Case No. 17-15673

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUADALUPE SALAZAR, et al.,
Plaintiffs-Appellants,

v.

MCDONALD'S CORP., et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for amici make the following disclosures:

The California Employment Lawyers Association, Asian Americans Advancing Justice – Asian Law Caucus, Bet Tzedek Legal Services, Centro Legal de la Raza, La Raza Centro Legal, Legal Aid at Work, the Partnership for Working Families, the Women's Employment Rights Clinic (Golden Gate University School of Law), and Worksafe, Inc. hereby certify as follows: *amici* have no parent corporations, have no stock, and hence, no public company owns 10% or more of its stock.

/s/ Aaron Kaufmann
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Pursuant to Circuit Rule 29-3, *amici curiae* obtained the consent of the parties to the filing of this brief.

I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae represent primarily low-wage workers, and have frequently prosecuted wage and hour violations that have occurred in franchise operations. Holding both franchisors and franchisees jointly liable for these wage and hour violations is crucial for effective enforcement of those laws and ensuring the workers' ability to collect the wages and penalties, they are due. The broad franchisor defense afforded under the subject decision will impede those efforts. A brief description of the work and the mission of each of the *amici curiae*, explaining their interest in the case, is as follows:

California Employment Lawyers Association

The California Employment Lawyers Association ("CELA") is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus

briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc*. 40 Cal. 4th 1094 (2007), *Gentry v. Superior Court* 42 Cal. 4th 443 (2007), *Brinker Restaurant Corp. v. Superior Court* 53 Cal. 4th 1004 (2012), *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014), and in cases before the Ninth Circuit.

Asian Americans Advancing Justice - Asian Law Caucus

Asian Americans Advancing Justice - Asian Law Caucus ("ALC") was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of low-income Asian and Pacific Islanders and other immigrant communities. ALC is part of a national affiliation of Asian American civil rights groups, with offices in Los Angeles, Chicago, Washington DC, and Atlanta. ALC's advocacy has included direct services, litigation, and policy advocacy for low-wage immigrant workers on a range of workplace problems, including misclassification and sub-contracting issues, and support for the passage of AB 1897.

Bet Tzedek Legal Services

Bet Tzedek Legal Services ("Bet Tzedek")—Hebrew for the "House of Justice"—was established in 1974 as a nonprofit organization that provides free

legal services to Los Angeles County residents. Each year their attorneys, advocates, and staff work with more than one thousand pro bono attorneys and other volunteers to assist more than 20,000 people regardless of race, religion, ethnicity, immigrant status, or gender identity. Bet Tzedek's Employment Rights Project focuses specifically on the needs of low-wage workers, providing assistance through a combination of individual representation before the Labor Commissioner, civil litigation, legislative advocacy, and community education. Bet Tzedek has taken a leading role in advocating for the rights of low-wage and immigrant workers in California, including by submitting amicus briefs and letters on such issues of broad importance to California employees. Bet Tzedek's interest in this case comes from over 15 years of experience advocating for the rights of low-wage workers in California. As a leading voice for Los Angeles's most vulnerable workers, Bet Tzedek has an interest in the correct development and interpretation of California's worker-protection laws, including those presented in the case.

Centro Legal de la Raza

Since 1969, Centro Legal de la Raza ("Centro Legal") has provided free legal services to low-income and immigrant clients throughout the San Francisco Bay Area and Northern and Central California. Centro Legal assists thousands of workers, tenants, and immigrants each year through legal clinics and

consults, as well as full representation in state and federal court. In our employment cases, questions of franchisor liability, joint employment, and employment status often determine whether our clients are able to recover the money they are owed.

La Raza Centro Legal

La Raza Centro Legal is a community-based legal organization established 1973 dedicated to empowering Latino, immigrant and low-income communities of San Francisco to advocate for their civil and human rights. We combine legal services and advocacy to build grassroots power and alliances towards creating a movement for a just society. La Raza Centro Legal's Workers' Rights Program for over 20 years has advocated on behalf of very-low wage workers including domestic workers, restaurant workers, car wash workers, and other low-wage, immigrant workers who have been cheated out of rightfully earned wages or otherwise exploited by unscrupulous employers. We assist among other workplace issues with wage-and-hour cases, and have represented workers in franchisee-franchisor employment situations.

Legal Aid at Work

Legal Aid at Work ("LAAW", and formerly the Legal Aid Society – Employment Law Center) is a non-profit public interest legal organization founded in 1916 whose mission is to protect, preserve, and advance of 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. LAAW frequently appears in federal and state courts to promote the interests of clients from wage theft both as counsel for plaintiffs and as *amicus curiae.* In addition to litigating cases, LAAW assists hundreds of low-wage workers with filing administrative wage claims with the California Labor Commissioner through our Wage Rights Clinics and advises thousands of low-wage workers on their wage rights through our Worker's Rights Clinics. LAAW has represented numerous clients working for franchisee-franchisors and experiencing wage theft, specifically in the fast food and janitorial industries, in a variety of legal forums, and it is more and more common that our low-wage workers are in fissured workplaces: where the job application is submitted to one employer, the handbook is provided from another, and the paychecks are issued from a third. LAAW has a strong interest in ensuring that workers receive all protections to which they are entitled under California wage-and-hour law, and all employers violating the law are held accountable.

Partnership for Working Families

Founded in 2002, the Partnership for Working Families is a national federation of regional power building organizations. Together with our 19 affiliates and one emerging coalition, we are driving a broad progressive agenda to reshape

our built environment to create healthy communities, remake our democracy by building power through civic engagement, and restructure our economy to reduce racial and wealth inequality. The Partnership has focused on reversing harmful employment trends, including misclassification and abusive temporary staffing and subcontracting arrangements in support of this mission. Through direct legal services and policy advocacy, specifically through our support for the passage of AB 1897 and AB 5, the Partnership seeks to improve the working conditions for millions of workers.

Women's Employment Rights Clinic (Golden Gate University School of Law)

The Women's Employment Rights Clinic of Golden Gate University School of Law ("WERC") is an on-campus non-profit that serves the dual purpose of training law students and providing critical legal services to the community. WERC represents low-wage workers, predominately women, through impact litigation, individual representation, policy advocacy and community education. A majority of WERC's clients are immigrants with limited English proficiency or are monolingual Spanish and Tagalog speakers. WERC, through its attorneys and law students, advises, counsels, and represents clients in a variety of employment-related matters including wage and hour violations, and involving franchisee-franchisor employers.

Worksafe, Inc.

Worksafe, Inc. ("Worksafe") is a California-based non-profit organization dedicated to advocating for worker health and safety through education, training, and advocacy. Millions of low-wage and immigrant workers often toil long hours in harsh and hazardous work environments in California. The fissured workplace has eroded the basic workplace protections workers are owed. Worksafe is interested in protecting the rights of workers against misclassification or other employment classifications that prevent workers from full access to workplace protections under the law.

II. INTRODUCTION

Amici Curiae are a group of organizations whose members prosecute California wage and hour claims on behalf of workers—most often low-wage earners—in a wide-variety of industries and workplace settings, including fast-food restaurants, agriculture and landscaping, garment manufacturing, transportation, construction, warehousing, meat packing and cannery, other assembly line facilities, and office work.[1] Our worker clients are frequently employed in franchised businesses, where neither the franchisor nor the franchisee have taken the necessary steps required to ensure the minimum working standard

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to its preparation or submission.

protections mandated by California's Industrial Welfare Commission wage orders and other state and federal wage and hour laws.

In many such cases, the workers are hired and paid by a franchisee but remain under the contractual control of the franchisor that sets company-wide workplace policies. In others, the workers are employed directly by the franchisor, which has designated the worker as a "franchisee" or other type of "independent contractor" in order to avoid various tax obligations and/or to circumvent the wage-and-hour, anti-discrimination, and other workplace law protections that apply only to "employees." In both circumstances, far greater clarity is needed concerning the rights and obligations of the workers and their putative employers than currently exists under California law – and only the California Supreme Court is in a position to provide that needed clarity.

Amici submit this brief in support of Appellants' Petition for Rehearing of the 2-1 panel decision in *Salazar v. McDonald's Corp.*, Case No. 17015673, Dkt. No. 94-1. That decision, if left standing, will inevitably cause even greater uncertainty than currently exists about the requirements of California law in the joint employer and franchisor/franchisee context, because it (1) directly conflicts with the earlier panel decision in *Vazquez v. Jan-Pro Franchising, Inc.*, 923 F.3d 575, *withdrawn*, 930 F.3d 1107, *certifying question*, 939 F.3d 1045, *re-establishing other holdings*, 939 F.3d 1050 (9th Cir. 2019), *pet. for rehearing pndg.*; (2) creates

a new "franchisor" exception to California wage-and-hour law that has no basis in the applicable statutory and Wage Order language or purposes; (3) rests upon what seems to be a clear misreading and unduly broad application of *Patterson v. Domino's Pizza, LLC*, 60 Cal.4th 474 (2014); and (4) effectively eviscerates the "suffer or permit" standard that historically applied broadly to capture unconventional and indirect workplace relationships.

With increasing frequency in the modern American "fissured" workplace, workers are being asked to provide services for the benefit of multiple entities or individuals, whether denominated as franchisors/franchisees, parents/subsidiaries, or contractors/subcontractors. The rules governing when responsibility must be shared for compliance with applicable workplace laws is in a state of flux, and the panel's decision creates far greater confusion and uncertainty than previously existed.

The California Supreme Court recently adopted the ABC test in applying the "suffer or permit" test in the independent contractor/employee "misclassification" context to draw clear lines that would enable workers to "provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect." *Dynamex*, 4 Cal.5th at 951 (broadly interpreting the "suffer or permit" language of the wage orders in light of the orders codification of "fundamental obligations" for the workplace). How the "suffer or permit" test

applies in the joint-employer context has not yet been decided by that Court, however. Neither has the question of whether special rules should govern the workplace responsibilities of "franchisors," including in cases like this where the franchisor seeks to evade responsibility for workplace violations that it *caused* and has clear contractual authority to *prevent* by asserting that its conduct is justified (as the split panel found) by the need to ensure quality control and maintenance of brand standards." Dkt. 94-1, p. 17.

Given the conflicting lines of authority, the clear importance of these issues for California workers and businesses alike, and the serious doubts that have been raised about the correctness of the panel majority's analysis, either the panel or this Court as a whole should give the California Supreme Court the opportunity through the certification process to address how the "suffer or permit" and "statutory basis" tests apply in the franchisor/franchisee joint-employer. *Amici Curiae* thus urge the Ninth Circuit to certify the four issues identified in Appellants' Petition to the California Supreme Court or in the alternative to grant the petition for rehearing.

III. ANALYSIS

A. Robust Joint Employment Liability Is Key to Secure the Basic Standards of California Wage and Hour Laws for Workers in the Franchise Setting

Joint employment liability is crucial to guaranteeing the minimum standards of California's wage and hour laws, because franchising, among other forms of

joint or "fissured" employment, can often contribute to wage and hour violations occurring. The phenomenon of joint employment and resulting wage theft was the focus of Professor David Weil's work as the Administrator of the Wage and Hour Division of the U.S. Department of Labor from 2014 until January 2017 and has been a continuing focus of Prof. Weil and other leading academics in employment and labor market policy. *See, e.g.*, Weil, David, "The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It," Harvard Press (2017); Bernstein, Jared, "The increasing importance of a Labor Department that understands the threats to workers in the current economy," Washington Post (Feb. 20, 2017), https://www.washingtonpost.com/posteverything/wp/2017/02/20/the-increasing-importance-a-labor-department-that-understands-the-threats-to-workers-in-the-current-economy/?utm_term=.1e213cdee18a.

Dr. Weil has used the term "fissured workplace" to describe the increasingly common workplace models whereby companies distribute their core work through an extensive network of contracting, outsourcing, ownership, and *franchising*. Weil, David, "How to Make Employment Fair in an Age of Contracting and Temp Work," Harvard Business Review (March 2017) https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work; Weil, David, "Why the Fissured Workplace is Bigger than the Contingent Worker

Survey Suggests," May 14, 2019, http://www.fissuredworkplace.net/Thoughts-2019.php#fiswor; Weil, David, "Enforcing Labour Standards in Fissured Workplaces: The US Experience," The Economic and Labour Relations Review, Vol. 22, No. 2, p. 36 (July 1, 2011). Dr. Weil concludes from his research and experience that an increase in violation of wage and hour laws has followed the spread of the "fissured employment" models. Weil, "How to Make Employment Fair in an Age of Contracting Temp Work."

Dr. Weil has concluded that fissured employment models contribute to non-compliance with labor standards and has identified *franchising* as one such model. He explains generally:

> The employment relationship in a growing number of industries--particularly those with large concentrations of low wage workers -- has become 'fissured', where the lead firms that collectively determine the product market conditions in which wages and conditions are set have become separated from the actual employment of the workers who provide goods or services. Instead, the direct employers of low wage workers operate in far more competitive markets that create conditions for non-compliance.

Weil, David, "Enforcing Labour Standards in Fissured Workplaces: The US Experience," The Economic and Labour Relations Review, Vol. 22, No. 2, p. 34 (July 1, 2011). As Dr. Weil and his colleagues concluded after studying the impacts of franchising on labor standards compliance in the fast food industry: "Franchisee-owned fast food restaurants experience systematically higher level of noncompliance with minimum wage and overtime than do comparable

establishments owned and managed by the franchisor." Ji, MinWoong & Weil, David, "The Impact of Franchising on Labor Standards Compliance," Industrial & Labor Relations Review (Cornell Univ.), Vol. 68(5), Oct. 2015, p. 1003. The authors further explain that compared to a large franchisor operating its restaurants directly, the franchisee—which typically runs just a single restaurant—will more likely ignore workplace regulations in part due to more acute economic pressures to cut costs and a lesser fear of enforcement. *Id.*, p. 980.

Given the prevalence of franchising, the potential it has for contributing to noncompliance with labor standards is profound. As a panel of this Court noted in *Jan-Pro,* franchised establishments employ over 755,000 workers in California. 993 F.3d at 1049. *Amici* themselves have prosecuted California wage and hour claims on behalf of thousands of workers laboring in a franchise setting. These claims have not just risen in the fast food restaurants, but also in the transportation, bakery and snack distribution, and janitorial industries.

Given these serious concerns about low wage workers in franchise settings being deprived of minimum workplace standards, meaningful joint employment liability is central to effective enforcement of such laws. *See Weil*, Reflecting on a Fissured World, p. 43. As noted by Dr. Weil, and in *amici's* own experience representing low-wage workers, the franchisee most often runs just one operation, with limited resources. Collecting back wages and other damages from such

franchisees can be difficult if not impossible. Limiting liability to the franchisee only can thus leave workers without any real remedy despite being victimized by clear wage and hour violations. Such would be the result in countless instances if the decision here stands, as it in essence creates a franchisor exemption to the "control, over wages, hours, or working" conditions coverage language of California's wage orders, as noted by Appellants Petition, p. 2.

B. Shielding Franchisor Control Motivated by Brand Protection Defies California's "Statutory Purpose"

The panel here recognized that McDonald's did in fact "exercise … control over the means and manners of work performed at its franchises," but it dismissed that control as an indicia of employment because it concluded that it was "geared specifically toward quality control and maintenance of brand standards." *See* Dkt. 94-1, p. 17. The panel offers *no* authority for drawing such a conclusion. Indeed, that result discords with the teachings of the California Supreme Court, which identified mechanisms geared toward "'[d]iligence and quality control'" as indicia of employment. *Dynamex,* 4 Cal.5th at 933, *quoting S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 356-357 (1989).

The panel's conclusion—that a franchisor's wide range of detailed work specifications and monitoring do not support a finding of employment status simply because those controls somehow furthered the broad goal of brand protection—could have deleterious effects beyond the joint employment setting.

Amici have represented workers—such as janitors, bread distributors, package delivery drivers, and airport shuttle van drivers—who provided services *directly* to franchisors and their customers under form agreements that have designated them as "independent contractors" as well as franchisees. *See also Jan-Pro*, 929 F.3d at 580-81 (explaining the two-tiered franchise system, where janitors purchase the right to work as "unit franchisees"). In these settings, the franchisors have issued detailed instructions and employed layers of supervision (through both personnel and technology) directly over the workers to ensure compliance. "Brand protection" should not excuse such control over the manner and means of the work and thereby allow franchisors acting as direct employers to avoid compliance with California's wage and hour laws.

Given the potentially profound implications of the panel's conclusory finding about franchisor control, the Ninth Circuit should reconsider this issue and seek guidance from the California Supreme Court.

IV. CONCLUSION

Based on the foregoing the petition for review should be granted.

Dated: November 7, 2019

Respectfully submitted,

By: */s/ Aaron Kaufmann*

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November 7, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 7, 2019. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Aaron Kaufmann
Aaron Kaufmann