

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 14, 2014, 3:09 pm
BY RONALD R. CARPENTER
CLERK

NO. 89534-1

E CRF
RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

EXPERT JANITORIAL, LLC, dba Expert JMS, and
FRED MEYER STORES, INC.,

Petitioners.

RESPONDENTS' ANSWER TO AMICI CURIAE BRIEF

WILLIAM RUTZICK, WSBA #11533
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, WA 98104
(206) 622-8000
Counsel for Respondents

DAVID N. MARK, WSBA #13908
LAW OFFICE OF DAVID N. MARK
810 Third Avenue, Suite 500
Seattle, WA 98104
(206) 340-1840
Counsel for Respondents

 ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	2
A. The <i>Amici</i> 's Description of Outsourcing, Especially Janitorial Outsourcing, Is Supported And Corroborated by the Record	2
B. The Minimum Wage Act Definition of "Employ" Is Functionally Identical With That Of the FLSA of 1938.	3
C. The FLSA "Economic Reality" Test Gives Weight to the Premises Where Work is Performed Because the Owner of the Premises is in a Position to Prevent Violations; Here, Fred Meyer and Expert Had the Ability to Prevent Violations.....	5
D. Knowledge Of And Ability To Control Violations Are Important With 21 st Century Retail Janitors, As It Was To Pre-FLSA Child Labor Violations.	8
E. The <i>Amici</i> and FLSA Authority Similarly Consider the Economic Realities of Poorly-Compensated Subcontractors.....	10
F. Dr. David Weil's Observations Are On Point and Entitled to Deference.	12
III. CONCLUSION	14

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Anfinson v. FedEx Ground Package System, Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012)	4, 5
<i>Antenor v. D & S Farms</i> , 88 F.3d 925 (11th Cir. 1996)	6, 14
<i>Barfield v. New York City Health and Hospitals Corp.</i> , 537 F.3d 132 (2d Cir. 2008).....	11
<i>Becerra v. Expert Janitorial, LLC</i> , 176 Wn. App. 694, 309 P.3d 711 (2013)	5
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007)	4
<i>Castillo v. Givens</i> , 704 F.2d 181 (5th Cir. 1983)	10, 13
<i>Commodore v. University Mechanical Contractors, Inc.</i> , 120 Wn.2d 120, 839 P.2d 314 (1992).....	14
<i>Ellington v. City of East Cleveland</i> , 689 F.3d 549 (2012).....	13
<i>Gulf King Shrimp Co. v. Wirtz</i> , 407 F.2d 508 (5th Cir.1969)	6
<i>In Jacobson v. Comcast</i> , 704 F. Supp. 683 (D.C. Md. 2010)	10
<i>Lopez v. Silverman</i> , 14 F.Supp.2d 405 (S.D.N.Y. 1998)	6
<i>Reyes v. Remington Hybrid Seed Co., Inc.</i> , 495 F.3d 403 (7th Cir. 2007)	10
<i>Rutherford Food Corp. v. McComb</i> , 331 U.S. 722 (1947).....	5, 9, 10, 14
<i>State v. Bobic</i> , 140 Wn.2d 250, 996 P.2d 610 (2000).....	5
<i>Stevens v. Brink's Home Security, Inc.</i> , 162 Wn.2d 42, 169 P.3d 473(2007).....	5

<i>Torres-Lopez v. May</i> , 111 F.3d 633 (9th Cir. 1997)	6
<i>Zavala v. Wal-Mart, Inc.</i> , 393 F.Supp.2d 295 (D.N.J. 2005)	14
<i>Zheng v. Liberty Apparel Co., Inc.</i> , 556 F.Supp.2d 284 (S.D.N.Y. 2008).....	11
<i>Zheng v. Liberty Apparel Co.</i> , 355 F.3d 61 (2d Cir. 2003).....	passim
<u>Statutes</u>	
29 U.S.C. § 203(g)	4
RCW 49.46.010(2).....	4
<u>Regulations</u>	
WAC 296-126-002(3)	5
WAC 296-126-002(8)	5
WAC 296-296-002(3).....	3
<u>Miscellaneous</u>	
1984 FINAL LEGISLATIVE REPORT, 48 th Wash.Leg.	4
THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014 Harvard Press)	12
Goldstein, <i>Enforcing Fair Labor Standards In The Modern American Sweatshop: Rediscovering The Statutory Definition Of Employment</i> , 46 UCLA L. Rev. 983 (1999).....	14

I. INTRODUCTION

The *Amici Curiae* Brief (“*Amici*”¹) argues that to “suffer or permit” work should be construed in light of the meaning it had acquired in the child labor cases at the time the Fair Labor Standards Act of 1938 was adopted. Under those authorities liability was extended to the companies where the child labor was performed regardless of whether the workers were put there by a labor contractor. The rationale was that the company would be in a position to know about the violations and could prevent them from occurring. The *Amici* also discuss the historical economic developments affecting the outsourcing of janitorial work and the wage/hour violations that have resulted therefrom. Respondents file this Answer to relate the *Amici* Brief to: (a) the record herein, (b) Washington case law and statutory history concerning “employ” under the MWA, (c) FLSA case law explaining why the premises where work was performed is important to “economic realities”, (d) the effect of a company’s knowledge and ability to control violations, and (e) to expand upon the views expressed by Dr. David Weil, upon whose work the *Amici* significantly rely, and who, on May 5, 2014, was sworn in as the

¹ The *Amici* are comprised of community, religious, labor and bar groups who are concerned about workplace practices affecting low-wage immigrant workers. Motion for Leave to File Brief as *Amici Curiae*, pp. 1-5.

Administrator of the Wage Hour Division of the United States Department of Labor.

II. ARGUMENT

A. The *Amici*'s Description of Outsourcing, Especially Janitorial Outsourcing, Is Supported And Corroborated by the Record

The *Amici*, pp. 3-9, discuss the economic forces that have led to fracturing or fissuring of the traditional employment relationship *and* gross abuse of vulnerable workers at the bottom of multi-tiered relationships. The *Amici*'s description of multi-tiered employment in the janitorial industry is fully supported by *the record* herein. The *Amici* and the record agree that:

- The retailer retains control over the janitors.²
- The national janitorial company subcontracts out its "core" business of supplying janitors.³
- The 2nd tier subcontractors are "offered take it or leave it" contracts at prices that allow for a profit only by violation of wage laws.⁴

² *Amici* at 1; CP 1055-64.

³ *Amici* at 4; CP 45.

⁴ *Amici* at 4-5; CP 240-41. According to Chaban, "[w]e ran that numbers and the amount we were getting paid we couldn't -- we'd be -- we'd go negative if we would treat them [janitors] as employees." *Id.* Chaban's calculations included *virtually no overhead* for running 15 Fred Meyer stores -- \$1500 a month, which included office rent, utilities, Expert-mandated insurance, supervisor salary, etc., *i.e.*, all overhead other than B&O taxes and \$50/store/month for equipment. *See* CP 1017 (¶ 13) & 1023-24 (calculations) & CP 241(overhead items).

Expert finds solace in Mr. Ezzo's testimony that the price Expert paid was "unlikely to attract 2nd tier subcontractors whose business practice has built into it regular compliance with classification and wage and hour laws," Ezzo CP 568. Expert Suppl. Br. at 17. Thus, Expert's principal business was supplying janitors to retailers, Expert paid so little that Chaban -- with minimal overhead -- could not comply with the law and Expert's

- The retailer and national janitorial company make the system work for them by looking the other way while easily-exploited janitors are working 60 hours and 7 nights a week without overtime pay and at below minimum wages.⁵

Moreover, this system is one which Fred Meyer and Expert Janitorial's predecessor would have known about prior to September 2004 when they entered into their first janitorial services contract.⁶ The *Amici's* description of the industry is fully consistent with the well-developed, largely undisputed record in this case.⁷

B. The Minimum Wage Act Definition of "Employ" Is Functionally Identical With That Of the FLSA of 1938.

The *Amici* argue that this Court should look for guidance to the "suffer or permit to work" definition of "employ" under the FLSA, as informed by pre-FLSA "suffer or permit" child labor case law. The *Amici*, page 10, cites Washington authority that the "the MWA is based on the Fair Labor Standards Act of 1938" and references the WAC 296-296-002(3) definition of "employ" that includes to "suffer or permit" work.

take-it-or-leave-it contract was *not likely to attract* any 2nd tier subcontractors who complied with the law. In addition, as is discussed *infra*, Expert knew of the violations, could have easily prevented the violations and failed to meet its contractual obligation to Fred Meyer to assure wage and hour law compliance.

⁵ *Amici* at 5 & 9; CP 564-67 (Ezzo discussion re 1st tier subcontractors) & 630-38 (All Janitorial quarterly employee report not including any Fred Meyer janitors); CP 682-86 & 774-75 (2008 emails involving All Janitorial); CP 247; CP 364-65 (L&I agent declaration re problems with other Expert 2nd tier subcontractors).

⁶ CP 549-68 & CP 1061-63.

⁷ Neither Fred Meyer nor Expert Janitorial offered opinion testimony to dispute Mr. Ezzo.

Respondents offer additional Washington case authority and statutory history in support of treating the FLSA “suffer or permit to work” definition of “employ” as functionally identical to the MWA’s “permit to work” definition of “employ.” Compare 29 U.S.C. § 203(g) with RCW 49.46.010(2).

In *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 867 & n.2, 281 P.3d 289 (2012), this Court held that the FLSA and MWA definitions of “employ” were “functionally identical,” even though the FLSA uses the phrase “suffer or permit to work” and the MWA only uses the phrase “permit to work.” This Court reasoned:

The relevant definition of "suffer" is "not to forbid or hinder" with the synonym " permit." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2284 (2002). As " suffer" is synonymous with " permit," its omission does not indicate a substantive change.

174 Wn.2d at 867 n.2.⁸ This is particularly true because, as Amici properly pointed out citing *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007), the MWA is to be “liberally construed in favor of the employee.” This holding was echoed by the Court of Appeals in

⁸ Moreover, the statutory history of the MWA supports reliance on FLSA “suffer or permit” authority and its child labor antecedent. As originally enacted, the MWA included the FLSA “suffer” language. Laws of Washington 1959, ch. 294, § 1(3), p. 1411. In Laws of Washington 1984, ch. 7, § 364, at p. 182, “suffer” was deleted as part of omnibus legislation that corrected hundreds of outdated references to the Department of Transportation’s predecessor agencies and made hundreds of “improve[ments to] the “grammar, sentence structure and word usage of the Code,” *i.e.*, non-substantive changes. See 1984 FINAL LEGISLATIVE REPORT, 48th Wash. Leg., at 62.

this case, quoting *Anfinson*, 174 Wn.2d at 870, for the holding that “[a]s remedial legislation, the MWA is given a liberal construction.”⁹

The *Amici* further note that WAC 296-126-002(3) defines “employ” as “to engage, suffer or permit to work.” Respondents add that this Court, in *Stevens v. Brink’s Home Security, Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473(2007), applied the WAC 296-126-002(8) definition of “work,” holding that it “governed” the meaning of hours worked under the MWA. Similarly, the Department of Labor and Industries’ definition of “employ” in WAC 296-126-002(3) should guide interpretation of the MWA.¹⁰

C. The FLSA “Economic Reality” Test Gives Weight to the Premises Where Work is Performed Because the Owner of the Premises is in a Position to Prevent Violations; Here, Fred Meyer and Expert Had the Ability to Prevent Violations.

The child labor “suffer or permit” cases discussed by the *Amici*, at pages 13-16, extend liability to a company on whose premises the work was performed, in part because that company would be in a position to know of and prevent violations. *Rutherford*, 331 U.S. at 730, found it

⁹ *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 704-05 & nn. 22-23, 309 P.3d 711 (2013). Contrary to Fred Meyer’s Supplemental Brief, p. 9 n.5, this holding is not confined to “construing exemptions.”

¹⁰ In *Anfinson*, this Court held that the MWA can be interpreted by looking at the FLSA of 1938 and outstanding FLSA authority in 1959, when the MWA was adopted. 174 Wn.2d at 868-69 (citing *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000)). *Anfinson* recognized that *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) was the principal pre-1959 FLSA authority interpreting “employ.”

significant that the work was performed on the putative joint employer's premises. Courts of Appeal have subsequently explained that ownership of the premises is a factor supporting joint employment because it suggests an ability to prevent violations:

"... a business that owns or controls the work site will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors."

Torres-Lopez v. May, 111 F.3d 633, 640 (9th Cir. 1997) (quoting *Antenor v. D & S Farms*, 88 F.3d 925, 937 (11th Cir. 1996) (citing *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 513-14 (5th Cir.1969)) (emphasis added). To this extent the child labor and FLSA authority are in alignment, even though Respondents do not argue that premises ownership *standing alone* is a sufficient condition for finding joint employment.

In the present case, Fred Meyer was not merely the owner of premises where some work was done. First, the janitors were not merely present part-time, each janitor worked 7 full shifts of approximately 8.5 hours per shift in his or her assigned Fred Meyer store, CP 1031-32; 1039; 1192-94; 1201-02; they worked nowhere else, CP 1031-32, 1039, 1191, 1201, 1231. *Accord, Lopez v. Silverman*, 14 F.Supp.2d 405, 417-18 (S.D.N.Y. 1998) ("extent to which employees at issue work exclusively for the putative joint employer, as opposed to other potential employers or even their nominal principal employer, is highly probative of their

economic dependence on the putative employer”); *Zheng*, 355 F.3d at 75 (adopting *Lopez* analysis). Second, Fred Meyer managers exercised daily supervision as part of the Fred Meyer-Expert contractual end-of-shift inspection – the janitors’ only in-store supervision.¹¹ Third, Fred Meyer’s contract with Expert gave it control over working conditions, dictating the minutiae of the janitors’ work, the chemicals and tools they used, and their hours worked. CP 1055-59. Fourth, Fred Meyer’s contract with Expert, gave Fred Meyer the right to require compliance with minimum wage and overtime laws – a factor not present in any case of which Respondents are aware. *See* CP 1057

The record establishes that Fred Meyer and Expert Janitorial had control over the violations that occurred and the ability to stop them. All Janitorial’s owner, Sergey Chaban, testified that the retailer and 1st tier subcontractor effectively controlled wage/hour law compliance –

¹¹ Fred Meyer’s Supplemental Brief continues to seek reversal by disputing facts established in the record. Consistent with its contract with Expert (CP 51, ¶ 4), Fred Meyer managers conducted a daily inspection of the stores with the janitors, ordering corrections or additional work before signing the janitors out and allowing them to leave work. E.g., CP 1051 (former Store Director stating Fred Meyer policy was to have the store director or divisional manager sign out the janitors); CP 1033-36 (food department manager describing how he was assigned by store director to do daily inspections); CP 855, 885, 913, 1032, 1039 (plaintiffs’ description of Fred Meyer manager supervision). In its Supplemental Brief at p. 4, Fred Meyer incorrectly characterizes this process as the janitors merely finding “any Fred Meyer employee willing to initial” the Work Order. Then, at pages 3 and 4, Fred Meyer concocts the position of “lead janitor” in an effort to put a level of supervision between the Fred Meyer managers and, presumably, the “non-lead” janitor on the two-janitor teams. Fred Meyer’s citation to the record does not support there being a “lead janitor” position. Respondents are aware of no support in the record that there ever was such a position.

Chaban treated janitors as employees only when a) he was paid enough to do so, and b) he was required to do so by the parties with whom he contracted. CP 240-41 & 247. Neither condition was met here, *see id.*, and Chaban misclassified the janitors in his 18 Fred Meyer stores and worked them 7 nights per week without overtime pay and below the minimum wage.¹² John Ezzo explained how in today's retail janitorial market, 2nd tier subcontractors are likely to engage in the practices complained of herein unless their 1st tier subcontractor or the owner dictate otherwise. CP 562-64 & 1068-70. Ezzo further described and demonstrated how easy it was to do a brief audit of All Janitorial to uncover its widespread misclassification of janitors as independent contractors, which is the launching point for wage/hour violations. CP 566-67 & 630-42. The evidence concerning the premises and the ability to control and prevent violations is a significant part of the "economic realities" supporting treating each Petitioner as the janitors' employer under the MWA.

D. Knowledge Of And Ability To Control Violations Are Important With 21st Century Retail Janitors, As It Was To Pre-FLSA Child Labor Violations.

In the child labor cases cited by the *Amici*, premises ownership was sufficient to find a company suffered or permitted work, because that

¹² CP 194-98, 240-41, 1297, 1303-05; see 2075, summarizing CP 1039 & 1264-65.

entity was in a position to acquire knowledge and exercise control over the violation. The *Amici*, citing *Rutherford*, 331 U.S. at 728 & n.7, explain that the “FLSA definition of employ emanates from state child labor statutes.” *Amici*, p. 11 n. 22. This history is inconsistent with Expert Janitorial’s position that there are disputes of fact concerning its knowledge of the violations, but that such disputes are material “only after a court rules than an entity is an employer.” Expert Supp. Br. 16 (emphasis in original).¹³ Knowledge and ability to control violations should be factored in as one element of the employer status determination, especially since providing janitorial labor was an integral part of Expert’s business and Expert had the ability and contractual obligation to stop the violations.

The child labor cases and *Rutherford* are also inconsistent with Fred Meyer’s and Expert’s repeated assertions that the four “formal factors” are the “first step” or the “four key factors” in determining joint employment. Fred Meyer Supp. Brief, p. 9; Expert Supp. Brief, p. 3. Not

¹³ Expert’s argument is based on a logical fallacy. Just because off-the-clock work cases involve proof of the employer’s actual or constructive knowledge of the work, does not mean a putative joint employer’s knowledge and ability to control violations is irrelevant to economic realities. The Building One model of multi-layer retail janitorial subcontracting, that began in California in the late 1990s, depends on 1st tier subcontractors who pay little to their 2nd tier subcontractors and look the other way while their 2nd tier subcontractors violate the rights of easily-exploited immigrant workers. CP 555-68. That is a harsh economic reality of Expert’s business model that affects the Respondents, even if actual or constructive knowledge of hours worked can also be used as evidence that unpaid work was “permitted.”

only were the “formal factors” not the “first step” nor the “four key factors” in the child labor cases cited by the *Amici*, but they were similarly of little significance to the analysis and holding in *Rutherford*. To the contrary, the *Rutherford* court held a factory owner was a joint employer despite the absence of most such formal control factors. 331 U.S. at 724-25. See also *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003).¹⁴

E. The *Amici* and FLSA Authority Similarly Consider the Economic Realities of Poorly-Compensated Subcontractors.

The *Amici* argue at page 5:

Because they are 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. ...

FLSA cases similarly consider pay to subcontractors and lack of incentives to comply with the law as part of the economic realities. *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 409 (7th Cir. 2007); *Castillo v. Givens*, 704 F.2d 181, 192 (5th Cir. 1983). In *Jacobson v. Comcast*, 704 F. Supp. 683, 685 (D.C. Md. 2010), which Fred Meyer

¹⁴ *Zheng* draws a line between simple strategically-oriented subcontracting and contracting in which the “the circumstances of the whole activity,” “viewed in light of ‘economic reality,’” support a finding of joint employment. 355 F.3d at 69-76. The multi-factor, multi-level review called for in *Zheng*, supports the Court of Appeal’s opinion below, *i.e.*, the record herein more than creates issues of fact supporting a finding that Fred Meyer and Expert jointly employed Respondents under the economic reality test. *Accord, Zheng v. Liberty Apparel Co., Inc.*, 556 F.Supp.2d 284, 290-91 (S.D.N.Y. 2008), *aff’d* 617 F.3d 182 (2d Cir. 2010)(application of *Zheng* ruling on remand and subsequent appeal, finding that a common form of strategic subcontracting in the apparel industry resulted in joint employer liability for the contracting company).

relies upon, the court conditioned denial of joint employment status on fees being “paid by the company to the direct employers of their workers [that] are sufficient to pay the workers the wages they are due.” The *Amici*’s discussion is also directly relevant to the analysis in *Zheng* which held joint employment may be found where “as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws” 355 F.3d at 73-74; *accord, Zheng v. Liberty Apparel Co., Inc.*, 556 F.Supp.2d 284, 290-91 (S.D.N.Y. 2008), *aff’d* 617 F.3d 182 (2d Cir. 2010)(on remand, there was evidence that the “‘contracting device’ ... “... developed in response to and as a means to avoid applicable labor laws,”). *See also Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 145-46 (2d Cir. 2008)(explicating *Zheng*).¹⁵

¹⁵ *Barfield* explains that:

[N]othing in *Zheng* suggests, as defendants urge, that functional control factors are relevant only to identifying subterfuge. To the contrary, *Zheng* makes clear that the reason for “looking beyond a defendant’s formal control over the physical performance of a plaintiff’s work” is to give full “content to the broad ‘suffer or permit’ language in the statute.” *Id.* at 75-76. In short, *Zheng* contemplates arrangements under which the totality of circumstances demonstrate that workers formally employed by one entity operatively function as the joint employees of another entity, even if the arrangements were not purposely structured to avoid FLSA obligations.on this issue ...”

F. Dr. David Weil's Observations Are On Point and Entitled to Deference.

The *Amici* rely on two articles and a book by Dr. David Weil, former professor of economics at the Boston University School of Management. *Id.* at 4, 5, 7, 8 & 9. Shortly after the *Amici* filed their brief, Dr. Weil was confirmed by the United State Senate and sworn in as the Administrator of the Wage and Hour Division of the United States Department of Labor, making him the leader of the division that enforces the Fair Labor Standards Act.¹⁶ Dr. Weil previously had been an advisor to the Wage and Hour Division.¹⁷

In his recent book, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014 Harvard Press), Dr. Weil describes the growth of outsourcing, emphasizing the extreme scope of violations in the supermarket/retail janitorial sector. *Id.* at 21, 89, 95 & 244. He cites a report about the Southern California supermarket/retail sector where subcontracted janitors worked seven nights a week on 8 hour shifts and laugh when asked if they get paid overtime. *Id.* at 88-89. Dr. Weil emphasizes that efforts to secure compliance with the law must "Focus[] at the Top," stating:

¹⁶ <http://www.dol.gov/whd/about/org/dweil.htm>; <http://www.dol.gov/whd/about/org/whdchart.htm>.

¹⁷ <http://www.dol.gov/whd/about/org/dweil.htm>.

[A]s has been argued throughout this book, the forces driving noncompliance in many industries arise from the organizations located at higher levels of industry structures. Strategic enforcement should therefore focus on higher-level, seemingly more removed business entities that affect the compliance behavior “on the ground” where vulnerable workers are actually found.

Id. at 201-02. *See also, Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (2012)(“it is incumbent upon the courts to transcend traditional concepts of the employer-employee relationship and assess the economic realities presented by the facts of each case”). The record here supports a finding that, in Dr. Weil’s words, “the forces driving noncompliance ... ar[o]se from the organizations located at higher levels of industry structures” than All Janitorial and All American Janitorial. Or, as Mr. Ezzo states, the violations herein were “not aberrant or due to unusual behavior by All Janitorial or All American Janitorial.” CP 1064. The “economic realities” and public policy impel applying the MWA to entities such as Fred Meyer and Expert Janitorial under the facts of the present case. These entities in every way have at least shared responsibility with the 2nd tier subcontractors for the egregious wage/hour violations experienced by the Fred Meyer store janitors herein, especially

when the record is viewed giving Respondents the benefit of all reasonable inferences.¹⁸

III. CONCLUSION

Respondents respectfully request that the Court of Appeals decision be affirmed.

Dated: May 14, 2014.

SCHROETER, GOLDMARK & BENDER


by: WILLIAM RUTZICK, WSBA #11533

LAW OFFICE OF DAVID N. MARK


by: David N. Mark, WSBA #13908
Counsel for Respondents

¹⁸ The *Amici* cite Goldstein, *Enforcing Fair Labor Standards In The Modern American Sweatshop: Rediscovering The Statutory Definition Of Employment*, 46 UCLA L. Rev. 983 (1999). It includes much of the historical material about child labor “suffer or permit” and then goes on to suggest a standard drawing on the “suffer or permit” child labor law history, but refashioned in light of the “economic reality” case law. *Id.* at 1139-63. Under their proposed standard, “employ” would extend to work performed as part of the putative joint employer’s business, giving significant weight to location and the type of work that was performed. Joint employment status would flow where the work was integral to the putative employer’s business or, for on-premises work, involved unskilled labor that the employer would ordinarily be able to perform itself. *Id.*, at 1143. The latter – unskilled labor – draws support from *Rutherford*. *Id.* The analysis at pp. 1139-63 offers the broad historical perspective of where “suffer or permit” originated and combines that with the analysis in *Rutherford*. Respondents’ arguments on appeal do not depend on this analysis, although the analysis considers factors that fit within the broad purview of economic reality. See also, *Zavala v. Wal-Mart, Inc.*, 393 F.Supp.2d 295, 326 (D.N.J. 2005)(quoting Goldstein on origin of “suffer or permit” and integrating it with *Zheng*; court holds that subcontracted janitors plead a proper FLSA joint-employer claim against Wal-Mart) See generally, *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 839 P.2d 314 (1992)(adopting a law-review-proposed model for narrowly applying § 301 L.M.R.A. preemption).