20-3806(L)

20-3815(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, COMMONWEALTH OF PENNSYLVANIA, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEW JERSEY, STATE OF NEW MEXICO,

(*Caption continued on inside cover*)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE RESTAURANT LAW CENTER AND NFIB SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF BRIEF FOR DEFENDANTS-APPELLANTS

Lisa M. Lewis
lmlewis@sheppardmullin.com
SHEPPARD MULLIN RICHTER & HAMPTON, LLP
30 Rockefeller Plaza
New York, NY 10112
Telephone: (212) 634-3046
Facsimile: (212) 655-1746

Counsel for *Amici Curiae* Restaurant Law Center and NFIB Small Business Legal Center

STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF WASHINGTON, STATE OF VERMONT, and COMMONWEALTH OF VIRGINIA,

Plaintiffs-Appellees,

v.

EUGENE SCALIA, ESQ., SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES OF AMERICA,

Defendants-Appellants,

INTERNATIONAL FRANCHISE ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, HR POLICY ASSOCIATION, NATIONAL RETAIL FEDERATION, ASSOCIATED BUILDERS AND CONTRACTORS, and AMERICAN LODGING AND HOTEL ASSOCIATION,

Intervenor Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Amicus Restaurant Law Center certifies that it has no corporate parent, and no publicly held corporation owns 10% or more of its stock. Amicus NFIB Small Business Legal Center certifies that it has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

The Restaurant Law Center ("RLC") is a public policy organization affiliated with the largest trade association in the United States, the National Restaurant Association. The RLC advocates on behalf of the restaurant and foodservice industry, which is the second-largest employer in the private sector with more than 15 million employees throughout the United States. The NFIB Small Business Legal Center ("SBLC") is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. SBLC is affiliated with the National Federation of Independent Business ("NFIB"), the nation's leading small business association, representing members in Washington, D.C., and all fifty state capitals.

The Final Rule[2] of the U.S. Department of Labor (the "Department") impacts nearly every restaurant and foodservice business, whether a national brand or a local establishment. Accordingly, the RLC and SBLC have a significant

[1] No party's counsel authored this brief, in whole or in part. Nor did a party, party's counsel or person other than the *amici curiae* contribute money intended to fund the preparation or submission of this brief.

[2] *Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2820 (January 16, 2020), codified at 29 C.F.R. §§ 791.1-791.3 (the "Final Rule").

interest in the development and application of the Department's joint employer regulations.

All parties consented to *Amici Curiae* Restaurant Law Center and NFIB Small Business Legal Center filing this brief, and the Court granted the RLC and SBLC until February 12, 2021 to do so pursuant to its January 28, 2021 order.

SUMMARY OF ARGUMENT

This *amici curiae* brief does not repeat the arguments or evidence already submitted on appeal by the Department and Intervenors. Rather, this brief explains why the Final Rule is neither arbitrary nor capricious under the Administrative Procedure Act ("APA"), as evidenced by the Department's reasoned consideration of submitted comments, which was erroneously not sufficiently considered by the district court.[3]

The district court held the Department's Final Rule is arbitrary and capricious for three reasons: (1) the Department did not adequately explain why it departed from its prior interpretations of the "joint employer" standard; (2) the Department did not consider the conflict between the Fair Labor Standards Act

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[3] The deferential standard of review of the Administrative Procedure Act ("APA") "requires the court to assess, among other matters, whether [a] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Guertin v. United States*, 743 F.3d 382, 385-86 (2d Cir. 2014) (citing *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 446 (2d Cir. 2013)) (quotation marks omitted). (Def. App. Brief at 49.)

("FLSA") and the Migrant and Seasonal Agricultural Workers Protect Act ("MSPA") regulations; and (3) the Final Rule did not "adequately" consider the Final Rule's cost to workers. (Order at 55-60.) The district's court order is erroneous, in part, because it ignores the fact that the Department made its determination after seeking and considering public comments on every aspect of the Final Rule. And in many instances, the Department revised the proposed rule based on this input, to reflect and address the concerns of both employer and employee associations. Moreover, in response to the public's comments, the Department provided comprehensive explanations for its reasoning. The Department's diligence and thoughtful consideration of public comment and its explanations provided in response exemplify the reasonableness of the Final Rule. (*See* Def. App. Brief at 50-51.)

This brief provides the Court with specific examples of the Department's diligence in its adoption of the Final Rule. This is relevant on appeal because it shows that the Department conducted a reasoned and comprehensive analysis before implementing the Final Rule, which supports a finding that the Final Rule is not arbitrary and capricious.

As an example, during the rulemaking process, both the RLC and NFIB submitted comments. In fact, the RLC submitted twenty-three pages of comments, many of which were referenced in the Final Rule, as were some of NFIB's

comments. Ultimately, the Department agreed with several of the RLC's proposed revisions, and made modifications accordingly. Specifically, the Department clarified the limits of indirect control in hiring and firing employees; eliminated consideration of a potential joint employer acting "directly or indirectly in the interest of the employer in relation to the employee;" and codified that operating as a franchisor, entering into a brand-and-supply agreement, or using a similar business model does not make joint employer status more likely. In each instance, the Department referenced the RLC's specific comments before explaining its position and reasoning.

The Department, however, did not always agree with the RLC's comments, and several requested revisions were rejected. Indeed, the Department declined to add a "day-to-day" qualifier to the second factor of the balancing test; did not delete the fourth factor from the balancing test; and adopted language allowing additional factors of significant control to be considered.

That the RLC and NFIB, public policy organizations, had the opportunity to participate in the rulemaking process, and received reasoned and thorough responses to their comments, refutes the district court's conclusion of an APA violation. Indeed, the Department's comprehensive explanations and analyses evidence the Department's overall commitment to analyzing and responding to public concerns and explaining the legal basis for the Final Rule. While the RLC

and the SBLC do not agree with every aspect of the Final Rule, plainly the Department's decisions were neither arbitrary nor capricious.

ARGUMENT

I. THE DEPARTMENT'S RULEMAKING PROCESS WAS NEITHER ARBITRARY NOR CAPRICIOUS

As an initial matter, the RLC and the SBLC agree the APA's notice-and-comment process was not required for the Department's interpretation of joint employer status under the FLSA. (*See* Def. App. Brief at 50.) Nevertheless, the reasonableness of the Rule is illustrated by the fact that the Department came to its determination after reviewing and considering 57,000 public comments "on any aspect" of the proposed rulemaking, and in many instances, revised the Rule based on these comments. Accordingly, *amici* offer a summary of the RLC's comments and the Department's responses to demonstrate both the vigor with which the Department considered the public's concerns with its proposed interpretative rule and the thoughtfulness of its implementation.

A. The Department evaluated the RLC's comments regarding specific factors of the balancing test and provided detailed responses.

As reflected in the Final Rule, the RLC agreed with the Department that a multi-factor balancing test is consistent with section 3(d). 85 Fed. Reg. at 2829, 2830. The RLC, however, proposed several revisions to the proposed factors.

First, the RLC suggested a "substantial frequency" requirement be added to the second factor, to require a joint employer to have "day-to-day" supervision and control. 85 Fed. Reg. at 2830. The Department, however, rejected this addition, finding a lack of precedential support for the frequency limitation. "While several courts outside of the Third Circuit have rejected a finding of joint employer status after noting the lack of day-to-day supervision, those courts did not explicitly hold that day-to-day supervision was necessary for joint employer liability." 85 Fed. Reg. at 2831. Instead, acknowledging courts generally agree "only substantial supervision is indicative of joint employer status," the Department revised the second factor of the test, § 791.2(a)(1)(ii), to require supervision and control "to a substantial degree." 85 Fed. Reg. at 2832. The Department's analysis and response to the RLC's comments, which included numerous parenthetical citations to relevant legal authority, demonstrate its comprehensive approach to evaluating comments and proposed revisions and its commitment to ensuring that its position was well-founded and legally justified.

The RLC also requested the fourth factor be deleted. The Department similarly rejected that change, reasoning "[c]ourts have frequently looked to maintenance of employment records as one of many factors appropriate for consideration in determining potential joint employer status." 85 Fed. Reg. at 2832. However, "given the breadth of comments" addressing the fourth factor, the

Department did add regulatory language, at § 791.2(a)(2), to clarify satisfaction of the fourth factor alone is not sufficient for joint employer status. *Id.* Once again, the Department did not simply accept or reject comments from employee or employer associations, but instead, reviewed circuit opinions and created its own solutions.

B. In response to the RLC's comments, the Department evaluated and revised the regulatory language to avoid uncertainty in application of the four-factor test.

The Department's adoption of the four-factor test was intended "[t]o promote greater uniformity in court decisions and predictability for organizations and employees." 85 Fed. Reg. at 2823; (SPA 197) (Def. App. Brief at 10.) As such, the Department appropriately evaluated and revised the Final Rule's regulatory language to avoid uncertainty in the application of the four-factor test. The district court did not adequately consider this important justification for the Department implementing the Final Rule or the steps that it took to reduce its uncertainty. (*See* Order at 55-57.)

In its comments, the RLC expressed concern that incidental impact on a worker's employment, such as a restaurant providing feedback or expressing customer preferences to a cleaning service, would result in a finding of joint employment, even where it was the contractor's decision whether to hire or fire an

employee in response to such feedback. 85 Fed. Reg. at 2833. Although the Department did not expressly clarify that providing feedback is not a factor that makes joint employment more likely, the Department added § 791.2(a)(3)(ii) to explain the limits of indirect control.

In light of this revision, and in response to the RLC's request, the Department also modified its fourth example, § 791.2(g)(4). 85 Fed. Reg. at 2847. In the Final Rule, the country club and landscaping company were replaced with a restaurant and cleaning company. *Id.* The facts were also changed to demonstrate "that a single request to fire an employee in this example was not significant enough to exercise indirect control over hiring or firing." *Id.*

The RLC was also concerned that § 791.2(b), authorizing "additional factors" to be considered beyond the four-factor test, would open the "floodgates" of litigation. 85 Fed. Reg. at 2836. The Department carefully considered public comments and adopted only part of subsection (b), deleting proposed § 791.2(b)(2) because it "does not provide meaningful limitation on the consideration of additional factors." *Id.* at 2837. The Final Rule now allows consideration of indicators of significant control, but language allowing the consideration of whether the potential joint employer acted "directly or indirectly in the interest of the employer in relation to the employee" has been deleted. 85 Fed. Reg. at 2836.

These examples illustrate the Department's thoughtful inquiry and analysis to avoid uncertainty in the application of the four-factor test, which shows that the Final Rule was not arbitrary and capricious.

C. The Department expressly balanced competing concerns in concluding that specific business models and strategies do not make joint employer status more likely.

As a public policy organization advocating on behalf of the restaurant and foodservice industry, the RLC requested the regulation specify that franchise business models, as well as certain contractual agreements and business practices, do not make joint employment more likely. 85 Fed Reg. at 2839, 2840. There are many different types of franchising arrangements in the food service industry, and "franchisors need to be able to communicate freely with their franchisees regarding their operations without the risk of joint employer liability." (Declaration of Lisa M. Lewis ⁋ #, Ex. A (June 25, 2019 Correspondence from RLC to U.S. Department of Labor re Notice of Proposed Rulemaking), p.18.)

On the other hand, labor unions and other worker representatives "felt strongly that business models should not be generally excluded from consideration of joint employer status." 85 Fed. Reg. 2840. The AFL-CIO "claimed that certain business models, such as temporary staffing agencies, labor supply firms, or franchisors, are empirically more likely to be joint employers." *Id.* The

Department also quoted commentary from the Center for Law and Social Policy, which claimed "the growing variety and number of business models and labor arrangements have made joint employment more common." *Id.* at 2840-2841. Thus, comments from the Center for Law and Social Policy were expressly considered and cited, which shows that the Department reasonably considered comments provide by employee associations.

As set forth in the Final Rule, the Department evaluated the comments and concerns from employer and employee associations alike, and ultimately concluded "there is nothing inherent" in the brand-and-supply or franchise business models that is "indicative of joint employer status under the FLSA." *Id.* The Final Rule, however, adopts a modified and more limited version of § 791.2(d)(2), "allowing for the possibility that business models could be devised" that would involve the exercise of control over the terms and conditions of employment, and thus make joint employer status more likely. *Id.* Thus, using a balanced approach to competing concerns, the Department modified the regulation to reach a middle ground, which further demonstrates the Department's comprehensive approach to reviewing and responding to public comments.

Relatedly, the RLC commented that providing sample handbooks and forms, analytical tools, or marketing materials to improve businesses and achieve legal compliance should not make joint employer status more likely. 85 Fed. Reg. at

2843. "To protect their brands, franchisors need to be able to provide guidance and support to franchisees. … Franchisors also need to be able to require that certain cleanliness, hygiene, safety, certification and training requirements are met." (Lewis Decl., ⁋ #, Ex. A, p. 10.)

The Department cites to these comments, as well as legal opinions and submissions received from employee associations, including labor unions, in analyzing the distinction between business strategies and resources and the exercise of control over employees' terms or conditions of work. 85 Fed. Reg. 2844. In adopting § 791.2(d)(5), the Department ultimately concluded a "potential joint employer would have to not only provide such resources, but would also have to somehow exercise control over the employees in relation to those resources." *Id.* The Department's conclusions are well reasoned, supported by ample authority, and clearly considered the input from both employee and employer perspectives.[4] *See id.*, fn. 87. This significant undertaking demonstrates there is

[4] The COVID-19 pandemic amplifies the wisdom of the Department's conclusion, as it is more important than ever for franchisors to be able to share resources and information with their business partners. For example, McDonald's USA issued a 59-page guide outlining minimum standards, such as temperature checks, social distancing guidelines, requiring gloves and masks, and frequent handwashing to keep restaurant employees and customers safe. McDonald's, Our Goal: Safety First (May 19, 2020), https://news.mcdonalds.com/news-releases/news-release-details/setting-record-straight-were-taking-care-our-family#:~:text=We%20are%20grateful%20for%20the,restaurants%20is%20a%20top%20priority.

nothing capricious or arbitrary about the Final Rule, and the Department had good reason for its implementation.

II. THE DISTRICT COURT'S JUDGMENT SHOULD BE REVERSED

The restaurant and foodservice industry and small businesses across the country face an ever-expanding set of unique, and sometimes contradictory, standards for joint employment established by different courts in different parts of the country. These inconsistencies are onerous for both small employers, which have limited resources, and larger businesses, which operate in multiple states. While the district court noted that "[p]romoting uniformity and clarity given the (at least superficially) widely divergent tests for joint employer liability in different circuits is a worthwhile objective," it did not adequately consider this critical justification for the Final Rule's implementation. (*See* Order at 60.)

Although many of the RLC's proposed revisions were not ultimately adopted, the Final Rule brings clarity and certainty to the standard for joint employment, and benefits businesses and employees alike. Accordingly, the RLC and SBLC urge the Court to reverse the district court's judgment.

III. CONCLUSION

For all of the foregoing reasons, the RLC and SBLC respectfully request that the Court reverse the district court's judgment.

New York, New York
February 12, 2021

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: /s/ Lisa M. Lewis

Lisa M. Lewis
lmlewis@sheppardmullin.com
SHEPPARD MULLIN RICHTER & HAMPTON, LLP
30 Rockefeller Plaza, 39th Floor
New York, New York 10112
Telephone: (212) 634-3046
Facsimile: (212) 655-1746

Attorney for *Amici Curiae* Restaurant Law Center and NFIB Small Business Legal Center

Angelo I. Amador
aamador@restaurant.org
RESTAURANT LAW CENTER
2055 L Street, NW, 7th Floor
Washington, DC 20036
(202) 492-5037

Counsel for *Amicus Curiae* Restaurant Law Center

Karen R. Harned
Elizabeth Milito
elizabeth.milito@nfib.org
NFIB SMALL BUSINESS LEGAL CENTER
555 12th Street, NW
Washington DC 20004
(202) 406-4443

Counsel for *Amicus Curiae* NFIB Small Business Legal Center

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 2,613 words in this brief.

New York, New York
February 12, 2021

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: /s/ Lisa M. Lewis

Lisa M. Lewis
lmlewis@sheppardmullin.com
SHEPPARD MULLIN RICHTER & HAMPTON, LLP
30 Rockefeller Plaza, 39th Floor
New York, New York 10112
Telephone: (212) 634-3046
Facsimile: (212) 655-1746

Attorney for *Amici Curiae*
Restaurant Law Center and NFIB Small Business Legal Center