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.

***AMICUS CURIAE* BRIEF OF CALIFORNIA LABOR FEDERATION, CHANGE TO WIN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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STATEMENTS OF INTEREST AND IDENTITY OF *AMICI*

Amici are organizations whose members and constituencies are affected by the increase in employer misclassification of employees as independent contractors across a number of industries. *Amici* are concerned that the trial court's misapplication of the law governing employee/independent contractor status will further exacerbate this nationwide trend, and undermine California labor standards, impacting workers, law-abiding employers, and the local economy. *Amici* do not submit this brief to repeat arguments made by the parties, but to highlight broader concerns of our members and constituencies. *Amici* submit this brief under Federal Rule of Appellate Procedure 29.

The California Labor Federation, AFL-CIO, ("Federation") is the California state body chartered by the American Federation of Labor - Congress of Industrial Organizations ("AFL-CIO"). It is a federation of affiliated labor organizations which represent in excess of two million workers in California. The Federation is interested in this case because it has historically represented the interests of labor organizations and of workers, organized and unorganized, before the Legislature in Sacramento. With some frequency the Federation has proposed, supported or opposed legislation dealing with the abuse of the independent contractor status which

is a persistent part of the underground economy in California. The application of another state law for California workers like plaintiffs will impermissibly deny those workers the benefits of California law.

Change to Win is a five-million member partnership of four unions founded in 2005 to build a new movement of working people that can meet the challenges of the global economy and restore the American Dream: a paycheck that can support a family, affordable health care, a secure retirement, and dignity on the job. The Change to Win partner unions are the International Brotherhood of Teamsters, Service Employees International Union, United Food and Commercial Workers International Union, and United Farm Workers of America. Misclassification of employees as independent contractors has become a business model in many industries in which Change to Win members work, denying workers protections such as overtime pay, health insurance, workers' compensation, equal opportunity, job-protected family and medical leave, and the right to join a union. In these industries, the practice lowers employment standards not just for misclassified employees but for all workers.

Founded in 1903, the International Brotherhood of Teamsters represents more than 1.4 million hardworking men and women in a variety of industries across the United States, Canada and Puerto Rico. All

industries in which the Teamsters represent workers have been impacted by the growing misclassification of workers, but the hundreds of thousands of men and women who work in the package delivery, freight and construction industry have been particularly hard hit. There the increase in misclassification has been especially acute, undercutting workers' living standards and made it difficult for unionized companies, who classify their workers appropriately, to compete. In addition, together with the Change to Win Federation, the Teamsters have been involved in a long-standing effort to organize the 100,000 port truckers who haul containers from our nation's ports to warehouses and rail terminals, the vast majority of whom are misclassified as independent contractors.

The National Employment Law Project (NELP) is a non-profit legal organization with nearly 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor and employment laws, and that employers are not rewarded for skirting those basic rights. NELP collaborates closely with community-based worker centers, unions, and state policy groups and has litigated directly and participated as *amicus* in numerous cases addressing the rights of contingent workers under the Fair Labor Standards

Act and the National Labor Relations Act and numerous state laws. NELP has testified before the United States Congress numerous times on the problems of independent contractor misclassification, and works closely with state agencies and legislatures seeking to close loopholes exploited by employers. This case is important to NELP and its constituents because a narrow application of California's Labor Code has the potential to adversely affect many mid- to low-income workers clearly working as employees, but called independent contractors by their employers.

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized. In this case, NELA is particularly concerned with ensuring that employers do not misclassify

workers as independent contractors and thereby deny them protections and benefits to which they are entitled under labor and employment laws.

SUMMARY OF ARGUMENT

Affinity Logistics Corporation ("Affinity") is a trucking company that contracts with Sears and other large national retailers to provide delivery and installation services for the retailers' customers.[1] It requires its drivers to sign "independent contractor" agreements in order to get a job. The drivers are indistinguishable from "employees," given the work they perform for Affinity and the control Affinity exercises over their work, as detailed in the record and the plaintiffs' brief.

By treating their workers as independent contractors, Affinity evades California wage and hour protections, avoids a multitude of other state and federal labor standards, including discrimination and health and safety protections, workers compensation, and unemployment insurance, and sidesteps union organizing attempts and employer payments of payroll taxes like Social Security and Medicaid. In doing so, it undercuts its competition and hurts state and federal revenues.

[1] *Amici* adopt the plaintiffs-appellants ("plaintiffs") statement of facts in their brief, and only highlight certain facts here for context. *Amici* join in the arguments submitted by *amicus* California Rural Legal Assistance Foundation, *et al* as well.

The drivers here sued Affinity seeking payment of unlawfully-withheld deductions from pay, failure to provide meal and rest periods, and other claims under California and federal law.[2] But the court below held that Affinity is not responsible as the plaintiffs' employer because the drivers are independent contractors under Georgia law.

This result is not correct for several reasons. First, California's strong public policy interests in ensuring that its baseline labor standards are complied with is undercut by employer-created independent contractor schemes like Affinity's, and these independent contractor structures are on the rise, across industries and across the nation. The California Labor Code claims were enacted to protect the very workers who are the plaintiffs in this case, and to establish a floor of basic minimum wage standards. These remedial laws are intended to cover all non-exempt employees in California, and their purposes would be flouted if employers like Affinity are permitted to evade them by erecting elaborate independent contractor structures for their low-skilled and low-paid delivery drivers that purport to fall outside labor standards.

The impacts of a ruling in favor of Affinity will be felt broadly, and not just in the trucking and delivery sectors of our economy. Independent

[2] The federal claims were dismissed based on the federal motor-carrier exemption.

contractor misclassification appears with increasing frequency in many of our nation's growth sector service jobs, like janitorial and building services, home health care, trucking, construction, and hotels, to name a few. If employers in those sectors feel empowered to staff their businesses with sham independent contractors, our minimum labor standards will have no meaning, workers and their families will suffer, and so will law-abiding employers that play by the rules and the public coffers that rely on payroll and other tax payments made for employees.

Businesses that create the schemes to shift core business functions to individual independent contractors create a huge competitive advantage for themselves over legitimate businesses paying employees in the same sector doing the same jobs.

Second, the district court erred in applying the narrower and common law- based Georgia law to determine the drivers' employment status. Plaintiffs brought their claims under the California Labor Code, which has its own legal test for determining whether a worker is covered as an employee, with purposive, multi-factor considerations that are different and broader than the Georgia common law. This case presents an important opportunity for this Court to define the proper approach for handling independent contractor cases brought under the California Labor Code,

which will arise with increasing frequency as the economy continues to squeeze businesses and workers alike.

Finally, even if Georgia common law applies, the district court erred in its application of that law. Georgia's law creates a presumption of independent contractor status if a written contract states so, but not if the contract specifies that the worker is subject to rules or policies of the employer. Affinity's mandated independent contractor contract explicitly requires drivers to comply with Affinity's Procedures Manual and other agreements it has with its customers.

Amici propose strong public policy reasons that support a rigorous approach in these cases brought by workers under remedial statutes, especially in this era of increasing independent contractor misclassification with its broad negative implications for *amici* and the workers they represent, as well as our broader economy. These public policies call out for this Court to correct these errors and make clear that employers may not evade their responsibilities through such subterfuges. *Amici* urge this Court to apply California law to find that plaintiffs are employees based on the record, reversing the district court's ruling, and to hold Affinity accountable as plaintiffs' employer.

ARGUMENT

I. Independent Contractor Misclassification Is Rampant In Many Industries, Which Undercuts Labor Standards and is Contrary to California's Interest in Upholding its Baseline Workplace Protections.

With increasing frequency, employers misclassify employees as "independent contractors." Many of these employers require workers to sign contracts stating that they are independent contractors as a condition of getting a job. This independent contractor misclassification is on the rise because:

- Firms can argue they are off-the-hook for any rule protecting an "employee," including the most basic rights to minimum wage and overtime premium pay, health and safety protections, job-protected family and medical leave, anti-discrimination laws, and the right to bargain collectively and join a union. Workers also lose out on safety-net benefits like unemployment insurance, workers compensation, and Social Security and Medicare.

- Misclassifying employers stand to save upwards of 30% of their payroll costs, including employer-side FICA and FUTA tax obligations, workers compensation and state taxes paid for "employees."

- Businesses that use IRS Form 1099's and pay off-the-books can underbid competitors in labor-intensive sectors like construction and building services, and this creates an unfair marketplace.

The United States Government Accountability Office (GAO) concluded in its July 2006 report, "employers have economic incentives to misclassify employees as independent contractors because employers are

not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers' compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans."[3]

Genuine independent contractors constitute a small proportion of the American workforce, because by definition, an "independent contractor" is in business for him- or herself.[4] True independent contractors bring specialized skill, invest capital in their business, and perform a service that is not part of the receiving firm's overall business. The receiving firm of a true independent contractor's labor is merely a "customer" who does not control the work to such a degree that it can be characterized as an "employer."

Most workers in labor-intensive and low-paying jobs are not operating a business of their own. As the U.S. Department of Labor's Commission on the Future of Worker-Management Relations (the "Dunlop Commission") concluded, "[t]he law should confer independent contractor status only on those for whom it is appropriate—entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent

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[3] Government Accountability Office, GAO-06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification* (July 2006), at p. 25.

[4] *See, Id.* GAO-06-656 (July 2006), at p. 43.

business, and so forth. The law should not provide incentives for misclassification of employees as independent contractors, which costs federal and state treasuries large sums in uncollected Social Security, unemployment, personal income, and other taxes."[5]

Calling employees "independent contractors" is a broad problem and affects a wide range of jobs. A 2000 study commissioned by the U.S. Department of Labor found that up to 30% of firms misclassify their employees as independent contractors.[6] Many states have studied the problem and find high rates of misclassification, especially in construction, where as many as 4 in 10 construction workers were found to be misclassified.[7]

In the delivery and trucking industries in particular, independent contractor misclassification is rampant. A 2007 report found that FedEx Ground classified 15,000 of its drivers as independent contractors, giving it

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[5] U.S. DEP'T OF LABOR, *Commission on the Future of Worker- Management Relations,* (1995), *available at* http://www.dol.gov/_sec/media/reports/dunlop/dunlop.htm#Table.

[6] Lalith de Silva *et al*., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, i-iv, *prepared for* U.S. Department of Labor, Employment and Training Division by Planmatics, Inc. (Feb. 2000), *available at* http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[7] *See, e.g,* National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries)* (June 2010) (describing and citing to state studies from 17 states), available at http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1.

an advantage over competitors like UPS and DHL that call their drivers employees.[8] Seventy to ninety percent of the nearly 100,000 port truckers who move cargo containers to and from terminals, rail yards and warehouses with Wal-Mart, Target, Home Depot, and other large shippers, are classified as independent contractors by the shipping or drayage firms.[9] Independent contractor-labeled drivers face serious economic hardships in California and other states, including forced foreclosures on their homes and trucks.[10]

California has a fundamental public policy interest in ensuring that its baseline labor and employment laws apply broadly and with consistency to workers and their employers in the state. When these labor standards are undermined by sham independent contractor arrangements, workers and their families earn less, the state's revenues drop due to missed payroll tax payments, and local economies suffer depleted activity.

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[8] Erin Johansson, *Fed Up with FedEx: How FedEx Ground Tramples Workers Rights and Civil Rights*, American Rights at Work (2007), http://www.americanrightsatwork.org/dmdocuments/ARAWReports/fedupwithfedex.pdf .

[9] Edna Bonacich and Jake Wilson, *Getting the Goods: Ports, Labor and the Logistics Revolution*, Cornell University Press (2007).

[10] Consumer Federation of California *et al*, *Foreclosure on Wheels: Long Beach's Truck Program Puts Drivers at High Risk for Default*, (August 2008), http://www.consumercal.org/downloads/Foreclosure%20on%20Wheels.pdf

A. Misclassification Harms Workers, Law-Abiding Employers and the Public

Misclassification of drivers has serious consequences for the workers themselves, law-abiding employers and the public coffers. An employer's insistence on labeling workers as contractors by itself tends to deter workers from claiming rights under workplace laws that rely on individual complaints for enforcement.[11] The same occupations with high rates of misclassification are also among the jobs with the highest numbers of workplace violations.[12] The result is our "growth-sector" jobs are not bringing people out of poverty and workers across the socio-economic spectrum are impacted.

Workers could lose out on: (1) minimum wage and overtime rules; (2) the right to a safe and healthy workplace and workers' compensation coverage if injured on the job; (3) protections against sex harassment and

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[11] The vast majority of DOL's Wage & Hour Division's (WHD) enforcement actions are triggered by worker complaints. *See, e.g.* U.S. Gov't. Accountability Office, GAO-08-962T, *Better Use of Available Resources and Consistent Reporting Could Improve Compliance* 7 (July 15, 2008) (72 percent of WHD's enforcement actions from 1997-2007 were initiated in response to complaints from workers); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 59-60 (2005) (finding that in 2004, complaint-derived inspections constituted about 78 percent of all inspections undertaken by WHD.)

[12] *See*, National Employment Law Project, *Holding the Wage Floor*, http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf

discrimination; (4) unemployment insurance if they are separated from work and other "safety net" benefits; (5) any paid sick, vacation, health benefits or pensions provided to "employees;" (6) the right to organize a union and to bargain collectively for better working conditions; and (7) Social Security and Medicaid payments credited to employee's accounts.

Federal and state governments suffer hefty loss of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums. A 2009 report by the Government Accountability Office (GAO) estimated independent contractor misclassification cost federal revenues $2.72 billion in 2006.[13] According to a 2009 report by the Treasury Inspector General for Tax Administration, the IRS's most recent estimates of the cost of misclassification are a $54 billion underreporting of employment tax, and losses of $15 billion in unpaid FICA taxes and UI taxes.[14]

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[13] U.S. General Accounting Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009), available at http://www.gao.gov/new.items/d09717.pdf.

[14] Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed* (February 4, 2009) available at http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf.

A growing number of states have been calling attention to independent contractor abuses by creating inter-agency task forces and committees to study the magnitude of the problem. Along with academic studies and other policy research, the reports document the prevalence of the problem and the attendant losses of millions of dollars to state workers' compensation, unemployment insurance, and income tax revenues. A review of the findings from the twenty state studies of independent contractor misclassification demonstrates the staggering scope of misclassification.[15]

In California alone, audits conducted by California's Employment Development Department between 2005 and 2007 recovered a total of $111,956,556 in payroll tax assessments, $18,537,894 in labor code citations, and $ 40,348,667 in assessments on employment tax fraud cases.[16] And the rates of independent contractor misclassification are rising; in California, the number of unreported employees increased by an impressive 54% from 2005 to 2007.

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[15] *See* NELP, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,* http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1.

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

II. THE DISTRICT COURT ERRED IN APPLYING GEORGIA RATHER THAN CALIFORNIA LAW TO DETERMINE THE APPLICABILITY OF CALIFORNIA LABOR LAW PROTECTIONS.

The district court dismissed Plaintiff's California Labor Code claims based on its finding that the plaintiff delivery drivers were independent contractors under Georgia law.[17] The district court erred, however, in applying Georgia law to make this determination. ER 13. This Court's recent decision in *Narayan v. EGL, Inc.*, ___F.3d___, 2010 WL 3035487 at * 2-3 (9th Cir. 2010), holds that whether a worker is covered by the California Labor Code as an employee, as opposed to an independent contractor, should be decided under California law. Without such a rule, contracts requiring application of less-protective state laws like Georgia's would undermine fundamental California labor policies. Employers like Affinity should not be permitted to force workers to waive the statutory protections of the California Labor Code by imposing contract terms that designate weaker workplace laws.

[17] Plaintiffs seek payment for breaks, employee related benefits such as vacation pay, holiday pay, and sick pay as well as reimbursement for business deductions such as deductions for worker compensation coverage. Plaintiffs also allege that Affinity committed unfair business practiced by misclassifying him and others as independent contractors.

While Plaintiff did not argue application of California law in the trial court,[18] this Court should, nevertheless, consider the choice of law issue consistent with its holding in *Kimes v. Stone,* 84 F.3d 1121, 1126 (9th Cir. 1996), which establishes exceptions to the general prohibition on raising issues for the first time on appeal.

A. California Law Applies

This Court's opinion in *Narayan* held for the first time that "California law should apply to define the boundaries of liability" under the California Labor Code. *Id.,* 2010 WL 3035487 at *3. In *Narayan,* as in this case, delivery truck drivers alleged that their employer had improperly classified them as independent contractors thereby depriving them of their rights under the California Labor Code. The trial court decided the question of the drivers' employment status based on the choice of law provision in the drivers' contracts (which designated Texas law), just as the trial court here did. *Id*. at *2. This Court reversed.

[18] Defendants argued in their motion for summary judgment that choice of law provisions set forth in the Independent Truckman's Agreement (ITA) and the Equipment Lease Agreement (ELA) constituted an agreement to apply Georgia law. *See* Doc. 59-1 at 16-17. Plaintiffs did not address that issue, although they cited both California and Georgia cases in their opposition to summary judgment. Doc 65 at 16. The Court found that Georgia law applied. Doc 79 at 6.

The Court noted that California Labor Code claims did not "arise out of the contract, involve the interpretation of any contract term, or otherwise require there to be a contract" even though the contract would "likely be used as evidence to prove or disprove the statutory claims." *Id.* at *3. Then, relying on *CBS Corp. v. FCC*, 535 F.3d 167 (3rd Cir. 2008), *vacated on other grounds*, 129 S.Ct. 2176 (2009), which held that the employee status for purposes of federal law should be determined under federal law despite a choice of law provision requiring application of New York law, this Court held that California had a similar interest in developing uniform, state-wide rules for determining the applicability of its Labor Laws. Accordingly, the Court concluded that "California law should apply to define the boundaries of liability under that scheme." *Narayan*, 2010 WL 3035487 at *3.

This case is indistinguishable from *Narayan*. The choice of law provision signed by the Affinity delivery drivers provided that "[t]his agreement and any dispute thereunder shall be governed by the laws of the State of Georgia." Georgia, like Texas, applies such choice of law provisions narrowly to claims arising out of the contract itself, but not to all disputes between the parties. *See Clark v. Roberson Management Corp.*, 2005 WL 6345578 (M.D. Ga. 2005) (deciding *respondeat superior* liability under Georgia law, despite truck driver's contract provision calling for

interpretation of the contract under Illinois law); *Young v. W.S. Badcock Corp.*, 474 S.E.2d 87,88 (Ga. App. 1996) (same). As in *Narayan*, the drivers' California Labor Code claims do not involve an interpretation of their contract or a dispute thereunder. Rather they are independent statutory claims that would exist even in the absence of a contract. Finally, and most importantly, the overriding public interest in ensuring that the Labor Code receives a uniform application, recognized in *Narayan*, applies with equal force in this case. Accordingly, California law should apply to determine whether the plaintiff drivers were employees.[19]

B. This Court Should Consider The Choice Of Law Issue

Although this Court does not, generally, consider issues raised for the first time on appeal, it will do so when one of three exceptions applies: "(1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of

[19] Even if the choice of law provision here were broad enough to encompass the driver's California statutory claims, the holding in *Narayan* that California has a fundamental interest in defining the boundaries of liability under its Labor Code would still require the application of California law, given the dramatic differences between California and Georgia law. *See Washington Mutual Bank v. Superior Ct.*, 24 Cal.4th 904, 916-917 (2001) (where a choice of law provision conflicts with a fundamental policy of California and California has a materially greater interest in determining the chosen issue, California law applies). Georgia law recognizes the same deference when applying choice of law provisions. See, *Nasco v. Gimbert*, 239 Ga. 675, 238 S.E.2d 368 (1977). Plainly California has a greater interest in determining the boundaries of its Labor Law than Georgia.

law." *Kimes,* 84 F.3d at 1126. Here, all three exceptions apply. First, as the Court indicated in *Nayaran,* California has a fundamental sovereign interest in defining the boundaries of the protections afforded by its labor laws. That public interest would be utterly frustrated if the applicability of the Labor Code were decided under Georgia law which, as explained in the next section of this brief, defines employee status more narrowly than California law. Indeed, because the California Labor Code is designed to protect not only individual employees from exploitation, but also law-abiding employers from unfair competition, failing to apply California law in this case could result in a miscarriage of justice whose effects will reach far beyond the individual drivers in this case. Indeed, so strong is California public policy in this regard that it prohibits individual workers from waiving the rights asserted here. *See* Cal. Labor Code §§ 1194, 2804. "By its terms, the rights to the legal minimum wage and legal overtime compensation conferred by the statute are unwaivable. *Gentry v. Superior Court,* 42 Cal.4th 443, 455 (2007) *cert. denied* 128 S.Ct. 123 (2008).

Second, Plaintiffs could not have raised the *Narayan* holding in the district court because *Narayan* was not decided until August 5, 2010, several months after the judgment in this case was entered in March, 2010, ER 7, and two and one-half years after Plaintiffs were faced with the issue when

submitting their opposition to the summary judgment motion. Doc. 65, filed December 3, 2007.

Third, the choice of law question Plaintiffs seek to present on appeal involves a pure question of law. California and Georgia look to the same facts to decide the employee/independent contractor question; they simply analyze the legal import of those facts in different ways. Thus, allowing Plaintiffs to raise the choice of law issue on appeal will in no way prejudice Defendant as the factual record would have been the same if Plaintiffs had argued California law below. In fact, Plaintiffs consistently relied on California case law, in addition to Georgia law, in their opposition to summary judgment [Doc 65 at 16], and trial brief [Doc. 180 at 30, 36, 37, 41]. The court's pre-trial order also cited California, in addition to Georgia law, as relevant. ER 74. So the application of California law should come as no surprise to Defendant.

Courts throughout the country have not hesitated to consider choice of law questions raised for the first time on appeal. As the Fifth Circuit noted, "[a]ppellate review does not consist of supine submission to erroneous legal concepts even though the parties declaimed the applicable law below." *Empire Life Ins. Co. v. Valdak Corp.,* 468 F.2d 330, 334 (5th Cir. 1972) (deciding choice of law issue *sua sponte,* despite parties' erroneous

agreement regarding the applicable law at the trial level). *See, e.g., Huber v. Taylor,* 469 F.3d 67, 74-75 (3d Cir. 2006) (deciding choice of law question raised on appeal because defendant had opportunity to offer all relevant evidence and to argue the issue on appeal); *Goldstein v. Madison Nat. Bank of Washington*, 807 F.2d 1070, 1072 fn 5 (D.C.Cir. 1986)("application of the correct law is surely in the interests of justice, and well within the federal appellate court's discretion to raise and decide on its own initiative"); *Roofing and Sheetmetal Services, Inc. v. La Quinta,* 689 F.2d 982, 989-990 (11th Cir. 1982) (considering choice of law issue not raised at trial because it involved pure issue of law, raised no new factual questions, and the ends of justice would be served by doing so). *Cf. Pecheur Lozenge Co. v. National Candy Co.*, 315 U.S. 666, 667 (1942) (remanding for application of "the appropriate local law" after choice of law issue was raised on certiorari).

C. Differences Between California And Georgia Law Require Reversal of the Judgment.

While *Amici* believe that the drivers were employees under both Georgia and California law, those States use strikingly different legal tests when evaluating the employee v. independent contractor question. Among other things, Georgia establishes a presumption in favor of independent contractor status where a contract designates the relationship as one of principal and independent contractor. *Fortune v. Principal Fin. Group, Inc.*,

465 S.E.2d 698, 700 (Ga. 1995). California law adopts the opposite presumption, which the district court did not apply.

Once a plaintiff making a claim under the California Labor Code comes forward with evidence that he provided services to an employer, the burden shifts to the employer to show that the worker was an independent contractor. *Narayan,* 2010 WL 3035487 at *4. California law requires that the definition of "employee" for purposes of Labor Code claims "be applied with deference to the purposes of the protective legislation" at issue, purposes that are very different from the tort principles out of which the common law control test arose, and upon which Georgia law is based. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations,* 48 Cal.3d 341 (Cal. 1989) at 351-353. Under California law, the actual relationship between the parties is relevant, and not what the contract calls the worker; "the parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship." *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal.App.4th 1 (Cal. Ct. App. 2007), at 10-11. *See also Borello, supra,* 48 Cal.3d at 359 (contractual designations are particularly irrelevant if workers had no "real choice" over their terms).

The California Supreme Court recently recognized that exclusive application of the common law standard, used in Georgia to determine

employee status, would "substantially impair" the effectiveness of its labor laws. *Martinez v. Combs* 49 Cal.4th 35, 64-65 (2010). *See also Yellow Cab Cooperative, Inc. v. Workers Compensation Appeals Board,* 226 Cal.App.3d 1288, 1294-1297 (Ct. App. 1991) (discussing differences between California law and general common law definitions of employment); *Borello, at 359* ("[t]he..statutory purpos[e] of the distinction between 'employees' and 'independent contractors' [is] substantially different" from the common law purpose).

Georgia employee/independent contractor law, by contrast, arises almost entirely from common law tort cases – the very context that *Borello* and *Martinez* reject. *See, e.g. Larmon v. CCR Enterprises,* 647 S.E.2d 306 (Ga. App. 2007). These differences between California and Georgia legal standards are significant enough to require a remand for reconsideration in light of California law. *See, e.g. Narayan,* 2010 WL 3035487 at *3.

III. THE DISTRICT COURT ERRED IN ITS APPLICATION OF GEORGIA LAW.

Even if this Court declines to consider the choice of law question, the judgment of the trial court must still be reversed because the district court erred as a matter of law in its application of Georgia law. The district court began its opinion by holding that the drivers' contracts, which designated

them as independent contractors, created a presumption under Georgia law in favor of independent contractor status. ER 13-15.

This was a clear error of law for two reasons. First, while it is true that Georgia law creates a presumption "[w]here the contract of employment clearly denominates the other party as an independent contractor," *Ross v. Ninety-Two West,* 412 S.E.2d 876, 881 (Ga. App. 1991), Georgia law also holds that "where the contract specifies that the employee's status shall be that of independent contractor but at the same time provides that he shall be subject to any rules or policies of the employer which may be adopted in the future, *no such presumption arises*." *Id.* (emphasis added). *See, e.g.*, *McGuire v. Ford Motor Credit,* 290 S.E.2d 487 (Ga. App. 1982) (no presumption applies where worker's contract called for him to follow observe alleged employer's "policies" and "instructions"); *Jordan v. Townsend*, 128 Ga.App. 583, 197 S.E.2d 482 (Ga. App. 1973) (no presumption applies where contract required driver to comply the reasonable rules adopted by owner).

The district court recognized this critical limitation on finding a presumption but erroneously held that "[t]here are no such provisions in this case." ER 13 fn2 . In fact, the drivers' contracts specifically state that "[a] condition of payment is completion of the delivery in accordance with the

requirements of the Agreement between Affinity and SLS, as outlined in the Contractor Procedures Manual, Sections II, III and IV." ER 721. The district court found that this manual contained extensive controls over the manner and means of performance of the drivers' work, [20] *see* ER 23, and, as such, it effectively precluded a presumption in favor of independent contractor status from arising in this case.[21]

Second, even if a presumption applied initially, once Plaintiff came forward with sufficient evidence to defeat Defendant's summary judgment motion, the presumption should have disappeared. In Georgia, a presumption

> is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule imposed by the law,

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[20] For example, the manual specified that, in the course of a delivery, drivers could remove doors on pin hinges, but not on spring loaded hinges, ER 486, prohibiting drivers from re-connecting current appliances in a new location, ER 487, and requiring trash to be separated into two containers, one for cardboard and one for all other trash. ER 493.

[21] At trial, the district court discounted the importance of the manual because "the evidence does not support that Plaintiffs received these manuals, or, if they did, that they read or referred to them." ER 24 *but see* TR 73-74 (*testimony that drivers received manuals)*. However, Affinity managers clearly testified that the manuals were distributed, ER 199, 279-280, and, in as much as compliance with the manuals was a condition of payment, drivers who failed to request a copy and read it did so at their peril. *See also* ER 137 (testimony of driver that he received manual). Thus, even if the court were correct that some drivers did not read the manual, Affinity had the right to insist on compliance with it. *See Borello*, 43 Cal.3d at 357 fn 9 (right to control, not actual exercise, is what matters).

> to be applied in the absence of evidence and whenever evidence contradicting the presumption is offered the latter disappears entirely, and the triers of fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact.

Floyd v. Colonial Stores, 121 Ga. App. 852, 858 (1970). Clearly when Plaintiffs came forward with sufficient evidence to create a triable issue as to whether the drivers were employees or independent contractors, Doc 79, that evidence was more than enough evidence to eliminate any presumption in favor of independent contractor status that might have arisen prior to that time.

By holding that Plaintiffs continued to bear the burden at trial of overcoming the presumption in favor of independent contractor status, the district court gave independent evidentiary value to the presumption. *See, e.g.*, ER 30 ("The Court finds that the Georgia test regarding Defendant's control over the Plaintiffs' time, manner and method of work indicates an independent contractor relationship, especially in light of the presumption arising from the language of the ITA.") This misapplication of Georgia law requires that the judgment of the district court be vacated even if the Court declines to decide the choice of law issue.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be reversed, and this Court should find that the plaintiffs are

employees, or in the alternative, reverse the judgment of the district court and remand the case for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Federal Rules of Appellate Procedure 29 (c)(5), 32(a)(7)(C), and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains a total of 6,027 words.

Dated: October 4, 2010
New York, NY

s/ Catherine K. Ruckelshaus
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