23-0996

IN THE SUPREME COURT OF TEXAS

Massage Heights Franchising, LLC,

Petitioner,

v.

Danette Hagman,

Respondent.

Brief of *Amicus Curiae* International Franchise Association

Mark Trachtenberg
State Bar No. 24008169
mark.trachtenberg@haynesboone.com
Ryan Philip Pitts
State Bar No. 24105941
ryan.pitts@haynesboone.com
HAYNES AND BOONE, LLP
1221 McKinney Street, Suite 4000
Houston, Texas 77010-2007
Telephone: (713) 547-2000
Facsimile: (713) 547-2600

Deborah Coldwell
State Bar No. 04535300
deborah.coldwell@haynesboone.com
Maral Kilejian
State Bar No. 24060093
maral.kilejian@haynesboone.com
Sam Mallick
Star Bar No. 24109501
sam.mallick@haynesboone.com
HAYNES AND BOONE, LLP
2801 N. Harwood Street, Suite 2300
Dallas, Texas 75201
Telephone: (214) 651-5000
Facsimile: (214) 651-5940

Counsel for *Amicus Curiae*
International Franchise Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

INTEREST OF AMICUS CURIAE

The International Franchise Association is the world's oldest and largest membership organization for franchisors, franchisees, and franchise suppliers. It serves as the voice for America's many franchise businesses. *See* https://www.franchise.org/. The Association paid all fees for this brief. Tex. R. App. P. 11.

INTRODUCTION

The court of appeals' erroneous decision has injected significant uncertainty into the franchise industry in Texas. The International Franchise Association ("Association") writes on behalf of its membership to urge reversal and clarification that Texas law follows the majority "instrumentality" test for assessing franchisor liability, as has been long understood.

Petitioner Massage Heights Franchising, LLC articulates many flaws of the lower court decision and judgment that separately require reversal. The Association joins its arguments and provides additional context on the business model and body of law on franchising, which courts around the country have developed over decades. The Association would draw the Court's attention to the well-reasoned decisions by the Supreme Courts of California, Kentucky, and Wisconsin on franchisor liability. *See Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 739, 742 (Cal. 2014); *Papa John's Int'l, Inc. v. McCoy*, 244 S.W.3d 44, 54 (Ky. 2008); *Kerl v. Rasmussen, Inc.*, 682 N.W.2d 328, 340–41 (Wis. 2004). As they explain, the contract-based franchising model turns on the ability of the franchisor to offer a brand name, intellectual property, know-how, and a business structure in return for fees—and which leads to the standardization of goods and services—while franchisees exercise day-to-day judgment in operating franchises they started and independently own. This is done by a franchise agreement. Because franchisors contractually commit the operation of franchise businesses to franchisees, this Court and many others have restricted any potential franchisor liability for conduct of the franchisee and the franchisee's employees to situations where a franchisor actually controlled the instrumentality

that allegedly caused the injury. *See Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex. 1993) ("[T]he court's inquiry must focus on who had specific control over the safety and security of the premises, rather than the more general right of control over operations."). This "instrumentality" test is the "consensus" rule, which has enabled franchise partners to understand and structure their legal obligations. *McCoy*, 244 S.W.3d at 54.

The result below casts doubt over this settled test for franchisor liability. In this case, an employee of the franchisee committed a terrible crime against a customer. The plaintiff tried and won a negligent hiring case, including against the franchisor. But the franchise agreement assigned full control of hiring to the franchisee, and the jury rightly rejected that the franchisor, Massage Heights, had any control. Misunderstanding the franchisee-franchisor relationship, the court of appeals held that Massage Heights owed and breached a legal duty to the customer of the franchisee. The court erroneously focused on general operating and quality standards present in the franchise agreement, rather than the specific instrumentality at issue: a hiring decision. Courts across the country have correctly reasoned that general operating standards alone cannot demonstrate a level of direct control sufficient to justify franchisor liability. Operating standards do not equate to decision-making authority or control of the specific aspect of operations that allegedly caused the injury.

If the lower-court decision stands, Texas franchisors will be left to wonder whether Texas law continues to respect one of the key premises of the franchise relationship, namely, that the franchisor may safely relegate business operations of

individual franchises, like hiring, to their independent owners (franchisees). The decision also conflicts with precedent of the First Court of Appeals. *Compare* Op.7–8, *with Doe v. YUM! Brands, Inc.*, 639 S.W.3d 214, 235–36 (Tex. App.—Houston [1st Dist.] 2021, no pet.). Absent this Court's intervention, confusion will reign as to which rule of law now governs the many franchises in the Houston area.

The specter of uncertainty raised by the decision below also carries serious economic ramifications. Approximately 79,860 franchise businesses operated in Texas in 2023, and the decision may profoundly affect their autonomy, bottom-line, and hiring. *See* International Franchise Association, 2024 Franchising Economic Outlook (2024), link. Undue interference of the law in business relationships causes increased administrative drag, higher prices, and lower employment. The court of appeals drew an enormous field of liability around franchisors—to the unwarranted benefit of the plaintiffs' bar, and at the expense of free enterprise and local business.

Therefore, the Association respectfully urges that this Court grant review, reverse, and reaffirm that, under the unique franchise contract relationship, a franchisor may face liability for conduct of a franchisee's employee only when evidence supports that it in fact exercised actual control over the instrumentality allegedly causing the harm, in accord with settled law across the country. *See Patterson*, 333 P.3d at 739–42; *McCoy*, 244 S.W.3d at 54; *Kerl*, 682 N.W.2d at 341; *see also DePianti v. Jan-Pro Franchising Int'l, Inc.*, 990 N.E.2d 1054, 1064 (Mass. 2013); *Ketterling v. Burger King Corp.*, 272 P.3d 527, 533 (Idaho 2012); *VanDeMark v. McDonald's Corp.*, 904 A.2d 627, 636 (N.H. 2006); *Kennedy v. W. Sizzlin Corp.*, 857 So. 2d 71, 77 (Ala. 2003); *Folsom v. Burger King*, 958 P.2d 301, 309 (Wash. 1998);

Ciup v. Chevron U.S.A., Inc., 928 P.2d 263, 267–68 (N.M. 1996); *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 814 (Iowa 1994); *Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 90 (E.D.N.Y. 2000). Any other rule erodes the legal foundation beneath the wildly successful franchise model of business.

ARGUMENTS

"Franchising is a bedrock of the American economy." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 441 (3d Cir. 1997). It "has evolved into an elaborate agreement by which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee through advertising, promotion and other advisory services." *Atl. Richfield Co. v. Razumic*, 390 A.2d 736, 374 (Pa. 1978) (quotation omitted).

I. The franchise model depends on freedom of contract to efficiently allocate resources and responsibility between business partners.

The Association starts with the pertinent first principles. To encourage business enterprise and innovation, Texas law protects freedom of contract and the use of corporate forms as a vehicle to allocate risk and responsibility.[1] Franchising operates from these principles. *See* Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J. Law & Econ. 223, 224, 228 (1978) ("A

[1] *See In re Weatherford Int'l, LLC*, 688 S.W.3d 874, 882 (Tex. 2024) (orig. proceeding) (per curiam) ("Texas law presumes that two separate corporations are indeed distinct entities." (quotation omitted)); *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017) ("[P]arties shall have the utmost liberty of contract." (quotation omitted)).

franchise agreement is a contract between two (legal) firms, the franchisor and the franchisee."). Franchisors own trademarks and a proven business system. Through a franchise agreement, they license these assets to entrepreneur-franchisees who wish to start their own independent businesses. This arrangement places the "franchisee[s] in a better position than other small businesses" by providing "access to resources [they] otherwise would not have, including the uniform operating system itself." *Patterson*, 333 P.3d at 734. "The burdens of starting and operating a business are eased considerably by the franchisor, which provides quality and operational methods and standards, and may offer management training programs to the franchisee." *Kerl*, 682 N.W.2d at 337. And, of course, franchisees also "capitalize on the good will and established market associated with the franchisor's trademark." *Id.* For their part, by shifting operation costs and daily management to franchisees, franchisors "reach new, far-flung markets without having to directly manage a vast network of individual outlets" *Id.*

While the franchisee pays royalties and follows the franchisor's system of standards, she controls her business. "It is the franchisee who implements the operation standards on a day-to-day basis, hires and fires store employees, and regulates workplace behavior." *Patterson*, 333 P.3d at 726. In short, she "retains autonomy as a manager and employer" and assumes "the risk of loss, in order to own and profit from" her business. *Id.* at 726, 734; *see also Kerl*, 682 N.W.2d at 338 ("The typical franchisee is an independent business or entrepreneur, often distant from the franchisor and not subject to day-to-day managerial supervision by the franchisor."); Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique*,

1993 Colum. L. Rev. 89, 90 (1993) (the "franchise relationship sets out a detailed scheme of control between two autonomous businesses").[2]

The autonomy of franchisees to make decisions regarding the day-to-day operations of their businesses forms a core reason that many franchisees choose to become franchisees. They possess the latitude to create their own corporate culture within the four walls of their independent businesses. Research has shown that employees benefit from that autonomy, with employees of franchised businesses enjoying greater compensation and benefits than employees of non-franchised counterparts.[3] Franchisees invest their life savings for such independence and autonomy.

Autonomy is the essence of the franchise model. The contractual allocation of responsibility between the local business owner, who focuses on running an individual business, and a national or regional partner that focuses on standardization and the brand has concrete benefits. It efficiently divides capital, responsibility, and effort—and, as a direct result, has fostered the growth of locally-run businesses that

---

[2] *Accord Hersh v. CKE Rest. Holdings, Inc.*, No. 4:17-CV-02043, 2022 WL 407124, *9 (E.D. Mo. Feb. 10, 2022) (the "entire purpose of franchise law is to separate the franchisor from the day-to-day running of the actual business, which is the duty of the franchisee"); *Pereda v. Atos Jiu Jitsu LLC*, 301 Cal. Rptr. 3d 690, 699 (Cal. App. 2022) ("The franchisee sells goods or services under the franchisor's name and benefits from the universal standard of the franchisor, but retains autonomy when implementing the operational standards on a day-to-day basis and otherwise independently owns, runs, and staffs itself." (quoting omitted)).

[3] Matthew Haller, *Why Franchises Hire More People, Drive More Sales, and Pay Better Wages Than Non-Franchise Businesses*, Entrepreneur (Sep. 21, 2021), https://www.entrepreneur.com/franchises/why-franchises-hire-more-people-drive-more-sales-and-pay/386629.

are pillars of the communities in which they operate. This delivers high-quality goods and services to consumers and creating job opportunities for local workers.

II. The court of appeals misapplied the common law to disregard the agreed allocation of responsibility between the franchisor and franchisee.

The contractual division of responsibility forms the crux of franchising. The franchise business model cannot continue to generate employment and business in Texas if the common law disregards the bargained-for allocation of responsibility of franchise agreements and extends liability over franchisors for duties clearly allocated to the franchisee, like hiring. But the court of appeals' decision does precisely that.

The franchise agreement in this case expressly delegated all hiring decisions to the franchisee. That is not in dispute. Nor is it in dispute that Massage Heights neither hired, interviewed, reviewed records of, nor recommended hiring the individual who committed a sexual assault, Mario Rubio. The franchisee did all of that, as required by the franchise agreement. Even the jury concluded that the franchisee was not "strictly subject to the control" of Massage Heights.

Nonetheless, the court of appeals disregarded the agreement. It conjured an overgeneralized legal duty based on *operations standards* regarding "the minutia of [the] franchise locations and of the work performed by the masseuses." Op.7. The creation of standards for uniform, quality *services* and *storefronts* provides no justifiable basis for placing a common-law duty on a franchisor for *hiring* decisions committed by contract to the franchisee's sole judgment. Common sense counsels that franchisees, rather than franchisors, should make the hiring decisions for the

businesses they own. Franchisees "hold a personal and financial stake in the business" and have a "right to hire the people who work for [them], and to oversee their performance each day." *Patterson*, 333 P.3d at 739. Franchisees know best what they want and need from employees, at particular times, and in specific locations.

Moreover, nearly every franchise agreement dictates minutia relating to franchise stores and their products, and so the court of appeals' reasoning would extend legal duties regarding hiring to virtually every franchisor in Texas. Franchisors *must* set detailed operations standards. *First*, customers value the universal and dependable quality they associate with the brand. *See Patterson*, 333 P.3d at 733 (franchisors seek "to build and keep customer trust by ensuring consistency and uniformity in the quality of goods and services, the dress of franchise employees, and the design of the stores themselves"); *accord Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1030 (9th Cir. 2019). *Second*, the federal Lanham Act *requires* franchisors to police the integrity of licensed trademarks, or otherwise risk losing them. It "is necessary to evaluate the franchise relationship in light of the franchisor's duty to police its trademark," and unduly extending tort liability "could improperly penalize a franchisor for exercising the degree of control necessary to protect the integrity of its trademark." *Rainey v. Langen*, 998 A.2d 342, 348 (Me. 2010); *see Kerl*, 682 N.W.2d at 338 (compliance with the Lanham Act should not "automatically saddle the [franchisor] with the responsibilities under state law of a principal for his agent" (quotation omitted)); *Raines v. Shoney's, Inc.*, 909 F. Supp. 1070, 1078 (E.D. Tenn. 1995) ("The protection of its trademark and service mark is

a necessary duty of a franchisor; to interfere with this duty would unfairly impose liability on the basis of a necessary duty.").[4]

Recognizing that making standards does not equal exercising actual control over an independently owned business, courts in Texas and elsewhere have widely rejected that franchise operating standards alone legally suffice to impose liability against franchisors for conduct by franchisees or their employees. "A franchisor does not 'control' the franchisee by retaining certain rights such as the right to enforce standards, the right to terminate the agreement for failure to meet standards, the right to inspect premises, the right to require that franchisees undergo certain training, or the mere making of suggestions and recommendations." *Allied Servs., LLC v. Smash My Trash, LLC*, No. 21-CV-00249, 2024 WL 2842633, *42 (W.D. Mo. May 16, 2024) (quotation omitted). An enormous body of caselaw confirms that a requirement to follow operations standards does not demonstrate direct "control" over the conduct of the franchisee, an entirely separate legal entity. *See Kelley v.*

[4] *See Oberlin v. Marlin Am. Corp.*, 596 F.2d 1322, 1327 (7th Cir. 1979) ("The Lanham Act requires supervision of trademark licensees at the expense of abandonment of the trademark. The licensor must control the operations of its licensees to ensure that the trademark is not used to deceive the public as to the quality of the goods or services bearing the name."); *People v. JTH Tax, Inc.*, 151 Cal. Rptr.3d 728, 744 (Cal. App. 2013) (franchisors "are often caught between the Scylla of failing to exercise sufficient control to protect their marks, and the Charybdis of exercising so much control they are vicariously liable for the torts of the franchisees or other licensees"); David J. Kaufmann *et al.*, *A Franchisor Is Not the Employer of Its Franchisees or Their Employees*, 34 Franchise L. J. 439, 461 (2015) ("[U]nder the Lanham Act and all decisional law both preceding and succeeding the 1946 enactment of that statute, it is an absolute requirement that a trademark licensor (and thus every franchisor) must promulgate, impose, and police standards of operations and quality associated with its marks in order for those marks to maintain their legal standing and not be deemed abandoned."); *see also* Jeffrey H. Wolf & Aaron C. Schepler, *Caught Between Scylla and Charybis: Are Franchisors Still Stuck Between the Rock of Non-Uniformity and the Hard Place of Vicarious Liability?*, 33 Franchise L.J. 195, 196 (2013); Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of their Franchisees*, 62 Wash. & Lee L. Rev. 417, 468–69 (2005).

Wurzbach, No. 14-97-00557-CV, 1999 WL 33640, *6–7 (Tex. App.—Houston [14th Dist.] Jan. 28, 1999, no pet.) (a franchise agreement was "no[t] evidence of McDonald's right to control the security operations of its franchises"); *O'Bryant v. Century 21 S. Cent. States, Inc.*, 899 S.W.2d 270, 272 (Tex. App.—Houston [14th Dist.] 1995, no writ) (a franchise agreement did not suffice to show actual control); *Patterson*, 333 P.3d at 726 ("The imposition and enforcement of a uniform marketing and operational plan cannot *automatically* saddle the franchisor with responsibility for employees of the franchisee who injure [others] on the job."); *Kerl*, 682 N.W.2d at 331, 340–41 ("[T]he marketing, quality, and operational standards commonly found in franchise agreements are insufficient.").[5]

These decisions make plain, equitable sense. It is unfair to hold someone liable for something that, *first*, they did not do, *second*, they expressly agreed in writing someone else would do, *third*, they could not directly control, and, *fourth*, they did not know the facts until afterward. Moreover, Massage Heights possessed neither reason nor legal authority to order the franchisee, a separate business owner, not to hire Rubio. Requirements in franchise agreements are covenants between the parties

[5] *Accord Nears v. Holiday Hosp. Franchising, Inc.*, 295 S.W.3d 787, 796 (Tex. App.—Texarkana 2009, no pet.); *Hoffnagle*, 522 S.W.2d at 814; *Allen v. Choice Hotels Int'l, Inc.*, 276 F. App'x 339, 343 (4th Cir. 2008); *Bender v. Hilton Domestic Operating Co. Inc.*, No. 19-CV-271, 2021 WL 1401494, *3–4 (M.D. Ala. Apr. 14, 2021); *Wu*, 105 F. Supp. 2d at 88; *Currier v. Newport Lodge No. 1236, Loyal Order of Moose*, 589 F. Supp. 3d 210, 236 (D.N.H. 2022); *Hutchins v. DIA Lodging LLC*, No. 20-CV-00242, 2021 WL 8083699, *6 (E.D. Ark. Sept. 30, 2021); *Courtland v. GCEP-Surprise, LLC*, No. CV-12-00349, 2013 WL 3894981, *6 (D. Ariz. July 29, 2013); *Triplett v. Soleil Grp., Inc.*, 664 F. Supp.2d 645, 650 (D.S.C. 2009); *Viado v. Domino's Pizza, LLC*, 217 P.3d 199, 209–10 (Or. App. 2009); *Viches v. MLT, Inc.*, 127 F. Supp. 2d 828, 832 (E.D. Mich. 2000); *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180, 182 (Ind. App. 1997); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. App. 1990).

in structuring the *quid pro quo* of their relationship—which may only result in breach—not evidence of control of the franchisor over daily business decisions. Franchisors lack any legal duty to place additional or different operations standards in their negotiated agreements with franchisees, as the court of appeals and Plaintiff wrongly suggested.

Indeed, Plaintiff says Massage Heights could have stopped Rubio's hiring by threatening to terminate the franchise agreement. That is nonsense. The mere possibility of applying commercial pressure to try to compel certain hiring practices does not create a tort duty. Here, because the franchise agreement expressly committed hiring decisions to the franchisee, Massage Heights had no obligation to dictate how the franchisee should hire.[6] And the fact that franchisors retain the right to alter a franchise agreement does not mean they exercise sufficient control for courts to impose a duty on them, especially when such duties are expressly assigned to the other party. On this point, Texas courts agree. *See Domino's Pizza, L.L.C. v. Reddy*, No. 09-14-00058-CV, 2015 WL 1247349, *5 (Tex. App.—Beaumont March 19, 2015, pet. denied) (mem. op.) ("Although Domino's has authority to modify its own rules and regulations, the right to prescribe alterations and deviations is not the type of supervisory control sufficient for imposing a duty on Domino's."); *YUM! Brands*, 639 S.W.3d at 232 ("[T]he fact that Pizza Hut retained the right to terminate

[6] And, even if Massage Heights *had* chosen to include a provision in the franchise agreement that required franchisees to conduct background checks, the *franchisee* would still have had control over how to conduct the background checks and hiring—specifically, what hiring decisions would or would not be made as a result of those background checks. *See Zampos v. W & E Comm'cns, Inc.*, 970 F. Supp. 2d 794, 803 (N.D. Ill. 2013); *Thornton v. Charter Comm'cns, LLC*, No. 12-CV-479, 2014 WL 4794320, at *13–14 (E.D. Mo. Sept. 25, 2014).

the franchise agreement or require MUY to comply with Pizza Hurt's procedures is not evidence of control."); *Wu*, 105 F. Supp. 2d at 88 ("[R]etaining a right to enforce standards or to terminate an agreement for failure to meet standards is not sufficient control.").[7]

III. A franchisor can be liable for the conduct of a franchisee only if it exercised actual control of the alleged injury-causing instrumentality.

Because American courts honor the freedom of contract, corporate separateness, and the public good of the franchising model, the rule has long been that franchisors can be held liable for conduct by franchisees or their employees only if the former directly controlled the "instrumentality" that allegedly caused the injury. As the California Supreme Court explained in the context of *respondeat superior*, a "franchisor enters this arena, and becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and

---

[7] *Accord Fitz v. Days Inns Worldwide, Inc.*, 147 S.W.3d 467, 473 (Tex. App.—San Antonio 2004, pet. denied) ("DIW's general right to suspend or terminate a franchisee's operations is insufficient to establish actual control."). Courts in other jurisdictions have articulated the same. *See Rainey*, 998 A.2d at 350 ("Although Domino's Pizza retains the right to conduct inspections and terminate the franchise relationship, such conditions do not constitute sufficient control to impose vicarious liability."); *Burnett v. Wahlburgers Franchising LLC*, No. 16-CV-4602, 2021 WL 12102076, *4 (E.D.N.Y. Mar. 19, 2021) ("[E]vidence of corporate guidance in the hiring process is insufficient to demonstrate that a franchisor has power to hire a franchisee's employees."); *Gray v. McDonald's USA, LLC*, 874 F. Supp.2d 743, 753 (W.D. Tenn. 2012) ("McDonald's Operations Manual merely suggests methods that operators could employ in effectively managing their personnel, which suggests a lack of direct control."); *accord Hunter v. Ramada Worldwide, Inc.*, No. 04-CV-00062, 2005 WL 1490053, at *7 (E.D. Mo. June 23, 2005); *Fant v. Beamteam, Inc.*, No. 2023-CA-0280-MR, 2024 WL 387729, *4 (Ky. App. Feb. 2, 2024); *In re Motor Fuel Temperature Sales Pracs. Litig.*, No. 1840, 2012 WL 1536161, *5 (D. Kan. Apr. 30, 2012); *Coty v. United States Slicing Mach. Co.*, 373 N.E.2d 1371, 1376 (Ill. App. 1978).

relevant day-to-day aspects of the workplace behavior of the franchisee's employees." *Patterson*, 333 P.3d at 739. The "critical factor is whether the franchisor had day-to-day control over the specific 'instrumentality' that caused the alleged harm." *Id.* at 735, 739–40. Many other state supreme courts have agreed. *See Depianti*, 990 N.E.2d at 1064; *Ketterling*, 272 P.3d at 533; *McCoy*, 244 S.W.3d at 54; *VanDeMark*, 904 A.2d at 636; *Kerl*, 682 N.W.2d at 341; *Folsom*, 958 P.2d at 309.[8]

In *Exxon Corp. v. Tidwell*, this Court itself applied the instrumentality test to a direct negligence claim against a franchisor. 867 S.W.2d 19, 23 (Tex. 1993). It reversed and remanded for the trial court to analyze whether Exxon possessed a "right to control of the security of" a gas station where a robbery occurred—rejecting the argument that a "right of control over general operations" legally sufficed for liability. *Id.*[9] The Texas courts of appeals—including the First Court—have followed *Tidwell*'s instrumentality test to assess potential franchisor liability. *See YUM! Brands*, 639 S.W.3d at 233; *Reddy*, 2015 WL 1247349, at *4, 2015 WL 1247349, at *15; *Poynor v. BMW of N. Am., LLC*, 441 S.W.3d 315, 321–22 (Tex.

[8] Indeed, "[t]he predominant test for holding a franchisor liable for the tortious conduct of its franchisee [i]s whether the franchisor controls or has the right to control the daily conduct or operation of the particular instrumentality or aspect of the franchisee's business that is alleged to have caused the harm." *Gray*, 874 F. Supp. 2d at 752 (quotation omitted). The Maine Supreme Court declined to apply the formal "instrumentality" test, but in effect applied the same analysis. *Rainey*, 998 A.2d at 348–351.

[9] *See also Tex. Cent. Co. v. Arredondo*, 612 S.W.3d 289, 295 (Tex. 2020); *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 479 (Tex. 2017); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 199 (Tex. 1995); *e.g.*, *Townsend v. Goodyear Tire & Rubber Co.*, 249 F. App'x 327, 329 (5th Cir. 2007) (per curiam) ("The contract here did not provide for Goodyear to train Prine's employees, and it did not provide Goodyear with supervision of the specific methods and means of Prine's operations which caused Trevor Townsend's unfortunate injuries.").

App.—Dallas 2013, no pet.); *Risner v. McDonald's Corp.*, 18 S.W.3d 903, 906 (Tex. App.—Beaumont 2000, pet. denied); *Fitz v. Days Inns Worldwide, Inc.*, 147 S.W.3d 467, 473 (Tex. App.—San Antonio 2004, pet. denied); *Doubletree Hotels Corp. v. Person*, 122 S.W.3d 917, 920 (Tex. App.—Corpus Christi–Edinburgh 2003, no pet.); *Morris v. Scotsman Indus., Inc.*, 106 S.W.3d 751, 754 (Tex. App.—Fort Worth 2003, no pet.); *Johnson v. Burger King Corp.*, No. 09-99-548-CV, 2000 WL 1160490, at *4–5 (Tex. App.—Beaumont Aug. 17, 2000, pet. denied) (per curiam); *Smith v. Foodmaker, Inc.*, 928 S.W.2d 683, 687 (Tex. App.—Fort Worth 1996, no pet.).[10]

The Court should take this opportunity to reaffirm that Texas follows the instrumentality test. A franchisor may be liable for the conduct of the franchisee or the franchisee's employees "only if [it] has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm." *Kerl*, 682 N.W.2d at 132. This test not only tracks the Court's ruling in *Tidwell*, but also fosters "stability in franchise relationships by respecting the independence of the franchisee as an independent business owner while allowing the franchisor to impose the requirements necessary to protect its brand, trademarks, and goodwill." Susan A. Grueneberg *et al.*, *Drafting Franchise Agreements after Patterson v. Domino's*, 36 Franchise L.J. 189, 193 (2016). The instrumentality test makes "a predictable rule that will provide certainty to

[10] The instrumentality test also comports neatly with this Court's broader jurisprudence, which requires analytical rigor in causally linking the complained-of injury to breach of a specific legal duty. *See Elephant Ins. Co., LLC v. Kenyon*, 644 S.W.3d 137, 145 (Tex. 2022) ("Courts may not hold people to very general duties of exercising ordinary care in all circumstances."); *Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016) (the breach of a duty must be "a cause in fact of" a foreseeable harm, not merely create "the condition that makes the harm possible").

[franchising] parties." *Apache Corp. v. Apollo Expl., LLC*, 670 S.W.3d 319, 332 (Tex. 2023). It is the predominant rule for good reason.

While often applied to the potential vicarious liability of franchisors, the instrumentality test applies equally to assess direct tort duties, as the Court tacitly held in *Tidwell*, which involved a direct negligence claim. "[D]irect liability cases look to the franchisor's actual control or retained right of control to determine the presence of a duty for purposes of evaluating whether the franchisor was itself negligent." *Kerl*, 682 N.W.2d at 334 n.3; *e.g.*, *Wu*, 105 F. Supp. 2d at 90.[11] This makes sense. How can the law justly impose a tort duty on someone who had no control over what caused an injury? It should not and does not. As this Court analogously explained for general-contractor liability, any legal "duty is commensurate with the control [a general contractor] retains over the independent contractor's work." *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 214 (Tex. 2008) (quotation omitted); *see YUM! Brands*, 639 S.W.3d at 232 ("The right of control test remains 'the keystone' for imposing liability on a franchisor based on the actions of a franchisee or the franchisee's employees.").

[11] *See also Bender*, 2021 WL 1401494, *2 (in determining duty of a franchisor, "the central issue is the extent of control that the franchisor exercised over the franchisee"); *Karnauskas v. Columbia Sussex Corp.*, No. 09-CV-7104, 2012 WL 234377, *3 (S.D.N.Y. Jan. 24, 2012) ("Marriott did not have a duty of care to plaintiff because it did not have any day-to-day control over the hotel and did not select, recommend, or inspect the coffee carafe at issue."); *Allen*, 276 F. App'x at 343 n.4; *Sutherland v. Barton*, 570 N.W.2d 1, 5–7 (Minn. 1997).

IV. The court of appeals erred by failing to apply this instrumentality test, which properly forecloses liability here.

The decision by the court of appeals etched an unjustified aberration into Texas caselaw—at odds with prior Texas decisions, including *Tidwell*, and the weight of reasoned authority from other jurisdictions. It imposed a legal duty on Massage Heights simply because of general operating standards articulated in the franchise agreement, despite that the agreement specifically committed the relevant conduct—hiring massage therapists—to the franchisee. Under the instrumentality test, the correct question was, "Did Massage Heights retain actual control over hiring decisions?" Because the answer was undisputedly, "No," Massage Heights had no legal duty. And because Massage Heights had no duty pertaining to hiring, the court of appeals' reasoning that Massage Heights supposedly "allowed" franchisees to hire "masseuses with any type of criminal history" holds no water. Massage Heights did not control what the franchisee here—an independent legal entity—did as to hiring. The franchisee was in charge of its workforce.

Plaintiff points to immaterial evidence of what Massage Heights allegedly knew or should have known about the possibility of sexual assaults at massage locations generally. Resp. Merits Br. 36–46. This evidence does not matter. Aside from Rubio's own criminal intent, the only possible cause of the sexual assault was the franchisee's own *judgment call* to hire Rubio. No evidence supported that Rubio exhibited abnormal behavior previously during his employment or that employee training could have prevented him from acting on criminal impulses. Absent evidence of prior sexual misbehavior, courts have held that it is not "reasonably

foreseeable" to a massage company that "a masseur will sexually assault a client." *Stern v. Ritz Carlton Chi.*, 702 N.E.2d 194, 197–98 (Ill. App. 1998); *see also Sitton v. Massage Odyssey, LLC*, 158 N.E.3d 156, 159 (Ohio App. 2020) ("[E]ven if, as Ms. Sitton claims, an investigation into Mr. Miller's [massage] license would have revealed some incompetence or dishonesty, this would not have sounded the alarm about the prospect for a later sexual assault."); *Tomsic v. Marriott Int'l, Inc.*, 739 S.E.2d 521, 530 (Ga. App. 2013) (rendering judgment as a matter of law because there was no evidence a masseuse had a propensity for sexual misconduct). While the court of appeals and Plaintiff cited caselaw about investigating applicants who will have access to "vulnerable groups," this caselaw has no bearing here: Massage Heights did not participate in or control of hiring in the first place. *See YUM! Brands*, 639 S.W.3d at 227–28. In any event, no legal duty exists to predict a sexual assault by a trained, licensed massage therapist who there was no reason to suspect of such propensities. As a *franchisor* who did not employ Rubio, Massage Heights knew nothing of Rubio before the assault. Only the initial decision to hire Rubio as a massage therapist could have been a proximate cause of the sexual assault, which the franchisee made alone, as provided by the franchise agreement.[12]

How did the court of appeals go so astray? It read too far into *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 735 (Tex. 1998) and applied an overgeneralized test of "some control" over any "means, methods, or details." Op.5, 8. In *Read*, a vacuum

[12] Further, although a franchisor's forbearance in dictating express employment practices of its franchisees may leave the franchisee to formulate hiring policies (even if they are unadvisable ones), the alternative of a franchisor dictating and enforcing every specific employment practice across a franchise system is not tenable for the franchise model, nor even possible in many cases.

manufacturer assigned the hiring of salespersons to its distributors (independent contractors) but required them to market its vacuums by in-home demonstrations. *Id.* at 734–36. One of the distributor's salesmen sexually assaulted a woman in her home on a sales call. *Id.* The Court applied the instrumentality test and held that requiring in-home demonstrations evinced control and triggered a legal duty on the manufacturer. *Id.* at 736.

But respectfully, *Read* failed to consider the true instrumentality. It was not that the manufacturer required in-home marketing that proximately caused the sexual assault—which the salesman may have committed regardless of in-home marketing—but rather the distributor's failure to screen the salesman's background before hiring him. *Id.* at 735–36. That simple screen would have revealed prior sexual improprieties by the salesman. *Id.* In his dissent, Justice Abbott identified this flaw in *Read*'s reasoning and summarized: "Because the injury is not related to the control retained by [the manufacturer], the *Tidwell* [instrumentality] test is not met and [the manufacturer] owed no duty to [the plaintiff] under the circumstances of this case." *Id.* at 744–45 (Abbott, J., dissenting).

The *Read* dissenters were correct, and the Court should clarify that *Tidwell* still governs and requires control by a franchisor of the specific instrumentality that allegedly caused the injury.[13] Indeed, a different court later held that the same

[13] When the analysis is not tethered to a specific instrumentality, it really boils down to liability based on respondeat superior. And employers are not vicariously liable for intentional torts that were not "in furtherance of the employer's business interests." *Beech v. Hercules Drilling Co., L.L.C.*, 691 F.3d 566, 574 (5th Cir. 2012) (Elrod, J.). Sexual assault does not further a conceivable business interest.

defendant as at issue in *Read* did not in fact exercise sufficient control to be subject to liability for sexual harassment. *See Johnson v. Scott Fetzer Co.*, 124 S.W.3d 257, 264–67 (Tex. App.—Fort Worth 2003, pet. denied).

And correctly applying a tailored instrumentality test under *Tidwell*, many other Texas courts of appeals have rejected liability against franchisors for intentional wrongdoing by franchisee employees. In *Yum! Brands*, the First Court held that Pizza Hut was not vicariously liable for a sexual assault by a pizza deliveryman. 639 S.W.3d at 236–37. In *Smith v. Foodmaker, Inc.*, the court rejected claims against the franchisor for a shooting by a franchisee employee: "Not only did Foodmaker have no right of control over the hiring practices, terms, or conditions of [the franchisee's] employees, the franchise agreement does not even contain suggestions on background screenings or criminal history investigations for applicants seeking employment from the franchisee/independent contractor." 928 S.W.2d at 687. And other Texas courts have reached similar conclusions.[14]

The caselaw of other jurisdictions likewise resoundingly rejects liability against franchisors for intentional misconduct committed by franchisee employees. The Supreme Courts of California and Alabama have rejected liability against franchisors for sexual harassment allegedly committed by franchisee employees. *See*

[14] *See also O'Bryant*, 899 S.W.2d at 272 (rejecting liability on a franchisor for a sexual assault at the premises of a franchisee); *Risner*, 18 S.W.3d at 906–07 (rejecting liability on a franchisor based on a franchisee employee spraying pepper spray); *Richards v. Domino's Pizza, Inc.*, No. 05-96-0024-CV, 1997 WL 644867, at *2 (Tex. App.—Dallas Oct. 21, 1997, pet. denied) (denying liability against a franchisor for injuries sustained during the robbery of a pizza deliveryman); *Ely v. Gen. Motors Corp.*, 927 S.W.2d 774, 778 (Tex. App.—Texarkana 1996, writ denied) (rejecting liability on a car manufacturer for a death caused by the employee of a dealership).

Patterson, 333 P.3d at 743; *Kennedy*, 857 So.2d at 77. In *Kerl*, the Wisconsin Supreme Court foreclosed liability against Arby's for a shooting committed by a franchisee employee. 682 N.W.2d at 342. The *Kerl* decision rightly noted the franchise agreement did "not establish that Arby's controlled or had the right to control [the franchisee's] hiring and supervision of employees, which is the aspect of [the franchisee's] business that is alleged to have caused the plaintiffs' harm." *Id.* In *VanDeMark*, the New Hampshire Supreme Court rejected liability on McDonald's for an assault at a franchise store. 904 A.2d at 631–634. And in *Wu*, a seminal decision in franchise law, the court rejected liability on Dunkin' Donuts for a sexual assault on a franchisee employee allegedly caused by inadequate security measures at a store, despite evidence Dunkin' Donuts knew of prior robberies there. 105 F. Supp. 2d at 91–94. The examples could go on and on.[15]

[15] *See, e.g.*, *Folsom*, 958 P.2d at 309 (rejecting liability on Burger King for the murder for two franchisee employees); *Hoffnagle*, 522 N.W.2d at 814–15 (rejecting liability on McDonald's for an assault against a franchisee employee); *Ciup*, 928 P.2d at 268 (rejecting liability on Chevron for an assault at a gas station); *N.T. v. Taco Bell Corp.*, 411 F. Supp. 3d 1192, 1197 (D. Kan. Sept. 3, 2019) (dismissing a claim for sexual harassment); *Casey v. Ward*, 211 F. Supp.3d 107, 120 (D.D.C. 2016) (rejecting liability for a death resulting from an assault at a McDonald's); *Bricker v. R & A Pizza, Inc.*, 804 F.Supp.2d 615, 623 (S.D. Ohio 2011) (dismissing sexual harassment claim); *Miles v. Century 21 Real Est. LLC*, No. 05-CV-1088, 2007 WL 92795, at *8 (E.D. Ark. Jan. 11, 2007) (rejecting liability on a franchisor for alleged racial discrimination); *Lind v. Domino's Pizza LLC*, 37 N.E.3d 1, 8 (Mass. App. 2015) (rejecting claim for the murder of a pizza deliveryman); *Parmenter v. J & B Enters., Inc.*, 99 So. 3d 207, 213-14 (Miss. App. 2012) (rejecting liability for an assault committed by a franchisee's employee); *Allen v. Choice Hotels Int'l*, 942 So.2d 817, 822–23 (Miss. App. 2006) (rejecting liability for a death resulting from an assault at a hotel); *Chelkova v. Southland Corp.*, 771 N.E.2d 1100, 1111 (Ill App. 2002) (rejecting liability on a franchisor for a sexual assault); *Bahadirli v. Domino's Pizza*, 873 F. Supp. 1528, 1527 (M.D. Ala. 1995) (rejecting a discrimination claim); *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180, 182–83 (Ind. App. 1997) (rejecting liability for a rape and murder); *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (N.C. App. 1987) (rejecting liability for an assault).

Plaintiffs cannot wield negligence claims to subvert the allocation of responsibility in franchise agreements. The "weight of authority construes franchisor liability narrowly, finding that absent a showing of actual control over the [at-issue] measures employed by the franchisee, franchisors have no legal duty in such cases." *Wu*, 105 F. Supp. 2d at 90. "The contract-based operational division that otherwise exists between the franchisor and the franchisee would be violated by holding the franchisor accountable for misdeeds committed by employees who are under the direct supervision of the franchisee, and over whom the franchisor has no contractual or operational control." *Patterson*, 333 P.3d at 726. Nor does any compelling public policy justify liability on franchisors that "could not have prevented the misconduct and corrected its effects." *Id.* at 739; *see Hous. Area Safety Council, Inc. v. Mendez*, 671 S.W.3d 580, 583 (Tex. 2023) (consideration of "whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm" bears on a legal duty (quotation omitted)).

Unless sufficient evidence supports that the franchisor exercised actual control over the specific instrumentality that allegedly caused the injury, there is no legal duty on a franchisor. And because there is no such evidence in this case, the court of appeals wrongly held Massage Heights liable.

V. The court of appeals' decision has injected unwarranted uncertainty in an enormous sector of the Texas economy.

By failing to apply the long-time instrumentality rule, on which franchisors have depended in Texas for decades, the court of appeals' decision has sent shockwaves of uncertainty through the Texas franchise industry. By the court of

appeals' holding, Texas franchisors would be unable to commit daily business decisions to franchisees without the looming risk of tort liability, and the franchise model would thus lose its primary benefit: appropriate respect for the individual business owners balanced with protecting the interests of all franchisees through preservation of the franchise system's brand reputation and consumer loyalty. Franchisors would then face an unenviable decision between exerting control over the daily business activities of tens, hundreds, or even thousands of franchises—or not, and risking liability. Either way, the model would become less efficient. Litigation costs and administrative drag would foreseeably result in increased franchise royalties and, therefore, higher prices and lower employment at Texas franchise businesses.

Considering the scale of the franchising industry, this issue warrants the Court's valuable attention. The "economic effects of franchising are profound." *Patterson*, 333 P.3d at 733. Nationally, franchising "employs millions of people, carries payrolls in the billions of dollars, and generates trillions of dollars in total sales." *Id.*[16] As to Texas specifically, in 2023 alone, franchise businesses employed over 860,000 Texans and generated more than 84 billion dollars in revenue. 2024 Franchising Economic Outlook, at pp.vii, xi, link; *see also id.* at 14 ("Texas remains the top state for franchising for the third year in a row.").

[16] *See also* Kaufmann, *A Franchisor Is Not the Employer*, 34 Franchise L. J. at 452 ("[F]ranchising not only entirely dominates certain industries—such as guest lodging, real estate brokerage, quick-service restaurants, vehicle repair, tax preparation, lawn care, pest control, and convenience stores—but has propelled itself to the forefront of not only the American economy but, increasingly, the global economy as well.").

Finally, no one should lose sight of the devastating effect of the court of appeals' reasoning on the job prospects for Texans with non-violent criminal histories. The court of appeals held that sexual assault was "a foreseeable risk" of hiring someone with dated convictions for non-violent crimes. Op.11. If the rule is that the mere fact of a non-violent criminal conviction will subject employers (and franchisors) to liability for otherwise unforeseeable intentional torts, then all Texans with such histories may find employment increasingly difficult to come by. That would adversely affect not only the Texas workforce, but also the daily lives and families of those individuals. One terrible occurrence, however odious, should not ruin employment opportunities for millions of Texans.

The Court should step in and fix the court of appeals' costly error.

CONCLUSION

Respectfully, and on behalf of the franchise industry, the International Franchise Association urges the Court to grant review and reverse.

Respectfully submitted,

/s/ Mark Trachtenberg
Mark Trachtenberg
State Bar No. 24008169
mark.trachtenberg@haynesboone.com
Ryan Philip Pitts
State Bar No. 24105941
ryan.pitts@haynesboone.com
HAYNES AND BOONE, LLP
1221 McKinney Street, Suite 4000
Houston, Texas 77010-2007
Telephone: (713) 547-2000
Facsimile: (713) 547-2600

Deborah Coldwell
State Bar No. 04535300
deborah.coldwell@haynesboone.com
Maral Kilejian
State Bar No. 24060093
maral.kilejian@haynesboone.com
Sam Mallick
Star Bar No. 24109501
sam.mallick@haynesboone.com
HAYNES AND BOONE, LLP
2801 N. Harwood Street, Suite 2300
Dallas, Texas 75201
Telephone: (214) 651-5000
Facsimile: (214) 651-5940

Counsel for Amici Curiae,
International Franchise Association

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because, according to Microsoft Word's word-count function, it contains 7,048 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

2. This brief complies with the requirements of Texas Rule of Appellate Procedure 9.4(e) because it is set in a proportionally spaced typeface—Equity A—with 14-point font in the text and 12-point font in footnotes. It was prepared using Microsoft Word.

/s/ Mark Trachtenberg
Mark Trachtenberg

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record via electronic service in accordance with the Texas Rules of Appellate Procedure on December 10, 2024.

/s/ Mark Trachtenberg
Mark Trachtenberg