Case No. 10-55581

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO RUIZ, et al.,
Plaintiffs-Appellants,

v.

AFFINITY LOGISTICS CORP.
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 3:05-cv-02125

HON. JANIS L. SAMMARTINO, J.

MOTION OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, WOMEN'S EMPLOYMENT RIGHTS CLINIC AND WORKSAFE, INC, FOR LEAVE TO FILE AMICUS CURIA BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL OF THE DISTRICT COURT DECISION

CYNTHIA L. RICE
JULIA MONTGOMERY
CALIFORNIA RURAL LEGAL
ASSISTANCE FOUNDATION
2210 K Street Suite 201
Sacramento, CA 95816
Telephone: (916) 446-7901
Facsimile: (916) 446-3057

Attorneys for *Amici Curiae*

Amicus Curiae, California Rural Legal Assistance Foundation , the Women's Employment Rights Clinic and Worksafe, Inc.; respectfully move this court for leave to file an *amicus curiae* brief in support of Plaintiffs-Appellants and seeking reversal of the lower court's decision in this case.

California Rural Legal Assistance Foundation ("CRLAF") is a non-profit California organization established to provide legal services to low-income individuals and families in rural California. CRLAF advocates have extensive experience and nationally recognized expertise in the interpretation of California wage and hour laws. CRLAF represents low-income families in rural California and engages in regulatory and legislative advocacy which promotes the interests of low-wage workers, particularly farm workers.

The Women's Employment Rights Clinic (WERC) is a clinical program of the Golden Gate University School of Law focused on the employment issues of low-wage workers. WERC advises, counsels and represents clients in a variety of employment-related matters, including individual and systemic claims for wage and hour violations. WERC has represented hundreds of workers in wage and hour cases in both court and administrative proceedings, and served as co-counsel in *Cuadra v. Millan* (1998) 17 Cal. 4th 855, overruled on other grounds, *Samuels v. Mix* (1999) 22 Cal.4th 1, 16.

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

Cynthia Rice, counsel for *Amici*, is a member of the Board of Directors of the California Employment Lawyers Association (CELA) and a participant in the Wage and Hour Committee of that organization. Counsel for CRLAF also participate in a statewide coalition of worker advocates the California Coalition of Low-Wage and Immigrant Worker Advocates (CLIWA). As a result of their extensive and long-standing work on behalf of low-wage workers in California, CRLAF is familiar with the cases of thousands of workers whose employment rights and remedies have been seriously undermined by employers who have

unlawfully characterized their employees as independent contractors. More recently, employers have systematically attempted to use choice-of-law provisions to invoke less protective laws of other states, thereby undermining not only the rights of the affected worker, but the very purpose and scope of California's longstanding policy of promoting the public welfare by ensuring broad protections for workers.

Increasingly, *Amici* are encountering the use of written contracts for farmworkers, janitors, drivers and other non-exempt workers. These agreements that purport to create independent contractor relationships include arbitration clauses, indemnification clauses and other terms and conditions historically found only in agreements with exempt employees. Many of these clients do not speak or read English, and some are not literate in any language. Workers are presented with the agreements as a condition of being hired. There is no arm's length negotiation and the workers have no opportunity to discuss, much the less object to or change the conditions imposed by the contract.

The lower court's decision in this case will provide a new incentive to employers to condition employment on the execution of these agreements, and to include choice of law provisions designed to help them escape liability.

Amici are California organizations that have represented California workers in thousands of administrative and judicial proceedings. Their brief will provide 1)

an analysis of the development of California labor protections that will assist the court in assessing the public policy interests that must be weighed when determining choice of law questions; and 2) an application of California law to the fact of the underlying case.

Based upon the foregoing *Amici Curiae* respectfully request that this court grant leave to file the accompanying *Amicus Curiae* Brief.

Dated: October 4, 2010

CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION

BY: //SS// Cynthia L. Rice
Cynthia L. Rice
Attorneys for Amici Curiae

Case No. 10-55581

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO RUIZ, et al.,
Plaintiffs-Appellants,

v.

AFFINITY LOGISTICS CORP.
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 3:05-cv-02125

HON. JANIS L. SAMMARTINO, J.

AMICI CURIAE BRIEF OF CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, WOMEN'S EMPLOYMENT RIGHTS CLINIC AND WORKSAFE, INC, IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL OF THE DISTRICT COURT DECISION

CYNTHIA L. RICE
JULIA MONTGOMERY
CALIFORNIA RURAL LEGAL
ASSISTANCE FOUNDATION
2210 K Street Suite 201
Sacramento, CA 95816
Telephone: (916) 446-7901
Facsimile: (916) 446-3057

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

California Cases

California Statutes

Georgia Cases

Other Authorities

Treatises

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amicus Curiae, California Rural Legal Assistance Foundation ("CRLAF") is a non-profit California organization established to provide legal services to low-income individuals and families in rural California. CRLAF advocates have extensive experience and nationally recognized expertise in the interpretation of California wage and hour laws. CRLAF represents low-income families in rural California and engages in regulatory and legislative advocacy which promotes the interests of low-wage workers, particularly farm workers. Since 1986 CRLAF has recovered wages for thousands of farm workers. These workers have been subjected to a variety of schemes intended to defraud them of the minimum wages, contract wages, overtime wages, and in some circumstances all wages owed. CRLAF regularly represents seasonal workers and others who really work as non-exempt crew leaders, but are forced to enter into sham independent contractor agreements in order to get or keep their jobs. Every year, particularly in the strawberry industry, crews of workers go unpaid because the "independent contractor" lacks the financial ability to make payroll for the last few weeks of the season because the primary contractor – or employer – has failed to pay. These independent contract agreements are similar to those the Supreme Court rejected in *Borello v. Dep't of Indus. Relations*, 48 Cal.3d 341, 353 (Cal.1989). The

preservation of that standard is critical to the protection of California farmworkers and other low-wage workers.

The Women's Employment Rights Clinic (WERC) is a clinical program of the Golden Gate University School of Law focused on the employment issues of low-wage workers. WERC advises, counsels and represents clients in a variety of employment-related matters, including individual and systemic claims for wage and hour violations. WERC has represented hundreds of workers in wage and hour cases in both court and administrative proceedings, and served as co-counsel in *Cuadra v. Millan* (1998) 17 Cal. 4th 855, overruled on other grounds, *Samuels v. Mix* (1999) 22 Cal.4th 1, 16.

Worksafe, Inc. is a California-based non-profit organization dedicated to promoting occupational safety and health through education, training, and advocacy. Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California's most vulnerable low-wage workers. Worksafe considers it vitally important that the millions of low-wage and immigrant workers who often toil long hours in harsh and hazardous work environments in California not be misclassified as

independent contractors and consequently excluded from protections of occupational safety and health laws.

Cynthia Rice, counsel for *Amici*, is a member of the Board of Directors of the California Employment Lawyers Association (CELA) and a participant in the Wage and Hour Committee of that organization. Counsel for CRLAF also participate in a statewide coalition of worker advocates the California Coalition of Low-Wage and Immigrant Worker Advocates (CLIWA). As a result of their extensive and long-standing work on behalf of low-wage workers in California, CRLAF is familiar with the cases of thousands of workers whose employment rights and remedies have been seriously undermined by employers who have unlawfully characterized their employees as independent contractors. More recently, employers have systematically attempted to use choice-of-law provisions to invoke less protective laws of other states, thereby undermining not only the rights of the affected worker, but the very purpose and scope of California's longstanding policy of promoting the public welfare by ensuring broad protections for workers.

Increasingly, *Amici* are encountering the use of written contracts for farmworkers, janitors, drivers and other non-exempt workers. These agreements that purport to create independent contractor relationships include arbitration clauses, indemnification clauses and other terms and conditions historically found

only in agreements with exempt employees. Many of these clients do not speak or read English, and some are not literate in any language. Workers are presented with the agreements as a condition of being hired. There is no arm's length negotiation and the workers have no opportunity to discuss, much the less object to or change the conditions imposed by the contract.

The lower court's decision in this case will provide a new incentive to employers to condition employment on the execution of these agreements, and to include choice of law provisions designed to help them escape liability.

INTRODUCTION

Amici concur with all the positions in the Opening Brief submitted by plaintiffs-appellants (hereinafter "plaintiffs") and *Amici* The California Labor Federation, AFL-CIO et al., particularly their argument that *Narayan v. EGL, Inc.,* ___F.3d___, 2010 WL 3035487 is controlling and indistinguishable from this case, and that the *Narayan* court's holding that a choice of law provision is not applicable to determination of independent contractor status must equally apply to this case. *Narayan, supra* 2010 WL 3035487 at *3-4. *Amici* submit this brief to address the California public policy supporting the conclusion that the choice of law provision is not controlling, and to address the application of California law to the factual circumstances of this case.

ARGUMENT

I. THE EMPLOYMENT CONTRACT'S CHOICE-OF-LAW PROVISION CALLING FOR THE APPLICATION OF GEORGIA LAW IS UNENFORCEABLE BECAUSE IT IS CONTRARY TO FUNDAMENTAL CALIFORNIA PUBLIC POLICY.

Fernando Ruiz and the workers comprising the class he represents performed their work exclusively in California. They were recruited and advised about the terms and conditions of their working agreement in California. They signed their contracts in California. The work that they performed for Defendant Affinity, to fulfill Affinity's contracts with Sears, all took place in California where Affinity was competing with other businesses subject to the wages, hours, and working conditions established by California law. There is nothing in the record to suggest that the State of Georgia had any fundamental policy interest that would be promoted by application of its laws. However, California has a fundamental interest in ensuring that the laws that it passes to promote the well-being of its citizens are uniformly applied to employees within its jurisdictional borders.

The lower court held that Georgia law applied when determining whether an employment relationship existed in this case, but failed to address the standards for

determining choice of law.[1] In determining the enforceability of arm's length contractual choice-of-law provisions, California applies the principles set forth in Restatement § 187. *Wash. Mut. Bank, FA v. Super. Ct., 24 Cal.4th 906, 916* (Cal. 2001). Restatement (Second) of Conflicts of Law § 187(2) provides, in part, that the law of the state chosen by the parties to govern their contractual rights and duties will be applied unless "application of the law of the chosen state would be *contrary to a fundamental policy* of a state which has a materially greater interest than the chosen state in the determination of the particular issue." (*Id.,* emphasis added). California courts "…decline to enforce a law contrary to this state's fundamental public policy.'" *Wash. Mut. Bank, FA v.Super. Ct*., *supra,* 24 Cal.4th at 917, citing, *Nedlloyd Lines B.V. v. Superior Court,* 3 Cal.4th 459 at 466 (Cal.1992). Enforcement of the less protective Georgia standard for determining independent contractor status is contrary to California's fundamental interest in protecting workers employed in this state.

A. California Has A Longstanding And Well-Recognized Public Policy In Favor Of Protecting Its Workers And Ensuring Employer Compliance With Minimum Labor Standards.

Through its Constitution, statutes, regulations and case law, California has established and reiterated, for nearly a hundred years, the fundamental nature of the protections afforded its workers.

[1] CRLAF respectfully refers the court to the brief of *Amici Curiae*, AMERICAN FEDERATION OF LABOR, AFL, et al. for a discussion of the lower court's error and standard for review of this issue on appeal.

Article XIV, Section I of the Constitution of the State of California states: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers." The Legislature thus conferred on the Industrial Welfare Commission (IWC) the power to investigate the health, safety and welfare, and to regulate minimum wages, maximum hours and working conditions of California's employees *See* Labor Code §§1173, *et. seq.*[2]

In 1937, the Legislature established the Department of Industrial Relations (DIR). Labor Code § 50 et. seq. "…to foster, promote and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment." Labor Code § 50.5. The provisions of Chapter 1 of Part 4 of Division 2 of the California Labor Code, entitled "Wages, Hours, and Working Conditions," are administered and enforced by the DIR through the Division of Labor Standards Enforcement (DLSE). Labor Code §§ 61, 79.

Labor Code §90.5 codified, in the plainest terms possible, California policy with respect to labor standards:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect

[2] All statutory references are to the California Labor Code unless otherwise indicated.

> employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

Id.

California's administrative and regulatory framework has been buttressed by the courts. Private rights of action to enforce wage and hour protections were recognized in California as early as 1915, the effective date of the act entitled "An act providing for the time and payment of wages," approved May 1, 1911, (Cal. Stat 1911, p. 1268). *Kerr's Catering Service v. Department of Industrial Relations*, 57 Cal.2d 319, 325-26 (Cal.1962). Since then, the California Supreme Court has repeatedly reaffirmed the fundamental nature of California's labor standards.

In 1948, the Court noted that, "[i]t has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." *In re Trombley*, 31 Cal.2d 801, 809 (Cal.1948).

In 1962, the Court held, "[w]ages of workers in California have long been accorded a special status... This public policy has been expressed in the numerous statutes regulating the payment, assignment, exemption and priority of wages.... California courts have long recognized the public policy in favor of full and

prompt payment of wages due an employee." *Kerr's Catering Service v. Department of Industrial Relations*, *supra*, 57 Cal.2d 319, 325-26

In 1980, the Court found "in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 702 (Cal.1980), a rule the court reiterated in *Murphy v. Kenneth Cole Productions, Inc.* 40 Cal.4th 1094, 1103 (Cal. 2007).

In 2006, the Court again concluded, "[t]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established." *Smith v. Superior Court*, 39 Cal.4th 77, 82 (Cal. 2006).

Most recently, the California Supreme Court reiterated the fundamental importance of California labor protections and expressly recognized that construction and enforcement of those laws must be by reference to California statutes and IWC regulations not federal or common law. (California's employer definition …" belongs to a set of revisions intended to distinguish state wage law from its federal analogue, the FLSA.") *Martinez v. Combs,* 49 Cal.4th 35, 59 (2010). California's IWC Wage Orders, not the common law control when determining the definition of the employment relationship. *Id*. at 62.

The Legislature has also recognized on several occasions, the need for *increased protection* for workers, particularly those employed in low-wage enterprises or the "underground economy," and enacted legislation specifically designed to further promote the enforcement of basic labor law protections.

In 2003, the legislature expressly recognized the need to increase enforcement of state labor law protections and enacted the Labor Code Private Attorney General Act, Labor Code §§ 2698, et seq., specifically finding that:

> (a) Adequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices.
>
> ….
> (d) It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.

Cal. Stats 2003 ch 906.

The legislature also enacted Labor Code § 2810, which addressed the problem of undercapitalized labor contractors by making it unlawful for any person or entity to enter into a contract for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor, that does not include funds sufficient to allow the contractor to comply with all applicable labor laws.

The robust administrative enforcement framework, the succession of reminders from the California Supreme Court, and the Legislature's recent enactments combine to firmly establish California's longstanding and well-recognized public policy in favor of protecting its workers and ensuring employer compliance with minimum labor standards.

B. The Determination Of Who Qualifies For California's Fundamental Worker Protections Cannot Be Divorced Or Disaggregated From The Protections Themselves.

Because California has gone to substantial lengths to establish fundamental protections for its workers, the question of who qualifies for such protections is equally fundamental and cannot appropriately be decided by another state via a choice-of-law provision.

The definition of employee cannot be disaggregated from the protective legislation, but rather "must be applied with deference to the purposes of the protective legislation." *See generally Borello v. Dep't of Indus. Relations*, *supra,* 48 Cal.3d 341, 353.

Status as an "employee," as that term is defined under California law, and the protections afforded to persons working as employees cannot be contracted away in California. *Borello, supra,* at 359, see e.g. *Gentry v. Superior Court*, 42 Cal.4th 443, 450, 457 (Cal. 2007). Accordingly, such a contract provision is accorded minimum weight under California law in determining the parties' actual

relationship. *See Estrada v. FedEx Ground Package Sys., Inc*. 154 Cal.App.4th (Cal.Ct. App. 2007), *Toyota Motor Sales v. Superior Court*, 220 Cal.App.3d 864 (Cal. Ct.App.1990), and *Grant v. Woods*, 71 Cal.App.3d 647 (Cal.Ct. App.1977).

C. The Fundamental Nature Of California's Labor Standards Are Best Understood In The Context Of The Systemic Efforts To Undermine Their Enforcement.

A study commissioned by the California Legislature found:

> Industries and occupations in California that have a relatively high concentration of low-wage workers (those earning $6.75 per hour or less) are concentrated in the agriculture, manufacturing, and services sectors. These sectors are under intense economic competitive pressure, and are thus likely to seek ways, including illegal ones, to keep labor costs down.

Analysis of the California Labor and Workforce Development Agency's Enforcement of Wage and Hour Laws, Final Report, December 19, 2003, Paul M. Ong, PhD., Jordan Rickles, M.P.P., Amy Ford, Matthew Graham, Ralph and Goldy Lewis Center for Regional Policy Studies, School of Public Policy and Social Research, UCLA, page 18.[3]

The incentives for an employer to utilize independent contractors rather than hire employees – or to misclassify the latter as the former – are plain. By classifying employees as contractors, employers avoid responsibilities they would otherwise face under a range of California laws, including statutory protections

[3] A full copy of the report, which was commissioned by the California Legislature, may be downloaded at http://lewis.sppsr.ucla.edu/research/publications/reports/WagesandHoursFinalReport.pdf.

governing workers' compensation, health and safety, wage and hour, unemployment benefits, anti-discrimination and others. In monetary terms, the simple act of "classifying" a worker as an independent contractor rather than an employee results in a substantial savings.

In a study of misclassification of workers as independent contractors, California rated first among all states studied in the proportion of workers misclassified as independent contractors for purposes of unemployment compensation.[4]

Despite (or perhaps because of) California's expansive protections and enforcement mechanisms, there has been an increase in the misclassification of workers as independent contractors. *Amici* have also noticed an increase in mandatory employment agreements for non-exempt, unskilled workers who, unlike high level executives, are not in a position to negotiate such agreements at arm's length. These agreements include independent contractor, employment-at-will, arbitration and/or choice-of-law provisions that undermine the basic California public policy governing workplace rights.

The negative consequences of the misclassification epidemic extend well beyond the misclassified workers themselves. Independent contractor misclassifications result in heavy losses to both U.S. and state coffers in the form

[4] Planmatics, Inc., for U.S. Department of Labor, *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, (2000). Available at http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums. The Government Accounting Office (GAO) estimated that misclassification of employees as independent contractors reduced federal income tax revenues by up to $4.7 billion.[5]

Furthermore, law-abiding businesses that do not misclassify their employees as independent contractors are forced to compete with those businesses that misclassify and thus operate with lower labor costs at an unfair competitive advantage.

D. The District Court Failed To Consider The Purpose Of The California Labor Laws At Issue In Determining The Drivers' Status.

Because the Labor Code does not expressly define "employee" for purposes of California Labor Code §§ 1194, 2204 and the other sections asserted by the drivers, the California Supreme Court has developed a multi-factor test for determining employment status. *Borello,* 48 Cal.3d 350-355. As with other states, California looks principally to "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *Id.* However, in focusing on this factor, the California Supreme Court has recognized that this test "must be applied with deference to the purposes of the protective legislation" that the worker seeks to enforce. *Id.* at 353. "The nature of

[5] U.S. General Accounting Office, Tax Administration Information: Returns Can Be Used to Identify Employers Who Misclassify Employees, GAO/GGD-89-107 (1989).

the work, and the overall arrangement between the parties, must be examined to determine whether they come within the 'history and fundamental purposes' of the statute." *Id.* at 353-354. "[T]he employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose" behind the statute the worker seeks to enforce. *Id.* This is equally true with respect to wage and hour protections. *Martinez v. Combs, supra*, at 61, citing *Industrial Welfare Com. v. Superior Court*, 27 Cal. 3d. 690,702 (Cal. 1980).

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ITS ANALYSIS OF PLAINTIFFS' STATUS.

The district court's factual findings show that Affinity exercised near total control over all aspects of the drivers' work. The district court ignored those controls in determining that the drivers were independent contractors because (1) many of the controls arose from the requirements of Affinity's contract with Sears or from federal regulation, and (2) the controls were, in the district court's view, designed to ensure "results in conformity with the contract" rather than to regulate the manner and means by which those results were accomplished. Neither of these reasons finds support in law.

A. Affinity Exercised Complete Control Over The Drivers.

According to the district court's findings, the plaintiff delivery drivers were required to show up at the warehouse each morning for a 7:15 a.m. "stand-up" meeting with Affinity managers. ER 20; 273-274. At these meetings Affinity

provided drivers with their routes for the day and the time each delivery was to be made.[6] ER 20-21; 112. Affinity managers also used these meetings to address "…problems encountered throughout the day and protocols regarding safety." ER 25. Before the drivers could leave the warehouse, Affinity managers inspected the trucks to ensure they were properly loaded and to ensure that the drivers and their helpers were dressed in conformance with Affinity's uniform and grooming requirements. ER 121, 155, 275-277, 319-322. Drivers who did not comply with Affinity's requirements were not permitted to drive. ER 16; 159.

The drivers' "Independent Truckers Agreement" (ITA) stated that compliance with Affinity's Procedures manual was a "condition of payment." ER 721. Workers were provided copies and expected to read and comply with the manual. ER 279-280. The district court found that this manual includes detailed instructions regarding manifests, loading, customer procedures, reporting requirements, returns, property damage and accidents. ER 23, 408-434. Affinity monitored the drivers' progress throughout the day. ER 28, 268, 292. Absent permission from Affinity, deliveries had to be made in the order and at the times specified by Affinity. ER 133, 288. Drivers were required to call Affinity dispatchers after every other delivery, ER 144, 325, and were required to maintain

[6] Sears generated the route manifests each day. Affinity then allowed drivers to choose from among the available routes in the order of their rankings on surveys of customer satisfaction performed by Sears. ER 21. All routes involved 18-20 stops per day. ER 248.

a daily log book. ER 326. "[A]fter deliveries were completed, the drivers were not allowed to take their trucks home with them, or operate them for other companies or for personal use." ER 25. Instead, trucks were parked in Affinity's secured lot each night. *Id.* Affinity had access to and made the trucks available for use by other Affinity drivers. ER 25; 129-132, 160, 161.

Drivers were penalized if they failed to show up for work, ER 271-272, 310-311, and drivers who wanted a day off were required to obtain Affinity's permission, which was withheld if there were not enough drivers scheduled for that day. ER 20 fn 10; ER 138-139, 164-165. Affinity paid drivers a fixed rate per delivery specified in the driver's contract, but it retained the right to unilaterally change the amount paid per delivery on sixty days' notice.

In addition, Affinity conducted periodic "follow-alongs" in which Affinity management would follow a driver for a few stops to make sure that they were in the field in uniform and to make sure they were using proper techniques for delivery. ER 29. Perhaps Affinity's most effective means of controlling the manner and means of the drivers' work was the fact that it could terminate them at-will if it was displeased with their manner of performance.[7] ER 33. *See Narayan, supra,* 2010 WL 3035487 at *4 (right to discharge at-will is "the most important"

[7] The drivers' contract provided that it could be terminated without cause on 60 days' notice. ER 717. However, there was no penalty in the contract for terminating with less notice, and in practice, Affinity assumed the right to refuse to allow drivers to work whenever it wanted. ER 1. Thus, as a practical matter, the contract was at-will.

indicia of employee status); *Toyota Motor Sales supra* 220 Cal.App.3d at 875 (same).

B. The Trial Court Erred In Discounting Controls Imposed By Sears Or By Government Regulations.

The district court discounted many of these controls, including the procedures manual, the morning meetings, and the daily monitoring, by reasoning that these were requirements imposed by Sears. The reasons why an employer imposes controls over its workers are irrelevant. The California Supreme Court decided this issue conclusively in *Borello.* The Borello employer argued that the contractual controls he imposed on his cucumber harvest workers should not be viewed as evidence of an employer/employee relationship because those controls were dictated by Vlasic Pickle, the entity to whom *Borello* sold his cucumbers – precisely the argument that Affinity makes in this case. The Supreme Court found that argument "specious." *Borello, supra,* 48 Cal.3d at 458 fn 13.

> Whatever Borello's reasons for using the Vlasic contract form, the relationship between Borello and the harvesters is not thereby obviated. Under the contract and in reality, the harvesters are recruited by Borello to work on Borello's land harvesting crops owned by Borello until sold after harvest to Vlasic.

Id. See also City Cab Co. of Orlando, Inc., 628 F2d 261, 264 fn 8 (D.C.Cir. 1980) (finding it "irrelevant" that controls over workers are "maintained only to help the company comply with its contractual obligations."). Following *Borello*'s logic,

this Court in *Narayan* held that controls imposed on delivery drivers as a result of a company's contracts with its customers were evidence of and employer/employee relationship. *Narayan,supra,* 2010 WL 3035487 at * 6. The controls imposed on plaintiffs as a result of Affinity's contract with Sears are equally compelling evidence of employee status.[8]

Affinity also exercised extensive control over the hiring of the drivers and their helpers and substitutes. All drivers and helpers had to undergo drug testing, background checks, medical examinations, and meet vehicle inspection and maintenance standards. ER 17. The district court noted that ordinarily, these controls would "weigh in favor of finding the requisite control of an employee relationship," but because they were required by federal regulation, the court discounted them entirely. ER 16. This too was error. Virtually all federal courts have agreed that controls imposed by government regulation, while not sufficient in themselves to create an employment relationship, are nevertheless evidence that "may be considered in conjunction with other elements of the relationship in determining the status of an individual worker." *Merchants Home Delivery Service, Inc. v. NLRB,* 580 F.2d 966, 974 (9th Cir. 1978). *See also, NLRB. v. A.*

[8] That Sears required Affinity to impose certain controls may suggest that Sears was acting as a joint employer of the drivers along with Affinity, but it does not diminish Affinity's status as employer. *See, e.g., Hodgson v. Griffin & Brand of McAllen,* 471 F.2d 235, 238 (5th Cir. 1973) (controls that corporate growers required its crew leaders to impose on the crew leaders' field workers indicates that the corporate growers and crew leaders were joint employers of the field workers).

Duie Pyle, 660 F.2d 379, 385 (3rd Cir. 1979) (same); *NLRB v. Deaton, Inc.,* 502 F.2d 1221, 1225 (5th 1974) (same); *Ace Doran Hauling & Rigging Co. v. NLRB,* 462 F.2d 190, 194 (6th Cir. 1972) (finding truck drivers were employees based on "both 'additional controls' and the control and supervision exercised pursuant to ICC requirements).[9] It is especially important to consider regulatory controls, such as those at issue here, which essentially obviate the need for a delivery company to establish its own personnel policies. The regulatory requirements that mandate Affinity's controls over the drivers' hiring procedures go to the heart of the employee relationship. This was not the case in *Empire Star Mines Co. v. California Employment Comm.,* 28 Cal.2d 33, 44 (Cal.1946), which addressed regulatory mine safety inspection requirements. Whatever their source, the fact remains that these controls allowed Affinity to exercise and reap the benefits of employer-like control over the hiring process, while at the same time limiting the drivers' ability to exercise the unfettered freedom to hire that is typically indicative of an independent business. Thus, contrary to the trial court's conclusion, the controls Affinity exercised over the hiring process should be viewed as evidence of an employer/employee relationship – precisely what this Court did in *Narayan,*

[9] Even Georgia cases do not go so far as to say controls imposed by federal regulations are entirely irrelevant. *Larmon v. CCR Enterprises,* 647 S.E.2d 306, 307 (Ga. App. 2007), found that the manner and method of executing the contract was left to the driver's discretion despite ICC regulations. *Upshaw v. Hale Intermodal Transp. Co.,* 480 S.E.2d 277, 278 (Ga. App. 1997), merely held that controls imposed by federal regulation did not preempt Georgia law deeming a truck driver to be an independent contractor.

2010 WL 3035487 at * 7 (noting delivery company control over hiring of drivers' helpers as evidence of an employee relationship).

C. The District Court Erred In Discounting Affinity's Controls Because They Allegedly Related To Contract Results Rather Than The Means Of Performance

The district court also discounted Affinity's controls over the drivers because in its view, they were designed to control the ends, rather than the means and manner, of performance. This conclusion was erroneous for two reasons. First, California courts view the kinds of controls exercised by Affinity, such as requiring drivers to appear for morning meetings, designating the deliveries to be made and the times they were to be made, precluding work for other companies, and monitoring drivers' progress throughout the day, to be controls over the manner and means of performance, not the results of performance. *See, e.g., Estrada v. FedEx Ground Package Sys.,supra,* 154 Cal. App.4th 1, 11-12 ; *Yellow Cab Coop.,supra,* 226 Cal.App.3d at 1298-1299 (Ct.App.1991); *Toyota Motor Sales, supra,* 220 Cal.App.3d at 875-876. *See also, NLRB v. Amber Delivery Service,* 651 F.2d 57, 62 (1st Cir. 1981) (per Breyer, J.) (characterizing controls over delivery drivers similar to those at issue here to be controls over the "means of physical performance."). California courts also treat uniform and appearance requirements such as those imposed by Affinity as controls over the manner of work indicative of an employment relationship. *See, Narayan,supra,* 2010 WL

3035487 at *6 ; *Estrada,* 154 Cal. App.4th at 11-12; *Yellow Cab Cooperative, supra,* 226 Cal.App.3d at 1298.

Second, even if the controls imposed by Affinity were viewed as regulating the end result rather than the manner of performance, such controls remain significant indicators of employee status. Low-skill jobs, such as delivery driver,[10] rarely require careful monitoring of the manner in which work is performed. Control over the end result is all that is really necessary or practical, and where that is the case, control over the end result is indicative of employee status. For example, the grower in *Borello,* like Affinity, argued that the controls he imposed on his cucumber harvesters were designed to obtain a "specified result," without concern for the details of how the result was accomplished. *Borello, surpa,* 48 Cal.App.3d at 356. The California Supreme Court found this distinction unpersuasive:

> A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks "control" over the exact means by which one step is performed by the responsible workers.

[10] The district court's assertion that the drivers were specialists who needed no supervision is not supported by substantial evidence and is inconsistent with the above-cited cases characterizing delivery drivers as low-skill. Drivers did not need or have commercial drivers' licenses and they had no special skills. They were prohibited from performing carpentry, electrical or plumbing work, *see* Ex. 49 (Manual) at 6, 13. Indeed, they were only allowed to install gas appliances where there was a shut-off valve that allowed them to simply screw in the connection – exactly what any untrained homeowner could do.

Id. California courts have repeatedly applied this reasoning to delivery drivers. For example, the court noted in *JKH Enterprises, Inc. v. Dept. of Indust. Relations,*

> the functions performed by the drivers, pick-up and delivery of papers or packages and driving in between, did not require a high degree of skill. And the functions constituted the integral heart of JKH's courier service business. By obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all *necessary* control over the operation as a whole.

142 Cal.App.4th 1046, 1064-1065 (Cal. Ct. App. 2006). *See also, Yellow Cab Coop.,* 226 Cal.App.3d at 1299-1300 (company exercised all necessary control over cab drivers); *Grant v. Woods ,supra,* 71 Cal.App.3d 647 (newspaper delivery company exercised all necessary control over carriers). See also, *Narayan, supra,* 2010 WL 3035487 at *7.

The reasoning of these cases applies with equal force here. By requiring drivers to work exclusively for Affinity, to be at the warehouse at a fixed time each morning, and to make 18-20 deliveries per day at set times in uniform and in accordance with the requirements of Affinity's procedures manual, Affinity exercised all necessary control over the drivers' work. Indeed, the only decisions left to the drivers – what roads to take and what speed to drive -- were simply freedoms "inherent in the nature of the work and not determinative of the employment relation." *Toyota Motor Sales,* 220 Cal.App.3d at 876; *Narayan,* 2010 WL 3035487 at * 8. These facts establish as a matter of law that Affinity

controlled the drivers' work and compel the conclusion that the drivers were employees.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DRIVERS OPERATED INDEPENDENT BUSINESSES

The district court's conclusion that the drivers were in business for themselves was erroneous for a number of reasons.

A. Business Paperwork Compelled By Affinity Is Of No Significance

The district court gave significant weight to the fact that drivers established assumed business names, opened bank accounts, and obtained tax I.D. numbers. However, as the district court recognized, drivers only did these things because Affinity insisted that they do so. Affinity was "substantially involved in helping the drivers establish their businesses." ER 19, 110-112, 146-150. Affinity provided drivers with the assumed name and tax applications and explained how to file them so that all the driver had to do was sign the paper. ER 19. Drivers did these things at Affinity's insistence and doing so was no more indicative of independent contractor status than the fact that they had to sign contracts designating them as independent contractors in order to work. *Toyota Motor Sales, supra,* 220 Cal.App.3d at 877 (characterization in contract that worker is independent contractor will be ignored if conduct indicates otherwise). That Affinity could impose these requirements says a great deal about Affinity's

control over the drivers, but nothing about whether the drivers in fact operated independent businesses.

The fact that drivers were responsible for withholding taxes from their helpers' and substitute drivers' wages is similarly meaningless as an indicator that the drivers operated independent businesses. As the Court in *Toyota Motor Sales* noted,

> [t]he requirements that Heard [a pizza delivery driver] pay his own payroll and income taxes and provide his own worker's compensation insurance are of no help to [the purported employer]. These are merely the legal consequences of an independent contractor status, *not a means of proving it.* An employer cannot change the status of an employee to one of independent contractor by illegally requiring him to assume burdens that the law imposes directly on the employer.

220 Cal.App.3d at 877 (emphasis added). That drivers handled personnel matters involving their helpers and second drivers was also a consequence of Affinity's decision to label them independent contractors, not a means of proving that fact. Even if drivers earned a bit more for taking on these supervisory duties, that hardly distinguishes them from employee foremen and supervisors who also earn more for exercising managerial responsibilities.

B. The Right To Hire Assistants Did Not Give Drivers Entrepreneurial Opportunity

The court's conclusion that the hiring of helpers and additional drivers was by itself, compelling evidence of independent status was also an error of law. "Courts have had little difficulty finding employment status though the employee

could hire others within his discretion." *Mednick v. Albert Enterprises,* 508 F.2d 297 (5th Cir. 1975) (giving no weight to fact that worker hired assistants because hiring conveyed no real economic independence); *Real v. Driscol Strawberry,* 603 F.2d 748, 755 (9th Cir. 1979). Delivery drivers in particular are frequently found to be employees despite hiring their own employees. For example, in *Estrada, supra,* 154 Cal.App.4th at 336-337, the court found Fed Ex delivery drivers to be employees despite fact that they hired helpers and temporary replacements. Similarly, in *Burlingame v. Gray,* 22 Cal.2d 87 (Cal. 1943), newspaper dealers were determined to be employees of the newspaper, despite the fact that each dealer hired 15-20 delivery boys to physically deliver the papers within the dealer's assigned area. *See also, NLRB v. Amber Delivery Service,* 651 F.2d 57, *supra*, (delivery drivers were employees of the company despite having the power to hire assistants); *Roadway III,* 326 NLRB 842, 845 (NLRB 1998) (delivery drivers were employees notwithstanding their right to hire replacement drivers without prior approval). As these cases make clear, the fact that a worker hires assistants and additional drivers is not necessarily strong evidence of independent contractor status, as the district court assumed. What matters is whether the right to hire employees gives a worker the ability to engage in an independent business. In this case, it did not.

First, as with the formation of their businesses, drivers only took on extra trucks and drivers because Affinity demanded that they do so, not out of some entrepreneurial desire to expand their businesses. ER 141,165-166, 353, 366. Affinity even provided the drivers with "suggested" salaries to pay their additional drivers. ER 167-168.

Second, Affinity's control over the application process, its ability to refuse to let the drivers assistants work when they did not conform to *Affinity's* requirements, and Affinity's monitoring of the day to day activity of the drivers' assistants severely limited the drivers' independence and "weighs in favor of finding the requisite control of an employee relationship." *Id.*

Third, because Affinity paid drivers a fixed sum for each delivery made, their "profit" from hiring additional drivers was only the marginal difference between what they received from Affinity and what they paid to their drivers. Drivers could not even count on earning that amount since Affinity retained the right to change the "per-stop rate" on 60 days' notice. ER Ex. 77 at 4. Drivers were unanimous that they could not make money under these circumstances and Plaintiff Ruiz testified that he actually lost money when he operated a second truck. ER 19 fn 6; ER 141. Whatever money they did make was simply a typical "override" for supervising workers, not the kind of profit from entrepreneurial initiative and risk that indicates independent contractor status.

See Beliz v. McLeod, 765 F.2d 1317, (5th Cir. 1985), (finding a crew leader to be an employee of the farm despite the fact that he hired and supervised a crew of forty-five field workers and "could and did make a profit out of the work of his crew." His profit "was not based on risk of loss of any capital investment or his entrepreneurial skill but was simply a piece-rate override measured by the difference between the total amount [the farmer] paid for each bin and the amount paid pickers for the buckets.").

C. The Drivers Had No Significant Business Investment

At the San Diego terminal where Plaintiff Ruiz worked, Affinity arranged for drivers to lease their trucks from Affinity with no money down. ER 126-127, 160, 299-300. Virtually all costs associated with leasing the trucks and, indeed, with the rest of the drivers' business operation were advanced by Affinity. The per-stop rate was then set at a level that allowed Affinity to recoup its advances out of the drivers' weekly settlements, leaving some amount for the drivers' labor. Thus, for example, lease payments, insurance premiums, worker compensation premiums on the driver and his workers, uniform costs and, in some cases, even fuel were advanced by Affinity and deducted from the drivers' pay. *See* ER 136-137, 162, 283, 291, 300, 313. Moreover, because Affinity itself leased the trucks from Ryder Truck Rental under a deal which included painting and monthly maintenance by Ryder, even the costs of upkeep of the truck involved no actual

cash outlay by the drivers, but were included in the lease payment deducted them from the drivers' pay. ER 186-187. This sort of arrangement, where a company advances the capital for the worker's "business" and then deducts those advances from workers' pay does not represent any real investment on the part of a worker. It is simply a paper transaction designed to create the appearance of investment and to disguise the fact that the drivers were, in fact, being paid for nothing more than their labor just as any employee would be. A similar sham got short shrift from the California Supreme Court in *Pacific Lumber Co. v. Indus. Accident Comm.,* 22 Cal.2d 410 (Cal. 1943). In that case a lumber company devised a contract in which it purportedly "sold" trees on its property to a logger who then cut the trees and sold the resulting lumber back to the lumber company. The logger did not pay cash for the trees he "bought" and no bill of sale was generated. Rather, once the logger had reduced the trees to lumber, the company simply deducted the "sale price" of the trees from the price it paid for the lumber. The California Supreme Court found this paper sale of the trees to have no significance, and viewed the contract as nothing more than a contract of employment for the logger's labor. *See also, Marshall v. Sureway Cleaners,* 656 F.2d 1368, 1372 (9th Cir. 1981) (where the alleged employer offsets an increase in rent paid by operators of dry cleaning stores with an increase in payments, employer, not worker, is providing the risk capital).

That Affinity's lease arrangement was a sham is further evidenced by the fact that Affinity never bothered to reduce its lease to the drivers to writing, ER 285, and felt free to demand use of the drivers' trucks without compensation when a driver had a day off. ER 25; 129-132, 161,162.

Drivers who owned their own trucks had more investment, but merely owning a small delivery truck "would at most be a 'secondary element' and, without more, worthy of little weight." *Toyota Motor Sales, supra,* 220 Cal.App.3d at 876 (owning car of no weight). *See e.g., Estrada, supra,* 154 Cal.App.4th 1 (finding delivery drivers employees despite their ownership of their trucks); *Air Couriers Int'l., supra,* 150 Cal.App.4th 923 (same); *Corporate Express Delivery Systems supra,* 292 F.3d 777 (same); *Amber Delivery Service,* 651 F.2d 57 (same).

Another factor indicating the drivers were not in business for themselves was the fact that they were not free to turn down loads or to work for anyone other than Affinity. A driver who can haul for others has much greater independence than a driver who is bound to a single company and who must accept all work offered whether profitable or not and this is a critical distinction when construing independent contractor status. Compare *Estrada,* 154 Cal.App.4th at 12 (delivery drivers who cannot drive for others are employees); *Corporate Express Delivery Systems,* 292 F.3d at 780 (same); *Amber Delivery Service,* 651 F.2d at 62 (delivery drivers who cannot turn down loads and must work exclusively for company are

employees); with *FedEx Home Delivery v. NLRB,* 563 F.3d at 498-499 (D.C.Cir. 2009) (delivery drivers who can use trucks for other commercial purposes are independent contractors); *A. Duie Pyle,* 606 F.2d at 382-383 (delivery drivers who can reject loads and haul for other companies are independent contractors); *Dial-A-Mattress,* 326 NLRB 884 (1998) (same).

Indeed the actual day to day operations – as opposed to the written contracts – demonstrate that the drivers had little or no control or entrepreneurial interest in the driving they did for Affinity. Under California law this compels the conclusion that they were employees, and the District Court's decision should be reversed.

CONCLUSION

California has a longstanding and well-recognized public policy in favor of protecting its workers and ensuring employer compliance with minimum labor standards. The determination of who qualifies for California's fundamental worker protections cannot be divorced or disaggregated from the protections themselves. The fundamental nature of these standards is especially clear in the context of the systemic efforts to undermine them. As such, the choice-of-law provision at issue here, which calls for the application of Georgia law, is unenforceable because it is contrary to fundamental California public policy.

For the foregoing reasons, the district court erred in granting summary judgment, and its decision should be reversed.

Dated: October 4, 2010

CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION

BY: //SS// Cynthia L. Rice
Cynthia L. Rice
Attorneys for Amici Curiae

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 6,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* WORD
(state font size and name of type style) 14 PT. TIMES ROMAN, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____
with *(state number of characters per inch and name of type style)*

_____.

Signature SS/CYNTHIA L. RICE

Attorney for Amici Curiae, California Rural Legal Assistance Foundat

Date Oct 4, 2010

9th Circuit Case Number(s) 10-55581

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

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 (date) _____.

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

Signature (use "s/" format) _____

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

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 (date) 10/04/2010 .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Daniel R. Barney
SCOPELITIS GARVIN LIGHT AND HANSON
Suite 280
1850 M Street NW
Washington, DC 20036-5804

Signature (use "s/" format) ss/CYNTHIA L. RICE