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REEXAMINING JOINT EMPLOYMENT WAGE AND HOUR CLAIMS FOLLOWING *DYNAMEX* AND AB 5

*Alexander Moore**

I. INTRODUCTION

In 2017, Jeffery Lines sued his employer, Tenet Concepts (“Tenet”), alleging that the company violated wage and hour laws by altering paychecks to avoid payment of overtime¹ and by forcing employees to work off-the-clock, including during meal breaks.² Lines was one of over four hundred delivery drivers employed by Tenet³ but effectively working for Amazon. Rather than employ its own drivers, Amazon contracted with Tenet to provide the labor necessary to allow for same-day delivery of products listed on Amazon. These drivers, though officially Tenet employees, operated out of Amazon warehouses, delivered Amazon packages, and wore Amazon uniforms.⁴ Accordingly, Lines also listed Amazon as a defendant on the complaint,⁵ alleging that Amazon and Tenet jointly employed him and the other drivers.⁶ However, through an indemnification clause, Tenet was required to pay for Amazon’s defense.⁷ Fearing an anticipated \$800,000 in legal costs, Tenet filed for bankruptcy protection.⁸ Lines’s

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1. First Amended Complaint at 2, *Lines v. Amazon.com, Inc.*, No. 1:17-00072-LY (W.D. Tex. Apr. 14, 2017).

2. *Id.* at 10.

3. *Id.* at 8.

4. *Id.*

5. *Id.* at 1.

6. *Id.* at 7.

7. Patricia Callahan, *Amazon Pushes Fast Shipping but Avoids Responsibility for the Human Cost*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/05/us/amazon-delivery-drivers-accidents.html>.

8. *Id.*

case was transferred to bankruptcy court, where Lines's claim against Amazon was stalled.⁹ Though Amazon was the true beneficiary of Lines's labor, and despite Amazon being the second company in world history to be valued at over \$1 trillion,¹⁰ Lines was unable to recover his back wages of \$7.25 per hour.¹¹ Through its choice to outsource its labor needs to Tenet, rather than employ its own delivery drivers, Amazon effectively avoided the costs of employment and the liability for labor violations stemming from the delivery of Amazon products. How did this come to be?

Employment status confers many benefits to a worker. Most importantly for the purposes of this Comment, employment determines a worker's right to minimum wage and overtime protections.¹² It also entitles a worker to Social Security benefits, unemployment, worker's compensation, and the federal rights to collective bargaining and freedom from discrimination.¹³ These benefits, though, create substantial costs for employers. According to the U.S. Bureau of Labor Statistics, employment benefits represent nearly 30 percent of an employee's total compensation costs, with standard wages representing the remaining 70 percent.¹⁴

To avoid these costs, some employers rely on legal—but problematic—means of shifting responsibility. National media has focused extensively on the gig economy, wherein companies, such as the rideshare giants Lyft and Uber, rely on workers classified as independent contractors to form their labor force.¹⁵ Because independent contractors do not receive the benefits associated with employment, they are 20 to 30 percent cheaper than employees.¹⁶ If their drivers were

9. *Id.*; Order Granting Motion to Transfer Venue, *Lines v. Amazon.com, Inc.*, 1:17-00072-LY (W.D. Tex. Aug. 9, 2018).

10. David Streitfeld, *Amazon Hits \$1,000,000,000,000 in Value, Following Apple*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/technology/amazon-stock-price-1-trillion-value.html?searchResultPosition=1>.

11. Callahan, *supra* note 7; First Amended Complaint, *supra* note 1, at 8.

12. Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 115 (2018).

13. *Id.* at 115–16.

14. U.S. BUREAU OF LAB. STATS., EMPLOYER COSTS FOR EMPLOYEE COMPENSATION—DECEMBER 2019, at 1 (2020), https://www.bls.gov/news.release/archives/ecec_03192020.pdf.

15. See Eli Rosenberg, *Can California Rein in Tech's Gig Platforms? A Primer on the Bold State Law That Will Try*, WASH. POST (Jan. 14, 2020, 10:32 AM), <https://www.washingtonpost.com/business/2020/01/14/can-california-reign-techs-gig-platforms-primer-bold-state-law-that-will-try/>.

16. *Id.*

classified as employees, it is estimated that Lyft and Uber would be required to pay an additional \$3,625 per driver annually in taxes and benefits.¹⁷ Instead, these costs are passed onto the workers themselves, who must pay their own self-employment taxes and bear the risks of unemployment and work-related injury.

In recent years, this practice of purposefully labelling workers as independent contractors to avoid the costs of employment—known as misclassification—has come to the forefront of California politics. In 2018, the California Supreme Court introduced the ABC test for misclassification schemes in its case *Dynamex Operations West, Inc. v. Superior Court*.¹⁸ This test, discussed in detail below, greatly limits an employer’s ability to avoid the costs of its employees by misclassifying them as independent contractors. In 2019, the California legislature passed Assembly Bill 5 (AB 5), which codified the ABC test and was seen as a direct attack on Lyft and Uber’s practices.¹⁹ In 2020, after spending roughly \$200 million, Lyft and Uber led a successful ballot initiative, known as Proposition 22, which exempted app-based delivery and rideshare companies from the ABC test, allowing these companies to continue to classify their drivers as independent contractors.²⁰

This fight over misclassification has largely overshadowed a separate—but closely related—means by which businesses in California have avoided the costs of employment. Just as Lyft and Uber use independent contractor classification to pass costs directly onto their workers, other businesses contract out their labor needs to separate entities that—at least in theory—carry the costs of employing workers. This practice can be illustrated by the *Lines* case. For the purposes of this Comment, the business engaging in—and benefitting from—this practice will be deemed the “lead,” exemplified by Amazon; the business that supplies labor will be deemed the “intermediary,” like Tenet.

17. Alison Griswold, *How Much It Would Cost Uber and Lyft if Drivers Were Employees*, QUARTZ (June 14, 2019), <https://qz.com/1643263/the-cost-to-uber-and-lyft-if-drivers-were-employees/>.

18. 416 P.3d 1 (Cal. 2018).

19. Rosenberg, *supra* note 15; Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019).

20. Taryn Luna, *California Voters Approve Prop. 22, Allowing Uber and Lyft Drivers to Remain Independent Contractors*, L.A. TIMES (Nov. 3, 2020), <https://www.latimes.com/california/story/2020-11-03/2020-california-election-tracking-prop-22>; see also CAL. BUS. & PROF. CODE § 7450 (Deering 2021) (codifying the purpose of Prop. 22 as “protect[ing] the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies . . .”).

In this business model, the intermediary acts as a buffer for the lead. Though the workers are providing labor for the lead, only the intermediary is directly liable for labor violations. Because workers can exercise their employment rights against the intermediary, courts can evade assessing the lead's involvement.²¹ This business arrangement, and the failure of the courts to fully consider its effects, has adverse consequences on workers. As in *Jeffery Lines's* case, a worker may be unable to obtain judgment from the intermediary and unable to sustain an action against the lead. In fact, as discussed below, the lead-intermediary relationship is itself responsible for promulgating the very labor violations a plaintiff might allege.

In the lead-intermediary relationship, the intermediary does generally classify its workers as employees. Thus, laws like AB 5, which target misclassification—a practice whereby an employer labels its workers as independent contractors to avoid employment costs—are not applicable. Because the workers are already the intermediary's employees, the only relevant question is whether they are also the lead's employees.²²

To answer this question, courts have long recognized the doctrine of joint employment.²³ Under this doctrine, a worker can be deemed an employee of more than one employer, opening each employer to joint and several liability for wage and hour violations, among other abuses.²⁴ The joint employment doctrine arose to complement the common law's strict definition of employment. Under the common law, an employer is one who controls the manner and means of the employee's performance of work.²⁵ This definition is grounded in the traditional concept of the master-servant relationship, where a master physically imposes their will over a servant.²⁶ Direct, physical control over a worker became the key inquiry in determining employment under this definition.²⁷ Where control is indirect or abstract, a court is

21. *See, e.g.,* *Curry v. Equilon Enters.*, 233 Cal. Rptr. 3d 295, 314 (Ct. App. 2018) (finding that, where an intermediary has employed the plaintiff workers—and thus the workers have protections—looser standards are permissible in determining whether the lead is also an employer).

22. *Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1032 (9th Cir. 2019).

23. *See, e.g.,* *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (holding a maintenance company and an apartment building owner to be joint employers of maintenance workers).

24. 29 C.F.R. § 791.2(f) (2019).

25. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. L. INST. 2006).

26. Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 319 (2003).

27. *Id.*

much less likely to find an employment relationship.²⁸ Such a definition is ill-suited in the modern economy, where business formalities, such as the lead-intermediary relationship, can be used to attenuate the employment relationship.²⁹

Thus, the federal and state governments have recognized and developed definitions of employment far more expansive than the common law.³⁰ One such definition is “to suffer or permit work,” by which a business is deemed an employer when work is performed for its benefit, whether authorized or not, provided the business had knowledge the work was being performed and an opportunity to prevent it.³¹ The United States Supreme Court has recognized that a broader definition of employment would be difficult to fathom,³² and the California Supreme Court has held that California’s interpretation is even more expansive than its federal analogue.³³ Still, the federal system has yet to standardize its analysis of the “suffer or permit” definition, and the California Supreme Court has neutered its application in joint employment cases.

This Comment seeks to shed light on the prevalence of the lead-intermediary relationship, the dangers it presents for workers, and the inadequacy of current California law to protect its workers’ rights. California’s current standard for joint employment, developed in the 2010 California Supreme Court case *Martinez v. Combs*,³⁴ affords a far too narrow understanding of California’s expansive “suffer or permit” definition of employment.³⁵ This understanding must be reconciled with *Dynamex*, wherein the California Supreme Court used the “suffer or permit” definition to expand employment rights to workers misclassified as independent contractors.³⁶

This reconciliation is necessary because the *Martinez* standard, which focuses on a business’s direct control over the workers involved, fails to account for a lead’s tacit encouragement of labor violations by its intermediaries. Only *Dynamex*’s interpretation, in which

28. *See id.*

29. *Id.* at 321.

30. *See* discussion *infra* Parts III–IV.

31. 5 C.F.R. § 551.104 (2020).

32. *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945).

33. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 12 (Cal. 2018).

34. 231 P.3d 259 (Cal. 2010).

35. *Id.* at 279.

36. *Dynamex*, 416 P.3d at 35.

a purported employer suffers or permits all work performed within the usual course of its business,³⁷ creates liability for leads that implicitly benefit from such violations.

Dynamex's broader interpretation is supported by the legislative and judicial history of the "suffer or permit" standard. Further, the *Dynamex* court's main policy concern—a fear that lenient laws will perpetuate labor abuses—is expressed in the joint employment context by the inherent dangers of the lead-intermediary relationship. A broad joint employment standard will provide leads with an incentive structure to ensure compliance with labor law. Nevertheless, the use of intermediaries can be beneficial to both businesses and the public: though employment status should be applied broadly, safeguards should exist to protect beneficial intermediary relationships.

Part II describes the historical necessity for joint employment and illustrates the modern means by which leads create sweatshop conditions. Part III provides a counterpoint, emphasizing the benefits of intermediary relationships and showing that not all relationships perpetuate sweatshop conditions. Part IV tracks the development of federal law and the circuit courts' split over joint employment. Part V explains the California courts' current understanding of joint employment in *Martinez*. Part VI describes *Dynamex*'s broad proscription of employment status. Part VII argues for expanding California's joint employment standard to match protections given to misclassified workers in *Dynamex*. Part VIII describes available and potential safeguards to allow for beneficial uses of intermediaries. Part IX concludes this Comment.

II. THE IMPORTANCE OF JOINT EMPLOYMENT

Employer wage theft, including minimum wage and overtime violations, is highly prevalent in the United States. Though California is widely considered to be an employee-friendly state, its workers remain susceptible to wage theft.³⁸ A 2008 report found that, in Los Angeles County, 88.5 percent of 1815 employees surveyed had experienced at least one type of pay-based violation in the previous week,³⁹ resulting

37. *Id.* at 37.

38. Matthew Fritz-Mauer, Comment, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 73–74 (2016).

39. RUTH MILKMAN ET AL., INST. FOR RSCH. ON LAB. & EMP., UNIV. OF CAL., L.A., WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 30 (2010).

in a loss of 12.5 percent of average weekly earnings.⁴⁰ The researchers estimated a weekly loss of \$26.2 million as a result of such violations.⁴¹ In industries where leads contract out for their labor needs, the joint employment doctrine becomes a potential means for workers to recover back wages even where their direct employer, the intermediary, is insolvent or otherwise judgment-proof.⁴²

More importantly, the joint employment doctrine can also change the incentive structure by which leads operate. The use of intermediaries allows leads to engage in business practices which maximize profits while tacitly encouraging intermediaries to violate wage and hour laws. Historically, these business practices are best exemplified by the garment industry's use of sweatshops, aptly named after a lead's ability to force its intermediaries and their workers to "sweat out" profits through the violation of labor law.⁴³ Today, the use of advanced technology and data collection allows leads to sweat profits more effectively and on a larger scale, as illustrated below by Amazon's use of Delivery Service Providers.

A. The Garment Industry and the Traditional Sweat Shop

Sweatshops—often depicted in popular media as dingy and cramped basements brimming with garment workers and overseen by an authoritarian supervisor—are inextricably bound to the lead-intermediary relationship. By contracting out their labor needs, garment manufacturers have traditionally minimized their fixed production costs, shielded themselves from swings in market demand, and avoided liability for labor violations.⁴⁴ The manufacturers' incentive for profit creates a vicious and self-promulgating labor market wherein workers are routinely exploited.

The relationship is deceptively simple: a garment manufacturer outsources the production of its garments to several contracted intermediaries. In doing so, the manufacturer passes on the labor and other production costs of garment-making, as well as liability for labor violations. The manufacturer identifies the market need for certain garments and offers a contract price to an intermediary in return for the

40. *Id.* at 53.

41. *Id.*

42. *See, e.g.*, First Amended Complaint, *supra* note 1.

43. Lung, *supra* note 26, at 302.

44. *Id.* at 301.

completed garments. The intermediary agrees to the contract price, uses it to pay labor costs, and keeps any remaining amount as profit. However, the economic reality of the relationship gives the manufacturer an inordinate amount of control in setting prices to maximize its own profit.⁴⁵ Intermediaries vastly outnumber manufacturers,⁴⁶ and with a limited number of contracts for garments, intermediaries looking to stay in business must underbid each other.⁴⁷ Further aggravating this power dynamic is the low barrier for creating an intermediary business—a small shop, sewing equipment, and a few workers.⁴⁸ When one intermediary fails, another rises to take its place, ensuring that the manufacturer maintains a selection of competing intermediaries to choose from.

Because intermediaries have the same incentive as the manufacturer to maximize profit, they have a motivation to recoup low contract prices by exploiting their workers. To stay in business, and to remain profitable, intermediaries violate wage and hour laws.⁴⁹ Once intermediaries choose to engage in these illegal practices, the system becomes self-promulgating. Substandard labor conditions create a competitive advantage:⁵⁰ intermediaries that violate labor laws are able to accept lower contract prices than those that do not. Over time, this results in a “race to the bottom,” wherein labor-compliant intermediaries either begin violating the law to stay competitive or are pushed out of business by non-compliant intermediaries.⁵¹

Without strong laws, such as an expansive joint employment doctrine, workers are left with little recourse. Because of low contract prices, intermediaries are chronically undercapitalized⁵²—though workers could ostensibly sue for back wages and other violations, there is no guarantee that a favorable judgment would result in actual recompense. Embattled intermediaries often declare bankruptcy to avoid judgment, later re-opening as new businesses.⁵³ Further,

45. *Id.*

46. *See id.* at 302.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See* Bruce Goldstein et. al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1003–04 (1999).

51. *See* *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 37–38 (Cal. 2018).

52. *See* Goldstein, *supra* note 50, at 1000.

53. Lung, *supra* note 26, at 305.

sweatshops have traditionally preyed upon vulnerable groups, such as undocumented immigrants, who are more likely to accept substandard labor conditions when faced with adverse immigration outcomes should they choose to report abuses.⁵⁴

In 1999, in response to the exploitative incentives of the garment industry, California passed a law requiring garment manufacturers to guarantee the payment of minimum wage and overtime when outsourcing their labor needs to intermediaries.⁵⁵ In 2015, under California Labor Code section 2810.3, the California Legislature extended this requirement to many other industries that outsource work performed “within [the] usual course” of their business.⁵⁶ In 2018, the California Labor Commissioner’s Office used section 2810.3 to issue a \$4.5 million fine against Cheesecake Factory and its janitorial contractor after the contractor failed to pay minimum wages and overtime to its custodians.⁵⁷ Again, in 2019, the Labor Commissioner’s Office issued a \$1.6 million fine against Trader Joe’s and its inventory contractor for similar failures.⁵⁸

However, section 2810.3 is limited to labor that occurs “within or upon the premises” of the lead⁵⁹ and explicitly does not apply to labor outsourced to a “motor carrier of property.”⁶⁰ Thus, the sweating system continues to operate unchecked in the delivery industry. In the absence of such laws, Amazon has successfully created one of the largest and most technologically advanced sweatshops in modern history.

B. Amazon’s Last Mile Delivery System: A Modern-Day Sweatshop

In a traditional delivery relationship, a business uses true third parties, such as the UPS or FedEx, to deliver its goods. The business agrees to a standard delivery rate and provides the packages to be

54. *Id.* at 307.

55. CAL. LAB. CODE § 2673.1 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.).

56. *Id.* § 2810.3(a)(1)(A). This is a term of art later used in *Dynamex* as a test for employment and a major topic of this Comment. See discussion *infra* Section VI.C.

57. News Release, Cal. Dep’t of Indus. Rels., Labor Commissioner’s Office Cites Cheesecake Factory, Janitorial Contractors More than \$4.5 Million for Wage Theft Violations (June 11, 2018), <https://www.dir.ca.gov/DIRNews/2018/2018-40.pdf>.

58. News Release, Cal. Dep’t of Indus. Rels., California Labor Commissioner’s Office Cites Inventory Company, Grocers More than \$1.6 Million for Wage Theft Violations (Nov. 5, 2019), <https://www.dir.ca.gov/DIRNews/2019/2019-83.html>.

59. CAL. LAB. CODE § 2810.3(a)(6).

60. *Id.* § 2810.3(p).

shipped but does not maintain oversight or control over the delivery process. Though delivery is an intrinsic part of all e-commerce, the delivery itself does not fall within the purview of the seller—it is instead the duty of a third-party carrier like UPS. Amazon, though, blurs this line by operating as both a seller of goods and as a delivery company. Amazon has built its own delivery network rivaling UPS and FedEx—in 2018, it was capable of reaching 72 percent of American households within 24 hours.⁶¹ As noted by the *Lines*⁶² case, Amazon uses intermediaries, which Amazon calls Delivery Service Providers (DSPs), to fulfill its vast demands for speedy home delivery. Under this business model, Amazon maintains oversight and control over the delivery of its goods in a way that nearly all other e-commerce businesses do not. This relationship closely mirrors the garment industry's traditional sweatshop model but uses modern technology and Amazon's massive reserve of wealth to further streamline Amazon's profit maximization.

Amazon effectively monitors intermediary profit margins and adjusts its contracts as necessary to keep those margins thin. Much like the garment industry, Amazon pays most of its intermediaries a flat contract fee for each delivery route.⁶³ This fee must cover the cost of labor, the vehicle lease and its insurance, and any other overhead.⁶⁴ In 2018, Amazon began requiring new intermediaries to lease vans from Amazon, and to obtain insurance and manage payroll through select providers.⁶⁵ These changes allow Amazon to keep track of how its intermediary spends its contract fees to deliver packages and how much profit remains.⁶⁶ Amazon, then, has the knowledge necessary to maximize its profits by keeping its intermediaries' profits low. When

61. Eugene Kim, *Amazon Can Already Ship to 72% of US Population Within a Day, This Map Shows*, CNBC (May 5, 2019, 3:07 PM), <https://www.cnbc.com/2019/05/05/amazon-can-already-ship-to-72percent-of-us-population-in-a-day-map-shows.html>.

62. See First Amended Complaint, *supra* note 1, at 2.

63. Caroline O'Donovan & Ken Bensinger, *3,200 Amazon Drivers Are Going to Lose Their Jobs*, BUZZFEED NEWS (Feb. 27, 2020, 3:22 PM), <https://www.buzzfeednews.com/article/carolineodonovan/3200-amazon-drivers-are-going-to-lose-their-jobs> [hereinafter *3,200 Amazon Drivers to Lose Jobs*].

64. *Id.*

65. *Id.*

66. Caroline O'Donovan & Ken Bensinger, *The Cost of Next-Day Delivery: Amazon's Next-Day Delivery Has Brought Chaos and Carnage to America's Streets—but the World's Biggest Retailer Has a System to Escape the Blame*, BUZZFEED NEWS (Sept. 6, 2019, 5:14 PM), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths> [hereinafter *The Cost of Next-Day Delivery*].

Amazon discovers an intermediary making a substantial profit, it can change the terms of its contracts—in one case, by rescinding the monies needed to cover the cost of dispatchers, forcing intermediaries to pay those costs out of their profit margins.⁶⁷

Amazon can make use of this method for profit maximization because of its DSPs' lack of bargaining power, which Amazon itself fuels. Amazon initially began its delivery service in 2014 by enlisting large delivery firms qualified to handle hundreds or thousands of delivery routes.⁶⁸ In 2018, Amazon began to aggressively shift to small intermediaries capable of managing only a few dozen routes, paying them as much as 5 percent less per route than its traditional partners.⁶⁹ These small companies lack the leverage to negotiate effectively with a behemoth like Amazon.⁷⁰ As in the garment industry, these intermediaries may rely exclusively on Amazon for contracts⁷¹ and are thus forced to compete against each other for these contracts. Amazon monitors and ranks the performance of its intermediaries, rewarding good performance with more contracts and rescinding contracts from intermediaries that fall behind or speak out against Amazon's practices.⁷² An owner of Lasership, an Amazon DSP, stated that asking for even a 5 percent raise in contract prices would lead a company like Amazon to terminate all contracts with the intermediary.⁷³ Amazon further exacerbates this competition by ensuring that it has many intermediaries to choose from. Amazon recently claimed to have “enabled the creation” of at least two hundred new intermediaries⁷⁴ by offering business training and special pricing on vans and insurance programs.⁷⁵ Amazon asserts that entrepreneurs may start a successful

67. *Id.*

68. *3,200 Amazon Drivers to Lose Jobs*, *supra* note 63.

69. *Id.*

70. *Id.*

71. *See* Callahan, *supra* note 7.

72. *The Cost of Next-Day Delivery*, *supra* note 66.

73. Farhang Aryan Deposition of Aug. 13, 2012 at 162, *Sanchez v. Lasership, Inc.*, 937 F. Supp. 2d 730 (E.D. Va. 2013) (1:12-cv-00246-GBL-TRJ), http://big.assets.huffingtonpost.com/lasership_aryan_deposition3.pdf; Dave Jamieson, *Meet the Real Amazon Drones*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/amazon-delivery-lasership_n_5193956.

74. *The Cost of Next-Day Delivery*, *supra* note 66.

75. Getting Started, AMAZON LOGISTICS, <https://logistics.amazon.com/marketing/getting-started> (last visited Feb. 21, 2021); Hayley Peterson, *Missing Wages, Grueling Shifts, and Bottles of Urine: The Disturbing Accounts of Amazon Delivery Drivers May Reveal the True Human Cost of 'Free' Shipping*, BUS. INSIDER (Sept. 11, 2018, 10:48 AM), <https://www.businessinsider.com/amazon-delivery-drivers-reveal-claims-of-disturbing-work-conditions-2018-8>.

DSP business with as little as \$10,000,⁷⁶ and further provides \$10,000 in rebates to select DSPs operated by U.S. veterans.⁷⁷ The ease with which Amazon allows the creation of new intermediaries ensures that its DSPs will always have competitors, aggravating the need of DSPs to meet Amazon's goals and maintain their contracts.

As a result, Amazon's intermediaries routinely resort to worker abuses, creating the sweatshop "race to the bottom." Though Amazon does not directly engage in these abuses, it has established a business model that indirectly promotes worker exploitation. Amazon requires that 999 orders out of 1,000 be made on time.⁷⁸ To ensure on time deliveries, Amazon monitors drivers through handheld package scanners known as "rabbits."⁷⁹ A typical route may exceed 250 deliveries in a single day, and it is well-reported that drivers routinely work long hours, skip meals, and urinate in bottles to stay on track.⁸⁰ Faced with razor-thin profit margins, intermediaries have withheld pay from drivers to stay afloat.⁸¹ To cut costs and maintain contracts over competitors, intermediaries even engage in misclassification, labelling their drivers as independent contractors and then forcing them to sign contracts lowering their own rate.⁸²

This exploitation of workers is the direct consequence of the choices made by leads like Amazon. The artificially low contract prices that Amazon and others are able to extract from intermediaries directly affect the way in which intermediaries treat their workers and whether workers receive minimum wage and overtime.⁸³ This sweating system is the result of a rational incentive structure; to put an end to this worker exploitation, laws must be introduced to curtail these incentives. As Shirley Lung states, "[t]he strong, direct, and foreseeable nexus between low contract prices and sweatshop conditions justifies the imposition of joint liability."⁸⁴ But does the use of

76. AMAZON LOGISTICS, <https://logistics.amazon.com/> (last visited Feb. 21, 2021).

77. *After the Military, an Entrepreneur Is Born*, AMAZON.COM: TRANSP. BLOG (Jan. 21, 2019), <https://blog.aboutamazon.com/transportation/after-the-military-an-entrepreneur-is-born>.

78. Callahan, *supra* note 7.

79. Peterson, *supra* note 75.

80. *Id.*

81. *The Cost of Next-Day Delivery*, *supra* note 66.

82. Milton Sanchez Deposition of Aug. 21, 2012 at 42, 92, *Sanchez v. Lasership, Inc.*, 937 F.Supp. 2d 730 (E.D. Va. 2013) (1:12-cv-00246-GBL-TRJ), http://big.assets.huffingtonpost.com/milton_sanchez_deposition2.pdf; Jamieson, *supra* note 73.

83. Lung, *supra* note 26, at 302.

84. *Id.* at 353.

intermediaries inherently cause more harm than good? If not, what makes it so deleterious when Amazon uses intermediaries?

III. THE BENEFITS OF INTERMEDIARIES AND THE FRANCHISE MODEL

Undeniably, the use of intermediaries can have strong, positive effects on consumers. Amazon's business strategy of amassing intermediaries and avoiding employment costs has allowed it to provide one- or two-day shipping in the contiguous United States for a low monthly payment. Since 2015, Amazon has nearly tripled its logistics infrastructure, spurring its competitors to innovate their own systems.⁸⁵ By tightening delivery times, e-commerce is increasingly becoming a viable alternative to brick-and-mortar shopping—and consumers have placed greater value in e-commerce during the COVID-19 pandemic.⁸⁶

Perhaps most importantly, the use of intermediaries fosters entrepreneurship. Each intermediary is its own business, buoyed by the labor needs of its lead, but free to grow and branch out in any way it sees fit. The leaders who choose to run an intermediary do not just make a living—they develop managerial experience and build credibility as business owners. This expertise is valuable and will translate to new ventures should these entrepreneurs choose to move on to greener pastures.

Small businesses can themselves benefit from the use of intermediaries. An entrepreneur who lacks the capital or know-how to manage their own workers may nevertheless build a business by outsourcing his labor needs to others. Over one million small- and medium-sized businesses sell their products on Amazon, and many choose Amazon's delivery network for their shipping needs.⁸⁷ By taking advantage of Amazon, entrepreneurs outsource the costs of customer service, shipment of individual orders, and returns.⁸⁸

85. Kim, *supra* note 61.

86. Sarah Perez, *COVID-19 Pandemic Accelerated Shift to E-Commerce by 5 Years, New Report Says*, TECHCRUNCH (Aug. 24, 2020, 8:42 AM), <https://techcrunch.com/2020/08/24/covid-19-pandemic-accelerated-shift-to-e-commerce-by-5-years-new-report-says/>.

87. Jeff Wilke, *Small Businesses Reaching Customers Around the World*, AMAZON.COM: SMALL BUS. BLOG (May 3, 2018), <https://www.aboutamazon.com/news/small-business/small-businesses-reaching-customers-around-the-world>.

88. Seller Page, AMAZON.COM, <https://sell.amazon.com/fulfill.html> (last visited Feb. 21, 2021).

A reasonable person could believe that the benefits of using intermediaries outweigh the risk of sweatshop conditions. In fact, the franchise model provides an example of intermediary use that does not necessarily result in sweatshop conditions.⁸⁹ The differences between the franchise model and Amazon's use of intermediaries provide insight into the ways that established financial incentives can counteract downward wage pressures.

Under a general franchise contract, the franchisor sells the franchisee a license to use the franchisor's brand name at a particular location for a specified period of time; the franchisee pays this upfront fee and agrees to give the franchisor a portion of its revenues.⁹⁰ To maintain the reputation of the brand, the franchise contract includes precise provisions regarding operating policies.⁹¹ A franchise agreement presents a unique opportunity for entrepreneurs: it allows them to gain experience as the owner of a business with an established reputation and a successful business strategy.⁹² The franchisor gains access to a new market, fostering inter-brand competition.⁹³

Much like the lead-intermediary relationship, the franchise model provides franchisors the means to retain indirect control of the venture while avoiding the costs and liabilities of day-to-day operations.⁹⁴ In fact, prior to Proposition 22's passage, Uber and Lyft considered the franchise model as an alternative to classifying their drivers as employees under California's AB 5.⁹⁵ Though franchisee-owned businesses tend to engage in more hour and wage violations than their franchisor-owned counterparts,⁹⁶ the franchise model seems less susceptible to sweatshop conditions and the so-called race to the bottom.

89. This is not to say that the franchise model has no effect on downward wage pressures. See generally Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907 (2018) (discussing the franchise model and its effects on employment law compliance).

90. MinWoong Ji & David Weil, *Does Ownership Structure Influence Regulatory Behavior? The Impact of Franchising on Labor Standards Compliance* 5 (Bos. U. Sch. Mgmt., Working Paper No. 2010-21, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623387.

91. *Id.* at 6.

92. *Id.*

93. Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191, 195–96 (2010).

94. Elmore, *supra* note 89, at 915.

95. Kate Conger, *Uber and Lyft Consider Franchise-Like Model in California*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/technology/uber-lyft-franchise-california.html>.

96. Ji & Weil, *supra* note 90, at 36–37. On average, a franchisee-owned business owes \$4,265 more in back wages. *Id.* at 36.

Why is this? For one, the franchisor does not benefit from direct competition between its franchisees.⁹⁷ The franchisor collects revenue from each franchisee-owned business and thus has an incentive to ensure the success of each franchisee.⁹⁸ Rather than pitting franchisees against each other, as Amazon does with its intermediaries, franchisors seek to maximize their profit by boosting the royalties and fees they receive from their franchisees across the board.⁹⁹

Further, the franchise relationship itself incentivizes stronger cooperation between the franchisor and the franchisee. Unlike Amazon's contracts with its intermediaries, which it may terminate with ease,¹⁰⁰ a franchise agreement often requires a long-term relationship.¹⁰¹ Most franchises have relatively large upfront costs—they require a brick-and-mortar storefront, industry-specific licensing, and extensive training from the franchisor.¹⁰² For these reasons, a franchise agreement may last as long as twenty years.¹⁰³ Because the relationship is long-term, the franchisor has an increased incentive to ensure franchisee-owned businesses are run successfully. A franchisor cannot escape an unsuccessful franchise agreement without causing a breach of contract.¹⁰⁴

Finally, the franchisor's focus on its reputation incentivizes it to ensure that franchisees comply with labor law. Empirical research suggests that franchisors consider labor compliance as a source of brand reputation.¹⁰⁵ This is likely because franchises often involve direct contact with consumers in a way that Amazon's delivery service does not: labor compliance may correlate to better service quality, or consumers may be sensitive to publicly-visible labor violations.¹⁰⁶ To this end, franchisors typically require training on compensation and benefits¹⁰⁷ and provide franchisees with payroll software to calculate gross

97. *Id.* at 2.

98. *Id.*

99. *Id.* at 6–7.

100. See *The Cost of Next-Day Delivery*, *supra* note 66.

101. See *A Consumer's Guide to Buying a Franchise*, FED. TRADE COMM'N 2 (June 2015), https://www.ftc.gov/system/files/documents/plain-language/591a_buying_a_franchise_sept_2020.pdf.

102. *Id.* at 1–2, 8.

103. *Id.* at 2.

104. *Id.*

105. Ji & Weil, *supra* note 90, at 37–38.

106. *Id.* at 38.

107. Elmore, *supra* note 89, at 921.

wages owed to employees.¹⁰⁸ These efforts are not always successful in preventing labor violations,¹⁰⁹ but they do represent a good faith effort to ensure labor compliance. Though the franchise model is not perfect, it provides a helpful example of intermediary use that does not necessarily entail flagrant labor violations.

Unfortunately, neither the federal government nor California has developed law that adequately balances the beneficial aspects of labor outsourcing and the use of intermediaries while addressing the abuses of the lead-intermediary relationship. Despite strong assurances of the depth and breadth of employment law, both jurisdictions have developed lenient standards that allow nefarious leads, like Amazon, to avoid responsibility for their role in incentivizing labor violations. Nevertheless, the history of these standards provides a useful backdrop for a more robust joint employment doctrine.

IV. THE DEVELOPMENT OF FEDERAL LAW UNDER THE FAIR LABOR STANDARDS ACT OF 1938

In 1938, Congress passed the Fair Labor Standards Act (FLSA), which greatly expanded the rights of workers and paved the way for joint employment analysis by providing an expansive definition of employment for the purpose of wage and hour actions.¹¹⁰ However, federal courts have failed to develop a common and effective framework by which plaintiff workers can enforce their rights against leads such as Amazon.

A. History of the Fair Labor Standards Act

The FLSA was born out of early twentieth-century shifts in the labor market that had led to extremely weak employee bargaining power regarding hours and wages.¹¹¹ In the 1920s, as a result of collapsed agricultural prices, nearly twenty million Americans moved from rural to urban areas.¹¹² This emigration created an expansive pool

108. *Id.* at 928–29.

109. *See, e.g.,* Salazar v. McDonald’s Corp., 944 F.3d 1024, 1028 (9th Cir. 2019). McDonald’s supplied a franchisee-owned business with timekeeping software that did not correctly measure overtime. *Id.*; *see* discussion *infra* Part VIII.

110. Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.); *see infra* Section IV.B.

111. *See* Carl H. Petkoff, Note, *Joint Employment Under the FLSA: The Fourth Circuit’s Decision to Be Different*, 70 S.C. L. REV. 1125, 1127–28 (2019).

112. Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 97–98 (2000).

of labor in cities.¹¹³ At the same time, advances in technology led to greater industrial production efficiency, meaning more work could be performed with fewer workers.¹¹⁴ Competition for limited industrial positions put the average worker in a weak position for negotiating hours and wages.¹¹⁵ This lack of bargaining power was particularly pronounced among members of the new workforce, such as women, who were shunted into sweatshop conditions.¹¹⁶ At the time, there existed no federal wage or hour protections.¹¹⁷

In the 1930s, in the midst of the Great Depression, President Franklin Roosevelt led efforts to create federal law addressing this discrepancy in bargaining power and the resulting exploitation of sweated workers.¹¹⁸ His early efforts, such as the National Industrial Recovery Act, did not survive scrutiny by the *Lochner* Court, but in a joint effort with Secretary of Labor Frances Perkins, Congress passed the FLSA in 1938.¹¹⁹ The Act established a national minimum wage, set a maximum weekly workload without overtime of forty-four hours (to decrease to forty hours within three years), and eliminated child labor.¹²⁰

The consequences of the Act were immense. Congress described its intent in passing the Act as to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”¹²¹ The Supreme Court later maintained that the FLSA was meant “to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation.”¹²² At the time the Act passed, eleven million workers benefited from these new regulations.¹²³

113. *Id.* at 98.

114. *See* Petkoff, *supra* note 111, at 1127.

115. Harris, *supra* note 112, at 98.

116. *Id.* at 50–51, 98.

117. *Id.* at 20.

118. *Id.* at 103; Petkoff, *supra* note 111, at 1128.

119. Petkoff, *supra* note 111, at 1128–30.

120. Fair Labor Standards Act of 1938, Pub. L. No. 718, §§ 6, 7, 12, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 206, 207, 212).

121. *Id.* § 2.

122. Powell v. U.S. Cartridge Co., 339 U.S. 497, 510 (1950).

123. Harris, *supra* note 112, at 140.

B. Ensuring Compliance with the FLSA

In passing such an expansive act, the proponents of the FLSA recognized the threat that businesses would avoid compliance.¹²⁴ Congress feared that business formalities, such as contractual terms designating workers as independent contractors rather than employees, would allow businesses to evade coverage.¹²⁵ In an effort to curb such practices, the FLSA defined employment in a manner intended to reach a broader range of working relationships than just those covered under the common law.¹²⁶

Under the FLSA, the definition of “employ” includes “to suffer or permit to work.”¹²⁷ The Supreme Court has remarked that “[a] broader or more comprehensive coverage of employees . . . would be difficult to frame.”¹²⁸ Given the importance of labor rights, the Court has further stated that this definition “must not be interpreted or applied in a narrow, grudging manner.”¹²⁹

To further ensure compliance with the FLSA, the Department of Labor introduced the concept of joint employment to its regulations in 1939.¹³⁰ Though the FLSA does not itself use the words “joint employment,” the Supreme Court has recognized that its “suffer or permit” definition of employment applies in joint employment actions.¹³¹ Despite this, the Court has never determined the exact scope of this definition of employment, leaving its interpretation to the circuit courts.¹³²

124. See, e.g., *Fair Labor Standards Act of 1937: Joint Hearings Before the S. Comm. on Educ. and Lab. and the H. Comm. on Lab. on S. 2475 and H.R. 7200*, 75th Cong. 181 (1937) (statement of Hon. Frances Perkins, Sec. of Lab.) (“One of the greatest difficulties to overcome, if legislation of this character is to be successful is that of enforcement.”).

125. Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 594 (2019).

126. James Reif, *‘To Suffer or Permit to Work’: Did Congress and State Legislatures Say What They Meant and Mean What They Said?*, 6 NE. U. L.J. 347, 351 (2013).

127. 29 U.S.C. § 203(g) (2018).

128. *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (holding that the FLSA definition of employment applies to piece-rate workers, i.e., workers paid per unit of creation).

129. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944), *superseded by statute in part*, *The Portal-to-Portal Act of 1947*, Pub. L. No. 49, 61 Stat. 84 (codified as amended at 27 U.S.C. §§ 251–262), *as recognized in Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27 (2014). The Court specifies it is referring to 29 U.S.C. § 203(g). *Id.* at 597–98.

130. Petkoff, *supra* note 111, at 1130.

131. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728, 730 (1947) (holding that, under the FLSA, plaintiff meat boners could be employed by both a middleman who hired, paid, and supervised them and the business that engaged the middleman); Reif, *supra* note 126, at 352.

132. Reif, *supra* note 126, at 352–53.

C. The Current Circuit Split

Without guidance from the Supreme Court, the circuit courts are currently split in determining how the “suffer or permit” standard applies to leads in joint employment actions.¹³³ Though the courts tend to cite to the “suffer or permit” language and the Supreme Court’s determination of its broad coverage, they vary broadly in their application, relying on verbiage and terms of art that appear nowhere in the statutory text.¹³⁴

The circuit split first became pronounced with *Bonnette v. California Health and Welfare Agency*¹³⁵ in 1983. In *Bonnette*, the Ninth Circuit elucidated four nonexclusive factors that “provide a useful framework” for determining joint employment: “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”¹³⁶ This framework became known as the “economic realities” test and focuses on whether a worker is economically dependent upon the lead.¹³⁷

By contrast, the Second Circuit applies a six-factor test to determine whether the lead exercises “functional control” over a worker, developed in the 2003 case *Zheng v. Liberty Apparel Co.*¹³⁸ Most circuit courts apply some combination of factors from the economic realities and functional control tests, often considering additional factors they feel are pertinent to the analysis.¹³⁹ In 2017, the Fourth Circuit expressly rejected these two tests, instead developing its own six-factor test in *Salinas v. Commercial Interiors, Inc.*,¹⁴⁰ focusing on the

133. See Goldstein, *supra* note 50, at 1011; Petkoff, *supra* note 111, at 1134–39 (providing a brief description of each circuit court’s test for joint employment).

134. Reif, *supra* note 126, at 353–54. Reif notes concepts such as “economic reality,” “dependence,” and “functional control.” *Id.* at 354.

135. 704 F.2d 1465 (9th Cir. 1983).

136. *Id.* at 1470.

137. Petkoff, *supra* note 111, at 1132.

138. 355 F.3d 61, 71–72 (2d Cir. 2003). The factors are (1) whether the worker used the putative employer’s premises and equipment; (2) whether the worker could easily shift work from one putative employer to the other; (3) the extent to which the work performed was integral to the putative employer’s business; (4) whether work responsibilities could be passed from subcontractor to another without material changes; (5) the degree to which the putative employer supervised the worker; and (6) whether the worker worked exclusively or predominately for the putative employer. *Id.* at 72. District courts are also permitted to consider economic reality factors. See *id.* at 71.

139. Petkoff, *supra* note 111, at 1134–39. Of note, the modern Ninth Circuit test applies thirteen separate factors. *Id.* at 1137.

140. 848 F.3d 125 (4th Cir. 2017).

relationship between the putative joint employers, rather than on a lead's relationship with the worker.¹⁴¹ Given the lack of clear statutory language and the absence of Supreme Court guidance, the federal framework for joint employment actions is varied and complex. Rather than a single and simple standard, the circuit courts have developed multiple tests, each relying upon a set of similar yet distinct factors. Consequently, legal scholars have criticized these tests as unpredictable and susceptible to manipulation by employers and judges.¹⁴² At the federal level, joint employment remains an unsettled area of law.

V. CALIFORNIA LAW UNDER *MARTINEZ V. COMBS*

In 2010, by contrast, the California Supreme Court created a relatively straightforward test for joint employment in the case of *Martinez v. Combs*.¹⁴³ The court, for the first time in its history, interpreted the definitions of employment under the California Industrial Welfare Commission (IWC) wage orders, rejecting the FLSA's definition.¹⁴⁴ In doing so, the court propounded upon the meaning of "suffering or permitting" work when determining whether a business is a joint employer for the purpose of state wage and hour actions.¹⁴⁵ Ultimately, the court determined that a lead is liable where it (1) has knowledge

141. *Id.* at 139. The six factors are:

(1) [w]hether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means; (2) [w]hether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment; (3) [t]he degree of permanency and duration of the relationship between the putative joint employers; (4) [w]hether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer; (5) [w]hether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and (6) [w]hether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

Id. at 141–42.

142. Lung, *supra* note 26, at 325–26.

143. See *Martinez v. Combs*, 231 P.3d 259 (Cal. 2010).

144. See *id.* at 267–68.

145. See *id.* at 279.

that work is occurring, (2) has the ability to prevent the work, and (3) fails to prevent the work.¹⁴⁶

In applying this definition of employment to the facts of the case, the court focused on the lead's ability to prevent the work by hiring, firing, or supervising the worker,¹⁴⁷ much like the Ninth Circuit's economic realities test. Where a lead possesses such control over a worker, liability for unpaid wages will attach.¹⁴⁸

A. The Facts of Martinez

In *Martinez*, a strawberry farmer, Munoz, was unable to pay wages to his seasonal agricultural workers.¹⁴⁹ These workers brought action for unpaid wages under California Labor Code section 1194 against both Munoz and two of the four produce merchants to whom he sold strawberries.¹⁵⁰ Munoz declared bankruptcy and was discharged from the case, leaving the plaintiff-workers' only hope for recompense with a finding of liability on behalf of Munoz's produce merchants.¹⁵¹ To establish such liability, the plaintiff-workers claimed that, along with Munoz, the produce merchants were their joint employers.¹⁵²

The problem for these plaintiff-workers, though, was that Munoz alone engaged in the common tasks of an employer, such as hiring, firing, and the setting of hours and wages.¹⁵³ The produce merchants, for their part, had very limited interactions with the plaintiff-workers: all business was conducted through Munoz.¹⁵⁴ Aside from minor supervisory functions, such as training workers how to pack the strawberries, the merchants were not involved in the workers' day-to-day operations.¹⁵⁵

146. *Id.* at 281.

147. *Id.* at 282.

148. *Id.*

149. *Id.* at 265.

150. *Id.* at 266. CAL. LAB. CODE § 1194 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.) states in part, "any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

151. *Martinez*, 231 P.3d at 263.

152. *Id.* at 266–67.

153. *Id.* at 264.

154. *See id.* at 284.

155. *Id.* at 286.

To maximize the chances of a finding of liability against the produce merchants, the plaintiff-workers contended that the California IWC definitions of “employ” and “employer” applied to the action.¹⁵⁶ Under these definitions, an employer “directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions” of a worker.¹⁵⁷ To “employ” itself means “to engage, suffer, or permit to work.”¹⁵⁸

The superior court granted summary judgment for the merchants.¹⁵⁹ The court of appeal, finding no case law interpreting the IWC’s definitions, applied the Ninth Circuit’s economic realities test for use under the FLSA and found that the merchants did not exercise adequate control over the plaintiffs to be deemed joint employers.¹⁶⁰ The California Supreme Court granted review to determine how the IWC definitions should be interpreted and applied in joint employment actions.¹⁶¹

B. Defining Employment Under the Industrial Welfare Commission Wage Orders

The court reviewed the IWC wage orders to expound on its definitions of employment.¹⁶² In 1916, the IWC adopted its first wage order, establishing a minimum wage for women and children in the vegetable canning industry.¹⁶³ Though it did not contain a definition of employment, the order held businesses liable for unpaid wages where they “employ[ed] or suffer[ed] or permit[ted]” any woman or child to work.¹⁶⁴ In 1947, the IWC added a separate definition of “employer” as one who “employs or exercises control over the wages, hours, or working conditions of any person.”¹⁶⁵ Further, the court held that the IWC did not intend these definitions to supersede the common law employment relationship, as doing so would have withheld wage and

156. *Id.* at 266–67.

157. CAL. CODE REGS. tit. 8, § 11010(2)(F) (2001). The IWC provided industry-specific wage orders, but its definitions of employment remain the same across industries. *See, e.g., id.; id.* § 11020(2)(F) (applying the same definitions of employment to the manufacturing and personal services industries, respectively).

158. *Id.* § 11010(2)(D).

159. *Martinez*, 231 P.3d at 267.

160. *Id.* The Ninth Circuit’s economic realities test is discussed *supra* Section IV.C.

161. *Martinez*, 231 P.3d at 268.

162. *Id.* at 273–74.

163. *Id.*

164. *Id.* at 273 (quoting Cal. Indus. Welfare Comm’n, Order No. 1 (1916)).

165. *Id.* at 274 (quoting CAL. CODE REGS. tit. 8, § 11140(2)(F) (2002)).

hour protections from regularly employed workers, who comprised the bulk of California's workforce.¹⁶⁶

The court thus determined that "employ," for the purposes of California wage and hour actions, has three definitions: "(a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship."¹⁶⁷ A business is liable for unpaid wages where any one definition is met.¹⁶⁸

Returning to the facts of the case, the *Martinez* court was quickly able to eliminate two of these definitions from application. The produce merchants neither engaged the plaintiff-workers by creating a common law master-servant relationship nor exercised control over their wages, hours, or working conditions.¹⁶⁹ At all times, Munoz maintained control over his business operations.¹⁷⁰ Wages were paid from his account, stemming from revenue from a variety of merchants.¹⁷¹ The court conceded that supervision is a "working condition" under the IWC's definitions,¹⁷² but found that the merchants' ability to advise the plaintiffs about the manner by which strawberries were to be packed did not rise to the requisite level of supervision or control.¹⁷³ Given this finding, the ultimate issue of the case was whether the produce merchants had "suffered or permitted" the work of the plaintiffs and could thus be held liable as employers.¹⁷⁴

In beginning its analysis of the "suffer or permit" standard, the court noted that the IWC was created in 1913, twenty-five years before the FLSA.¹⁷⁵ The court thus held that IWC's use of the "suffer or permit" language, first promulgated in 1916, is not based upon federal law.¹⁷⁶ The definition of "suffer or permit" in California is not constrained by the language of the FLSA or the economic realities test, which was first implied into the language of the FLSA by the United

166. *Id.* at 278.

167. *Id.* (emphasis omitted).

168. *See id.*

169. *Id.* at 284–285, 287.

170. *Id.* at 284.

171. *Id.*

172. *Id.* at 286.

173. *Id.* at 286–87.

174. *Id.*

175. *Id.* at 270.

176. *Id.* at 279.

States Supreme Court in 1961¹⁷⁷ and later developed by the Ninth Circuit in *Bonnette*.¹⁷⁸ In separating the IWC's language from that of the FLSA, the court recognized that enforcement of state wage laws allows for greater worker protections than the federal law affords.¹⁷⁹

To determine whether the produce merchants "suffered or permitted" the work performed by the worker-plaintiffs, the court was thus required to develop its own interpretation of the words. The court explained that the language first appeared in model child labor laws in the early 1900s.¹⁸⁰ The court then purported to base its interpretation of the language on case law resulting from the application of these child labor laws.¹⁸¹ The court found that the IWC did not intend "suffer or permit" to mean anything other than its meaning in these early cases and decided that "suffer or permit" would be given its historical meaning.¹⁸²

In reviewing several child labor cases, the *Martinez* court determined that the "suffer or permit" language was used to create liability even where no common law employment relationship existed between the child and the purported employer.¹⁸³ A business proprietor "suffered or permitted" the work of a child "working in his or her business" by acquiescing to the work or failing to hinder it.¹⁸⁴ This definition thus reached irregular working arrangements otherwise not covered by the common law.¹⁸⁵ Instead, "the basis of liability [was] the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist."¹⁸⁶ Utilizing these cases, the *Martinez* court concluded that a business "suffers or permits" work, and is thus liable under wage and hour actions, when the business (1) has knowledge that work is occurring, (2) has the ability to prevent the work, and (3) fails to prevent the work.¹⁸⁷

177. *Id.* (citing *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961)).

178. *See* discussion *supra* Section IV.C.

179. *Martinez*, 231 P.3d at 280–81.

180. *Id.* at 273.

181. *Id.*

182. *Id.* at 281.

183. *Id.*

184. *Id.* (a businessowner "shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder" the work (quoting *Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1129 (Okla. 1913))).

185. *Id.* at 273.

186. *Id.* at 281 (emphasis omitted) (quoting *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 167 N.Y.S. 958, 961 (App. Div. 1917)).

187. *Id.*

C. *Martinez's Narrowing of the "Suffer or Permit" Standard*

Applying this definition to the facts of the case, the *Martinez* court noted the potential power of such a broad definition of employment. Finding that the produce merchants lacked direct power to prevent the plaintiffs from working, the court nonetheless mused that the merchants may have prevented the plaintiffs' work by ceasing to buy strawberries from Munoz.¹⁸⁸ Without a purchaser, there would be no reason to produce strawberries, and thus no reason to hire laborers to work.¹⁸⁹ The court decided that such indirect forms of preventing work should not be considered when assessing employment under the "suffer or permit" standard.¹⁹⁰ If a merchant could be found to be an employer simply because they purchased produce, would an individual consumer of strawberries also employ the workers who harvested them?¹⁹¹

Instead, the court focused on direct means by which a business may prevent work, finding that Munoz alone had the power to "hire and fire [the plaintiff-workers] . . . and to tell them when and where to report to work."¹⁹² According to the *Martinez* court, a purported employer has the ability to prevent work, and thus suffers or permits work, only if it has control over the hiring, firing, or supervision of a worker.¹⁹³ As will be shown, this is a substantial narrowing of the definition from the understanding of the child labor cases where the "suffer or permit" language first appeared.

The *Martinez* court ultimately affirmed the merchants' motion for summary judgment, holding that the merchants did not (1) control the plaintiffs' hours, wages, or working conditions, (2) establish a common law employment relationship with the plaintiffs, or (3) suffer or permit the plaintiffs' work.¹⁹⁴

D. *The Aftermath of Martinez*

Following *Martinez*, courts have continued to focus their review of the "suffer or permit" standard of employment on the lead's ability to hire, fire, or supervise a worker. In two recent cases, the California

188. *Id.* at 282.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *See id.*

194. *Id.* at 287.

Courts of Appeal were asked to determine whether the franchisor Shell was a joint employer of workers employed by its franchisees for the purpose of wage and hour actions. In *Henderson v. Equilon Enterprises*,¹⁹⁵ the court found that Shell “had no power to fire plaintiff, hire his replacement, or prevent him from working” despite the ability of Shell to ask the franchisee to “remove” employees with good cause.¹⁹⁶ In *Curry v. Equilon Enterprises*,¹⁹⁷ the court concluded that Shell “could not acquiesce” to the worker’s employment because the franchisee was in control of its workers’ hiring, firing, and daily tasks.¹⁹⁸ Finally, in *Salazar v. McDonald’s Corp.*,¹⁹⁹ the Ninth Circuit, focusing on *Curry*’s analysis, applied California law to find that McDonald’s did not suffer or permit the work of its franchisee’s workers because it held no power over hiring or firing.²⁰⁰

Under *Martinez*, the “suffer or permit” standard of employment hardly extends beyond the common law definition. By focusing on a lead’s direct control over a worker through hiring, firing, and supervision, the court’s holding is evocative of the master-servant relationship. Despite noting that the IWC issued the standard to reach irregular working arrangements not covered by the common law,²⁰¹ the *Martinez* court nevertheless greatly limited its application. The *Curry* court went further, insinuating that the ability to prevent work never concerns the lead’s ability to hinder the intermediary from engaging the plaintiff in work.²⁰² This interpretation of “suffer or permit” does not match what the California Supreme Court would later call the IWC’s “exceptionally broad” standard.²⁰³

VI. *DYNAMEX*: RETURNING TO A BROAD UNDERSTANDING OF “SUFFER OR PERMIT”

In 2018, the California Supreme Court reexamined the “suffer or permit” standard in *Dynamex Operations West, Inc. v. Superior*

195. 253 Cal. Rptr. 3d 738 (Ct. App. 2019).

196. *Id.* at 747.

197. 233 Cal. Rptr. 3d 295 (Ct. App. 2018).

198. *Id.* at 311.

199. 944 F.3d 1024 (9th Cir. 2019).

200. *Id.* at 1031.

201. *Martinez v. Combs*, 231 P.3d 259, 273 (Cal. 2010).

202. *Curry*, 233 Cal. Rptr. 3d at 311–12 (“[The failure to prevent work from occurring] does not concern failing to hinder a third party . . .”).

203. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 31 (Cal. 2018).

Court.²⁰⁴ Unlike *Martinez*, *Dynamex* was not a joint employment case, but rather focused on the misclassification of workers as independent contractors.²⁰⁵ The court introduced the ABC test to determine whether the hiring business misclassified workers as independent contractors, allowing the business to avoid providing employment rights.²⁰⁶ The ABC test created a rebuttable assumption of employment for plaintiff-workers and established three prongs an employer must meet to avoid an action under the IWC wage orders.²⁰⁷

Of great importance, the court implemented the ABC test as part of the “suffer or permit” standard.²⁰⁸ In establishing the ABC test, the court relied heavily upon *Martinez* and its underlying child labor cases.²⁰⁹ However, the ABC test’s application of the “suffer or permit” standard only begins with *Martinez*’s interpretation of the ability to hire, fire, or supervise a worker. The *Dynamex* court found that, in addition to this control analysis, a business may also be found to be an employer wherever a worker has performed work in the usual course of the alleged employer’s business.²¹⁰

A. The Facts of Dynamex

In 2004, *Dynamex*, a nationwide same-day delivery service much like Amazon, reclassified its delivery drivers as independent contractors to avoid the costs of employment.²¹¹ The drivers were required to provide their own vehicles and pay all transportation costs.²¹² They were required to pay for *Dynamex* uniforms, which they were expected to wear.²¹³ In some cases, drivers were further required to purchase and display *Dynamex* decals on their vehicles.²¹⁴ *Dynamex* set the rates to be charged for delivery and controlled the number and nature of deliveries its drivers obtained.²¹⁵

204. *See id.* at 1.

205. *Id.* at 5.

206. *Id.* at 7.

207. *Id.* at 36–40.

208. *Id.* at 26, 37.

209. *See id.* at 37.

210. *Id.*

211. *Id.* at 8.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

Charles Lee, one such driver, led a class action against Dynamex alleging labor violations, including a failure to pay overtime, based on the premise that Dynamex misclassified its drivers as independent contractors when they should have been classified as employees.²¹⁶ Lee and the other plaintiffs argued that the three standards of employment elucidated in *Martinez* were applicable to the question of worker misclassification.²¹⁷ Dynamex, by contrast, argued that *Martinez* applied only to joint employment cases, and that the common law test for employment laid out in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*²¹⁸ was controlling.²¹⁹ The California Supreme Court granted the petition for review to consider whether the definitions of employment under the IWC's wage orders, standardized under *Martinez*, applied to misclassification claims.²²⁰

B. Dynamex's Holding

The *Dynamex* court ultimately found that the "suffer or permit" standard of employment applies to the question of misclassification.²²¹ Following *Martinez*, the *Dynamex* court reemphasized the authority of the IWC to promulgate the definition of "employ" that governs the application of California's wage orders.²²² It again examined the child labor cases from which the "suffer or permit" language was borrowed.²²³ It recognized the "exceptionally broad" scope of the standard.²²⁴

Most importantly, the *Dynamex* court justified its decision by expounding upon one of the findings of *Martinez*. Quoting *Martinez*, the *Dynamex* court held that the "suffer or permit" standard "must be interpreted and applied broadly to include within the covered 'employee' category *all* individual workers who can reasonably be viewed as '*working in [the hiring entity's] business,*'" including those misclassified as independent contractors.²²⁵ Thus, a hiring entity would

216. *Id.* at 9–10.

217. *Id.* at 10.

218. 769 P.2d 399 (Cal. 1989).

219. *Dynamex*, 416 P.3d at 10.

220. *Id.* at 7.

221. *Id.* at 26.

222. *Id.* at 29.

223. *Id.* at 26–27.

224. *Id.* at 31–32.

225. *Id.* at 32 (quoting *Martinez v. Combs*, 231 P.3d 259, 281 (Cal. 2010)) ("A proprietor who knows that persons are *working in his or her business* without having been formally hired, or while

not be liable under the “suffer or permit” standard for a traditional independent contractor operating their own independent business,²²⁶ but would be liable for all workers, *regardless of classification*, who could reasonably be viewed as working in the hiring entity’s business.²²⁷

Using the framework of the “suffer or permit” standard, the *Dynamex* court then introduced the ABC test for determining whether a worker has been misclassified as an independent contractor.²²⁸ Under the ABC test, a worker is presumed to be an employee of the hiring entity unless the hiring entity proves

(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*

(B) that the worker performs work that is outside the usual course of the hiring entity’s business; *and*

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.²²⁹

The ABC test was codified in 2019 by California’s AB 5.²³⁰ The introduction of the ABC test represented a major expansion of employment rights for workers improperly classified as independent contractors.

C. The Usual Course of Business: Expanding the “Suffer or Permit” Standard

Dynamex’s understanding of the “suffer or permit” standard of employment begins with a reconsideration of the analysis of *Martinez*. Under the *Martinez* joint employment analysis, the test of whether a lead employed a worker is based on the lead’s ability to hire, fire, or supervise the worker.²³¹ Prong A of the ABC test closely mirrors this analysis with its focus on the “control and direction” a hiring entity has over performance of the work. The *Dynamex* court, however,

being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so.” (emphasis added) (quoting *Martinez*, 231 P.3d at 281)).

226. *Id.* at 33.

227. *Id.*

228. *Id.* at 35–36.

229. *Id.* at 35.

230. Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019).

231. *Martinez v. Combs*, 231 P.3d 259, 282 (Cal. 2010); *see supra* Section V.C.

recognized Prong A as a form of the common law test for employment and included it within the ABC test only because if the common law test is met, the broader “suffer or permit” standard must also necessarily be met.²³² The court drew a comparison between Prong A and the common law *Borello* test, suggesting that *Martinez*’s focus on hiring, firing, and supervision—all forms of control—was merely a revision of common law principles of employment.²³³

In establishing Prong B, the *Dynamex* court recognized that the “suffer or permit” standard operates “independent of the question of control.”²³⁴ Calling upon *Martinez* and its child labor antecedents, the court, for a second time, acknowledged that the “suffer or permit” standard was intended to “bring within the ‘employee’ category all individuals who can reasonably be viewed as working ‘in [the hiring entity’s] business.’”²³⁵ This language, mentioned though overlooked in *Martinez*, represents a major departure from *Martinez*’s joint employment analysis.

In addition to the *Martinez* control factors, the *Dynamex* court found that a business also suffers or permits work, and thus employs the worker, when that work is comparable to the work expected of an employee of the business.²³⁶ The court provided helpful examples. A retail company that hires a plumber to fix its pipes does not suffer or permit the work because the retail company is not in the business of fixing pipes.²³⁷ The plumber is not employed—he is rather an independent contractor engaged in their own independent business.²³⁸ However, a garment manufacturer suffers or permits the work of laborers engaged in sewing garments regardless of business formalities because the manufacturer is in the business of sewing garments.²³⁹ With this focus on the usual course of business, the *Dynamex* court

232. *Dynamex*, 416 P.3d at 36 (“[B]ecause a worker who is subject, either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over employees would be considered an employee under the common law test, such a worker would, a fortiori, also properly be treated as an employee for purposes of the suffer or permit to work standard.”).

233. *Id.*

234. *Id.* at 37.

235. *Id.* (citing *Martinez*, 231 P.3d at 282).

236. *Id.* Of note, the *Dynamex* court cites Goldstein, *supra* note 50, at 1159. In his article, Goldstein called for this analysis to apply to labor contracting schemes like the lead-intermediary relationship. Goldstein, *supra* note 50, at 1161–62.

237. *Dynamex*, 416 P.3d at 37.

238. *Id.*

239. *Id.*

established that the “suffer or permit” standard has a separate analysis distinct from the issue of control—and distinct from the ability of a business to hire, fire, or supervise a worker.

Nevertheless, subsequent courts have not extended this broadening of the “suffer or permit” standard to the joint employment context. The *Curry* court found that the ABC test was limited to misclassification claims,²⁴⁰ but did not consider how *Dynamex*’s new formulation of the “suffer or permit” standard might affect joint employment analysis. The Ninth Circuit, in *Salazar*, summarily dismissed the idea that *Dynamex* has application outside of misclassification claims.²⁴¹ The *Henderson* court considered the applicability of Prong B analysis in the joint employment context, but found that because workers in such cases are employees of the intermediary, and thus already entitled—at least nominally—to employment protections, such analysis would make “little sense.”²⁴² However, as the *Lines* case showed, the existence of employment protections does not guarantee that a worker will recover for wage and hour violations. Further, the history of the “suffer or permit” language, and the policy concerns surrounding its creation, strongly supports Prong B analysis in joint employment cases.

VII. REEXAMINING JOINT EMPLOYMENT IN THE WAKE OF *DYNAMEX*

Dynamex’s expanded understanding of the “suffer or permit” standard falls much more closely in line with its historical application in the child labor cases from which the IWC borrowed the language. The policy concerns that *Dynamex* and the ABC test are meant to address are equally present in the joint employment context. *Dynamex*’s “usual course of business” analysis should complement *Martinez*’s control factors in the joint employment context. There is no reason to have separate tests for the “suffer or permit” definition based on whether a wage action is brought as a joint employment or worker misclassification claim. By reconciling *Martinez* with *Dynamex*, California courts will bring clarity to the question of employment and better protect the rights of exploited workers.

240. *Curry v. Equilon Enters.*, 233 Cal. Rptr. 3d 295, 314 (Ct. App. 2018).

241. *Salazar v. McDonald’s Corp.*, 944 F.3d 1024, 1032 (9th Cir. 2019).

242. *Henderson v. Equilon Enters.*, 253 Cal. Rptr. 3d 738, 753 (Ct. App. 2019).

A. *Legislative and Judicial History Supports Dynamex's Interpretation*

In both *Martinez* and *Dynamex*, the California Supreme Court relied on the holdings of early child labor cases, where the “suffer or permit” standard was first used and developed, to determine the intent of the IWC in promulgating the standard.²⁴³ *Martinez* directly cites three such cases when developing its understanding of the standard: *Curtis & Gartside Co. v. Pigg*,²⁴⁴ *Purtell v. Philadelphia & Reading Coal & Iron Co.*,²⁴⁵ and *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*²⁴⁶ Though these cases do not involve direct joint employment, they stand for the principle that suffering or permitting work is not limited to a firm’s ability to exercise control over the worker in question. Rather, early courts, and by extension the IWC, believed that a firm suffers or permits work within the usual course of its business by failing to prevent the work through any means available to it.

In each of these cases, businesses passively accepted the benefits of labor performed by children despite the presence of statutes prohibiting the suffering of child labor. Each business was held liable regardless of whether it possessed any direct control over the child laborer in question. In *Purtell*, for example, employees of a coal yard hired an eleven-year-old to serve as their water-boy.²⁴⁷ Though the coal yard did not employ the boy, and thus could not directly control his actions, the court nonetheless held the coal yard liable because it had knowledge of the work being performed and had not attempted to prevent the work by reprimanding the employees who hired the boy.²⁴⁸

These courts accepted that a business has a “duty of using reasonable care” to ensure that child labor does not take place.²⁴⁹ In *Sheffield*, employees of a milk distributor hired children to stand guard over their wagons while they left to make individual milk deliveries.²⁵⁰ In holding that the distributor suffered the children’s work, the court noted that the purpose of labor statutes is

243. See, e.g., *Martinez v. Combs*, 231 P.3d 259, 281 (Cal. 2010); *Dynamex*, 416 P.3d at 37.

244. 134 P. 1125 (Okla. 1913).

245. 99 N.E. 899 (Ill. 1912).

246. 167 N.Y.S. 958 (App. Div. 1917).

247. *Purtell*, 99 N.E. at 900.

248. *Id.* at 902.

249. *Id.*

250. *Sheffield*, 167 N.Y.S. at 959.

to impose upon the owner or proprietor of a business the duty of seeing to it that the condition prohibited by the statute does not exist. . . . *The duty is an absolute one, and it remains with him whether he carries on the business himself or intrusts [sic] the conduct of it to others.*²⁵¹

This is an important insight about the reach of the “suffer or permit” standard. In *Curtis*, a factory foreman permitted a child to engage in dangerous tasks that he was statutorily barred from performing.²⁵² Under agency law, the court found the manufacturer liable because it had delegated its agent, the foreman, express authority to oversee its operations.²⁵³ A lead that entrusts its usual course of business to an intermediary is functionally undistinguishable from a company that delegates authority to supervisors to carry out its work. It follows that, in both cases, a business has a duty to ensure that prohibited conditions do not exist.

The ABC test—and Prong B in particular—acknowledges a common thread among these child labor cases: the purpose of the “suffer or permit” standard is to create an extensive net of liability for firms that benefit from labor violations. Just as the child labor cases did not center on joint employment, neither did they deal directly with the misclassification of workers. Nevertheless, they form the basis for the ABC test because the “suffer or permit” standard was meant to be applicable in all employment contexts. The *Dynamex* court recognized that the standard extends employment status to workers regardless of their employer’s ability to directly control their work—which forms the heart of the *Martinez* analysis. Employment—and the resulting liability for wage and hour violations—exists not just where a business can hire, fire, or supervise a worker; it exists wherever a firm knowingly benefits from work performed in the usual course of its business and fails to prevent that work.²⁵⁴ In this way, *Dynamex* mirrors the intent of the IWC and early courts in utilizing the “suffer or permit” language.

Though the ABC test is designed for misclassification claims,²⁵⁵ there is no reason its inclusion of the “usual course of business”

251. *Id.* at 960 (emphasis added).

252. *Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1127 (Okla. 1913).

253. *Id.* at 1129.

254. *See Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 35 (Cal. 2018).

255. Prong C, in particular, asks whether the worker is engaged in their own business, an issue not present in joint employment cases. “Trying to apply Part C of the ABC test to joint employer

analysis under the “suffer or permit” standard should be limited to such claims. The “suffer or permit” standard has always relied upon the common definitions of the two words.²⁵⁶ It makes little sense for the standard to refer only to the *Martinez* control factors in joint employment claims but to further encapsulate the “usual course of business” analysis in worker misclassification claims. Rather, courts should apply the standard uniformly to both types of claims. Such a standardization would simplify the law and provide recognition that the policy concerns of *Dynamex* are present in all wage and hour claims regardless of their form.

B. Policy Considerations Favor Dynamex’s Interpretation

In *Dynamex*, the court acknowledged two broad policy concerns in favor of establishing the ABC test and its “usual course of business” analysis. The first is largely unique to misclassification claims—classifying employees as independent contractors causes the federal and state governments to lose billions in tax revenue.²⁵⁷ Because intermediaries in the lead relationship employ their workers, courts like *Henderson* have found lost tax revenue an inapplicable concern.²⁵⁸

But more importantly, *Dynamex* recognized that the broad “usual course of business” analysis is necessary to prevent the so-called “race to the bottom” where workers are stripped of the protections inherent in their employment.²⁵⁹ The court identified that such a race occurs at both individual and business-to-business levels. First, workers that desire employment protections are in competition with—and will ultimately be harmed by—those who are willing to forgo such protections for a paycheck.²⁶⁰ Secondly, and as discussed above, law-abiding businesses are in competition with those willing to skirt employment laws.²⁶¹ Thus, the enforcement of employment laws must be broad and robust to “create a level playing field” at both levels and to prevent the

claims recalls the proverbial square peg in a round hole.” *Henderson v. Equilon Enters.*, 253 Cal. Rptr. 3d 738, 754 (Ct. App. 2019).

256. See *Curtis*, 134 P. at 1129 (defining “suffer” to mean “not to forbid or hinder; to tolerate”); *Reif*, *supra* note 126, at 380.

257. *Dynamex*, 416 P.3d at 5.

258. *Henderson*, 253 Cal. Rptr. 3d at 752–53.

259. *Dynamex*, 416 P.3d at 37–38.

260. *Id.* at 37.

261. *Id.* at 38; see discussion *supra* Section II.A.

downward pressure on wages and conditions inherent in such economic competition.²⁶²

This justification is just as applicable to the lead-intermediary relationship as it is to worker misclassification. A lead outsourcing its labor needs to smaller, competing intermediaries creates the same downward pressure on wages and conditions as a business that gains an unfair competitive edge by misclassifying its workers. Courts cannot simply focus on the role the intermediary plays in exploiting workers. The problem stems from the lead—so long as intermediaries protect the lead from liability, worker exploitation will occur. For every intermediary that a court targets, a new one will pop up in its place to support the lead. Thus, courts should rather focus on the role of the lead in perpetuating worker exploitation.

Holding the lead liable for the abuses of its intermediaries makes economic sense. First, the lead is in the best position to ensure compliance with labor law:

The purpose of the broad imposition of liability on business owners with the power to prevent the work is to provide incentives for them to assert their power to prevent the violations. It is presumed that the power to prevent the performance of the work carries with it the power to allow the work, conditioned on compliance with minimum labor standards contained in these laws.²⁶³

Secondly, the lead is in the best position to distribute the costs of labor compliance.²⁶⁴ Any efforts by a lead to prevent worker abuses, either by employing its own workers to perform the labor or by policing its intermediaries, will have economic costs compared to the status quo. Though these increased operational costs might be passed onto consumers, it is undoubtedly preferable to allowing the costs of labor violations to fall arbitrarily upon workers attempting to support themselves and their families.²⁶⁵

Finally, the lead is the party most susceptible to the deterrent effect of robust labor laws. Leads are fewer in number, have substantial assets, live long corporate lives²⁶⁶ and would be exposed to exorbitant

262. *Dynamex*, 416 P.3d at 37–38.

263. Goldstein, *supra* note 50, at 1137.

264. See Aditi Bagchi, *Production Liability*, 87 *FORDHAM L. REV.* 2501, 2529–30 (2019).

265. See *id.* at 2530.

266. *Id.*

costs if found liable for labor violations. Further, they have reputational interests to consider.²⁶⁷ Here, Amazon provides an example. Following an exposé by BuzzFeed News and ProPublica, Senators Richard Blumenthal, Elizabeth Warren, and Sherrod Brown sent a letter to Jeff Bezos questioning Amazon's role in the abuse of its drivers.²⁶⁸ The publicity Amazon received led it to cancel contracts with a number of intermediaries accused of labor violations and tort claims.²⁶⁹ If leads are held accountable for labor violations, they will be less likely to condone them.

Ultimately, the primary concern of courts should be to ensure workers are protected by labor law. By focusing on the lead, rather than its intermediaries, the legal system will be better able to curb the "race to the bottom" and protect employment rights. By establishing a more robust joint employment regime, courts can create a broad incentive structure encouraging leads to avoid labor violations and better police their intermediaries. As shown by the franchise model, leads are less likely to allow labor violations by their intermediaries where incentives, legal or non-legal, exist to comply with labor laws.

Ensuring labor compliance will result in increased costs for the lead, which will almost certainly pass these costs onto consumers. If leads choose to employ their own workers rather than rely on intermediaries, the entrepreneurial efforts of small business owners will be stifled. But *Dynamex's* interpretation of the "suffer or permit" standard is not an extreme solution. With proper safeguards, a broad joint employment doctrine can target the nefarious aspects of the lead-intermediary relationship without eliminating the benefits that intermediary use provides to small businesses and entrepreneurs.

VIII. SAFEGUARDS PROVIDING FOR THE BENEFICIAL USE OF INTERMEDIARIES

Undoubtedly, a joint employment doctrine that utilizes both the *Martinez* control factors and *Dynamex's* usual course of business analysis will cast a broad net that captures bad actors like Amazon, as well

267. *Id.*

268. Letter from Sens. Richard Blumenthal, Elizabeth Warren and Sherrod Brown to Jeffrey Bezos, Chairman, President & CEO, Amazon.com Inc. (Sept. 12, 2019), <https://www.buzzfeed-news.com/article/kenbensinger/blumenthal-elizabeth-warren-amazon-delivery>.

269. Ken Bensinger et al., *Amazon Is Firing Its Delivery Firms Following People's Deaths*, BUZZFEED NEWS (Oct. 12, 2019, 8:02 PM), <https://www.buzzfeednews.com/article/kenbensinger/amazon-is-severing-contracts-with-delivery-firms-linked-to>.

as innocuous—and even beneficial—uses of intermediaries, such as the franchise model. Because labor outsourcing can provide support for small businesses, and because the use of intermediaries fosters entrepreneurship, it is important that any joint employment doctrine does not fully eliminate intermediary relationships. Luckily, the usual course of business analysis is not all-encompassing, and the use of indemnification clauses can provide protection for businesses seeking to utilize intermediaries. Finally, the state legislature may choose to recognize a defense for leads accused of labor violations: a lead may be protected where it has made a good faith effort to ensure its intermediaries comply with labor laws.

A. The Limitations of the “Usual Course of Business” Analysis

In its analysis of the “suffer or permit” standard, the *Martinez* court feared a joint employment doctrine that would ensnare every party involved in the work performed: from the farmer who hired laborers to pick his fruit to the consumer who ultimately bought the fruit at the grocery.²⁷⁰ But the *Dynamex* analysis has a limit: an alleged employer must be in the business of the work being performed. The *Dynamex* court explained this in simplistic terms: a retail store does not employ a plumber it hires to fix its pipes because the store is not in the business of plumbing.²⁷¹ Just so, neither does a fruit vendor or a consumer employ a farm laborer because these actors are not in the business of farming. But it is not always so clear where the line should be drawn. Is Uber a taxi service or a software developer? Is McDonald’s in the business of flipping burgers or selling trademark licenses? E-commerce and the delivery industry provide an example of the limits of the ABC test and of how small businesses may be spared liability under a robust joint employment regime.

As mentioned previously, over one million small- and medium-sized businesses choose Amazon’s delivery network over traditional carriers for their shipping needs.²⁷² One could view these small Amazon sellers as leads, with Amazon and its DSPs acting as intermediaries. But one would be loath to find these sellers liable under joint employment theory for the workplace abuses of the delivery companies involved. Why?

270. *Martinez v. Combs*, 231 P.3d 259, 282 (Cal. 2010).

271. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 37 (Cal. 2018).

272. *Wilke*, *supra* note 87.

The answer: effective and profitable e-commerce requires the ability to efficiently deliver goods across the nation. Small entrepreneurial sellers lack the resources, infrastructure, and expertise to develop such a network. Thus, they must rely upon separate entities, such as Amazon or FedEx, to effectuate delivery. The seller agrees to the listed shipping rates, and once the goods are in the hands of the carrier, the seller lacks any oversight over the process of delivery. Though the delivery is an intrinsic part of the seller's business, the seller cannot be said to be in the business of delivery.²⁷³ Because of this, small sellers should not be responsible as joint employers for labor violations for which they lacked any power to prevent. The same can be said of all small businesses that lack the capital and expertise to oversee their own labor needs. To provide clarity and consistency—and to encourage business ownership—the legislature could consider providing blanket exemptions from this analysis to particularly small businesses.²⁷⁴

Amazon, though, is not a small business. Rather, it has a national delivery network, and it maintains control and oversight over the delivery of its goods that traditional sellers do not maintain. Because of this, delivery is within Amazon's usual course of business.²⁷⁵ Amazon has far greater power to control the work performed and thus has the power to prevent labor violations from occurring. Unlike a traditional seller, Amazon can employ its own delivery drivers rather than outsource to a third party, or it can exercise its influence over its intermediaries to ensure that labor violations do not occur. For Amazon, the use of intermediaries is a choice, and it is a choice that allows Amazon

273. This may explain why CAL. LAB. CODE § 2810.3 specifically precludes use of the usual course of business analysis to businesses that outsource their shipping needs to others. Shipping is a special industry that requires capital and know-how far beyond what could reasonably be expected of a typical business.

274. For example, CAL. LAB. CODE § 2810.3 exempts businesses “with a workforce of fewer than 25 workers, including those hired directly by the client employer and those obtained from, or provided by, any labor contractor” and businesses “with five or fewer workers supplied by a labor contractor or labor contractors to the client employer at any given time.” CAL. LAB. CODE § 2810.3(a)(1)(B)(i)–(ii) (West, Westlaw through Ch. 372 of 2020 Reg. Sess.).

275. Though Amazon may claim to be a market platform rather than a delivery company, it seems pertinent to note that 112 million Amazon users pay monthly for two-day shipping (and, admittedly, other benefits). *Number of Amazon Prime Members in the United States as of December 2019*, STATISTA, <https://www.statista.com/statistics/546894/number-of-amazon-prime-paying-members/#:~:text=Number%20of%20U.S.%20Amazon%20Prime%20subscribers%202013%2D2019&text=Amazon%20Prime%20is%20constantly%20growing,95%20million%20in%20June%202018> (last visited Feb. 21, 2021).

to avoid employment laws while causing widespread harm to workers downstream. The imposition of joint employment is warranted where a lead could have prevented the conditions leading to its intermediaries' labor violations by exercising the other options available to it. This is not to say that Amazon must be prohibited from using intermediaries, but if it seeks to avoid liability for wage and hour violations, it must seek other avenues of recourse.

B. Indemnification Clauses

Though a robust joint employment doctrine will hold leads that outsource their labor needs liable as employers, these leads need not bear the full cost—or any of the cost—associated with legal claims stemming from alleged labor violations. A lead can continue to insulate itself from financial liability by requiring its intermediary to sign an indemnification clause under which it agrees to pay the damages, plus costs and fees, resulting from legal action against the lead.²⁷⁶ Under such an arrangement, the lead would be liable for labor violations but would only suffer financial loss where its intermediary is underfinanced or judgment-proof. Such a setup would be beneficial for workers: plaintiffs like Jeffery Lines would no longer bear the burden of seeking recompense from a cash-poor intermediary. For leads, the potential for liability would create incentives to (1) seek out intermediaries with a track record of labor compliance,²⁷⁷ (2) promote labor compliance among its intermediaries, and (3) ensure that its contract prices account for the minimum wage. However, indemnification clauses—and the reduced risk of financial loss for labor violations they provide—would continue to make the use of intermediaries an attractive option.

C. Good Faith Efforts to Ensure Labor Compliance

Finally, the state legislature may consider creating a new affirmative defense providing basic protections for leads that have made a good faith effort to ensure their intermediaries comply with labor laws. The franchise model, for one, may be a lead-intermediary relationship worth protecting in such a manner, given its robust cultivation of entrepreneurship. Where a franchisor has sought to prevent labor

276. Goldstein, *supra* note 50, at 1145.

277. *Id.*

violations by its franchisees, and a franchisee has nevertheless promulgated such violations, courts might rightly hesitate to penalize the franchisor.

Salazar provides an example of what might not constitute a good faith effort by a franchisor to prevent labor violations. In *Salazar*, the franchisor, McDonald's, provided its franchisee with software meant to assist in scheduling, timekeeping, and determining overtime pay.²⁷⁸ Unfortunately, the software did not correctly measure overtime and failed to schedule government-mandated rest breaks and second meal periods, causing the franchisee's employees to miss out on overtime pay.²⁷⁹ Though the Ninth Circuit, utilizing the *Martinez* control factors, spared McDonald's by finding that it was not a joint employer,²⁸⁰ McDonald's failure to program basic labor laws into its software, though, undoubtedly constitutes a lackluster attempt to ensure labor compliance.

To protect itself from liability by taking advantage of a good faith defense, a lead must, somewhat paradoxically, take *more* control over its relationship with its intermediaries. But this is not a radical change. In the franchise model, for instance, franchisors already exercise substantial control: franchise agreements include strict provisions regarding operating policies and quality assurance.²⁸¹ Further, standard franchise agreements already contain general provisions requiring the franchisee to operate in compliance with labor laws, including the FLSA.²⁸² In *Salazar*, McDonald's did not require its franchisee to utilize its timekeeping software²⁸³ but had it made such a requirement—and had the software been adequately programmed—the resulting labor violations would likely not have occurred. This may be all that is required to establish a lead's good faith effort to prevent labor violations, and such a relatively small change may truly protect workers from wage theft.

Ultimately, a broad expansion of employment will provide incentives for leads to actively engage in the prevention of labor violations. In some cases, this may lead to the termination of intermediary relationships: a lead may choose to exercise total control of an enterprise

278. *Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1027–28 (9th Cir. 2019).

279. *Id.* at 1028.

280. *Id.* at 1032.

281. Ji & Weil, *supra* note 90, at 6.

282. *Id.*

283. *Salazar*, 944 F.3d at 1028.

if it will undoubtedly be held liable for the costs of employment. Nevertheless, beneficial lead-intermediary relationships, and particularly the entrepreneurism that they foster, can be protected. Courts may use a well-rounded and fair usual course of business analysis to excuse small businesses that engage in labor outsourcing. Leads can protect themselves by including indemnification clauses in their contracts and by choosing labor-compliant intermediaries. The legislature can consider new legal defenses for leads that adequately police their intermediaries.

IX. CONCLUSION

The California Supreme Court and state legislature—through *Dynamex* and AB 5, respectively—have signaled a strong intent to protect the employment rights of gig economy workers misclassified as independent contractors. In expressing the need for the robust ABC test, these bodies have pointed to the unfair advantage misclassifying companies have over those that employ their workers and the rise of income inequality created by eroding workplace protections.²⁸⁴ But these concerns are not limited to misclassification schemes. Rather, they exist wherever a business outsources its labor needs to avoid the costs and liability associated with employment. The lead-intermediary relationship, illustrated here by Amazon’s use of DSPs, creates conditions that perpetuate substandard wages and other labor abuses. Without intervention, the use of this business practice will continue to exasperate working conditions and place strain on fair market competition.

To effectively respond to this problem, the court or legislature must simply extend their decisions in *Dynamex* and AB 5 to joint employment claims. Prong B of the ABC test—the usual course of business analysis—will allow plaintiffs like Jeffery Lines to obtain recompense from a lead where their intermediary employer is chronically undercapitalized due to the nature of the lead-intermediary relationship. The legislative and judicial history of the “suffer or permit” definition of employment—which governs both *Dynamex*’s ABC test and California’s current joint employment doctrine under *Martinez*—supports a comprehensive and dynamic employment standard. It makes

284. See *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 38 (Cal. 2018); Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019).

little sense for the “suffer or permit” definition to be expansive in the context of misclassification claims but constricted to the ability to “hire, fire, or supervise” in joint employment analysis. More importantly, the threat of litigation and liability for labor violations will encourage leads to develop business practices that better protect workers’ rights.

This answer is not a radical solution. Given the precedent of *Dynamex* and AB 5, California is in a unique position to extend labor protections without completely restructuring its governing law. In fact, under California Labor Code section 2810.3, the usual course of business analysis is already an accepted standard in some cases of labor outsourcing.²⁸⁵ Furthermore, a more robust joint employment doctrine would not necessarily disrupt the benefits that labor outsourcing can provide to both business owners and consumers. The legislature may choose to provide additional protections to businesses, and the courts will continue to have discretion in applying the standard to specific factual circumstances.

In the absence of extensive labor laws, fair wages and working conditions would not exist. For over 100 years, from the publishing of the IWC’s wage orders to the passage of AB 5, California has remained at the forefront of providing labor protections to its citizens. The expansion of the joint employment doctrine is merely another step on that path.

285. CAL. LAB. CODE § 2810.3 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.); see discussion *supra* Section II.A.