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No. 91610-1

IN THE SUPREME COURT OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent

v.

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

Appellant/Petitioner

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT

PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

It is not surprising that, prior to 2010, L&I did not consider Lyons' franchisees (or franchisees in any industry) to be covered "workers" under Industrial Insurance Act (IIA). After all, Lyons' franchisees look nothing like workers. They are independent business owners who work for their own benefit—not for Lyons' benefit. The franchisees make a substantial financial investment in their own businesses; they have their own business licenses; they have their own insurance; they pay their own taxes; they maintain their own books; they purchase their own supplies; they find new customers and reject existing ones; they hire, fire and train their own employees; and they decide when and how to service their commercial cleaning accounts without any supervision from Lyons. Unlike a salaried worker, it is the franchisees who pay royalties and fees to Lyons (not the other way around), and who bear the risk of loss if a customer fails to pay.

This Court should reject the Court of Appeals' holding that Lyons' franchisees are covered "workers" for three reasons. First, the "essence" of Lyons' franchise agreement is not "personal labor"; it is a franchise relationship between two separate businesses, in which the independent franchise owners work in furtherance of their own interests rather than in Lyons' employment. Second, even if it could be said that the essence of the franchise agreement is labor, that labor is not "personal" to the franchisee; the essence of an independent contract is not personal labor when there is no expectation that a specific contractor will do the work.

Finally, the fact that Lyons' franchisees possess common and/or legally required attributes of a franchise should not automatically disqualify them from satisfying the elements of RCW 51.08.195's six-part exemption test.

II. STATEMENT OF ISSUES

1. An independent contractor is a covered "worker" under the IIA only if the "essence" of the contract is "personal labor." RCW 51.08.180. Lyons' franchise agreement is a highly regulated contract, through which the franchisees pay Lyons royalties and fees to access proprietary rights and services that the franchisees use to succeed as independent commercial cleaning businesses. Is the essence of Lyons' franchise agreements the franchisee's personal labor? **No.**

2. In *White v. Dep't of Labor & Indus.*, 48 Wn.2d 470, 294 P.2d 650 (1956), this Court held that RCW 51.08.180 does not apply to an independent contractor who "employs others to do all or part of the work" because, in any such case, the labor is not "personal" to the contractor. Does this exception apply to Lyons' franchisees because the franchise agreement permits the franchisees to hire their own employees and delegate the work to others? **Yes.**

3. If an independent contractor is a "worker," he or she is still exempt from IIA coverage if RCW 51.08.195's six-part test is satisfied:

a) The first test requires a contractor to be "free from control ... over the performance of the service." Franchise law, however, requires a franchisor to establish and police uniform standards governing a

franchisee's business, including "training" and "operational, managerial, technical, or financial guidelines." RCW 19.100.010(11). Do these types of uniformity standards, which do not entail supervision of a franchisee's day-to-day work and are hallmarks of any valid franchise, preclude Lyons' franchisees from ever establishing they are "free from control"? **No.**

b) The third test requires a contractor to be "customarily engaged in an independently established ... business." Many of Lyons' franchisees are first-time business owners. Further, like most franchises, Lyons' franchise agreement prohibits franchisees from offering competing goods or services during and for a period of time after the term of the franchise. Does a franchisee's status as a first-time business and/or the existence of the noncompete provision preclude the franchisees from ever establishing they are an "independently established ... business"? **No.**

III. STATEMENT OF THE CASE

The Court of Appeals' opinion contains a neutral, but concise, statement of the case. *Dep't of Labor & Indus. v. Lyons Enters.*, 186 Wn. App. 518, 524-28, 347 P.3d 464 (2015). A more complete description is found in Lyons' opening brief on appeal. In summary, Lyons is a regional franchisor for Jan-Pro Franchising International, Inc. (Jan-Pro). Lyons' sole business is selling Jan-Pro franchises to franchisees who, in turn, use the Jan-Pro brand, training and methods to operate a commercial cleaning business. Lyons does not do any cleaning itself. CP 23-24. Lyons is a franchisor in good standing with the Department of Financial Institutions,

and its franchise agreements comply with the Franchise Investment Protection Act (FIPA), RCW 19.100 *et seq.* CP 1652; 2168-70.

Under its franchise agreement, Lyons is required to furnish each franchisee with sufficient customer accounts to generate a guaranteed amount of income (that varies depending upon the initial fee paid by the franchisee)—which Lyons achieves by finding customers and entering into cleaning contracts with them that it can then assign to the franchisees. CP 23-24; 1651 (Ex. 24). Franchisees can reject an account for any reason and, when they do, Lyons must provide a substitute account at no charge. CP 23; 1911-14; 1926; 1981. Although Lyons is the signatory on the customer cleaning contracts, franchisees are encouraged to find their own customers and negotiate their own rates, which many do. *Id.*

The franchise agreement also requires Lyons to perform various services to support the franchisees' businesses, including billing and collections. CP 23; 1916-17; 2159-63; 2168-69. These services are a key inducement to many franchisees, who may lack experience or resources to carry out these administrative tasks. *Id.* Indeed, beginning in 2010, Lyons' franchisees had the option to do their own invoicing and collections, but not one elected to do so. CP 2158-59; 2190. Importantly, regardless of whether the customer pays Lyons or the franchisee in the first instance, the franchisee always bears the risk of loss; if the customer does not pay, the franchisee does not get paid (even though it remains obligated to pay Lyons royalties and fees). CP 1910-11; 2192.

In addition to guaranteed revenue and back-office support, Lyons provides franchisees with basic training on the Jan-Pro system, safety and running a business (around 30 hours total), as well as various manuals. CP 23-24; 1940; 2204-05 2152-53; 2193. Lyons does this because FIPA requires all franchisees to operate under the same “marketing plan,” which can include “[t]raining regarding the promotion, operation, or management of the business.” RCW 19.100.010(5). “The reason ... for doing so is to ensure ‘a substantial uniformity in the quality, type, and standards of products, services and manner of operations’... and to some extent ... to preserve the validity of the franchisor’s trademark.” Chisum, *State Regulation of Franchising; The Washington Experience*, 48 Wash. L. Rev. 291, 296 (1973). Lyons’ expert testified that Lyons’ marketing plan was among the “least control[ling]” he had ever reviewed. CP 2107-09.

For their part, the franchisees pay Lyons an initial fee for the Jan-Pro franchise and, thereafter, periodic royalties and management fees. CP 23; 1914-15. The franchisees typically retain around 85% of the revenue collected from their customers. CP 23; 1931-32. Beyond making a significant investment in their own businesses, the franchise agreement requires the franchisees to have their own business license, procure their own insurance, maintain their own books, pay their own taxes (including IIA premiums for their employees), and purchase their own supplies. CP 23-25; 1936-37; 1947; 1974; 2144; 2165-66. Lyons can only terminate a franchise agreement—which has a 10-year term—for cause. CP 339-42.

As independent businesses, Lyons' franchisees make all decisions regarding their daily operations. They decide when and how the work is done, and who does it. The franchise agreement permits the franchisees to hire employees and, if they do, the franchisee is responsible for training and paying them. CP 24; 328 (§ 8.2); 1909; 1920; 2148-54; 2200-01. Around 80% of Lyons' franchisees use employees or assistants from time to time. CP 24; 2147. The franchisees deal directly with the customer on scheduling and other issues; Lyons does not supervise its franchisees, and is not on-site when they do the work. CP 24-25; 1909; 1936-37; 1947-48; 1950; 1960-64; 1979-81; 2015-16; 2027-27. The franchisees may, with Lyons' consent, sell or transfer their franchise rights. CP 24.

L&I audited Lyons in 2005, and concluded that Lyons' franchisees were not covered "workers." CP 873-79. Five years later, though nothing had changed, L&I concluded that all of Lyons' franchisees were workers. CP 146-48; 191-202. L&I's litigation specialist testified that franchises that sold services, as opposed to goods, were now subject to the IIA, CP 2271—a position L&I maintained throughout the case. 2/7/13 Hr. at 49:2-10 (Judge: "So is it [L&I's] position that all franchises that are franchises for personal service [are] covered under this Act?" AAG: "Yes."). After its own IAJ found in favor of Lyons, the Board of Industrial Insurance Appeals (Board) reversed, concluding that all of Lyons' franchisees were "workers" except those that had employees of their own. CP 22-31. It further found that none of Lyons' franchisees could satisfy RCW 51.08.195's six-part exemption test. *Id.*

The trial court then reversed the Board in part, resuscitating L&I's view that all of Lyons' franchisees were workers. CP 2391-99. The Court of Appeals reversed in part yet again. It affirmed the Board's conclusion that, as a general matter, Lyons' franchisees are "workers" under RCW 51.08.180, and they could not satisfy RCW 51.08.195's exception to "worker" status. But, citing *White v. Dep't of Labor & Indus.*, 48 Wn.2d 470, 294 P.2d 650 (1956), the court held that any franchisee who actually uses "subordinates" to help with the work is not a "worker" under the IIA, and it remanded to the Board for further fact finding on the issue.

III. SUPPLEMENTAL ARGUMENT

A. The "Essence" Of Lyons' Franchise Agreement Is Not The Franchisees' "Personal Labor."

An independent contractor is a worker only if the "essence" of the contract is "personal labor." RCW 51.08.180. The legislature enacted the "essence test" in 1937. Laws of 1937, Ch. 211, § 2. Before then, only employees were covered by the IIA, and it was deemed "desirable ... to eliminate the technical issue of whether the workman was an employee or an independent contractor by giving him protection in either situation." *White*, 48 Wn.2d at 474. This Court's early cases emphasize that, while expanding coverage, the legislature did not intend the IIA to reach all independent contracts—only those where a contractor's "personal efforts constitute the main essential in accomplishing the objects of the employment." *Norman v. Dep't of Labor & Indus.*, 10 Wn.2d 180, 184, 116 P.2d 360 (1941); *Haller v. Dep't of Labor & Indus.*, 13 Wn.2d 164,

168, 124 P.2d 559 (1942) (“must be one whose *own personal labor*, ... the work which *he* is to do *personally*, is the *essence* of the *contract*”).

This Court has never defined what it means for the essence of an independent contract to be personal labor. The closest is *White*, but *White* only identifies three situations where the essence of a contract is *not* personal labor; it did not describe the kinds of business relationships that would or would not satisfy the essence test. Yet many cases, including the Court of Appeals’ decision, view *White* as both a starting and ending point for analyzing RCW 51.08.180; that is, if an independent contract involves “labor” but does not trigger one of *White*’s three prongs, then *a fortiori* the “essence test” is satisfied.¹ This Court should reject that superficial analysis here and hold that, both separate from *and* because of *White*, the essence of Lyons’ franchise agreement is not personal labor.

1. The Essence Of Lyons’ Franchise Agreements Is A Franchise Relationship Between Separate Businesses.

There is only one essence to a thing. If “the very heart and soul,” *Haller*, 13 Wn.2d at 168, of Lyons’ franchise agreement is something other than “personal labor,” the franchisees are not “workers.” It is something different. The heart and soul of the agreement is the mutual

¹ See, e.g., *Dana’s Housekeeping, Inc. v. Dep’t of Labor & Indus.*, 76 Wn. App. 600, 886 P.2d 1147 (1995); *Jamison v. Dep’t of Labor & Indus.*, 5 Wn. App. 125, 827 P.2d 1085 (1992); *Lloyd’s of Yakima Floor Ctr. v. Dep’t of Labor & Indus.*, 33 Wn. App. 745, 662 P.2d 391 (1982). The Board, too, has lamented the lack of a workable test. See *In re Traditions Unlimited, Inc.*, BIIA No. 870,600, 1989 WL 164536, *8 (1989). The Board proposed several factors it thought relevant, but concluded “we do not feel it is appropriate for us to expand the *White* test beyond the parameters which have been set by case law[.]” *Id.*, *9.

obligations of a franchisor-franchisee relationship, in which a franchisee's "labor" is secondary to the agreement's purpose: the grant of a "franchise" to an independent business owner. A franchise gives a franchisee a chance to start and operate its own business with no experience by giving it access to the franchisor's brand, training and support. At the same time, it allows a franchisor to profit from its brand and business model through the entrepreneurial efforts of its independent franchisees. Chisum at 296.

The essence of a franchise is reflected in the horizontal relationship between franchisor and franchisee, not the vertical relationship between the franchisee and its customers.² This is true whether the franchisee uses the franchisor's brand, training and support to run a business that offers "services" rather than "goods." FIPA does not distinguish between the two, RCW 19.100.010(6), and neither should a franchisee's status under the IIA. Indeed, any distinction between goods and services for purposes of "worker" status is both artificial and unworkable; a franchise that offers "goods" may require as much of the franchisee's "labor" (to produce, market and sell the item) as a franchise that offers "services." In the end, it does not matter whether the franchisee's customer walks away with a hamburger, a completed tax return, a starched shirt or a clean facility; for

² The Court of Appeals erred because it ignored Lyons' horizontal relationship with its franchisees (reflected in the franchise agreement) and, instead, focused entirely on the vertical relationship with the customer (reflected in the cleaning contracts). *See Lyons*, 186 Wn. App. at 532 ("The essence of these *cleaning contracts* is that though someone's "labor" the end customer's facility is made clean." (emphasis added)). Of course, it is the essence of the franchise agreement, not the customer cleaning contracts, that matters.

all true franchises, the essence of a franchise agreement is the same.³

Whether a franchise involves goods or services, the franchisor relies on a franchise's status as an independent business; the franchisor's royalties and fees are tied to the franchisee's success in generating revenue. Unlike a true "worker" who is paid to work for the benefit of the employer's business, a franchisee pays a franchisor for the tools it needs to work for the benefit of its own business. Lyons' franchise agreement reflects this. CP 317-65. As required by FIPA, the agreement details the "franchise fee" (royalty and management fees) the franchisees pay to Lyons, and the "marketing plan" (proprietary marks, training, services and accounts) they receive from Lyons in return. *Id.*; RCW 19.100.010(6), (8) & (11). The franchise agreement requires franchisees to have a business license, and that they be responsible for their own taxes, insurance, books, equipment and supplies, employees and dealings with customers. *Id.*

Indeed, the IIA as a whole shows it was never intended to apply to independent contracts, such as Lyons' franchise agreement, where the contractor does not work for the employer in the employer's business. Both employees and independent contractors can be "workers," but in either case, the labor must arise "in the course of ... employment." RCW

³ The IIA relies on employer self-reporting. RCW 51.16.060. Under L&I's new approach, which is not explained in any rule or interpretive statement, franchisors now must guess whether L&I will consider their franchisees to be "workers" depending on the "product" they sell; is it a good or a service? For franchises that defy easy classification, or offer a combination of goods and services, franchisors are left to guess where L&I will draw the line; if they guess wrong, they will be subject to audit, assessment, interest and penalties.

51.08.180. The “course of employment” means a “worker acting at his or her employer’s direction or in furtherance of his or her employer’s business.” RCW 51.08.013(1). Lyons’ franchisees do neither thing. As discussed below, they do not work under Lyons’ direction. Nor do they work in the course of Lyons’ business; Lyons “is in the business of selling and servicing regional franchises,” and the franchisees are in the business of commercial cleaning. CP 23. The franchise agreement involves labor, but the franchisees provide that labor in the course of their own business. In short, they are not independent contractors in Lyons’ “employment.”⁴

This distinction between working for oneself and working for another is also apparent from the IIA’s exclusion of independent business owners from covered “employments.” Specifically, the IIA exempts from mandatory coverage sole proprietors, partners and members of LLCs; these business owners do not have to pay IIA premiums for themselves when working for their own businesses. RCW 51.12.020; *Dep’t of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 309-310, 849 P.2d 1209 (1993). Lyons’ franchisees are sole proprietors or LLCs and, as noted, all are licensed as independent businesses. Thus, if the franchisees contracted with and worked directly for their customers outside of a Jan-Pro franchise, they would be IIA-exempt owners, not covered “workers.”

⁴ This same principle is reflected in RCW 51.12.020(3), which excludes from IIA coverage “[a] person whose employment is not in the course of the trade, business, or profession of his or her employer” Here, too, Lyons is in the business of selling and supporting franchises, but unlike Lyons’ own employees (for whom Lyons duly pays IIA premiums), the franchisees do not work in the course of Lyons’ franchise business.

The fact that the franchisees enter into a franchise agreement with Lyons to start or expand their businesses should not change their status as exempt business owners working for themselves. To be sure, not every individual is an IIA-exempt “sole proprietor.” But RCW 51.08.180 and RCW 51.12.020 must be read together, and they distinguish between individuals who work strictly in the course of an employer’s business, and individuals who work in the course of their own business. The former is a covered “worker” (if the labor is “personal,” *see below*); the latter is an exempt “sole proprietor.” Exempt business owners can opt into the IIA system (which some of Lyons’ franchisees choose to do) and, of course, they must IIA premiums when they hire “workers” of their own (which Lyons’ franchisees do as well). CP 1947, 1974, 1992, 2028-29.

That is what the legislature intended, and entirely consistent with L&I’s long-standing interpretation of RCW 51.08.180 in the franchise context. The IIA applies only to individuals who work in the employment of another. The essence of a franchise agreement—regardless of whether the franchise involves the sale of “goods” or “services”—is not personal labor because franchisees are independent businesses who work for their own benefit, not for the franchisor. The Court of Appeals’ holding ignores the requirements of FIPA and the distinct nature of a franchisee’s business, and will undermine the economic viability of the franchise model in Washington. It certainly will cripple Lyons’ business and the businesses of its franchisees, who rely on the franchise to succeed.

2. The Essence Of Lyons' Franchise Agreements Is Not "Personal Labor" Because The Parties Contemplate That The Franchisees May Delegate The Work.

White's "third-prong" excludes from "worker" status independent contractors "who of necessity or choice employs others to do all or part of the work." 48 Wn.2d at 474. Some courts (and the Board) properly apply this prong if the parties contemplate (contractually or otherwise) that the contractor can use others to do the work—even if the contractor ends up doing some or all of the work herself. *Silliman v. Argus Servs., Inc.*, 105 Wn. App. 232, 236, 19 P.3d 482 (2001); *Mass. Mut. Life Ins. Co. v. Dep't of Labor & Indus.*, 51 Wn. App. 159, 164-65, 752 P.2d 381 (1988); *In re Rainbow Int'l*, BIIA No. 882,664, 1990 WL 304362, *2, 6 (1990). Others, including the Court of Appeals, hold that *White's* third-prong "must be read literally—a contractor is excluded only if he or she *actually* 'employs others.'" *Lyons*, 186 Wn. App. at 533; *see also Dep't of Labor & Indus. v. Tacoma Yellow Cab Co.*, 31 Wn. App. 117, 123, 639 P.2d 843 (1982).

White cannot be construed so narrowly. Even if the "essence" of Lyons' franchise agreement is "labor," that labor is not "personal" to the franchisee. Any other result impermissibly reads the word "personal" out of the statute. *Lake v. Woodcreek Homeowners Ass'n.*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (court must give effect to all statutory language). This Court's early cases correctly recognized that the term "personal labor" has a specific meaning: "given their common, every-day meaning, they signify that ... an independent contractor must be one

whose *own personal labor*, that is to say, the work which *he* is to do *personally*, is the *essence* of the *contract*.” *Haller*, 13 Wn.2d at 168 (emphasis in original); also *Crall v. Dep’t of Labor & Indus.*, 45 Wn.2d 497, 499 275 P.2d 903 (1954) (“Labor that can be done by others *is not personal* as the word is used in the statute.” (emphasis in original)).

White rejected language in *Crall* to the effect that the essence test was satisfied only if the employer “requires the personal services of the independent contractor and is unwilling that any part of the work be done by someone else.” 48 Wn.2d at 473-74. But in concluding that RCW 51.08.180 was not limited to “personal services” contracts, this Court did not hold that the essence test is *always* satisfied if the work is done by the contractor herself. Indeed, *White* approved the result in *Crall, id.* at 476, which held that the essence of the independent contract was *not* “personal labor” even though “[o]n the fatal day of the crash, Crall was driving one of the trucks himself.” *Crall*, 45 Wn.2d at 499. Rather, what mattered in *Crall*, and what is properly reflected in *White*’s third-prong, is whether the parties “contemplated” that the work could be done by others. *Id.* If they did, the contracted labor is not “personal”—regardless of who does it.

This construction of “personal labor” fulfills the legislature’s intent that the IIA apply only to those independent contracts that mimic employer-employee relationships. “Independent contractors providing personal labor were included within the definition of worker to protect laborers who would ordinarily be considered employees.” *Silliman*, 105

Wn. App. at 236; *White*, 48 Wn.2d at 474 (RCW 51.08.180 applies “where the work could be done on a regular employer-employee basis”). Where a party contracts with a business to obtain a service, but with no expectation or requirement that the business owner perform the service personally, the contract looks nothing like an employment; the first party doesn’t care who does the work, so long as it gets done. In any such case, even if the essence of the contract is “labor,” it is not “personal” to anyone. And this is true whether the contractor is a corporation, LLC or sole proprietor.

Finally, it would lead to absurd results if the meaning of “personal labor” turns on whether the independent contractor or its subordinate does the work. *Estate of Bunch v. McGraw Res. Ctr.*, 174 Wn.2d 425, 433, 275 P.3d 1119 (2012) (courts must avoid construction that will lead to absurd result). This case proves the point. Lyons’ franchise agreement allows franchisees to hire and use others to do the work, and most do; Lyons doesn’t care either way. In the Court of Appeals’ view, a franchisee who does the work herself is Lyons’ worker, while a franchisee who uses a subordinate is not—even though the franchise agreement and expectations are identical in both cases.⁵ By the same token, Lyons must pay IIA premiums for one, but not the other, even though it has no way of knowing

⁵ The Court of Appeals reading of *White* leads to absurd and arbitrary results in another way—one that is plainly contrary to the text and purpose of RCW 51.08.180. Where the independent contract contemplates the personal services of a particular individual, its essence is “personal labor.” Yet, under the court’s approach, if the individual “*actually* uses subordinates”—despite the parties’ contemplation or the terms of their contract—*White*’s third prong applies, and the contractor is not a “worker” under RCW 51.08.180.

whether or when any particular franchisee uses others to do the work. This arbitrary and unpredictable result is avoided if the word “personal” has meaning, and RCW 51.08.180 excludes those independent contracts that permit the contractor to delegate the work to others.⁶

B. Traditional Elements Of A Franchise Should Not Disqualify Lyons’ Franchisees From Satisfying RCW 51.08.195.

The IAJ found that Lyons’ franchisees satisfied RCW 51.08.195’s six-part exception to worker status. The Board reversed on two grounds, concluding that the franchisees were not “free from control,” and were not “customarily engaged in an independently established ... business.” The Court of Appeals affirmed on the second ground and did not reach the first. *Lyons*, 186 Wn. App. at 535-37 & n. 11. If this Court holds that Lyons’ franchisees are “workers,” it must reverse the Board and Court of Appeals’ analysis of RCW 51.08.195. Elements common to, and in some cases legally required of, any legitimate franchise should not automatically disqualify Lyons’ franchisees from satisfying RCW 51.08.195.

1. Lyons’ Franchisees Are “Free From Control.”

The franchisees satisfy RCW 51.08.195(1) if they are “free from control or direction over the performance of the service.” “The crucial

⁶ If this Court adopts a narrow reading of *White*, then it must at least affirm the Court of Appeals’ holding that *White* exempts franchisees who “take on their own subordinates”—even if not traditional employees. If the word “personal labor” is to have any meaning at all, it applies only where a franchisee “works alone.” *Lyons*, 186 Wn. App. at 535. Where a franchisee receives aid from subordinates of any kind, whether from employees, assistants, helpers or even spouses, “then the franchisee is necessarily contributing more to the contract than his or her personal labor—the franchisee is contributing the labor of his or her subordinates.” *Id.* *White*’s third prong must go at least this far.

issue is ... whether [the employer] has the right to control the methods and details” of the work. *Western Ports Transp., Inc. v. Employ. Sec. Dep’t*, 110 Wn. App. 440, 452, 41 P.3d 510 (2002); WAC 296-17-31002 (no “direct supervision over the work hours or the methods and details of performance or having the right to exercise that authority under the contract”). The IAJ properly found that the franchisees were “free from control.” CP 122-24. Lyons does not tell the franchisees who can do the work; does not tell them when to do the work; does not provide them supplies for the work; and never supervises the work itself—nor does the franchise agreement give Lyons’ the right to do so. The Board ignored the lack of control over “methods and details,” and found “control” because the franchise agreement requires the franchisees to service their accounts “in a specific manner consistent with the Jan-Pro [sic] program.” CP 27.

This Court should reject the Board’s view that uniform standards franchisors *must* impose on their franchisees constitute “control.” FIPA requires all franchises to have a “marketing plan” governing aspects of franchisee operations. RCW 19.100.010(6) & (11). Without it, there is no “franchise.” *Id.*; Berry, *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U.L.Rev. 811, 838 (2009 (“key to the existence of a ‘marketing plan’ is whether ... there is a certain ‘level of control’ of the franchisee’s operation”). A legal requirement that ensures delivery of goods or services of uniform quality, which is a hallmark of any franchise and necessary to preserve the integrity of the franchisor’s

brand and proprietary system, is not “control” over “methods and details.” *Cf. Folsom v. Burger King*, 135 Wn.2d 658, 671-73, 958 P.2d 301 (1998) (franchisor not vicariously liable where “authority over the franchise was limited to enforcing and maintaining the uniformity of the ... system”).⁷

The Board also found control because Lyons, not the franchisees, contracts with customers and handles billing. CP 27. But customer contracts and administrative services are among the business opportunities and services that Lyons provides the franchisees and for which they pay a fee. They are not means of “control,” but key benefits of a franchise that franchisees want and need. The franchisees don’t just want a manual and branded t-shirt; they want an existing customer base and an easy means of collection. And, regardless of who signs the contract or bills the customer, the franchisee, not Lyons, “owns” the customer’s payments and bears the risk of loss if they don’t pay. The focus of RCW 51.08.195(1) is “control” over the “performance of the service,” which is absent where, as here, the franchisor neither directs nor supervises the franchisee’s work.

2. The Franchisees Are Independent Businesses.

The franchisees satisfy RCW 51.08.195(3) if they are “customarily engaged in an independently established ... business.” Here, too, the IAJ properly found in favor of Lyons. CP 124. The franchisees are separately

⁷ The Board adopted L&I’s view that no franchisee—whether it sells goods or services—will ever satisfy RCW 51.08.195(1)’s “free from control” test. As L&I told the trial court: “[It] is exactly the extreme element of direction and control required by the nature of a franchise operation so that every franchisee provides the same type of service or product to every customer that causes the failure under RCW 51.08.195.” CP 2360.

licensed businesses, responsible for their own taxes, insurance, employees, supplies, schedules and more. The Board and Court of Appeals concluded, however, that Lyons' franchisees fell short of this standard because they "were not in the commercial cleaning business" before becoming Jan-Pro franchisees, "nor will their businesses survive the termination of the franchise agreement" due to its one-year noncompete clause. *Lyons*, 186 Wn. App. at 535-37. Both conclusions are wrong.

Nothing in RCW 51.08.195(3)'s text or history suggests it applies only to existing businesses, and no other court has interpreted it that way. Such a standard will disqualify most franchisees (for which a franchise provides the means to start a business), and ignores the separate identity of their businesses. "Under FIPA, the franchise is conceptually distinct from the franchisee's business." *Coast to Coast Stores, Inc. v. Gruschus*, 100 Wn.2d 147, 152, 667 P.2d 619 (1983). Indeed, a key benefit of a franchise is that it "creates a class of independent businessmen" that would not exist otherwise. Chisum at 296. The IIA should encourage entrepreneurship, not discourage it. In short, a first-time business is no less "independently established" because it is created upon purchase of a franchise.

Nor does the noncompete clause in Lyons' franchise agreement negate RCW 51.08.195(3). The clause does not compel the franchisees to go out of business; it simply prevents them from soliciting customers and competing against other Lyons' franchisees for a period of one year. CP 344-47. Washington courts recognize the value of reasonable noncompete

clauses in franchise agreements, which they will enforce both during and after termination of the franchise. *Armstrong v. Taco Time Int'l, Inc.*, 30 Wn. App. 538, 635 P.2d 1114 (1981). It both protects the franchisor's brand, and enhances "its ability to sell new franchise rights" by protecting "existing franchisees from competition by a fellow franchisee." *Id.* at 546.

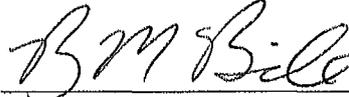
This kind of noncompete clause is common to franchises, and while it limits a former franchisee's ability to compete, it does not alter its status as an independent business. It is simply part of the consideration the franchisee agrees to pay for the right to use Jan-Pro's brand, goodwill and proprietary system for its own business benefit. CP 1920; 2201-02. A franchisee, like any other contracting party, can bargain away its ability to compete in exchange for valuable rights without losing its identity as an independent business. Here, too, this Court should reverse the Court of Appeals' view that a routine and mutually beneficial aspect of a franchise disqualifies Lyons' franchisees from ever satisfying RCW 51.08.195.

IV. CONCLUSION

Lyons' independent franchisees are not its "workers." This Court must reverse the Court of Appeals, and hold that the IIA does not apply to business owners who provide services under a lawful franchise agreement.

RESPECTFULLY SUBMITTED this 2nd day of November, 2015.

LANE POWELL PC

By 

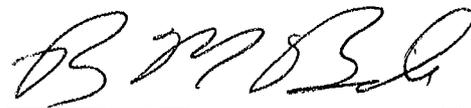
Ryan P. McBride, WSBA No. 33280

Attorneys for Lyons Enterprises, Inc.

CERTIFICATE OF SERVICE

I, Ryan P. McBride, hereby certify under penalty of perjury of the laws of the State of Washington that on November 2, 2015, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

<p>Attorney for Department of Labor and Industries:</p> <p>Steve Vinyard Assistant Attorney General Attorney General of Washington PO Box 40121 Olympia, WA 98504-0121 E-mail: stevev1@atg.wa.gov</p>	<p><input type="checkbox"/> by CM/ECF <input checked="" type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input checked="" type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery</p>
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Ryan P. McBride

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Dear Clerk:

Attached for filing is the following document --

Case No.: 91610-1
Case Name: Washington State Department of Labor & Industries v. Lyons Enterprises, Inc., d/b/a Jan-Pro Cleaning Systems
Document: Petitioner's Supplemental Brief
Filing Attorney: Ryan P. McBride, WSBA No. 33280

Thanks,

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