business Legal Center ("NFIB SBLC") 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. NFIB is the nation's leading small business association, representing members in Washington D.C., and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB SBLC frequently files amicus briefs in cases that affect small businesses.

This case is significant to the Amici because it implicates the viability of the franchise model of business, which is used by many entities whose interests the Amici represent. In the spirit of entrepreneurship, individuals regularly make the choice to be a franchisee, rather than an employee, in order to secure the many benefits of owning their *own* enterprise. Should this Court answer "yes" to the certified question, it would risk converting every franchise relationship in the Commonwealth into one of employment, effectively rendering the franchise model illegal. In doing so, the Court would discourage companies from entering franchise agreements in Massachusetts, to the great detriment of the economy, the public, and the many individuals who avail themselves of this long-standing business model.

For these reasons, Amici and their members have a considerable interest in the Court's answer to the certified question, and hope this brief will assist the Court in considering the issue.

INTRODUCTION

In certifying the present question to this Court, the First Circuit emphasized that resolution of the certified question "impacts untold sectors of workers and business owners across the Commonwealth." *Patel v. 7-Eleven, Inc*., 8 F.4th 26, 29 (1st Cir. 2021). That was no exaggeration. The damaging consequences that would result from applying the three-part conjunctive test of the "Independent Contactor Law" or "ICL" to the franchisor-franchisee relationship are numerous and far-reaching.

The franchise relationship is intentionally not an employer-employee relationship. And both the franchisor and the franchisee want it that way. Franchisees are themselves small business owners, investing their own capital into the business and having personal economic stakes in the success of the enterprise. Those stakes benefit the franchisees, who can realize capital appreciation; the franchisor, which secures returns from its franchisee-operated stores; and consumers, who experience uniformity and consistent high-quality from a recognized brand.

For these benefits to be realized, however, the franchisor must exercise some control over how the franchisee operates and must receive some degree of compensation from the franchisee. Indeed, the Federal Trade Commission's ("FTC") "Franchise Rule" *requires* franchisors either to exert a "significant degree of control over their franchisee's method of operation" or to "provide significant assistance in the franchisee's method of operation." 16 C.F.R. § 436.1(h)(2). And the Rule *requires* the franchisee to "make a required payment to the franchisor" "as a condition of obtaining or commencing operation of the franchise." *Id.* § 436.1(h)(3).

By comparison, the three-part conjunctive ICL test labels someone an "employee" if an "employer" exercises "control and direction in connection with the performance of the service." M.G.L. c. 149, § 148B. As a result, Plaintiffs argue that every Franchise Rule-compliant franchisee is an employee of its franchisor. But that is not what the Massachusetts Legislature said, and it cannot be what the Legislature intended.

Applying the ICL to the franchise model would extend the Wage Act's many prohibitions and requirements to the franchisee small business owners. Those include, most importantly, the ban on an employer requiring an employee to pay a fee for employment. *See Awuah v. Coverall N. Am., Inc.*, 460 Mass. 484, 498 (2011). The net effect of Plaintiffs' position is that any franchise agreement that complies

with the federal Franchise Rule would become *unlawful* under Massachusetts law. The economic disruption from such a ruling would be significant, and it is nowhere accounted for in the ICL or the Wage Act. Nothing in the ICL or the Wage Act indicates that it should apply to the franchise model, nor does it demonstrate a legislative intent to render Franchise Rule-compliant business relationships unlawful in the Commonwealth. Not only are the Wage Act and ICL silent as to franchises, but there is an extensive network of other state laws and regulations that specifically govern franchise relationships. These laws evidence a clear legislative intent to allow for franchising in the state.

Accordingly, for the reasons given by 7-Eleven and herein, the Court should hold that the ICL does not apply to the franchisee-franchisor relationship.

ARGUMENT

I. THE HISTORY AND BENEFITS OF THE FRANCHISE MODEL.

The franchise model has a long and storied history. Franchises have existed in one form or another for hundreds of years. Francine Lafontaine & Margaret E. Slade, *Franchising and Exclusive Distribution: Adaption and Antitrust*, *in* 2 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 386, 388 (Roger D. Blair & D. Daniel Sokol, eds., 2015) (franchising is "as old as commerce itself" and "franchising in the United States can be traced back to the mid-1800s"). The franchise model in the United States gained popularity in the decades after World

War II. *See* William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for A More Balanced View of the Franchisor-Franchisee Relationship*, 28 FRANCHISE L.J. 23, 24-25 (2008). Its growth was attributable to pursuit of the American Dream: people wanted financial stability, mobility, and freedom, and owning and operating one's own business—instead of being someone else's employee—was an attractive option. *See id.* at 24. The franchise model gave motivated individuals economic efficiencies unavailable to stand-alone business owners, which in turn helped to kickstart their success. *See id.*

Franchising remains "a bedrock of the American economy." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 441 (3d Cir. 1997). The most recently-available Census data show that franchising generates 7.3 million jobs with an economic output of $1.3 trillion. JA000430-431 ¶ 39 (citing U.S. Census Bureau, Economic Census, 2012 Data). And franchises have proven particularly adept at helping to spur economic recoveries after periods of downturn. The model allows for "faster hiring, rapid business openings, and more stable performance than independent businesses," such that franchises are expected to "be among leading business and job generators" as the economy recovers from the COVID-19

pandemic. *See* INT'L FRANCHISE ASS'N, 2021 ECONOMIC OUTLOOK FOR FRANCHISING 2 (2021).[2]

One of the most important benefits to franchisees is the opportunity for individuals to participate in the economic upside of a business as an *owner* rather than just an employee. As an expert witness in the federal district court action explained: "[P]urchasing a franchise provides financial benefits directly to the franchisee as compared to being an employee-manager of a store location. … [B]ecause the franchisee has claims to the profits of the franchised business, the franchise provides the franchisee with an income stream that has significant upside (and potential downside too)." JA000441-442 ¶¶ 61, 63 (explaining that four of the five named plaintiffs, as owners of their franchised locations, earned multiples of what they might have earned as managers). Unlike an employee, who is typically paid a salary, a franchisee "can increase the size of this income stream and earn a greater return on investment by increasing the business's profitability." *Id*. ¶ 61.

The importance of franchising to expanding capital ownership and encouraging small business formation has not been lost on the courts. As U.S. Supreme Court Justice Potter Stewart once explained, in warning against overly

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[2] *Available at* https://www.franchise.org/sites/default/files/2021-02/Economic%20Outlook%202021_web2.pdf.

vigorous enforcement of antitrust laws against franchise relationships, "[t]he franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs. If our economy had not developed that system of operation these individuals would have turned out to have been merely employees." *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 386-87 (1967), *overruled by Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (Stewart, J., concurring in part and dissenting in part) (internal quotation marks and citations omitted). He went on to caution that "[i]ndiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition and force suppliers to abandon franchising and integrate forward to the detriment of small business. In other words, we may inadvertently compel concentration by misguided zealousness." *Id.*

While many different franchise models exist in the United States, one of the most prominent is the "business format franchise," as used by 7-Eleven and others. "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." *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 733 (Cal. 2014) (citations and footnotes omitted). In exchange, "the franchisee … acquires a business plan, which the franchisor has crafted for all of its stores. 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." *Id.*

Because the franchisor provides its franchisee with "printed manuals, training programs, advertising services, and managerial support, among other things," the franchise model reduces barriers to entry and "puts the franchisee in a better position than other small businesses." *Id.* at 733-34. The business format franchise model thus serves as a reliable means through which individuals, especially those in underrepresented communities, can break into the ranks of small business ownership. "[I]n the small business ownership realm, franchisees of color and female owners are represented at a disproportionately higher rate, thanks to the assistance the franchise business format affords." INT'L FRANCHISE ASS'N & OXFORD ECONOMICS, THE VALUE OF FRANCHISING: A REPORT FOR THE INTERNATIONAL FRANCHISE ASSOCIATION 21 (Sept. 2021).[3] In fact, as of 2012, while minorities owned only about 18.8% of all other businesses, they owned 30.8% of franchised businesses. *See* PWC, FRANCHISED BUSINESS OWNERSHIP BY MINORITY AND GENDER GROUPS: AN UPDATE FOR THE IFA FOUNDATION 1 (Mar. 9, 2018).[4]

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[3] *Available at* https://openforopportunity.com/wp-content/uploads/2021/09/IFA_The-Value-of-Franchising_Sep2021.pdf.

[4] *Available at* https://www.franchise.org/sites/default/files/Franchise%20Business%20Ownership%20Study.pdf.

Women also have historically taken advantage of the franchise model to break into the ranks of small business ownership, with "the rate of female-owned franchises gr[owing] by around 10% from 2007 to 2012" and by 24% in the decade through 2019. Eric Stites, *More Women Are Embracing Franchise Business Ownership, But There's More Work To Be Done*, FORBES (Jan. 31, 2020).[5]

The immigrant community, too, has successfully leveraged the franchise model to achieve independent financial success. *See* Jim Judy, *Immigrant Entrepreneurs Flock to Franchising Opportunities*, ENTREPRENEUR (May 5, 2017).[6] Taking just one example: After Andy Patel immigrated to the United States, he took his first job as a manager at Wendy's. He then used his savings to become a successful IHOP franchisee. He eventually leveraged that single franchise into an empire of "63 Applebee's, 38 IHOPs, 24 Burger Kings, eight Pizza Huts, and three Travelodges." Mathew Flynn, *5 Inspirational Success Stories to Motivate Aspiring Franchisees*, BOSS MAGAZINE.[7]

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[5] *Available at* www.forbes.com/sites/forbesbusinesscouncil/2020/01/31/more-women-are-embracing-franchise-business-ownership-but-theres-more-work-to-be-done/?sh=7a56a14d1ec6. *See also* FRANCHISE BUSINESS REVIEW, WOMEN IN FRANCHISING REPORT 2019, *available at* https://franchisebusinessreview.com/page/women-in-franchising-report/.

[6] *Available at* https://www.entrepreneur.com/article/293452.

[7] *Available at* thebossmagazine.com/franchise-success-stories/ (last visited Nov. 16, 2021).

And, as that example shows, while some franchisees are single-location owners, many other franchisees own multiple stores, often forming independent companies to run them. Arturs Kalnins & Francine Lafontaine, *Multi-unit Ownership in Franchising: Evidence from the fast-food Industry in Texas*, 35 RAND J. ECON. 747, 750 (2004) (examining Texas franchises and concluding that "single-unit franchises owned only 13%" of the examined franchises in the state). In 2020, the top fifty largest multi-brand franchisees in the United States operated a combined 19,693 franchises, an average of nearly 400 franchised locations each. *2020 Multi-Brand 50*, FRANCHISING.COM (Mar. 31, 20210).[8] Some of these multi-unit franchisees are even backed by private-equity companies or are publicly traded companies in their own right. *See* Ryan LeClair, *Some Multi-Unit Franchisees Are Public Companies*, LEXOLOGY (Jan. 13, 2015).[9]

What franchisees of all types and sizes have in common, however, is that the owners are running their own business. *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962) ("The franchise system creates a class of independent

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[8] *Available at* https://www.franchising.com/articles/2020_multibrand_50.html.

[9] *Available at* https://www.lexology.com/library/detail.aspx?g=dea5e8f5-c851-40f8-8243-233d88d76640#:~:text=Publicly-traded%20franchisees%20include%20the%20following%20companies%3A%20Carrols%20Restaurant,company.%20Diversified%20Restaurant%20Holdings%20is%20a%20Nasdaq%20company.

businessmen"), *aff'd*, 332 F.2d 505 (2d Cir. 1964). Franchisees often "hire [their] own employees and decide what to pay them, as well as decide whether or not to pursue certain business opportunities." *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 873 F.3d 21, 24 (1st Cir. 2017). In short, all franchisees are independent business owners.

Finally, the franchise relationship also benefits consumers, including by helping to "ensur[e] consistency and uniformity in the quality of goods and services." *Patterson*, 333 P.3d at 733. The franchise model instills confidence in the consumer that he or she can walk into any store bearing a franchisor's branding and receive the same type and quality of goods and services. *Susser*, 206 F. Supp. at 640 (franchising "provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain. The franchise system of operation is therefore good for the economy.").

II. THE FRANCHISOR'S EXERTION OF DIRECTION AND CONTROL IS BOTH PRACTICALLY AND LEGALLY NECESSARY.

The benefits of the franchise model necessarily entail some degree of direction and control by the franchisor. Franchising is "all about controls" to ensure consistency across franchised stores. William L. Killion, *Franchisor Vicarious Liability-the Proverbial Assault on the Citadel*, 24 FRANCHISE L.J. 162, 164 (2005). "This approach minimizes chain-wide variations that can affect product quality,

customer service, trade name, business methods, public reputation, and commercial image." *Patterson*, 333 P.3d at 739 (observing that the "franchise contract consists of standards, procedures, and requirements that regulate each store for the benefit of both parties"). Franchisors want assurance that franchisees will deliver acceptable levels of service and convey consistent marketing messages. For this reason, franchising "places franchisees under added rules and surveillance as compared with [other] markets." Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, ADMIN. SCI. Q., Vol. 36, no. 2, 1991, at 283.

Most prominent among these rules is the FTC Franchise Rule, codified at 16 C.F.R. § 436.1 *et seq*., which dictates certain disclosure requirements for franchisors. The FTC Franchise Rule operates as "a pre-sale disclosure rule that requires specified disclosures through a disclosure document that must be provided to prospective franchisees." *7-Eleven, Inc. v. Spear*, 2011 WL 2516579, at *4 (N.D. Ill. June 23, 2011). Under this rule, franchisors must "disclose material information to prospective franchisees on the theory that informed investors can determine for themselves whether a particular franchise transaction is in their best interests." *Id.*

As relevant here, the Franchise Rule defines a franchise as:

> [A]ny continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

> (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;
>
> (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and
>
> (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

16 C.F.R. § 436.1(h). Thus, under the Franchise Rule, a commercial relationship is not a franchise unless the franchisor "will exert or has authority to exert a significant degree of control over" or will "provide significant assistance in the franchisee's method of operation." *Id*. § 436.1(h)(2). Such control is also necessary to ensure that a franchisor does not lose its intellectual property rights. As the federal district court explained here, federal law (the Lanham Act) requires a franchisor to "maintain control over [a franchisee's] use of its trademark," or else risk constructive abandonment of those rights. *Patel v. 7-Eleven, Inc.*, 485 F. Supp. 3d 299, 309 (D. Mass. 2020).

III. THERE IS NO PUBLIC POLICY REASON TO EXTEND THE WAGE ACT TO FRANCHISE RELATIONSHIPS GOVERNED BY THE FEDERAL FRANCHISE RULE.

Plaintiffs argue that the direction and control inherent in the franchise model as a matter of federal law means that all franchisees are employees under the ICL—

making franchise fees paid consistent with the Franchise Rule unlawful. *See Awuah*, 460 Mass. at 497-98. The district court rejected that argument, holding that Franchise Rule-compliant franchisees should not be deemed employees under the ICL. This decision was correct. This Court has not hesitated to reject similar claims when they would eliminate otherwise permissible commercial relationships. *See generally Monell v. Bos. Pads, LLC*, 471 Mass. 566 (2015) (holding that the ICL did not apply to real estate agents, where the Legislature did not intend to preclude them from being classified as independent contractors).

There is no policy reason to force the square peg of Franchise Rule-compliant business relationships into the round hole of the Wage Act. As originally enacted, the Wage Act applied only to employees in commercial industries such as manufacturing and mining. *See Melia v. Zenhire*, *Inc.*, 462 Mass. 164, 171 n.6 (2012). With time, however, it has expanded with respect to the scope of workers covered. *See id*. at 171. It now applies not to specifically enumerated industries, but to "[e]very person having employees in his service." *Id.* at 171 n.6 (quoting St. 1935, c. 350). Despite this expansion, the Wage Act's purposes have held steady: "to prevent the unreasonable detention of wages." *Boston Police Patrolmen's Ass'n v. Boston*, 435 Mass. 718, 720 (2002); *Am. Mut. Liab. Ins. Co. v. Comm'r of Lab. & Indus.*, 340 Mass. 144, 147 (1959) ("Doubtless the legislation in its early form was enacted primarily to prevent unreasonable detention of wages.").

To that end, the Wage Act contains a variety of requirements and limitations to ensure that *employees* are protected. For example, the Act requires "every person having employees in his service" to pay "each such employee the wages earned" within a fixed period. *See* M.G.L. c. 149, § 148. It further "provides [other] specific benefits and protections," including "when an employee must be notified of wage deductions," and the length of an employee's breaks. *Ives Camargo's Case*, 479 Mass. 492, 496 (2018). In the context of individual cleaners, this Court also has held that the Wage Act precludes any requirement that an employee pay an employer in exchange for her job. *See Awuah*, 460 Mass. at 498 (holding that "requir[ing] employees to buy their jobs from employers" would violate the Wage Act).

None of these protections make any sense as applied to the broad sweep of franchisees subject to the federal Franchise Rule. Consider again Andy Patel, the owner of 63 Applebee's, 38 IHOPs, 24 Burger Kings, eight Pizza Huts, and three Travelodges. *Supra*, p. 17. When he began paying a franchise fee to add, say, his sixty-third Applebee's franchise, he was in no meaningful sense "buy[ing his] job," the scenario that concerned the Court with respect to the individual cleaners in *Awuah*. And there is no reason for the Wage Act to be enforced such that each of his franchisors must ensure that he is receiving adequate break time. *See* M.G.L. c. 149, § 100 ("No person shall be required to work for more than six hours during a calendar day without an interval of at least thirty minutes for a meal."). It is not even

clear how application of the law would work in such a situation. The economic relationship between a franchisee operating as an independent business enterprise and its franchisor(s) simply does not implicate the policies that underlie the Wage Act, which concern the relationship between employers and vulnerable individual employees.

The ICL does not change the analysis. Originally enacted in 1990, and most recently amended in 2004, the ICL currently provides, in relevant part:

> (a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:—
>
> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> (2) the service is performed outside the usual course of the business of the employer; and,
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

M.G.L. c. 149, § 148B. The ICL was one of the Legislature's broadest expansions to the Wage Act's scope, "exclud[ing] far more workers from independent contractor status than [we]re disqualified under ... the Massachusetts common law." An Advisory from the Attorney General, Chapter 193 of the Acts of 2004 Amendments to Massachusetts Independent Contractor Law, M.G.L. c. 149, sec 148 2004/2, at

2.[10] But this Court has acknowledged that the Legislature did not intend the ICL to foreclose franchisees from being classified as anything other than employees. As the Court explained in *Awuah*, there can be "properly classified independent contractors operating under franchise agreements." 460 Mass. at 486 n.3; *see also Boulanger v. Dunkin' Donuts Inc.*, 442 Mass. 635, 640 (2004) (holding that plaintiff operating under a franchise agreement "was not the defendant's employee").

There is no discernible legislative intent—in either the text of the ICL itself or the relevant legislative history—indicating it was meant to sweep into the category of "employees" franchisees operating distinct businesses consistent with the Franchise Rule. The relevant act—titled "An Act Further Regulating Public Construction in the Commonwealth"—has only a sole stated purpose: "to regulate further public construction in the commonwealth." St. 2004, c. 193. The franchise relationship is not mentioned there or anywhere else in the pertinent legislative history.[11] *See Wallace W. v. Commonwealth*, 482 Mass. 789, 793 (2019) (in interpreting statutes, courts consider "cause of [the statute's] enactment, the mischief

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[10] *Available at* https://leslieray.com/wp-content/uploads/2013/11/Attorney-General-Advisory.pdf.

[11] Nor was such an intent expressed when the Legislature initially enacted the ICL in 1990. *See* St. 1990, c. 464. The relevant legislative history for the 1990 version of the ICL similarly contains nothing to indicate the Legislature intended it to apply to franchisees.

or imperfection to be remedied and the main object to be accomplished" as well as "legislative history where it is informative" (citations omitted)).

Although the ICL reaches beyond public construction, it still makes the most sense as applied to individuals hired to perform discrete tasks as part of some larger project. The Attorney General's guidance on the subject largely operates from this assumption. *See* An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B 2008/1 (hereinafter, "Advisory 2008/1").[12] As one "[f]or example," Advisory 2008/1 explains:

> if painting company X cannot finish a painting job and hires painting company Y as a subcontractor to finish the painting job, provided that all of the individuals performing the painting are employees of company Y, then the Law does not apply. However, if painting company X hires individuals as independent contractors to finish the painting job, then this would be a violation of prong two and a misclassification under the Law.

Id. at 5. Most other examples similarly relate to individual tradesmen hired to perform some discrete part of a project. *E.g.*, *id.* at 6 ("A drywall company classifies an individual who is installing drywall as an independent contractor. This would be a violation of prong two because the individual installing the drywall is performing an essential part of the employer's business."). None concern—and the Attorney

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[12] *Available at* https://www.mass.gov/doc/an-advisory-from-the-attorney-generals-fair-labor-division-on-mgl-c-149-s-148b-20081/download.

General's Advisory nowhere mentions—an ongoing franchise relationship. To the contrary, Advisory 2008/1 acknowledges that "there are legitimate independent contractors and business-to-business relationships in the Commonwealth," which are "important to [its] economic wellbeing." *Id.* at 5.

Importantly, when the Legislature wants to provide protections to franchisees vis-à-vis franchisors, it does so directly and explicitly. For example, M.G.L. c. 93K, § 1, *et seq.* explicitly contemplates and regulates franchises in the automobile repair industry, and M.G.L. c. 93B § 1, *et seq.* similarly regulates the franchise relationship between car manufacturers and dealers. If the Legislature wants to add additional protections applicable to all franchise relationships, these provisions evidence it knows how to do so. *Fernandes v. Attleboro Hous. Auth.*, 470 Mass. 117, 129 (2014) ("The omission of particular language from a statute is deemed deliberate where the Legislature included such omitted language in related or similar statutes.").

In short, should this Court hold that the Wage Act governs Franchise Rule-compliant business relationships, it would radically expand the Act's reach and completely upend thousands of existing commercial relationships in the Commonwealth. There is no policy reason and no evidence of a legislative intent for such a dramatic outcome—one would think if the Legislature intended to destroy the normal business-format franchise model, it would have done so more directly

than by silent implication from the Wage Act and the ICL. And as explained next, such a result would have dire economic and social consequences.

IV. APPLYING THE ICL TO THE FRANCHISEE-FRANCHISOR RELATIONSHIP WOULD HAVE DRASTIC PUBLIC POLICY CONSEQUENCES.

Application of the ICL to franchises that are compliant with the federal Franchise Rule would result in essentially all business format franchisees in the Commonwealth being classified as employees. *See Patel*, 8 F.4th at 28 ("It appears difficult, if not impossible, for a franchisor to satisfy the FTC Franchise Rule[] ... and simultaneously rebut the Massachusetts ICL's employee presumption"). This incongruous result would ensure the decimation of the franchise model in Massachusetts, to the detriment of the state economy and the many thousands of small business owners operating franchises. *See supra*, p. 13. Indeed, the harm to franchisees' reliance interests—some of whom have invested heavily in terms of time and money in their small businesses—is sure to be severe. Not only is such a result patently unfair to these hardworking small business owners, but a dramatic shift from a legal regime under which franchising is permitted, to one where franchise agreements suddenly become impermissible, also could have Takings Clause implications. At a minimum, such a legal change would deprive the Commonwealth of the economic outputs and job growth that franchises generate and cut off one of the primary avenues available for those without substantial amounts

of capital to break into the ranks of small business ownership, including disproportionately minorities, women, and recent immigrants.

Beyond depriving Massachusetts of these economic benefits, answering the certified question in the affirmative would detrimentally affect the beneficial relationship between franchisees and the local community. *See* INT'L FRANCHISE ASS'N & OXFORD ECONOMICS, *supra*, at 29. Franchisees, like most small business owners, are normally members of the community in which they operate. *Id*. This not only makes them "more attentive to the needs of their fellow community members," but also makes them more likely to give back to the local community. *Id*.

For example, franchisees overwhelmingly hire and purchase supplies locally. *Id*. at 30. In this way, "the franchise business model encourages local employment and wealth-sharing with local communities." *Id*. at 28. Franchisees also are exceedingly likely to donate to local charities. *Id*. at 29. One survey found that 65% of franchisees surveyed reported donating to local charities in an average amount of 6% of their profits. *Id* at 30. When extracted across the total franchisee population, it is estimated that franchisees "donated a total of $1.5 billion to charity in the year before the pandemic" and that "[s]ome 18 million hours of volunteering were sponsored by franchised businesses in 2019." *Id.* A holding that dramatically undermines the franchise model would reduce the number of small businesses in the

state, and so deprive communities across the Commonwealth of all these benefits. *Id.* at 31 ("32% of franchisees report they would not own a business if they were not franchisees. When applied to the total number of franchise firms, this would be equivalent to a loss of 60,000 businesses if franchising was not an option.").

A holding that all Franchise Rule-compliant franchisees are "employees" would wreak havoc on other regulatory regimes too. For example, the State Office of Minority and Women Business Assistance ("SOMWBA") has enacted regulations governing the certification of businesses for the state supplier diversity program. *See* 425 C.M.R. § 2.01. The regulation provides that an individual shall not be seen as lacking control over their own business, and thus ineligible for certification, "solely on the basis of the terms of a franchise/license agreement that relate to standardized quality, advertising or accounting format, as long as the franchiser or licenser is independent from the franchisee or licensee." *Id.* § 2.02. The regulation then creates a rebuttable presumption that a franchise is not independent if "one or more eligible principals is currently an employee of a non-minority or non-woman owned or controlled business enterprise or organization which has a direct or indirect financial or controlling interest in, or influence on, the applicant." *Id.* If the ICL applies to make all franchisees employees, then this regulation would make no sense; *all* franchisees would be "an employee of a … business enterprise or organization which

has a direct or indirect financial or controlling interest in, or influence, on, the applicant," and hence presumably ineligible for the supplier diversity program.

In short, there would be no upside, and plenty of downside, from holding that the ICL test applies to the relationship between a franchisor and its franchisee, where the franchisor must also comply with the FTC Franchise Rule. If there is a problem with franchisor-franchisee relationships, then the Legislature is far better positioned to address it than the judiciary, because the Legislature can consider the competing economic and social considerations and any interaction with existing laws and regulations concerning franchising.

CONCLUSION

For the foregoing reasons, the Chamber and NFIB SBLC respectfully request that the Court answer the certified question in the negative and hold that the ICL does not apply to Franchise Rule-compliant franchise relationships.

Respectfully submitted,

/s/ *Kevin P. Martin*
KEVIN P. MARTIN
(BBO # 655222)
WILLIAM E. EVANS
(BBO # 706382)
CHRISTOPHER J.C. HERBERT
(BBO #703492)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
kmartin@goodwinlaw.com
wevans@goodwinlaw.com
cherbert@goodwinlaw.com

Attorneys for Amici Curiae

November 17, 2021

CERTIFICATE OF COMPLIANCE

I, Kevin P. Martin, counsel for *Amici Curiae*, certify pursuant to Rule 17(c)(9) of the Massachusetts Rules of Appellate Procedure, that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 17 and 20. This brief contains 5,309 words, excluding the parts of the brief exempted by Mass. R. App. P. 20(a)(2)(D). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

/s/ Kevin P. Martin
Kevin P. Martin

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

CERTIFICATE OF SERVICE

I, Kevin P. Martin, counsel for *Amici Curiae*, hereby certify this 17th day of November, 2021, that I have served a copy of this Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amici Curiae* Supporting 7-Eleven, Inc., for the Commonwealth of Massachusetts Supreme Judicial Court, Case Number SJC-13166, by causing it to be delivered by eFileMA.com to counsel of record who are registered users of eFileMA.com. All counsel who are not registered users of eFileMA.com have been served via Email pursuant to the March 30, 2020 Supreme Judicial Court Order Concerning Email Service in Cases under Rule 5(b) of Mass. Rules of Civil Procedure:

Shannon Liss-Riordan (BBO #640716)
Michelle Cassorla (BBO #688429)
Tara Boghosian (BBO #706969)
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
(617) 994-5800
sliss@llrlaw.com
mcassaorla@llrlaw.com
tboghosian@llrlaw.com

Attorneys for Plaintiffs-Appellants

Matthew J. Iverson (BBO No. 653880)
Jennifer C. Brown (BBO No. 681442)
Jamie Kurtz (BBO No. 703588)
DLA PIPER LLP (US)
33 Arch Street, 26th Floor
Boston, MA 02110-1447
(617) 406-6000
(617) 406-6100
matthew.iverson@dlapiper.com
jennifer.brown@dlapiper.com
Jamie.kurtz@dlapiper.com

Norman M. Leon (admitted *pro hac vice*)
DLA PIPER LLP (US)
444 West Lake Street, Suite 900 Chicago, IL 60606 (312) 368-4000
Norman.leon@dlapiper.com

Attorneys for Defendant/Third-Party Plaintiff-Appellee

November 17, 2021

/s/ Kevin P. Martin
KEVIN P. MARTIN
(BBO # 655222)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
kmartin@goodwinlaw.com