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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent,

v.

LYONS ENTERPRISES, INC.,
d/b/a JAN-PRO CLEANING SYSTEMS

Appellant.

BRIEF OF AMICI CURIAE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 6; WORKER INJURY LAW & ADVOCACY GROUP; AND NATIONAL EMPLOYMENT LAW PROJECT

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I. INTRODUCTION & SUMMARY OF ARGUMENTS

Employee misclassification is a significant problem affecting thousands of employees nationwide, and the number of misclassified employees grows every year.[1] In this case, by labeling its workers as "franchisees," Lyons (d/b/a Jan-Pro) has avoided paying workers' compensation premiums and other payroll taxes. Though amicus curiae International Franchise Association claims that "no one becomes a franchisor to avoid paying employment taxes," according to the Treasury Inspector General, "misclassification of employees as independent contractors is a nationwide problem affecting millions of workers that continues to grow and contribute to the Tax Gap."[2] "[M]isclassification[] allow[s] employers to avoid paying a significant amount of money in employment taxes, which adversely affects employees and tax administration."[3]

The misclassification of Lyons/Jan-Pro workers as "franchisees" leaves them without any protection in the event that they are injured on the job. Janitorial work is physical labor characterized by high injury rates,

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[1] *See generally* SARAH LEBERSTEIN, NAT'L EMPLOYMENT LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES, (2012), available at http://nelp.3cdn.net/0693974b8e20a9213e_g8m6bhyfx.pdf.

[2] *See* Br. of IFA at 5; TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, REF. NO. 2013-30-058, EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULINGS (June 14, 2013).

[3] *Id.*

and Jan-Pro's attempt to evade its responsibility to provide workers' compensation coverage to its workers in this state cannot be tolerated. The Department of Labor & Industries correctly found that the essence of the contract between Jan-Pro and its franchisees was for their personal labor, and that the amount of control exerted by Jan-Pro over the terms of the contract and the work thereunder rendered those individuals "workers" within the meaning of RCW 51.08.180. The exceptions found at RCW 51.08.195 do not apply to the realities of the relationship between Jan-Pro and its workers. The policy and law of this state and others that have addressed this issue are squarely aligned against Jan-Pro's argument in this case.

II. IDENTITY AND INTEREST OF AMICI CURIAE.

A. Service Employees International Union (SEIU) Local 6

SEIU Local 6 was founded in 1921 to improve working conditions and create greater economic opportunity for janitors through collective bargaining. Today, SEIU Local 6 represents approximately thirty-two hundred (3,200) janitors in King, Pierce, and Spokane counties. Currently, most SEIU Local 6 janitors work full-time and receive full employer paid family health benefits, a modest hourly pension, and decent wages.

Over the last decade, protecting and expanding workplace standards, including health and safety, has grown more difficult due to the

growing number of unscrupulous janitorial companies that are willing to skirt our state's laws by intentionally misclassifying janitors as independent contractors or alleging janitorial workers are franchisees that are in business for themselves. This Court's decision will have a broad and meaningful effect on Washington's janitorial workers.

B. National Employment Law Project

The National Employment Law Project (NELP) is a non-profit legal organization with nearly 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights. NELP has litigated directly and participated as amicus in numerous cases and has provided Congressional testimony addressing the issue of subcontracting in employment.

C. Workers Injury Law and Advocacy Group

Amicus curiae Workers Injury Law & Advocacy Group (WILG) is a national non-profit membership organization dedicated to representing the interests of millions of workers and their families who, each year, suffer the consequences of workplace injuries and illnesses. The group acts principally to assist attorneys and non-profit groups in advocating the

rights of injured workers through education, communication, research, and information gathering.

III. ARGUMENT

A. THE HISTORY AND PURPOSE OF THE INDUSTRIAL INSURANCE ACT: THE "GREAT COMPROMISE."

Over one hundred years ago the State of Washington enacted the Industrial Insurance Act (IIA), LAWS OF 1911, Ch. 274. The IIA has been referred to as the "great compromise between employers and employed." *Stertz v. Indus. Ins. Comm'n*, 91 Wn. 588, 590, 158 P. 256 (1916). In that compromise, "employers accepted limited liability for claims that might not have been compensable under the common law," and in exchange, "workers forfeited common law remedies."[4] Moreover, the IIA guaranteed "sure and certain relief for workers . . . and their families . . . regardless of questions of fault *and to the exclusion of every other remedy*." RCW 51.04.010 (emphasis added). Washington courts early on held that, because the IIA is remedial in nature, it should be construed liberally in favor of its beneficiaries.[5] The Legislature codified this standard in 1971,

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[4] Cowlitz Stud Co. v. Clevenger, 157 Wn. 2d 569, 572, 141 P.3d 1 (2006) (citing Dennis v. Dep't of Labor & Indus., 109 Wn. 2d 467, 745 P.2d 1295 (1987)).

[5] Peet v. Mills, 76 Wn. 437, 136 P. 685 (1913). *See also* Wilber v. Dep't of Labor & Indus., 61 Wn. 2d 439, 446, 378 P.2d 684, 688 (1963) ("The industrial insurance act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries.").

mandating that the IIA "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010.[6] The thrust of this is that, "where reasonable minds can differ [as to the meaning of the IIA] . . . the benefit of the doubt belongs to the injured worker." *Cockle v. Dep't of Labor & Indus.*, 142 Wn. 2d 801, 811, 16 P.3d 583 (2001).

The IIA applies to "all employments which are within the legislative jurisdiction of the state." RCW 51.12.010. Thus, unless the employment relationship is specifically excluded by statute, it is covered by the IIA, and a worker is entitled to workers' compensation protection if he or she is injured on the job. RCW 51.12.020 ("Employments Excluded"); *Ochoa v. Dep't of Labor & Indus.*, 143 Wn.2d 422, 425, 20 P.3d 939 (2001) ("Th[e] right [to workers' compensation benefits] is extended to all employment, except those excluded under RCW 51.12.020."). If Lyons/Jan-Pro qualifies as an "employer" within the meaning of RCW 51.08.070 and its franchisees qualify as "workers" within the meaning of RCW 51.08.180, the franchisees are covered workers unless some statutory exception applies.

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[6] *See also* Cockle, 142 Wn. 2d at 811 (discussing the history of the 1971 amendment and its effect).

B. FRANCHISING IN THE JANITORIAL INDUSTRY

This case raises issues of critical importance to thousands of janitors and building cleaning workers in Washington who face significant health and safety risks at work.[7] The janitorial and cleaning service industry is a "chronically low-wage sector that, in many parts of the country, relies heavily upon undocumented immigrant labor and operates as a virtual outlaw in violation of immigration laws, tax laws, wage and hour laws, and other labor protections."[8]

The janitorial industry experienced major restructuring during the 1990s. Through the 1970s, the industry's workforce composed of both in-house janitors and contractors. During the 1980s firms in the public and private sector increasingly moved towards subcontracting. In the past two decades, two dominant models have emerged, subcontracting and franchising, representing 37 percent of the industry. Jan-Pro follows the

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[7] There are approximately 2.3 million janitors and building cleaning workers, comprising about 4% of the working population—not all of which are franchisees, however. NOAH S. SEIXAS ET AL., JANITORS WORKLOAD AND HEALTH AND SAFETY STUDY 3 (Dep't of Envtl. and Occupational Health Sciences, Univ. of Wash., 2013) [hereinafter "UW"].

[8] Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 352 (2005).

latter model and operates over 10,000 franchises in the U.S. and in Canada.[9]

Dr. David Weil, newly sworn-in Administrator of the Wage & Hour Division of the U.S. Department of Labor, has observed of the janitorial industry that violations of basic labor law protections are integrally connected to the emergence of the franchising model.[10] Under the franchising model, franchisors like Jan-Pro seek to profit from and control a janitor in the performance of his or her cleaning duties.[11] At the same time that the franchisor exerts control over the janitors, it attempts to shed its legal responsibility as an employer.

There are critical differences between janitorial "franchises" and traditional franchise systems. In a traditional franchise system, a franchisee purchases the right to own and operate an establishment and sells a product to the general public, without being restricted or controlled in choosing their customers.[12] But in the cleaning franchise industry generally, and in this case specifically, franchisees receive contracts from

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[9] ENTREPRENEUR, ABOUT JAN-PRO- FRANCHISING INT'L., *available at* http://www.entrepreneur.com/franchises/janprofranchisingintlinc/282471-0.html (last visited May 28, 2014).

[10] DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 132 (2014).

[11] *See* Coverall North American, Inc. v. Comm'r of Div. Unemployment Assistance, 447 Mass 852, 857 N.E.2d 1083 (2006) (discussing how janitorial franchisors control pricing, contracts, and cleaning standards)

[12] *See* WEIL, *supra* note 11, at 124.

their franchisor—contracts that franchisees do not negotiate and to which they are not parties.[13] They typically do not find their own customers, but even if they do, the franchisee's relationship with prospective clients is subject to pre-approval.[14] All relationships thereafter are between the franchisor and the client and the contract becomes the property of Jan-Pro.[15]

Further, a franchisee's loss of a cleaning customer presents an opportunity for more revenue for the franchisor, who can assign the customer to another franchisee, thereby realizing an additional "finder's fee" while continuing to enjoy the same revenue from the customer.[16] This situation creates an inherent conflict of interest between alleged franchisors like Jan-Pro and their cleaning workers.

Jan-Pro's franchise agreements purport to "sell" the right to clean unspecified buildings in unspecified locations chosen by Jan-Pro. The up-front purchasing costs incurred by the workers can reach into the tens of thousands of dollars, providing few if any real opportunities to recoup those initial outlays, much less make a living wage. Jan-Pro requires its workers to complete 30-hour training courses and to comply with policies

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[13] Certified Appeal Board Record ("CABR") 316, 1908; WEIL, *supra* note 11, at 134, 135

[14] CABR 1942.

[15] CABR 1933.

[16] WEIL, *supra* note 11, at 135–36.

and procedures manuals. Further, Jan-Pro employs managers to ensure that the quality of its workers' cleaning is compliant to Jan-Pro-standards. Jan-Pro's workers are told when and where to work and how to perform the work. Jan-Pro's workers are told what equipment to buy and from whom.

Franchise contracts may not provide enough income to franchisees to enable them to make a living, much less cover their own injuries. Economic modeling suggests that the "a franchisee [janitor] cannot service the contracts provided by the franchisor [company] at the market prices prevailing in many cases and still comply with labor standards, without going into the red."[17] However, "this does not imply that such profits are not attainable for the franchisor," as estimates of franchisor profitability reach up to 41 percent for companies like Jan-Pro.[18]

The not-surprising turnover that results from workers realizing they have been cheated, in addition to a franchisor not being able to provide the amount of work promised, allows the franchisor to once again reap the windfall up-front revenues it receives when it signs up new recruits.[19] Such a model is only sustainable if a steady stream of new

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[17] WEIL, *supra* note 11, at 13

[18] *Id.* at 15

[19] A study of turnover among janitorial services franchised companies shows that between 2006–2009 turnover among janitorial franchisees—which includes

janitors/franchisees is available to "replace those unable to make the business model work, allow[ing] franchising to persist (and benefit the franchisor.)"[20] As a result, janitorial workers are left in debt, confused about their status with respect to the janitorial firm, and with few tools to ensure protection of basic labor standards.

C. THE BROAD COVERAGE OF WASHINGTON'S WORKERS' COMPENSATION LAWS EXTENDS TO THE JANITORS IN THIS CASE.

1. The IIA Broadly Covers "Workers"

The primary issue before this Court is whether Lyons/Jan-Pro's "franchisees"[21] are "workers" within the meaning of RCW 51.08.180. When the IIA was first passed, it defined a "workman" as "every person in this state, who . . . is engaged in the employment of an employer [in certain specified industries] whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer." See LAWS OF 1911, ch. 74, § 3. But in 1937, the legislature amended RCW 51.08.180's definition of "workman" to include, additionally, "every person in this

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terminations, non-renewals, reacquired by franchisor, and ceased operations—were up to three times higher than turnover among fast-food franchises. WEIL, *supra* note 11, at 141.

[20] *Id.*

[21] Though Jan-Pro exclusively uses the term "franchisees" to describe the workers in this case, "the name chosen by the parties to describe their relationship is ordinarily of very little importance as against the factual rights and duties they assume." 3-63 LARSON'S WORKERS' COMPENSATION LAW § 63.03.

state who is engaged in the employment of or who is working under an independent contract, the essence of which is his personal labor for any employer coming under this act whether by way of manual labor or otherwise in the course of his employment." LAWS OF 1937, ch. 211, § 2 (emphasis added).

The Supreme Court in *Norman v. Dep't of Labor & Indus.* noted that "[p]rior to the effective date of the 1937 amendment, an independent contractor could not receive aid from the industrial insurance fund. Since that time, however, such person is entitled to receive compensation if the essence of the work he is performing is his personal labor." *Norman v. Dep't of Labor & Indus.*, 10 Wn. 2d 180, 183, 116 P.2d 360 (1941). Thus even if the court were to hold that the janitors in this case are independent contractors, they would be covered under the Act.

2. The Janitors are not Independent Contractors: Their Work is Integral to Jan-Pro's Operation and Performed Under Strict Control by the Franchisor.

The IIA incorporates a test similar to the three-part "ABC" test used by several states to determine whether an individual is an independent contractor.[22] The statute enumerates six elements, all of

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[22] The test is codified in RCW 51.08.195. The test is commonly referred to as the ABC test, after the first three elements. In addition to Washington, this is also the law in nine other states' workers' compensation acts: AZ, CA, CO, CT, DE, HI, NH, ND, and WI.

which must be satisfied in order for the exception to apply.[23] Thus, if any one of the six elements is not met, the exception does not apply. Primarily at issue in this case are sub-sections (1) and (3).[24] As noted above, the janitors are subject to strict controls over the performance of their work. Their service not only is in Jan-Pro's "course of business"—it is Jan-Pro's *only* business. They function as Jan-Pro's employees. Under a nearly identical test and nearly identical facts, janitors who are labeled "franchisees" have frequently been found to be employees.

Using a test for "employee" status nearly identical to that used in the IIA, a Massachusetts federal district court found that janitorial franchisees were employees under that state's wage and hour laws.[25] Similar to the case before this court, in *Awuah v. Coverall* individuals entered into janitorial "franchise" agreements with Coverall, a national janitorial company, to provide commercial janitorial services to third-party

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[23] The use of "and" in the statute is conjunctive. *E.g.*, Ski Acres v. Kittitas County, 118 Wn. 2d 852, 827 P.2d 1000 (1992).

[24] Sub-section (1) requires the putative employer show that the independent contractor "has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact." Sub-section (3) requires the employer to prove that the independent contractor "is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service." There is a second clause in sub-section (3), but Jan-Pro has conceded that it is not an issue in this case. Br. of Appellant at 42 n. 18.

[25] Awuah v. Coverall North America, Inc., 707 F. Supp. 2d 80 (D. Mass. 2010).

customers.[26] Like Jan-Pro in this case, Coverall dealt directly with the third-party customer, and the "franchisee" paid Coverall initial fees and on-going royalties. The characteristics of Coverall's franchise agreements are almost identical to those in this case, including control over "methods, procedures, standards for janitorial cleaning and business services."[27] The court focused on the second prong of Massachusetts's three-part test, "whether the service is performed outside the usual course of the business of the employer."[28] The factor at issue in *Awuah* is the same factor found in RCW 51.08.195(2).

Similar to Jan-Pro's assertions,[29] Coverall asserted that "it is not in the commercial cleaning business, but rather it is in the franchising business."[30] The court dismissed this argument, noting that "franchising appears to be no more than a means of distributing the goods or services to the final end user without acquiring significant distribution costs."[31] The court reasoned that Coverall trains franchisees and provides them with uniforms, it contracts with all customers with limited exceptions, it bills

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[26] *Id.* at 81-82.
[27] *Id.* at 81.
[28] *Id.* at 82.
[29] Jan-Pro asserts that it is "not in the commercial business cleaning business, but rather [are] in the franchising business." Br. of Appellant at 22.
[30] Awuah, 707 F.Supp.2d at 82.
[31] *Id.* at 84. The court continues, "[d]escribing franchising as a business in itself, as Coverall seeks to do, sounds vaguely like a description of a modified Ponzi scheme—a company that does not earn money from the sale of goods and services, but from taking in more money from unwitting franchisees to make payments to previous franchisees."

all customers, and it receives a percentage of the revenue earned on every cleaning service.[32] "These undisputed facts establish that Coverall sells cleaning services, the same services provided by [the janitorial franchisees]."[33] Like Coverall, Jan-Pro is indisputably in the janitorial business.

The Massachusetts Supreme Court similarly held that a franchisee janitorial worker was in fact a misclassified employee eligible for unemployment insurance, again under the "ABC" test.[34] As in the case discussed above, the claimant purchased a "franchise" from Coverall, and Coverall trained her, provided clients, and billed the clients directly. At issue in *Coverall* was the third-prong of the three-part independent contractor test, whether "the service in question could be viewed as an independent trade or business because the worker is capable of performing the service to anyone wishing to avail themselves of the services . . ."[35]

The factor at issue in *Coverall* is the same factor found in RCW 51.08.195(3). The court in *Coverall* held that the claimant was not "independent," but instead "compelled to rely heavily on Coverall."[36] As

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[32] *Id.*
[33] *Id.*
[34] Coverall North American, Inc. v. Com'r of Div. Unemployment Assistance, 447 Mass. 852 (2006).
[35] *Id.*
[36] *Id.*. at 859.

in the present case, the court reasoned that the claimant was required to allow Coverall to negotiate contracts and pricing directly with clients."[37] "[e]ven if the claimant was capable of being an 'entrepreneur' and expanding her own business, . . . the growth of her own business inevitably expanded Coverall's clientele base, as each new 'client' became a Coverall client."[38] Like the Coverall "franchisees," the work performed by the janitors in this case has little to do with a true independent business.

D. JANITORIAL WORK IS HARD, DANGEROUS PERSONAL LABOR INTENDED TO BE COVERED BY WORKERS' COMPENSATION LAWS

1. Janitorial Workers Suffer Higher Workplace Injuries than the General Workforce.

Janitorial workers have one of the highest rates of injuries and illnesses of all occupations.[39] The majority of tasks performed by janitors involve the use of long-handled equipment and heavy lifting, which place janitors at a high-risk for musculoskeletal disorder. Janitors are susceptible to injury from slips and falls on the job, cuts, bruises, and burns. Working with cleaning chemicals places janitors at

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[37] *Id.*

[38] *Id.*

[39] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, JANITORS AND BUILDING CLEANERS, http://www.bls.gov/ooh/building-and-grounds-cleaning/janitors-and-building-cleaners.htm#tab-3, (last visited May 28, 2014); Thomas J. Bukowski, *Cleaning up safety: Janitors and cleaners face multiple hazards*, NATIONAL SAFETY COUNCIL, Mar. 1, 2012, *available at* http://www.nsc.org/safetyhealth/Pages/312JanitorSafety.aspx#.UPeyJzkayfQ.

a high-risk for toxic exposure as well.[40] .

The Bureau of Labor Statistics reported in 2012 that janitorial workers suffered rates of nonfatal occupational injuries and illnesses two times higher than the average in the private industry.[41] Janitors' injuries resulted in a higher number of days away from work than the average in the private industry.[42]

This national trend is consistent with statistics in Washington State. The Washington Department of Labor & Industries (L&I) accepts more claims on average from workers in the janitorial services than in other industries, as they are disproportionately susceptible to injuries sustained from falls and toxic exposure.[43] From 2003 to 2011, accepted claims from injuries sustained by overexertion increased by 260% and injuries sustained by falls increased by 130–160%.[44] L&I also reported that during this period the average compensable claim

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[40] UW, supra note [23] at 3.

[41] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL INJURIES AND ILLNESSES AND FATAL INJURIES PROFILES, http://data.bls.gov/gqt/InitialPage (click "Case and Demographic Incidence Rates" tab; then select "2012;" then select "industry;" then select "janitorial services.")

[42] *Id.*

[43] Excel Chart Received by E-mail from Darrin Adams, Information and Technology Specialist, Safety and Health Assessment and Research for Prevention (SHARP) Program of the Washington State Department of Labor and Industries, to Matt Haney, Strategic Researcher, Service Employees International Union Local 6 (May 12, 2014, 13:30 PST) (on file with author) [hereinafter *L&I*].

[44] *Id.*

increased by $10,000. [45]

The Department of Environmental and Occupational Health Sciences at the University of Washington conducted an extensive study of the health and safety of janitors in Washington State. The survey found that janitorial workers in Washington have a high-frequency of injuries, poor and declining health, and a very high level of upper extremity disability.[46] The surveys showed that more than a third of respondents suffered from moderate to severe back pain, general poor health, and leg or arm pain.[47]

Janitorial work is hard physical labor that involves exposure to multiple hazards. The sure and certain relief guaranteed by the workers' compensation system is crucial to their overall health.

2. Janitorial Work is the Quintessential Personal Service, as it Involves Hard Physical Labor Performed to Benefit Another.

In this case, Jan-Pro argues that the "essence" of its relationship with its franchisees is the "creation of, and reciprocal obligations inherent to, a franchise relationship, not personal labor." Br. of Appellant at 21-22 (internal quotations omitted). Jan-Pro's argument elevates form over substance.

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[45] *Id.*
[46] UW, *supra* note 8, at 22.
[47] *Id.*

The "reciprocal obligations" of the parties to the franchise agreement are, simply put, that the janitors clean buildings and pay Jan-Pro for the privilege of doing so under its trademark and direction. The franchise agreements allow the franchisees to use the "Jan-Pro System" "to operate a business . . . that provides cleaning and maintenance services to one or more customer accounts." *See, e.g.*, BIIA Ex. 1 (emphasis added). This is quintessentially a contract for the "personal labor" of the franchisees. If companies like Jan-Pro can escape liability by simply providing their core services through "franchisees," Washington's labor standards would be rendered meaningless.

The janitorial workers in this case engage in dangerous, hard manual labor. They sweep carpets and floors, clean bathrooms, and empty trash and recycling. The janitorial workers labor for the benefit of Jan-Pro, which owns all client contracts and is paid directly for the work performed by the janitorial workers.

An exemplary contract is found in the Certified Appeal Board Record admitted as Exhibit 1. It evinces a substantial amount of control over the scope of the activities that franchisees may perform on behalf of Jan-Pro. For instance, "only" Jan-Pro may "invoice and collect from Franchisee's Customer Accounts" and "accept payments from Franchisee's Customers." *Id.* at 7.2. The franchisee must purchase his or

her own equipment and materials, but "solely from manufacturers and suppliers, and in accordance with specifications, that [Jan-Pro] authorizes in writing." *Id.* at 8.4. The method of performance of the cleaning services is dictated solely by Jan-Pro; the franchisee can only purchase equipment and supplies approved by Jan-Pro; and *all* of the billing, acceptance of payment, and solicitation of customers is performed by Jan-Pro. The "franchisees" are not "free from control or direction over the performance of the service," neither under the contract nor in fact.

Even if a small number of the franchisees receive help from others, the franchisee does not act like a traditional employer vis-à-vis the helper. It is, instead, Jan-Pro's franchise agreements that strictly guides how, where, and when the work is performed and for whom. Jan-Pro's control over the franchisees does not allow the franchisees to exercise any measurable control over the "helpers"—it is Jan-Pro that controls their work. While the question of "personal services" may be a close one in some cases, that is not the situation in this case.

The only possible reading of these terms is that the franchisees in this case work exclusively for Jan-Pro according to methods dictated by Jan-Pro, and cannot possibly be considered "independent" in any real sense of the term. They take all of the risk inherent to owning a business but reap none of the rewards. Meanwhile, Jan-Pro receives all of the

benefits of having an army of employees without having to provide statutorily mandated protections owed to employees. The conduct of entities such as Jan-Pro should be recognized for what it is—a deliberate end-run around hundreds of years' worth of legislation designed protect the health and welfare of workers.

V. CONCLUSION

Franchise agreements in the janitorial industry are ubiquitous and share many of the same attributes across the major franchising companies: the franchisors exert inordinate control over the work of janitorial "franchisees," while also disavowing any responsibility as employers. These workers are not independent contractors under common legal tests of that relationship. Their hard physical labor, under the exacting standards of a company that controls their cleaning contracts, meticulously trains them in the manner of their work, and distributes a portion of its income to them, makes them "workers" under any common understanding of the term and under the Washington Industrial Insurance Act.

Respectfully submitted this 30th day of May, 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 Court of Appeals Division II and copies were served to the following counsel of record:

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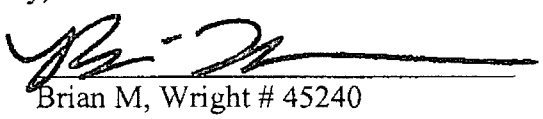

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