No. 89534-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioners.

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# MEMORANDUM OF AMICI CURIAE ASSOCIATION OF WASHINGTON BUSINESS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, WASHINGTON RETAIL ASSOCIATION, and INTERNATIONAL FRANCHISE ASSOCIATION SUPPORTING THE PETITION FOR REVIEW

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## I. INTRODUCTION

Amici curiae consist of four business organizations of statewide, nationwide, and international reach whose employer members routinely rely on subcontracting and outsourcing relationships with other businesses. The sweeping and negative impact of the published Court of Appeals decision on these routine business relationships is significant. The Court of Appeals, in attempting to resolve an issue of first impression, may have created joint employer liability for countless enterprises that have merely contracted for a service from a vendor. It is difficult to say, however, because while the Court of Appeals adopts the "economic reality" test under the Fair Labor Standards Act ("FLSA") for determining joint employment under the Washington Minimum Wage Act ("MWA"), the court never articulates a precise formulation of that test, never describes what factors are relevant to determine whether joint employment exists, and never explains how factors of an economic reality test should be weighed to make that determination on summary judgment. This conflicts with all recognized federal approaches, and conflicts with this court's directive to interpret the MWA in accordance with federal FLSA constructions. The result is untenable confusion and uncertainty for businesses, employees, trial courts, and counsel. Review is appropriate under RAP 13.4(b)(1) and (4).

## II. IDENTITY AND INTEREST OF AMICI CURIAE

Amici are four business associations who represent tens of thousands of employers across virtually every industry in Washington, around the country, and around the world. Common among them is routine and uncontroversial reliance on contracting relationships to procure services outside the purview of the employers' own business. The Court of Appeals decision interferes with these mundane transactions by calling into question whether they may now give rise to joint employment of subcontractors' employees.

### A. ASSOCIATION OF WASHINGTON BUSINESS

AWB is the state's oldest and largest general business membership federation, representing the interests of over 8,000 Washington employers who provide jobs for over 750,000 people statewide. AWB members operate in every major industry sector and geographical region of Washington, and range from large, highly visible, multi-national corporations to very small businesses with only one or two employees.

### B. THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm and is the legal arm of the National Federation of Independent

Business ("NFIB"). NFIB is the nation's leading small business association, representing about 350,000 employers across the United States and over 8,250 small businesses in Washington.

### C. THE WASHINGTON RETAIL ASSOCIATION

The Washington Retail Association ("WRA") represents the interests of the state's retailing industry before the Legislature and regulatory bodies. WRA has over 3,300 storefront member companies who employ thousands of workers in our state, including all types of retailers in all parts of the state, from the largest national chains to the smallest independent businesses.

### D. INTERNATIONAL FRANCHISE ASSOCIATION

The International Franchise Association ("IFA") is the world's oldest and largest organization representing franchising worldwide. IFA's mission is to protect, enhance, and promote franchising through government relations, public relations, and educational programs. IFA's over 14,500 worldwide members include franchise companies in over 100 different business format categories, individual franchisees and companies that support the industry in marketing, law, and business development.

## III. ISSUES OF CONCERN TO AMICI CURIAE

1. What is the proper interpretation and application of the federal "economic reality" test to determine whether a company is a joint

employer of a subcontractor's employees under the MWA? *Cf. Fred Meyer Stores, Inc.'s Pet. for Rev.* at 1 (Issue 1); *Pet. for Rev. of Expert Janitorial, LLC* at 2 (Issue 1).

2. Once the proper interpretation and application of the "economic realities" test is determined, does a dispute as to some individual factors preclude a grant of summary judgment when the balance of factors as a whole militates against a finding of joint employment? *Cf. Expert Janitorial's Pet. for Rev.* at 3 (Issue 2).

## IV. STATEMENT OF THE CASE

Amici adopt the statement of the case set forth by petitioner Fred Meyer, *Pet. for Review* at 3-7, and petitioner Express Janitorial, *Pet. for Rev.* at 3-6.

## V. WHY REVIEW SHOULD BE GRANTED

### A. THE COURT SHOULD GRANT REVIEW TO CLARIFY WHAT ECONOMIC REALITY TEST GOVERNS FOR DETERMINING JOINT EMPLOYMENT IN WASHINGTON.

Amici business associations' pressing concern with the Court of Appeals decision is its confusion over what version or articulation of the economic reality test controls for determining joint employment in Washington. Simply put, the court didn't say. This departs from this

court's accepted framework, articulated most recently in *Anfinson v. FedEx Ground Systems, Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012).

The court in *Anfinson* analyzed and applied the economic reality test for purposes of determining independent contractor status, and made clear that Washington courts will follow federal FLSA constructions for purposes of interpreting analogous MWA provisions. *Anfinson*, 174 Wn.2d at 869. The Court of Appeals did not follow any recognized federal test for determining economic reality in the joint employment context.

Indeed, after surveying three different versions of the economic reality test, discussing but not obviously applying the six factor test of *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947), the twelve factor test of *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004), and the four factor test of *Bonette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), the court simply concluded:

> Our holding is that the trial court's consideration of relevant factors was too narrow. On remand, the trial court shall consider what factors are appropriate to determine the economic reality of the parties' relationship.

*Becerra v. Expert Janitorial, LLC*, ___ Wn. App. ___, 309 P.3d 711, 720-21 (Sept. 16, 2013).

It's hard to know what to make of this. Either the Court of Appeals adopted *all* of the factors of all of the leading federal tests as open possibilities for the trial court to consider, or adopted none of them. This will not do. While it is true that the factors comprising the various versions of the economic reality test are not exclusive, *Bonette*, 704 F.2d at 1469 ("The determination . . . does not depend on 'isolated factors but rather upon the circumstances of the whole activity'") (quoting *Rutherford*, 331 U.S. at 730), nevertheless, the economic reality test is not a free-floating inquiry. The factors weighed and considered still have to be *relevant* to whether or not someone is a joint employer. *See, e.g., Moreau*, 356 F.3d at 947 (directing courts to "consider all factors 'relevant to the particular situation' in evaluating the 'economic reality' of an alleged joint employment relationship") (quoting *Bonnette*, 704 F.2d at 1470). The federal courts have given extensive guidance on which factors are and are not relevant to determine joint employment.

The Court of Appeals' approach, by contrast, is simultaneously all-encompassing and utterly opaque. On the one hand, the court seems to have adopted all of the tests, directing the trial court to consider all of the factors. On the other hand, by failing to decide which relevant factors apply and what relative weight should be given among them, the court in reality adopted none of them. This is an inherently confusing situation on

a matter of substantial public importance. The court should grant review to clarify which test applies to determine joint employer status, and explain how the various factors of the appropriate test may be correctly applied.

### B. THE COURT OF APPEALS DECISION WILL INTERFERE WITH COMMON CONTRACTING RELATIONSHIPS.

Equally pressing to amici is the concern that, while perhaps unintended, the breadth of the Court of Appeals decision brings within its purview even garden-variety outsourcing or contracting relationships, possibly expanding joint employer liability to cover any company that lets a contract for service. Petitioner Fred Meyer pointed this out persuasively:

> [The Court of Appeals'] failure to weigh the formal and functional control factors and its focus on whether any entity 'comes close' to supervising workers employed by its subcontractors all but assures that even 'typical outsourcing relationships' will be held to be joint employment relationships.

*Fred Meyer's Pet. for Rev.* at 18 (quoting *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 76 (2nd. Cir. 2003)).

It is expressly not the purpose of the joint employment doctrine to encompass ordinary contracting relationships. *See Jacobson v. Comcast*, 740 F. Supp. 2d 683, 689 (D. Md. 2010) ("When evaluating a putative joint employment relationship, courts must effectuate the broad scope of the FLSA, while not construing the statute so broadly as to subsume typical independent contractor relationships"). Indeed, "[t]he 'economic

reality' test, therefore, is intended to expose outsourcing relationships that lack a substantial economic purpose, but it is manifestly not intended to bring normal, strategically-oriented contracting schemes within the ambit of the FLSA." *Zheng*, 355 F.3d at 76.

This is as it should be, because there is no reason to view the contracting out of some services as inherently suspect. To the contrary, contracting out noncore services allows a business to focus on the aspects of its business that are critical for its success, instead assigning those noncore tasks to a business that focusses on such work. Thus, contracting out of some services is economically efficient and important to Washington businesses that compete in vigorous markets here and throughout the world.

These types of "normal" contracting relationships are extremely diverse among amici's members. Although janitorial services are contracted out by many, if not most, members of amici organizations who own their own buildings, there is no limit to the types of businesses that depend on a disciplined FLSA test to dismiss joint employment claims attacking traditional contracting relationships.

Numerous examples abound in the recent case law. For example, in *Jacobson*, a group of cable technicians brought suit against Comcast and smaller installation companies with which it contracted to install cable

services for Comcast customers. *Jacobson,* 740 F. Supp. 2d at 685-86 (holding against joint employment). In *Greenawalt v. AT&T Mobility, LLC*, 937 F. Supp. 2d 438, 440-41 (S.D.N.Y. 2013), a group of security guards brought FLSA claims against a mobile phone retailer and the companies with which it contracted to provide store security, which were also held not to be joint employers. In *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462, 464-65 (3rd Cir. 2012), a franchisee's branch managers brought suit under FLSA, unsuccessfully, against the rental car franchisee and franchisor, alleging joint employment. Finally, in *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1173 (11th Cir. 2012), delivery drivers employed by third party courier companies brought suit under FLSA, again unsuccessfully, against a shipping and logistics company who contracted with the couriers for local package delivery.

Installation, security, franchise management, and delivery are but a few examples of the many services for which amici members may contract. Grounds keeping, construction and building maintenance, bookkeeping and payroll services, marketing, and legal, are also typical services a company will procure from outside businesses so the company may focus its labor force on its core mission. Under the Court of Appeals decision, however, it is impossible to explain to these companies in

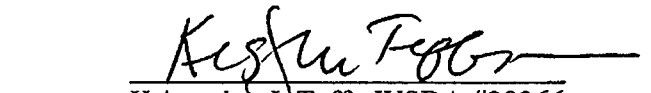
Washington when and under what circumstances such contracts may expose them to joint employer liability for the wage and hour compliance of their contractor and any third party subcontractors.

If left intact, this untenable holding will undoubtedly create unforeseen and unpredictable MWA liability for honest companies, far beyond the public policies justifying the joint employment doctrine, and in direct contravention of them. This expansive liability will unjustifiably drive business costs in Washington higher, as companies will be forced to reconsider previous outsourcing relationships, and it will negatively affect the ability of smaller, independent service providers to do business with larger companies. These are matters of substantial public importance, and merit this court's review.

## VI. CONCLUSION

The court should grant review under RAP 13.4(b)(1) and (4).

Respectfully submitted this 13th day of December, 2013.



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**Subject:** Becerra v. Expert Janitorial, LLC, et al., No. 89534-1
**Attachments:** Memo.pdf; COS.PDF; Motion.pdf

**Importance:** High

Dear Clerk and Counsel:

Please find attached for filing (and electronic service) the following documents in the above-referenced matter:

- Motion for Leave to Submit Memorandum of Amici Curiae Association of Washington Business et al.;
- Memorandum of Amici Curiae Association of Washington Business et al.; and
- Certificate of Service

Hand delivery is provided to Mr. Rutzick this afternoon per the Certificate of Service.

Please let me know should you have any difficulties opening the attachments or with the transmission.

Very truly yours,

Kris

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