NO. 89534-1

SUPREME COURT OF WASHINGTON

CAROLINA BECERRA BECERRA, JULIO CESAR MARTINEZ MARTINEZ, ORLANDO VENTURA REYES, ALMA A. BECERRA, and ADELENE MENDOZA SOLORIO,

Respondents/Plaintiffs,

v.

EXPERT JANITORIAL, LLC, and FRED MEYER STORES, INC.,

Petitioners/Defendants.

AMICI CURIAE BRIEF

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Faith Action Network
Latina/o Bar Association of Washington
National Employment Law Project
Service Employees International Union Local 6
Washington Employment Lawyers Association
Washington State Labor Council, AFL-CIO

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I. INTEREST OF AMICI CURIAE

This amicus curiae brief is prompted by deep concern about the difficulties low-wage subcontracted workers encounter when they seek to enforce their labor rights. Through their experiences as advocates for workers and as organizing groups, *amici* have gained extensive, on-the-ground knowledge of the structures of subcontracting relationships, the janitorial industry, and the effects of subcontracting on workers. Centro de Ayuda Solidaria a los Amigos (CASA) Latina, Faith Action Network, the National Employment Law Project, the Service Employees International Union-Local 6, and the Washington State Labor Council, AFL-CIO are organizations committed to proper enforcement of labor standards for the protection of all Washington workers. *See* Amicus Motion. The Latino/a Bar Association is an organization of lawyers focused on the impacts of Washington's legal system on the Latino community. *Id.* The Washington Employment Lawyers Association (WELA) is an organization of lawyers licensed to practice law in Washington and devoted as well to the protection of employee rights. *Id.*

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The growing abuse of subcontracting across many industries deprives workers of minimum standards guaranteed in an employment relationship, including the right to minimum wage. Subcontracting in the janitorial industry often follows the pattern in this case: a host employer subcontracts some or all of its workforce while retaining a high degree of control over the work of the workers at the bottom of the subcontracting

chain, who are economically dependent on the host employer. At the same time, the host employer attempts to pass off liability to a first or second-tier set of undercapitalized subcontractors who have nothing to lose by violating labor laws. Immigrant janitorial workers at the bottom of the subcontracting chain, like the janitors in this case, are especially vulnerable to exploitation.

The federal Fair Labor Standards Act (FLSA), on which the Washington Minimum Wage Act (MWA) is based, was designed to address these subcontracting schemes. The history of the FLSA shows that the drafters intended to place liability with the entities that are in the best position to know of and to prevent violations of the minimum wage law. To that end, Congress (and later the Washington legislature) created broad definitions of "employ," "employee," and "employer" that extend beyond the common law definitions of those words. If Fred Meyer and Expert Janitorial are not held accountable for abuses that each can observe and prevent, host companies will be able to thwart the purposes of the FLSA and the MWA and have it both ways: retain oversight of workers who labor on their premises or in their business, but distance themselves from widespread abuse of wage and hour laws. And low-wage workers will be left without meaningful remedies for wage theft.

Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). This Court has mandated that the MWA be "liberally construed in favor of the employee." *Bostain v.*

Food Express, Inc., 159 Wn.2d 700, 712, 153 P.3d 846 (2007). The "joint employer" test that most closely follows the history of the FLSA and this Court's command to liberally construe the MWA for the protection of employees is one that looks at "the circumstances of the whole activity," *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947), to determine which entities are in a position to know of and prevent violations of the law.

III. ARGUMENT

A. The Modern-Day Subcontracted Workforce Has Transformed Employment Relationships

Our economy is in the midst of a major restructuring in the way business operates, particularly in fast-growing service industries. As a result of outsourcing to subcontractors, the businesses that individuals "work for" are increasingly not the ones by which they are technically "employed"—a distinction that can erode labor standards and dilute accountability.

During much of the twentieth century, the critical employment relationship was between large businesses and workers in major sectors of the economy. Large employers—General Motors, US Steel, and Alcoa—dominated major sectors of the manufacturing economy. While the service sector operated at a more local level, the national players that

emerged—Marriott in hotels, Macy's and Sears in retail—similarly employed thousands of workers.[1]

During the twenty-first century, this model is disappearing in many industries. Large businesses with national reputations that operate at the "top" of their industries no longer employ large numbers of workers.[2] While they continue to dominate the private sector landscape and play critical roles in shaping competition in their markets, they have shifted entire categories of jobs to complicated networks of subcontractors. While "contracting out" is not per se harmful to workers, it often has devastating effects on wages and working conditions for low-wage workers and often shields culpable employers from liability for violations of wage and hour laws.

A widely recognizable form of outsourcing is one in which an employer inserts one or more intermediaries between itself and its workers, with an intermediary designated as the workers' sole "employer." In the janitorial industry in particular, it is common to find multiple layers of subcontractors. The first-tier contractor may be a large national company specializing in a particular industry. First-tier contractors, like Expert Janitorial in this case, may subcontract out their core work to a second tier of often-undercapitalized subcontractors.

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[1] David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 THE ECON. & LAB. REL. REV. 33, 36 (2011), *available at* http://web.law.columbia.edu/sites/default/files/microsites/career-services/David%20Weil%20Enforcing%20Labour%20Standards%20in%20Fissured%20Workplaces.pdf.

[2] *Id.*

As discussed more fully below, lower-level business contractors pay lower wages, seldom provide benefits, and frequently subject their workforce to conditions that violate wage and overtime, health and safety, and other workplace standards. There is a close correlation between contracted occupations and those with the highest numbers of workplace violations.[3] These poor wages and violations of workplace standards are not an inevitable result of the nature of the jobs. Instead, they arise directly from the model of subcontracting pursued in this industry.[4]

Second-tier janitorial contractors operate in an environment of cut-throat competition, competing head-to-head with other contractors for "take it or leave it" contracts. More intense competition creates pressure to lower costs, particularly the most sizeable cost and the one most easily controlled: labor. Because they themselves are paid so little, lower-tier contractors have little ability to comply with wage and hour laws. Because they have little capital investment (and are often insolvent), there is little incentive for compliance. These contractors have an incentive to seek out and hire the most vulnerable workforce available: often new immigrant workers who are afraid to come forward to complain of unfair treatment.

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[3] *See* NATIONAL EMPLOYMENT LAW PROJECT, HOLDING THE WAGE FLOOR: ENFORCEMENT OF WAGE AND HOUR STANDARDS FOR LOW-WAGE WORKERS IN AN ERA OF GOVERNMENT INFLATION AND EMPLOYER UNACCOUNTABILITY (2006), *available at* http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf (describing construction, home care, and janitorial, all sectors with high independent contractor abuses and high labor standards violation rates).

[4] Weil, *supra* note 1.

At the bottom of the employment chain, subcontracted workers may, as in the present case, be misclassified as "independent contractors." Mislabeling the workers as independent businesses means that the second-tier contractors save on labor costs, including overtime pay, workers' compensation premiums, insurance costs, and payroll taxes. For workers, it means the loss of protections under wage and hour, discrimination, and health and safety laws.[5] Workers at the bottom of the subcontracting chain are often victims of wage theft with no remedies against their insolvent, nominal employers.

B. Subcontracting in the Janitorial Industry

1. Characteristics and Trends

Nationally, the janitorial services industry generates approximately $47.2 billion in revenue per year, with revenues expected to grow in the current economic recovery.[6] As of 2012, there were more than two million janitorial workers in the United States.[7] Through the 1970s, the industry's workforce was composed of both in-house janitors and contactors. Restructuring in the 1980s resulted in a trend toward the use of contractors in both the public and private sector. In the past two decades, the outsourcing or subcontracting of janitorial services has grown

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[5] *See* Rebecca Smith et al., *The Big Rig: Poverty, Pollution and the Misclassification of Truck Drivers at America's Ports*, (Nat'l Emp't Law Project & Change to Win, 2010), http://www.nelp.org/page/-/Justice/PovertyPollutionandMisclassification.pdf?nocdn=1.
[6] IBISWORLD, JANITORIAL SERVICES IN THE U.S.: MARKET RESEARCH REPORT (2012), *available at* http://www.janitorialatoz.com/articles/Janitorial-Services-in-the-US.pdf.
[7] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Occupational Employment and Wages, May 2013: Janitors and Cleaners*, http://www.bls.gov/oes/current/oes372011.htm#ind (last visited April 24, 2014).

dramatically, now representing 37 percent of the industry.[8] In 2007, there were over 50,000 janitorial firms in the United States.[9] The result was a downgrading of working conditions for both sectors.[10]

Today, many janitors who clean retail stores, restaurants, hospitals, and offices are not hired directly by the entity for whom they clean but, instead, ostensibly work for a subcontracted entity. Under the model of subcontracted labor in the industry, a host business requiring janitorial services enters into a contract with a janitorial company to provide cleaning services at the host business's facilities. The janitorial company does not directly provide cleaning services; rather, it hires second-tier subcontractor companies to provide cleaning services at a lower price.

The second-tier subcontractors then provide the janitors to clean the host business's facilities. Second-tier subcontractors are able to make a marginal profit by engaging in unlawful cost-saving strategies, including misclassifying janitors as independent contractors or selling "franchise" licenses to unwitting workers. Second-tier contractors also save costs by evading payments for payroll taxes and workers' compensation premiums

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[8] Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 ILRReview 287 (2010), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1521&context=ilrreview; Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research* 17 (Inst. for Research on Labor & Emp't, Working Paper No. 100-14, 2014), *available* at http://irle.berkeley.edu/workingpapers/100-14.pdf.

[9] DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 133 (2014).

[10] Christian Zlolniksi, *The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley*, 103 Yale L.J. 2305, 2311-22 (1994).

and avoiding compliance with minimum wage and overtime requirements.[11]

The janitorial service industry has a growing workforce that disproportionately employs people of color and immigrant workers. More than half of janitorial workers are people of color—18.4 percent African American; 3.9 percent Asian; 30.3 percent Hispanic.[12] In a recent survey of Washington state janitors, 64 of 76 non-union janitors interviewed came from Mexico, and 69 percent spoke little or no English.[13]

2. Consequences for Workers

Poor working conditions are endemic to the janitorial industry. Janitorial workers typically work lengthy hours because of low industry wages. In 2012, the national median hourly wage for janitors and building cleaners was $10.73 per hour.[14] One academic study has found that janitorial workers have suffered a four to seven-percent wage penalty as a

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[11] David Weil, *Market Structure and Compliance: Why Janitorial Franchising Leads to Labor Standards Problems* (Int'l Soc'y of Franchising Conference, Working Paper, 2011), *available at* http://www.huizenga.nova.edu/ExecEd/ISOF/abstracts/abstracts2011/20_Weil.cfm; Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, N.Y. TIMES, Jul. 13, 2005, *available at* http://www.nytimes.com/2005/07/13/national/13janitor.html?pagewanted=all&_r=0.

[12] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Labor Force Statistics from the Current Population Survey*, http://www.bls.gov/cps/cpsaat11.htm (last visited April 24, 2014).

[13] NOAH S. SEIXAS ET AL., DEP'T OF ENVTL. & OCCUPATIONAL HEALTH SCI., UNIV. OF WASH., JANITORS WORKLOAD AND HEALTH AND SAFETY STUDY (August 2013) (on file with authors).

[14] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Occupational Outlook Handbook, Janitors and Building Cleaners* (2013), http://www.bls.gov/ooh/building-and-grounds-cleaning/janitors-and-building-cleaners.htm (last visited April 24, 2014).

result of subcontracting in the industry.[15] Another found in-house janitors earned 15 percent more than contracted janitors.[16] This occurred, at least in part, because the higher wages of better-compensated employees within a larger workplace placed upward pressure on the wages of the in-house janitors.[17] Once janitors were moved outside company walls, their wages fell to levels prevailing among the harshly competitive cleaning contractors.[18]

The industry is marked by significantly high rates of non-compliance with minimum wage and overtime laws and other basic labor protections. A recent academic survey of low-wage workers found that at least 26 percent of building service and ground service workers had not received minimum wage in the previous work week, 76 percent of workers who worked more than 40 hours the previous week had not received overtime pay, and 70 percent of workers who worked outside their shift times the previous week had performed such work off the clock and without pay.[19] Over half did not receive required meal breaks.[20]

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[15] Dube & Kaplan, *supra* note 8, at 287.
[16] Samuel Berlinski, *Wages and Contracting Out: Does the Law of One Price Hold?*, 46 Brit. J. of Indus. Rel. 59 (2008), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8543.2007.00665.x/abstract.
[17] WEIL, *supra* note 9, at 81-82.
[18] WEIL, *supra* note 9, at 95.
[19] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 2-3, 30 (2009), *available at* http://www.unprotectedworkers.org/index.php/broken_laws/index.
[20] *Id.* at 22-23.

C. The FLSA Is Relevant to This Court's Determination of the Proper "Joint Employer" Test Under the MWA

The FLSA sets a national minimum hourly wage for work performed in all businesses engaged in interstate commerce. 29 U.S.C. § 206. The Washington MWA includes parallel provisions that require that "employees" earn no less than our current state minimum wage of $9.32 per hour, along with a premium wage of one-and-a-half times the minimum wage for all hours worked over forty in a workweek. RCW 49.46.020; RCW 49.46.130.

Businesses such as Expert Janitorial and Fred Meyer are responsible for complying with minimum labor standards for all workers they "employ."[21] Under the FLSA, "'[e]mploy' includes to suffer or permit to work." 29 U.S.C. § 203(g). The parallel provision in the MWA also covers all workers an employer "permits" to work, and Washington regulations define "employ" as "to engage, suffer or permit to work." RCW 49.46.010(2); WAC 296-126-002(3).

This Court has repeatedly recognized that "the MWA is based on the Fair Labor Standards Act of 1938." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (internal marks and citations omitted). The Court's "fundamental objective" is "to discern and implement the intent of the legislature." *Anfinson*, 174 Wn.2d

[21] Under FLSA, an "employee" "means any individual employed by an employer," 29 U.S.C. § 203(e)(1), and "employer" "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). Thus, these definitions are not helpful in determining coverage until one knows if a business "employs" an individual and is therefore an "employer."

at 866 (quoting *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011)). By using a definition of "employ" in the MWA that is substantially similar to the definition in the FLSA, the Washington legislature evidenced its "intent to adopt the federal standards in effect at the time" for determining employment relationships—standards that "had decidedly rejected the right-to-control test" found at common law. *Id*. at 869-70.

1. History and Purposes of the FLSA

A review of the history and purpose of the FLSA illustrates it was intended to apply to employers like Fred Meyer and Expert that are in a position to know of and prevent violations of labor standards committed on their premises. The FLSA definition of "employ" emanates from state child labor statutes[22] and encompasses relationships not considered "employment" at common law.[23] In enacting the FLSA, Congress sought to make business owners responsible for child labor standards as well as paying minimum and overtime wages to workers for whom they could easily disclaim responsibility at common law.[24]

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[22] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947); *Nationwide Mut. Ins. Co v. Darden*, 503 U.S. 318, 325-26 (1992).

[23] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) ("This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.").

[24] Brief for the Administrator at 27-29, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (No. 562), 1947 WL 43939 (quoting S. 2475, 75th Cong. § 6(a) (1937)) (noting that the "suffer or permit language of the FLSA" arose from the legislative intent "to prevent the circumvention of the Act or any of its provisions through the use of agents, *independent contractors,* subsidiary or controlled companies, or home or off-premise employees, or by any other means or device"); *see also Walling v. American Needlecrafts*, 139 F.2d 60, 63-64 (6th Cir. 1943).

The "striking breadth"[25] of "to suffer or permit to work" makes it "the broadest definition [of employ] that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting the FLSA's principal sponsor, Senator Hugo Black, S. REP. NO. 884, at 6, 81 CONG. REC. 7657 (1937)).[26] This added breadth in coverage was necessary to accomplish the FLSA's goal to "lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions," *Rutherford Food*, 331 U.S. at 727, by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (quoting Message of the President to Congress, May 24, 1934).

In the FLSA, Congress intended to accomplish the goal of eliminating substandard labor conditions by expanding accountability for violations to include businesses like Fred Meyer that insert contractors between themselves and their laborers. Indeed, employment statutes like the FLSA were "designed to defeat rather than implement contractual arrangements," especially for workers who are "selling nothing but their labor." *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring); *see also Lehigh Valley Coal Co. v.*

[25] *Darden*, 503 U.S. at 326.
[26] *See also Rutherford*, 331 U.S. at 728; *Falk v. Brennan*, 414 U.S. 190, 195 (1973); *Frankel v. Bally, Inc.*, 987 F. 2d 86, 89 (2d Cir. 1993); *American Needlecrafts*, 139 F.2d at 64; *Walling v. Twyeffort, Inc.*, 65 F. Supp. 920, 922 (S.D.N.Y. 1946); *Fleming v. Demeritt Co.*, 56 F. Supp. 376, 381 (D. Vt. 1944).

Yensavage, 218 F. 547, 553 (2d Cir. 1915) (Hand, J.) (noting that employment statutes were meant to "upset the freedom of contract").

2. The Meaning of "To Suffer or Permit To Work" Was Well-Established when Congress Incorporated It in the FLSA

The FLSA's definition of "employ" was meant to impose accountability for upholding statutory standards on businesses beyond the reach of the common law (and commonly understood) definition of employment. Prior use of "suffer or permit to work" in other statutes shows just how broad this definition is.[27]

When Congress incorporated the language into the FLSA in 1938, it already had been applied for decades by state courts to enforce child labor prohibitions.[28] Under the "suffer or permit to work" language in these statutes, business owners could be held accountable when underage children worked or children of working age put in excessive hours, so long as the work was performed in, or in connection with, the owner's business. *See, e.g.*, *People ex rel. Price v. Sheffield Farms-Slawson Farms-Decker Co.*, 167 N.Y.S. 958, 960 (N.Y. App. Div. 1917), *aff'd*, 121 N.E. 474 (N.Y. 1918); *Purtell v. Philadelphia & Reading Coal & Iron Co*., 99 N.E. 899, 902 (Ill. 1912). This was the case even where the business owners

[27] *See* Bruce Goldstein, Marc Linder, Laurence E. Norton, II, Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 1089-1101 (1999) ("The words 'suffer or permit to work' were plainly designed to comprehend all the classes of relationship which previously had been designated specifically as likely means of avoidance of the Act.").
[28] *See id.* at 1089-1094.

had used labor contractors to "employ" workers in the common law sense. As a New York appellate court noted:

> The purpose and effect of a statute such as this is 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. He is bound at his peril so to do. The duty is an absolute one, and it remains with him whether he carries on the business himself of intrusts the conduct of it to others.

Sheffield Farms, 167 N.Y.S. at 960.

The phrases "to permit to work" and "to suffer to work" were defined by courts with a breadth that explicitly went beyond the common law concept "to employ." *See id.* at 960-61 (rejecting common law master-servant rule in interpreting child labor statute); *Purtell*, 99 N.E. at 902 (same); *Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1129 (Okla. 1913) (same). As the Oklahoma Supreme Court stated in rejecting a common law test:

> [The statutes] very plainly say that no child under the age of 16 years shall be *employed, permitted, or suffered* to do the things which plaintiff was doing when he was hurt. The inhibition is just as strong and positive against permitting or even suffering a child of this age to do such things as it is against employing him to do them. . . [This language] means that [the employer] shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder.

Curtis & Gartside, 134 P. at 1129. In general, in the child labor cases, the employer was presumed to have the power to prevent underage children

from working, so long as the work was performed in or in connection with the business. As stated by Judge Cardozo:

> [The employer] must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. . . He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he had delegated "his own power to prevent."

People, on Inf. Of Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474, 475-76 (N.Y. 1918) (internal citations omitted).[29]

Thus, business owners were responsible for labor conditions within their businesses, whether they used independent contractors to do the work or not. The only limit on this broad prohibition was that the work had been performed in the defendant's business with "knowledge or the opportunity through reasonable diligence to acquire knowledge" that it was being performed. *Sheffield Farms*, 121 N.E. at 476 ("The personal duty rests on the employer to inquire into the conditions prevailing in his business. He does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates."); *see also Lenroot v. Interstate Bakeries Corp.,* 146 F.2d 325, 328 (8th Cir. 1945). Thus, a business owner could defend a child

[29] *See also Daly v. Swift & Co*., 300 P. 265, 268 (Mont. 1931) (holding meatpacker liable for the death of a child employed by an independent contractor at its meatpacking plant); *Vida Lumber Co. v. Courson*, 112 So. 737, 738 (Ala. 1926) (holding that even if the boy was "employed" by his father and not the lumber company, the company violated the child labor law because it "permitted or suffered" him to work).

labor case by showing he had taken reasonable steps to prevent the use of children and that the work occurred without his knowledge. *See Sheffield Farms*, 121 N.E. at 476. Otherwise, under the "suffer or permit to work" language in the statutes, the owner was legally accountable for all unlawful work performed within his business. *Id.*; *see also* Goldstein, *supra* note 27, at 1065.

D. The "Suffer or Permit to Work" Test Should Give Rise to Coverage of Entities That Are In a Position to Know of Violations and to Prevent Them From Occurring or Correct Them

The FLSA contains the broadest definition of "employ" ever included in any one act. *Rosenwasser*, 323 U.S. at 363 n.3. It "sweeps in almost any work done on the employer's premises, potentially any work done for the employer's benefit or with the employer's acquiescence." *Lauritzen*, 835 F.2d at 1543 (Easterbrook, J., concurring). When the language used in a statute has a developed meaning, Congress is presumed to intend that meaning, unless it specifically indicates otherwise. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). The definition of "employ" in the FLSA "includes to suffer or permit to work." 29 U.S.C. § 203(g). Thus, courts must understand "employ" to encompass "suffering" or "permitting" work in the broader remedial sense developed through pre-FLSA child labor laws.

Based on this historical backdrop, the United States Supreme Court has long recognized that the determination of an employee-employer

relationship "does not depend on [certain] isolated factors but rather on the circumstances of the whole activity." *Rutherford Food*, 331 U.S. at 730.[30]

A close reading of the leading FLSA cases shows that the often-invoked concept of "economic reality" is really a shorthand reminder to courts to look beyond technical distinctions, self-serving statements of subjective intent, or the labels putative employers give their workers and to discern the actual, objective, economic relationships among the parties. *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *Real v. Driscoll Strawberry Associates*, 603 F.2d 748, 755 (9th Cir. 1979) ("Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA."). Under the "economic reality" test, federal courts reject formality in favor of flexibility. Such an approach allows for application of the test to the innumerable permutations that constitute employer/employee relationships. *See, e.g., Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012) (holding the "economic reality" test "is not a precise test susceptible to formulaic application" but instead "prescribes a case-by-case approach, whereby the court considers the circumstances of the whole business activity"). Thus, the "economic reality" test appropriately warns courts not to be taken in by formalities, but it does not supplant the "suffer or permit to work" component of the statutory definition.

[30] The Court also explained in *Rutherford Food* that the definition of "employ" is "comprehensive enough to require its application to many persons and working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category." *Rutherford Food*, 331 U.S. at 729 (citation omitted).

E. In Determining "Joint Employer" Status Under the MWA, Washington Courts Should Look at the Circumstances of the Whole Activity to Determine Whether the Entity Is in a Position to Know of and Prevent Violations

In *Anfinson*, this Court held that the economic reality test applies in determining whether workers are "employees" (as opposed to independent contractors) under the MWA. 174 Wn. 2d at 871. The Court recognized that "[f]ederal courts have established competing lists of nonexclusive factors" relevant to this analysis, but the Court did not adopt a specific set of considerations to apply in every case. *Id*. at 869. Instead, the Court noted there are "multiple factors" a trier of fact "may consider" in determining whether the workers are employees. *Id*. at 873-74 (emphasis added) (citing *Zheng v. Liberty Apparel Co.*, 335 F.3d 61, 68-69 (2d Cir. 2003)). Ultimately, however, "the determination of the [employment] relationship depend[s] . . . upon the circumstances of the whole activity." *Id*. at 869 (quoting *Rutherford*, 331 U.S. at 730). The touchstone for courts, consistent with the history and purpose of the law, is a single question: Was the entity in a position to know about violations and to prevent them? If so, the entity should be considered a "joint employer" under the MWA.

IV. CONCLUSION

The MWA was passed against a rich backdrop of history both before and after the passage of the FLSA. Indeed, case law interpreting the "suffer or permit to work" language in both pre-FLSA child labor statutes and the FLSA has confirmed that "employ" encompasses a broad

range of relationships not recognized under common law. Washington courts have frequently looked to the FLSA to interpret the meaning of terms under the MWA. The FLSA brought into coverage all entities that are in a position to know of violations and to prevent or cure them. This history and purpose are no less important—and likely far *more* important—in the modern context of subcontracted work.

The MWA, like the FLSA, was intended to reach much further than traditional, common law notions of "employer." Thus, the Court should affirm the Court of Appeal's reversal of the trial court's orders granting summary judgment to Appellants and hold that the "joint employer" test under the MWA requires consideration of the circumstances of the whole activity to determine whether the alleged employer is in a position to know about violations and to prevent them.

Respectfully submitted this 25th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that the above and foregoing AMICI CURIAE BRIEF was filed with the Washington Supreme Court and copies were served to the following counsel of record:

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