COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11282

GIOVANI DEPIANTI, et al.,
Plaintiffs-Appellants,

v.

JAN-PRO FRANCHISING INTERNATIONAL, INC.,
Defendant-Appellee

On Certified Questions from the United States District Court for the District of Massachusetts

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BRIEF OF *AMICI CURIAE* BRAZILIAN IMMIGRANT CENTER, BRAZILIAN WOMEN'S GROUP, CENTRO PRESENTE, CHELSEA COLLABORATIVE, CHINESE PROGRESSIVE ASSOCIATION, LAWRENCE COMMUNITY CONNECTIONS, MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY AND HEALTH, MASSACHUSETTS IMMIGRANT AND REFUGEE ADVOCACY COALITION, MASSACHUSETTS JOBS WITH JUSTICE, METROWEST WORKER CENTER, PROJECT VOICE/AMERICAN FRIENDS SERVICE COMMITTEE, AND THE NATIONAL EMPLOYMENT LAW PROJECT.

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Dated: January 22, 2013

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Amici adopt the statement of the issues presented for review submitted by Plaintiffs-Appellants.

STATEMENTS OF INTEREST OF *AMICI*

Amici Brazilian Immigrant Center, Brazilian Women's Group, Centro Presente, Chelsea Collaborative, Chinese Progressive Association, Lawrence Community Connections, Massachusetts Coalition for Occupational Safety And Health, Massachusetts Immigrant and Refugee Advocacy Coalition, Massachusetts Jobs with Justice, Metrowest Worker Center, Project Voice/American Friends Service Committee are non-profit community-based organizations that engage in a range of legal and policy advocacy, community organizing, and support and referrals for legal action for low-wage immigrant workers in Massachusetts. Greater Boston Legal Services (GBLS), counsel to these *amici*, provides legal representation and assistance to these organizations in their ongoing efforts to advise and support workers in the enforcement of their workplace rights. GBLS also brings to its representation of *amici* its own extensive experience representing low-

wage workers in a wide range of cases under the Massachusetts wage laws; one of GBLS's clients was Rhina Alvarenga, the janitorial cleaning franchisee and then unemployment benefits claimant who was held by this Court in 2006 to have been misclassified as an independent contractor. 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.

The *amici* organizations, apart than NELP, also work together in coalition, as members of the Massachusetts Fair Wage Campaign, to protect, strengthen, and improve enforcement of the Massachusetts wage laws through advocacy with the Massachusetts legislature and the Office of the Attorney General. *Amici* and their counsel have a strong interest in the present case because of the potential impact not only on those workers preyed upon by Jan-Pro and similar janitorial franchisors but also on the ability of all low-wage workers to vindicate their rights under the Massachusetts wage laws.

Amici have repeatedly seen the tremendous harm inflicted on vulnerable workers by Jan-Pro and similar janitorial franchisors. In the experiences of *amici*, Jan-Pro and the like are exploitative employers that use deceptive business practices — including multi-tiered structures with shadow intermediaries — to ensnare their "franchisees." Often, the franchisees are immigrants with limited English comprehension and little or no business experience, who are dishonestly enticed to sign lengthy, detailed, and blatantly one-sided franchise agreements that they cannot read or understand.

Amici view these franchise relationships in the janitorial industry as inherently exploitative and untenable. Such relationships drag down labor standards in the industry as a whole, allowing Jan-Pro and similar cleaning companies to compete unfairly with those employers who do not misclassify their employees and who do comply with basic labor standards.

Of course, the potential impact of the present case goes far beyond the janitorial cleaning industry. While janitorial franchisors provide a clear example

of exploitation of low-wage workers, similar exploitation and mischaracterization of employment relationships are rampant in other industries that rely on the low-wage workforce. *Amici* have seen the difficulties that workers face in attempting to combat workplace exploitation and abuse that are compounded by confusion around employer and employee status. For these broader reasons, as well as for their interest in addressing the serious problems in the janitorial franchising industry, *amici* have an extremely strong interest in this case.

DESCRIPTION OF *AMICI*

The **Brazilian Immigrant Center (BIC)**, founded in Boston by immigrant workers in 1995, is a grassroots membership organization. Its mission centers on the training, advocacy, and organizing of immigrant workers in order to address the root causes of abuse and discrimination, defend and advance labor, civil, and human rights of immigrants, and promote their empowerment as workers and civic participants. BIC's three principal, interconnected project areas are workers' rights, domestic workers, and immigrant rights, all of which involve organizing, policy, and

services that are closely connected to and support one another.

The **Brazilian Women's Group (BWG)** is a volunteer-run organization that was started in 1995 by a group of Brazilian immigrant women of various backgrounds and occupations. BWG promotes its goals through community organizing, with the aim of empowering Brazilian women to speak for themselves and to strengthen the Brazilian community. Seeing the significant need in the Brazilian community to address workers' rights violations, BWG created a workers' rights program with free workers' rights clinics, providing workers' rights education and encouraging workers to take leadership and ownership of their efforts to assert their rights.

Centro Presente is a member-driven, statewide Latin American immigrant organization dedicated to the self-determination and self-sufficiency of the Latin American immigrant community of Massachusetts. Through a combination of community organizing, leadership development, and basic services, Centro Presente strives to give its members a voice and build community power. Each year, Centro Presente assists

over 4,000 Latin American immigrants through the provision of services, including legal immigration services, workers' rights education and advocacy, and adult education. Over the past several years, Centro Presente has developed its worker center, specifically serving low-income Latino immigrant workers.

The **Chelsea Collaborative** has as its mission to empower Chelsea residents and Chelsea organizations to enhance the social, environmental, and economic health of the community and its people. The Collaborative carries out its mission through community organizing, technical assistance, program development, and information dissemination. Approximately 14,000 Latino immigrants live in Chelsea, the vast majority of them from Central America. Working at some of the most difficult, lowest-paying, and most hazardous jobs, they are among Chelsea's poorest residents. Since 1998, the Chelsea Latino Immigrant Committee has mobilized them for social justice and needed programs; its efforts include presenting workers' rights workshops, organizing workers in local workplaces, and developing and bringing wage and hour claims for legal enforcement.

The **Chinese Progressive Association (CPA)** is a grassroots community organization based in Boston's Chinatown. CPA works for full equality and empowerment of the Chinese community and to involve ordinary people in decision-making. CPA's Worker Center, established in 1987, helps immigrant workers learn about and organize for their rights on the job, including wage and hour rights.

Lawrence Community Connections (LCC), founded in 2010, is a community organization in Lawrence that also serves Lowell and other communities in the Merrimack Valley with large immigrant populations. LCC has a community-based and community-led worker center which engages in a combination of advocacy, community organizing, leadership development, mediation, and training to address various workplace problems, including wage violations.

The **Massachusetts Coalition for Occupational Safety and Health (MassCOSH)**, founded in 1976, is a non-profit coalition of workers, unions, community groups, health, safety, and legal professionals. MassCOSH's mission is to promote safe, secure jobs and healthy communities, with a particular focus on

immigrants. In recent years, MassCOSH has received growing demands for assistance from immigrant workers with wage and hour claims. MassCOSH engages in organizing and advocacy work directly with these workers, and also refers cases to private counsel for representation on a class-wide basis.

The **Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA)** is the largest organization focused on the rights and integration of immigrants and refugees in Massachusetts. MIRA serves the Commonwealth's one million foreign-born residents with policy analysis and advocacy, institutional organizing, training and leadership development, and strategic communications. MIRA's work involves an active membership of over 130 organizations, including community-based organizations, social service providers, ethnic associations, schools, refugee resettlement agencies, health centers and hospitals, religious institutions, unions, and law firms, as well as thousands of individual members, contributors, and allies. Because immigrants are especially vulnerable to violations of labor laws, MIRA works closely with members and allies to ensure that workers - both

immigrant and native-born - are afforded protection of the law from abusive employers.

Massachusetts Jobs with Justice (JwJ) is a coalition of over ninety organizations representing low-wage workers in many diverse communities. JwJ does extensive organizing around issues of immigrant and other low-wage workers subjected to abusive working conditions and nonpayment of wages.

The **Metrowest Worker Center (MWC)** was established in 2007 at the initiative of Metropolitan Interfaith Congregations Acting for Hope (MICAH), the New England Regional Council of Carpenters (NERCC), and the Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA). Based in Framingham, MWC works primarily with Brazilian and Spanish-speaking immigrant workers from Latin America.

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's areas of expertise include the workplace rights of nonstandard workers under state and federal employment and labor laws, with an emphasis on wage and hour rights. NELP has litigated directly and participated as *amicus* in numerous cases and has provided Congressional testimony addressing the issue of employment and independent contractors under the Fair Labor Standards Act and state labor standards.

Project Voice, American Friends Service Committee, is a nationally coordinated program that works for economic and social justice for all immigrants. The program works within immigrant communities to organize low-wage workers to defend their labor, civil, and human rights.

SUMMARY OF ARGUMENT

In this case, low-wage janitorial workers seek protection under Massachusetts labor and unfair business practices laws from Jan-Pro Franchising International, Inc. ("Jan-Pro"), a Massachusetts janitorial corporation. These janitorial workers, who paid thousands of dollars in franchise fees for the

opportunity to clean for Jan-Pro customers, were subject to Jan-Pro's false promises about the hourly rate of pay, imposition of excessive fees to enter the workforce, and sales practices undermining their ability to earn the promised income.

This Court has conclusively determined that workers classified as "franchisees" in the janitorial industry are employees under Massachusetts law, and are thus protected under Massachusetts labor standards. Coverall N. Am., Inc. v. Comm'r of Div. of Unemployment Assistance, 447 Mass. 852 (2006); see also Awuah v. Coverall N. Am., Inc., 707 F. Supp. 2d 80 (D. Mass. 2010). Jan-Pro, however, argues that it can evade responsibility for maintaining basic labor standards as an employer because it has established a multi-tiered franchising structure where its intermediary "master franchisees" sign contracts with janitors. This argument fails. As part of a remedial statute that provides basic labor protections to workers, G.L. c. 149, § 148B, has an expansive definition of "employee" that presumes that a worker is an employee entitled to protection under Massachusetts labor law. Jan-Pro's proposed

requirement that a worker must have signed a contract for service with a defendant in order to bring a claim for misclassification under Section 148B, moreover, mischaracterizes the logic of the statute's language by confusing the "necessary" and "sufficient" conditions of the statute, and cannot be imputed to the law.

Misclassification of workers to evade the protection of labor laws, in addition, raises key public policy concerns, particularly for thousands of Massachusetts janitorial workers subject to chronic abuse and exploitation. Jan-Pro has attempted to create a multi-tiered franchising structure that would enable the company to underpay workers, lower its labor costs, and avoid paying payroll taxes and other insurance premiums. The cumulative societal impact of such misclassification is substantial. Federal and state governments have lost billions of dollars in unpaid funds; law-abiding employers feel pressure to concoct similar schemes in order to stay competitive; and millions of workers lack vital labor protections to which they are otherwise entitled.

For these reasons, *amici* urge the Court to uphold the basic labor protections in Section 148B and to clarify that it is unnecessary for a plaintiff to have a contract for service with a defendant in order to properly bring a claim for misclassification under G.L. c. 149, § 148B.

ARGUMENT

I. ALLOWING DEFENDANTS SUCH AS JAN-PRO TO EVADE LIABILITY FOR MISCLASSIFICATION AND BASIC LABOR PROTECTIONS BY CREATING A MULTI-TIERED STRUCTURE ENSURES CONTINUED EXPLOITATION OF LOW-WAGE WORKERS.

Mr. DePianti's case raises issues of critical importance for thousands of Massachusetts janitorial and low-wage workers. 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."[1] Janitorial workers are particularly vulnerable to dangerous working conditions, high

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[1] Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 Colum. L. Rev. 319, 352 (2005).

workplace injury rates, and low pay. As the Department of Labor has noted, "[j]anitors and building cleaners have one of the highest work-related injury rates," where workers are susceptible to cuts, bruises, and burns from occupational hazards such as machinery, tools, and dangerous chemicals. Janitorial workers also face high exposure to infectious diseases, and suffer from musculoskeletal injury, slips, and falls on the job.[2]

Janitorial workers typically must seek lengthy hours because of low industry wages. In 2010, the national median hourly wage for janitors and building cleaners was $10.68 per hour.[3] The janitorial industry, moreover, is marked by significantly high rates of non-compliance with minimum wage, overtime laws, and other basic labor standards protections. A recent academic survey of low-wage workers found that at

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[2] Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2012-13 Edition, Janitors and Building Cleaners, available at http://www.bls.gov/ooh/building-and-grounds-cleaning/janitors-and-building-cleaners.htm; National Safety Council, Cleaning Up Safely: Janitors and Cleaners Face Multiple Hazards, available at http://www.nsc.org/safetyhealth/Pages/312JanitorSafety.aspx#.UPeyJzkayfQ.

[3] Bureau of Labor Statistics, supra note 2.

least 26 percent of building service and ground service workers had not received minimum wage payments, and 71 percent had not received overtime pay. Over half did not receive required meal breaks.[4]

Janitorial franchising schemes promulgated by firms like Jan-Pro enable this rampant non-compliance with basic labor standards. As Professor David Weil of the Boston University School of Management has observed of the janitorial industry, violations of basic labor law protections are integrally connected to the emergence of the franchising model. Such franchising arrangements uniquely seek to profit from and to control a janitor in the performance of his or her cleaning duties. Under a typical franchising arrangement promulgated by janitorial companies, revenues "flow first to the franchisor [company] and then back to the franchisee [janitor]."[5] Economic

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[4] Annette Bernhardt, et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, 31, 34, 37 (2009), available at http://www.unprotectedworkers.org/index.php/broken laws/index.

[5] David Weil, Market Structure and Compliance: While Janitorial Franchising Leads to Labor Standards Problems at 3-4, 7-8 (Boston University School of Management Working Paper 2011), available at

modeling, moreover, 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."[6] However, "this does not imply that such profits are not attainable for the *franchisor*."[7] In Professor Weil's study, estimates of franchisor profitability, defined as operating income as a percent of gross revenues, would reach up to 41 percent for companies like Jan-Pro.[8] Such a model is only sustainable if a steady stream of new janitors/franchisees is available to "replace those unable to make the business model work, allow[ing] franchising to persist (and benefit the franchisor.)"[9] 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.

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http://www.huizenga.nova.edu/ExecEd/ISOF/abstracts/abstracts2011/20 Weil.cfm.

[6] Id. at 13.

[7] Id. at 15 (emphasis in original).

[8] Id.

[9] Id.

This Court has already clarified that workers classified as "franchisees" in the cleaning industry are employees under Massachusetts law, and thus eligible for protection under Massachusetts labor standards. Coverall, 447 Mass. 852 ("franchisee" is considered an employee under Massachusetts unemployment statute with virtually the same test as Section 148B); see also Awuah, 707 F. Supp. 2d 80 (cleaning "franchisees" are employees under Section 148B). Jan-Pro, however, now argues it can evade responsibility for maintaining basic labor standards as an employer because it has established a multi-tiered franchising structure where its intermediary "master franchisees" sign contracts with janitors. This cannot be the correct result. Allowing companies such as Jan-Pro to evade liability for misclassification and enforcement of basic labor protections through the creation of a multi-tiered structure with shadow intermediaries will only ensure continued exploitation of low-wage workers.

II. EMPLOYEE MISCLASSIFICATION SCHEMES SUCH AS JAN-PRO'S MULTI-TIERED FRANCHISING SYSTEM IMPOSE SIGNIFICANT SOCIETAL COSTS IN MASSACHUSETTS.

In all forms of independent contractor misclassification, cost savings allow a misclassifying employer to obtain unfair economic advantage over competitors. Jan-Pro's multi-tiered franchising system creates an even more extreme variation of this theme, as it permits Jan-Pro to hide behind nominal entities to evade responsibility for the franchises it establishes with the workers. To require a contract for services between the plaintiff and defendant under Section 148B would skirt the intent of the law and permit Jan-Pro and other impecunious employers to take advantage of large groups of workers via a technical loophole that does not exist in the law.

In addition to weakened labor standards protections for workers, employer schemes like Jan-Pro's impose significant costs in today's economy. Employers who misclassify employees deny workers protection of workplace laws, rob unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reduce federal, state, and local tax withholding and revenues. The problem is

significant: a 2000 study commissioned by the U.S. Department of Labor found that up to 30% of audited employees misclassified workers.[10] The Massachusetts Attorney General's Fair Labor Division has thus prioritized enforcement against misclassification. As it noted in an advisory opinion, "[t]he need for proper classification of individuals in the workplace is of paramount importance to the Commonwealth. Entities that misclassify individuals are in many cases committing insurance fraud and deprive individuals of the many protections and benefits, both public and private, that employees enjoy . . . . [and] deprive the Commonwealth of tax revenue. . . . Misclassification undermines fair market competition and negatively impacts the business environment in the Commonwealth."[11] As the United States Government Accountability Office (GAO) has likewise concluded,

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[10] Lalith de Silva, et al., Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs at i-iv (2000), available at http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[11] Massachusetts Office of the Attorney General, An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B, Advisory 2008/1 1 (2008), available at http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf.

"employers have economic incentives to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers' compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans."[12]

The federal government suffers significant loss of revenue due to misclassification. Between 1996 and 2004, $34.7 billion of federal tax revenues went uncollected due to the misclassification of workers.[13] The Internal Revenue Service's (IRS) most recent estimates of misclassification costs are a $54 billion underreporting of employment tax, and losses of $15 billion in unpaid FICA taxes and unemployment

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[12] U.S. General Accounting Office, Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification, GAO-06-656, 25 (2006) (showing changes in size of contingent workforce), available at http://www.gao.gov/assets/260/250806.pdf.

[13] 156 Cong. Rec. S7135-01, S7136 (daily ed. Sept. 15, 2010).

insurance taxes.[14] Misclassification of this magnitude exacts an enormous toll: researchers found that misclassifying just one percent of workers would cost unemployment insurance trust funds $198 million annually.[15]

State governments also lose hundreds of millions of dollars in unemployment insurance, workers' compensation, and general income tax revenues due to misclassification.[16] One study of misclassification in Massachusetts's construction industry from 2001 to 2003 found that at least 14 percent of the state's construction employers and 13 percent of all employers misclassified its workers. Between 2001 and 2003, the Commonwealth of Massachusetts lost an estimated $91 million to $152 million in income tax revenue and up to $91 million of workers' compensation premiums as a

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[14] Treasury Inspector General for Tax Administration, While Actions Have Been Taken to Address Worker Misclassification, an Agency-Wide Employment Tax Program and Better Data Are Needed, 2009-30-035 (2009), available at http://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.pdf.

[15] De Silva, supra note 10, at iv.

[16] Sarah Leberstein, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (2011), available at http://nelp.3cdn.net/84304676b8982675ca d0m6iu02f.pdf.

result of misclassification in the construction industry alone.[17] A growing number of states have thus called attention to misclassification abuses by creating inter-agency task forces and committees to study and address the magnitude of the problem. In 2010, the Massachusetts Task Force on the Underground Economy and Employee Misclassification recovered nearly $6.5 million through its enforcement efforts; $2 million in new unemployment insurance taxes; $1.6 million in overdue taxes through review and investigation; $1.8 million in fines, and $1 million in other funds recouped through civil and criminal actions.[18] Jan-Pro's misclassification of workers and its attempt to evade its obligations as an employer through the use of a multi-tiered franchising scheme hurts low-wage workers and law-abiding businesses

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[17] Francoise Carre and Randall Wilson, The Social and Economic Costs of Employee Misclassification in Construction, Construction Policy Research Center, Harvard Law School and Harvard School of Public Health 15-16 (2004), available at http://www.law.harvard.edu/programs/lwp/Misclassification%20Report%20Mass.pdf.

[18] Massachusetts Department of Labor, Joint Task Force on the Underground Economy and Employee Misclassification 2010 Annual Report (June 2010), available at http://www.mass.gov/lwd/docs/dia/task-force/ar-2010.pdf.

alike. Permitting such schemes to continue permits the wage standards floor to drop, and costs the Commonwealth millions of dollars in lost payroll and tax revenue.

III. IT IS AN ILLOGICAL READING OF G.L. C. 149, § 148B, TO REQUIRE A WORKER TO HAVE A CONTRACT FOR SERVICE TO BRING A MISCLASSIFICATION CLAIM, AND IS COUNTER TO THE REMEDIAL PURPOSE OF THE LAW.

With Section 148B, Massachusetts has created one of the strongest and most objective tests to determine whether a worker is an employee and thus entitled to basic labor protections. The cornerstone of Massachusetts' wage laws "begins with the presumption that anyone performing services for another is an employee. This rebuttable presumption provides a far stricter standard for employers than either the agency law 'right to control' test . . . . signaling the state's public policy against misclassification of workers as independent contractors."[19] Prior to the enactment of Section 148B in 1990, Massachusetts courts employed the common law "right of control" test

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[19] Marsha E. Hunter, Assistant Attorney General in Fair Labor and Business Practices Division of the Attorney General's Office, Contingent Workers and Independent Contractors in Massachusetts, 45 Boston Bar J. 8 (2001).

to determine whether a worker is an employee. Commonwealth v. Savage, 31 Mass. App. Ct. 714, 717 (1991); Khoury v. Edison Elec. Illuminating Co., 265 Mass. 236, 238-39 (1928). This common law test was based in the principles of tort law, where courts determined an employer's liability for a tort based on whether the alleged employer had the "right to control the manner and means by which the product is accomplished." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 321 (1992). Under the common law test, only where the alleged master had the right to control details of a servant's work and the work was performed negligently, was it fair to hold the master accountable as tortfeasor — or as an employer.

In 1990, and with subsequent amendments, Massachusetts rejected this common law test in favor of a far more expansive definition of "employee." In contrast to the common law test, Section 148B provides a three-part test that places the burden of proof on a purported employer to show that the worker in question

is not an "employee" protected by Massachusetts labor protections. Under Section 148B's current language,

> an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters *unless*:
>
> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; *and*
>
> (2) the service is performed outside the usual course of the business of the employer; *and*
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

G.L. c. 149, § 148B(a) (emphasis added). This three-part test, commonly referred to as the "ABC" test, requires fulfillment of all three elements to classify a worker as anything other than an "employee." As the Massachusetts Office of the Attorney General has concluded, "the inability of an employer to prove any one of the prongs is sufficient to conclude that the individual in question is an employee."[20] The creation of a presumption of employee status, as in Section 148B, is one of the clearest and most objective tests

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[20] Massachusetts Office of the Attorney General, supra note 11, at 2.

for protecting against misclassification, and allows broad application of Massachusetts labor protection by looking at the actual conditions of work.[21]

Section 148B(a)(1) establishes that a worker is an employee unless it is established that "the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact" (of course prongs 2 and 3 have to be met as well). G.L. c. 149, § 148B(a)(1). Jan-Pro argues that this language imposes a requirement that a worker must have had signed a contract with the defendant in order to establish an employment relationship. This reading simply ignores the rules of basic conditional logic. The test of whether a worker should be considered an "employee" places the burden of proof on the purported employer. The use of the word "unless" creates a conditional phrase where the necessary condition is that an individual be free from control of the purported employer, both under a contract and in fact,

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[21] See Catherine Ruckelshaus and Sarah Leberstein, NELP Summary of Independent Contractor Reforms: New State and Federal Activity (2011), available at http://nelp.3cdn.net/85f5ca6bd2b8fa5120_9qm6i2an7.pdf.

and sufficient condition is the status of "employee."[22] Stated more simply, Section 148B(a)(1) provides that if a worker is not free from control and direction with the performance of the service *either* in contract *or* in fact, then the worker must be considered an employee for purposes of this prong of the test.

This interpretation is further supported by case law. As courts have observed, employers have required workers to sign contracts specifying that the workers are independent contractors in an attempt to avoid liability for employment and labor law protections. Such practices have led courts to specify that the actual conditions of the working relationship - not the existence and terms of a contractual agreement — determine the existence of an employment relationship. As the one court concluded in its reading of the Fair

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[22] See, e.g. Harry J. Gensler, Introduction to Logic 139 (2d ed. 2010) (use of "unless" and necessary/sufficient conditions). The conditional phrase "x unless y" is equivalent to "if not x, then y" or "if not y, then x." Here, if x equals "an individual is an employee," and if y equals "the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact," then the resulting equivalent statement would be that "if an individual is not free from control . . . either under the contract or in fact, then the individual is an employee."

Labor Standards Act, "economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA." Real v. Driscoll Strawberry Assoc. Inc., 603 F.2d 748, 755 (9th Cir. 1979) (citing Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947); Usery v. Pilgrim Equipment Co., 527 F.2d 1308, 1315 (5th Cir. 1976)).

Here, it is clear that the janitorial workers are employees of Jan-Pro. Under the clear language of Section 148B(a)(1), a contract need not be present in order to establish an employment relationship. Jan-Pro has not established that the janitorial workers were free from its control and direction in connection with the performance of cleaning. The janitors were plainly required to follow Jan-Pro's policies and procedures. Jan-Pro has also failed to show that the janitors' work was outside the usual course of its janitorial business. Jan Pro has furthermore failed to show that the janitors engaged in an independently established business, as workers were bound to non-competition policies and unable to establish businesses of their own. In contravention to the plain language off the statute, Jan-Pro attempts to evade its responsibility

to abide by basic labor standards protections by arguing that Section 148B requires a direct contract between the workers and Jan-Pro, instead of an intermediary "master franchisee." Such a result cannot be the correct outcome.

CONCLUSION

For the foregoing reasons, in additions to reasons set forth by Plaintiffs-Appellants, *amici* urge this Court to ensure basic labor protections for plaintiff workers, and clarify that it is unnecessary for a plaintiff to have a contract for service with a defendant in order to properly bring a claim for misclassification under G.L. c. 149, § 148B.

Respectfully submitted,

For *Amici* Brazilian Immigrant Center, Brazilian Women's Group, Centro Presente, Chelsea Collaborative, Chinese Progressive Association, Lawrence Community Connections, Massachusetts Coalition for Occupational Safety And Health, Massachusetts Immigrant and Refugee Advocacy Coalition, Massachusetts Jobs with Justice, Metrowest Worker Center, and Project Voice/American Friends Service Committee,

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Dated: January 22, 2013

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Mass. R. App. P. 16(k) that the foregoing Brief of *Amici Curiae* complies with the rules of court that pertain to the filing of briefs.

Audrey R. Richardson

Audrey R. Richardson

CERTIFICATE OF SERVICE

I hereby certify that two copies of the above document were served upon all counsel of record by first-class mail, postage prepaid, on this 22nd day of January, 2013.

Audrey R. Richardson

Audrey R. Richardson