IN THE

SUPREME COURT OF INDIANA

No. _____

WALGREEN CO.,	}	**Court of Appeals No. 49A02-1311-CT-950**
Appellant (Defendant Below),	}	**Appeal from the Marion Superior Court**
v.	}	
ABIGAIL V. HINCHY,	}	**Trial Court No. 49D10-1108-CT-29165**
Appellee (Plaintiff Below).	}	**The Honorable David J. Dreyer, Judge**

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDIANA CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANT'S PETITION TO TRANSFER

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INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation, representing the interests of 300,000 direct members, and indirectly representing the interests of over 3,000,000 businesses and professional organizations of every size, in every industry sector, and from every region of the country, including Indiana. Over 96 percent of the U.S. Chamber's members are small businesses with 100 or fewer employees. The U.S. Chamber advocates on issues of vital concern to America's business community, and regularly participates as *amicus curiae* before courts throughout the nation.

The Indiana Chamber of Commerce ("Indiana Chamber") has served Indiana's business community since 1922, now serving over 26,000 members and customers annually. The Indiana Chamber advocates on behalf of its members in matters affecting Indiana's business climate, including in the areas of employee relations, human resources, good government, state taxes, economic development and the concerns of small business owners.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting such businesses. The National Federation of Independent Business ("NFIB") is the country's leading small business association, representing members in Washington, D.C. and all 50 State capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB's 350,000 member businesses nationwide span the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The typical NFIB

member employs 10 people and reports gross sales of about $500,000 a year. NFIB's membership is a reflection of American small business.

The National Association of Manufacturers ("NAM") is the nation's largest manufacturing association, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs over 12,000,000 men and women; contributes roughly $2.1 trillion to the U.S. economy annually; has the largest economic impact of any major sector; and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to economic growth.

The U.S. Chamber, Indiana Chamber, NFIB Legal Center and NAM ("Business *Amici*") have vital interests in legal and policy developments that affect American businesses, including the countless business enterprises in Indiana and throughout the nation whose interests they represent. For the reasons set forth in this Brief, Business *Amici* believe the interests of Indiana businesses will be significantly and adversely affected by the Court of Appeals decision below.

SUMMARY OF ARGUMENT

In this case, the Court of Appeals upheld a $1.4 million damages award against Walgreen Co. based on *respondeat superior*. *Walgreen Co. v. Hinchy*, 21 N.E.3d 99 (Ind. Ct. App. 2014), *reh'g denied*, ___ N.E.3d ___, 2015 WL 207955 (Jan. 15, 2015) ["Decision"]. The Decision affirmed that award even though the employee wrongdoing was a personal, unauthorized, independent course of conduct, driven entirely by personal motives, that (as shown in Walgreen's Petition to Transfer) concededly was neither intended to nor did further any business interest of Walgreen's in any way.

As Business *Amici* explain herein, the Decision is mistaken on the law and misguided as a matter of policy. If allowed to stand, it will undermine Indiana economic development, job growth and expansion of opportunity, in conflict with the missions of all Business *Amici*.

On the law, the Decision significantly and erroneously alters Indiana *respondeat superior* requirements by allowing strict, vicarious liability for personal employee misconduct not even intended to further employer interests. The expansion of employer liability permitted by the trial court, now blessed by the reported appellate Decision, makes Indiana an outlier in *respondeat superior* jurisprudence.

The Decision also contravenes the "enterprise liability" policy on which the *respondeat superior* is grounded, and threatens significant harm to Hoosier businesses large and small, including the thousands who are members of Business *Amici*. Strict liability for acts outside employer control, and unrelated to any interest of the enterprise, exposes entities doing business in Indiana to large, unpredictable costs, such as the $1.4 million award here. This artificially and arbitrarily increases the costs and risks of doing business in Indiana, and thus discourages economic development and job growth (whether by formation of new enterprises, expansion of existing ones, or relocation of businesses from other States to this one). It also harms Hoosier consumers, as increased costs are inevitably passed through to business customers.

The vital privacy issues presented in this particular case do not justify the Decision's disregard of well-established *respondeat superior* law and policy. Companies represented by Business *Amici* take seriously their obligations to safeguard their customers' privacy, and have myriad ethical, legal and competitive incentives to take reasonable steps to do so. But the Decision imposes strict, vicarious liability on businesses *in spite of* their taking prudent measures to guard the integrity of customers' private information—and does so even when an employee

acts in ways that violate and undermine the employer's privacy protection efforts. This advances no privacy or other public policy interest.

Business *Amici* respectfully submit that the Decision's seriously mistaken law and misguided policy, in an area of vital importance to Hoosier businesses and their customers, warrant transfer and correction by this Court.

ARUGMENT

I. Imposing Vicarious Liability Under *Respondeat Superior* Is Permitted Only If An Employee's Wrongful Acts Were Undertaken To Further The Interests Of The Employer.

Proper application of legal principles is guided by the purposes and policies they serve. The fundamental purpose and policy served by *respondeat superior* is to ensure that an employer bears the costs of conducting its business, which include costs attributable to actions by an employee undertaken on behalf of the business. The requirement that the employee's actions must have been "in furtherance of" the business—which the panel below disregarded—thus goes to the core of the doctrine itself. That is why it has been one of the doctrine's central elements since development of the "scope of employment" inquiry that governs today's *respondeat superior* jurisprudence.

From an historical perspective, "scope of employment" is a comparatively modern feature of *respondeat superior* analysis. As Justice Holmes showed, the principle that a master may be liable for the act of a servant traces to the Romans; and in English law, "[t]he maxim *respondeat superior* has been applied to the torts of inferior officers from the time of Edward I" [r. 1272-1307]. O.W. Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 348-51, 356 (1891) ["Holmes"].

But through most of its history, as Professor Wigmore explained, the doctrine rested on the concepts that the servant or employee was subject to the "Command" and (later) the "Implied Command" of the master or employer, and was justified by "a fiction or other form of words," such as "[t]he master undertakes for the servant's care," or "the act of the servant is the act of the master," or "*qui facit per alium facit per se*" ("He who acts through another acts by or for himself"). J.H. Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 HARV. L. REV. 383, 384-99 (1894) (internal quotation marks omitted) ["Wigmore"]; definition of Latin maxim from BALLENTINE'S LAW DICT. 1042 (3d ed. 1969).

Towards the end of the eighteenth century, however, "the Command test disappears as a regular one, and 'scope of employment' and its congeners come into full control." Wigmore, at 399-400. As Professor Wigmore's case and treatise quotations illustrate, a necessary aspect of "scope of employment" analysis is whether the acts of the employee or servant were indeed undertaken on behalf of or in furtherance of the employer's or master's business. For example:

- "The maxim applies here *respondeat superior*. ... The defendants are responsible for the acts of their servants *in those things that respect his* [*sic*] *duty under them*."
- "If a servant *quits sight of the object for which he is employed*, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him."
- "No wilful [*sic*] trespass of a servant, *not arising out of the execution of his master's orders or employment*, will make him responsible."

Id. at 401-02 (emphasis added; ellipsis in original; citations & internal quotation marks omitted). As Professor Wigmore summarized, "From this time [*circa* 1826] the general test is phrased as

'scope' or 'course' of 'employment,' 'scope of authority,' or, in later times, *more carefully*, '*in furtherance of and within the scope of the business with which he was trusted.*'" *Id.* at 402 (emphasis added; citations omitted).

The key *respondeat superior* question described by Professor Wigmore remains the dispositive inquiry. As the leading treatise stated 90 years later, "the master is held liable for any intentional tort committed by the servant where its purpose, however misguided, is wholly or in part *to further the master's business.*" W. PAGE KEATON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 505 (5th ed.1984) (emphasis added) ["PROSSER"]. "But if [the servant] acts from *purely personal* motives"—*e.g.*, "because of *a quarrel over his wife which is in no way connected with the employer's interests*"—then the servant "is considered in the ordinary case to have departed from his employment, and the master is not liable." *Id.* at 506 (emphasis added).

The domestic dispute illustration offered by Professors Prosser and Keeton is directly comparable to the circumstances in the case at bar. More important, their treatise also correctly states the underlying purpose and policy of *respondeat superior* doctrine, which should govern its application *vel non* in any case: "The losses caused by the torts of employees, which as a practical matter are sure to occur *in the conduct of the employer's enterprise*, are placed upon that enterprise itself, as a required cost of doing business." *Id.* § 69, at 500 (emphasis added).

Indiana cases recognize *respondeat superior*'s "enterprise liability" policy foundation. "The purpose of the doctrine is to properly allocate the economic costs of doing business." *Shelby v. Truck. & Bus. Group Div. of Gen. Motors Corp.* 533 N.E.2d 1296, 1298 (Ind. Ct. App. 1989). "A business benefits from its employees performing their work within the scope of their employment. Thus, when another party is injured as the result of an employee performing work within the scope of his employment, the doctrine of *respondeat superior* requires that the

business pay the attendant costs which accompany the benefit." *Id.* (citing PROSSER § 69, at 500); *see Stump v. Ind. Equip. Co.*, 601 N.E.2d 398, 403 (Ind. Ct. App. 1992) ("doctrine has its origin in public policy and justice," based on principle "'that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it'") (citation omitted); *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 179-82, 348 S.E.2d 617, 621-23 (1986) (detailing history and development of doctrine from early "master commanded the servant" origins to modern jurisprudence, under which "*respondeat superior* is now generally considered to rest on a concept of enterprise liability").

This underlying policy and purpose are why American courts repeatedly hold that an employee's act must have been "in furtherance" of the employer's business or enterprise before *respondeat superior* liability may be imposed. Examples from just the past three years include:

- *Belmont v. MB Investment Partners*, 708 F.3d 470, 489 (3d Cir. 2013) (recovery "foreclosed" when wrongful acts are "outside the scope of employment or not in furtherance of the principal's business") (Pennsylvania law; citations & internal quotation marks omitted).
- *Liscar v. Pediatric Acute Care of Columbus, P.C.*, 2014 WL 1393110, at *3 (M.D. Ga. Apr. 9, 2014) (*respondeat superior* claims "clearly fail because [employee's] tortious conduct was not done in furtherance of his employment") (Georgia law).
- *Nathans v. Offerman*, 922 F. Supp. 2d 271, 275 (D. Conn. 2013) ("employee must be acting within the scope of his employment and in furtherance of the employer's business;" "it must be the affairs of the principal, and not solely the affairs of the agent, which are being furthered in order for the doctrine to apply") (Connecticut law; citations & internal quotation marks omitted).

- *Heritage Christian Sch., Inc. v. ING N. Am. Ins. Corp.*, 851 F. Supp. 2d 1154, 1158 (E.D. Wis. 2012) ("When the employee does not act in furtherance of the employer's goals but is on a 'frolic of his own,' the employer is not liable under *respondeat superior*") (Wisconsin law; citation omitted).
- *Stevens v. Sodexo, Inc.*, 846 F. Supp. 2d 119, 129 (D.D.C. 2012) (actions by employee "in virtue of his employment and in furtherance of its ends [are] within the scope of his employment;" when "employee's act is a marked and decided departure from his master's business, then the employer is no longer responsible for that employee's independent trespass done in the furtherance of his own ends") (District of Columbia law; citation & internal quotation marks omitted).
- *Perry v. City of Norman*, ___ P.3d ___, 2014 WL 7177263, at *3 (Okla. Dec. 16, 2014) (under *respondeat superior*, "a principal or employer is generally held liable for the wilful [*sic*] acts of an agent or employee acting within the scope of the employment in furtherance of assigned duties") (citation & internal quotation marks omitted).
- *Hass v. Wentzlaff*, 816 N.W.2d 96, 103-04 (S.D. 2012) ("Were the [agent's] acts in furtherance of his employment?" is an "essential focus of inquiry;" if agent "acts with an intention to serve solely his own interests, this act is not within the scope of employment, and [the principal] may not be held liable for it") (citations & internal quotation marks omitted; alterations in original).
- *Inman v. Dominguez*, 371 S.W.3d 921, 925 (Mo. Ct. App. 2012) (when employee's acts are "not in furtherance of the employer's business, but to gratify the employee's feelings of resentment or revenge, the conduct is outside the scope and course of the

employment") (citation & internal quotation marks omitted).

- *Mayo v. N.Y. City Transit Auth.*, ___ N.Y.S.2d ___, 2015 WL 161527, at *1 (N.Y. App. Div. Jan. 14, 2015) (no *respondeat superior* liability when employee's act "was not in furtherance of the [employer]'s business and was a departure from the scope of his employment, having been committed for wholly personal motives").

Such cases comport with this Court's jurisprudence, including its holding that "'[a]n employee's act is *not* within the scope of employment when it occurs within *an independent course of conduct* not intended by the employee *to serve any purpose of the employer*.'" *Barnett v. Clark*, 889 N.E.2d 281, 284 (Ind. 2008) (quoting RESTATEMENT (THIRD) OF AGENCY ["RESTATEMENT"] § 7.07(2) (2006) (emphasis added by Court). As shown in Walgreen's Petition, every *respondeat superior* decision by this Court in the past quarter century recognizes that for an employee's wrongful act to fall within the "scope of his employment," it must have been done "to an appreciable extent, to further his employer's business." *E.g., Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450, 453 (Ind. 2000); *accord Warner Trucking, Inc. v. Carolina Cas. Ins. Co.*, 686 N.E.2d 102, 105 (Ind. 1997) ("critical inquiry is ... whether the employee is in the service of the employer;" employee's wrongful act is "within the scope of his employment if his purpose was, to an appreciable extent, to further his employer's business") (citation & internal quotation marks omitted).

II. The Decision's Disregard Of *Respondeat Superior*'s Core Requirement That An Employee's Acts Must Have Been Undertaken To Further The Interests Of The Employer Is Seriously Mistaken As A Matter Of Law And Policy.

The Decision disregarded this Court's "critical inquiry" as to whether an employee's wrongful acts intended "to further his employer's business." The panel quoted *Barnett*'s holding that actions "not intended by the employee *to serve any purpose of the employer*" will not

support *respondeat superior* liability. Decision, 21 N.E.3d at 107. But it then effectively treated the requirement that an employee's act must have been "to further his employer's business" as merely an *alternative* basis for such liability, which (in the panel's view) may also be imposed if the acts were simply "of the same general nature as those authorized, or incidental to the actions that were authorized" as part of the employment. *Id.* at 108.

This is a dramatic departure from baseline *respondeat superior* law. This is illustrated by standard law school examples of "frolic and detour," such as a deliveryman who causes a traffic accident after leaving his route to make a purely personal delivery for purely personal reasons. Law students are correctly taught that this is outside the scope of the driver's employment—in this Court's formulations, because the personal delivery detour did not "further his employer's business" and was not intended "to serve any purpose of the employer"—thus precluding *respondeat superior* liability. Yet under the Decision below, the employer *would* be liable. The driver's personal delivery, while indeed purely personal, was certainly "of the same general nature" as his "authorized" deliveries; and the detour, occurring in the midst of his delivery activities for his employer, was plainly "incidental to the actions that were authorized."

This is insupportable under this Court's cases, and under the policy and purpose of the *respondeat superior* doctrine itself.

As shown, *respondeat superior* imposes vicarious liability on an employer for particular types of employee actions—those intended to further the employer's business or enterprise, and thus within the employee's scope of employment. The doctrine does not impose strict liability on an employer for any employee actions, including those that (as in the case at bar) were undertaken for purely personal motives and further no employer purpose whatever. Vicarious liability for acts that further the employer's business comports with the doctrine's "enterprise

liability" policy foundation. Strict liability for employee personal actions that further no purpose of the employer's enterprise—as the Decision below permits—does not.

That is why an employee, to be acting "'within the scope of employment,'" must be "'performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.'" *Barnett*, 889 N.E.2d at 284 (quoting RESTATEMENT § 7.07(2)). By contrast, wrongful employee acts that are "for the sole purpose of furthering the employee's interests or those of a third party ... will often lie beyond the employer's effective control"—even if (as here) those acts involve "work-related conduct." RESTATEMENT § 7.07 cmt. b; *see Konkle v. Henson*, 670 N.E.2d 450, 457 (Ind. Ct. App. 1996) ("simply because an act could not have occurred without access to the employer's facilities does not bring it within the scope of employment"). Further, "when an employee's tortious conduct is outside the range of activity that an employer may control, subjecting the employer to liability would not provide incentives for the employer to take measures to reduce the incidence of such tortious conduct." RESTATEMENT § 7.07 cmt. b.

Beyond serving no policy purpose, untethering *respondeat superior* from its enterprise liability moorings—which require that wrongful employee acts must have been undertaken to further the enterprise's interests—will harm Indiana businesses and consumers. Any business anywhere must take into account costs properly associated with carrying out the enterprise. But if the Decision stands, Hoosier business will face the added risk of huge, unpredictable costs (such as the $1.4 million award upheld below) based on purely personal employee misconduct that has no bearing on the enterprise and does nothing to advance its objectives. This is also a disincentive for out-of-State businesses to relocate to or open branches or outlets in Indiana.

These unpredictable and unavoidable costs, unrelated to the goods or services the enterprise provides, will be borne by Hoosier businesses and, ultimately, their consumers.

This Court's granting transfer and restoring established *respondeat superior* principles and requirements will not eliminate a business's responsibility for its *own* negligence (if any) in hiring or supervising a given employee who misuses as job to engage in personally motivated misconduct. "A crucial difference exists between liability as master (*Respondeat superior*) and direct liability." *McClelland v. Facteau*, 610 F.2d 693, 695 (10th Cir. 1979). "*Respondeat superior* is a doctrine of vicarious liability based upon public policy[—]the notion that the person who benefits by the acts of the servant must pay for wrongs committed by the servant; the one held liable as master need not be at fault in any way." *Id.* (citing Holmes); *see* RESTATEMENT § 7.07 cmt. b ("*respondeat superior* subjects an employer to vicarious liability for employee torts committed within the scope of employment, distinct from whether the employer is subject to direct liability").

"Under direct liability," however, a plaintiff may seek to show that the employer itself "breached a duty to plaintiff which was the proximate cause of the injury." *McClelland*, 610 F.2d at 695; *see* RESTATEMENT § 7.05(1) ("A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent"). Thus, "negligent supervision provides a remedy for injuries to third parties who would otherwise be foreclosed from recovery under the principal-agent doctrine of *respondeat superior* because the wrongful acts of employees in these cases are likely to be outside the scope of employment or not in furtherance of the principal's business." *Belmont*, 708 F.3d at 489.

But in the absence of employer negligence or other fault, vicarious employer liability for wrongful employee actions is sensible only when such acts were intended to further the interests of the enterprise. Assessing no-fault liability for purely personal employee misconduct, undertaken for purely personal motives, makes no sense under *respondeat superior* policy. Nor is it fair to the Hoosier business and consumers who will be harmed by the Decision's allowing this to occur.

CONCLUSION

The Court should grant transfer and reverse the trial court judgment against Walgreen.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44(F), I verify that the foregoing Brief (exclusive of Appellate Rule 44(C) items) contains no more than 4,200 words, as determined by the word processing system used to prepare the Brief (Microsoft Word 2010).

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CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24, I certify that on February 16, 2015 I caused copies of the foregoing Brief to be served upon the following by United States mail, first-class postage prepaid:

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