NO. 89723-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BF FOODS, LLC, FILO FOODS, LLC, ALASKA AIRLINES, INC., and WASHINGTON RESTAURANT ASSOCIATION,

Respondents/Cross-Appellants,

v.

CITY OF SEATAC, KRISTINA GREGG, CITY OF SEATAC CLERK,

Appellants/Cross-Respondents,

and the

PORT OF SEATTLE,

Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,

Appellant/Cross-Respondent.

BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAW PROJECT

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INTEREST OF AMICI CURIAE

The National Employment Law Project (NELP) is a non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP's areas of expertise include the minimum wage and the impacts of a raise in the minimum wage on individual workers, businesses, and communities. NELP staff have written extensively, litigated directly, and participated as *amicus* in numerous cases involving the minimum wage and its enforcement. In this Court, NELP has participated as *amicus* in several employment cases, including *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 664 (2010); *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002); and *Becerra Becerra v. Expert Janitorial, LLC et al.*, No. 89534-1 (pending).

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Plaintiffs in this case claim—without producing any evidence to support their claim—that the increase in the minimum wage that will result from the SeaTac Ordinance will affect the airlines' "price, route, or services" and thus run afoul of the Airline Deregulation Act (ADA).

A review of the actual impact of minimum wage increases at other airports, of the extensive literature on the effects of minimum wage increases, and of publicly-available data on the industries affected by the

Ordinance shows that the wage increase contained in the Ordinance is insignificant in light of the revenues and expenses of the large, thriving businesses operating at the airport.

Further, the relationship between costs and airline ticket prices is not, as Plaintiffs assert, a matter of a simple mathematical calculation. Rather, an extensive body of research into airline fare-setting shows that ticket prices are largely unrelated to labor costs, so that costs do not affect prices in any significant way.

Finally, research shows that minimum wage increases result in substantial cost savings to business, offsetting the already negligible costs of compliance. Long-term studies of minimum wage increases show that they reduce turnover and absenteeism, and increase productivity and morale. This means that even to the extent that increased labor costs might otherwise economically impact airlines operating at Sea-Tac airport, that economic impact is mitigated by these ancillary benefits.

Together, decades of research into the impacts of minimum wage increases on business and airline pricing schemes, as well as specific data on the operating costs and revenues of the airlines and contractors at the airport, show that implementation of the Ordinance will have at most a tenuous, remote or peripheral effect on ticket prices. The Ordinance is not preempted by the ADA.

II. ARGUMENT

A. Wage Standards Have Little Impact on Business Costs or Prices

The Airline Deregulation Act (ADA) preempts state laws "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(B)(1). Where that relationship to prices, routes, or services is "'too tenuous, remote, or peripheral,' it will have no preemptive effect."[1]

The SeaTac Ordinance[2] at issue in this case has no substantial effect on airline prices. This is illustrated by comparisons of airport prices at airports with living wage laws to those where no such law exists. It is further confirmed by decades of rigorous research on the effect of minimum wage increases on business.

A comparison of ticket prices at the six other U.S. airports that have implemented similar wage and benefits standards finds no correlation between these standards and ticket prices. Airports in San Francisco, CA (SFO), Los Angeles, CA (LAX), Oakland, CA (OAK), San José, CA (SJC), St. Louis, MO (STL), and Miami, FL (MIA) have increased their minimum wages by several dollars an hour above the applicable state minimum wage.

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[1] *Morales v Trans World Airlines, Inc.*, 504 U.S. 374, 390, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992).

[2] The SeaTac Ordinance Setting Minimum Employment Standards for Hospitality and Transportation Industry Employers, SMC 7.45, will be referred to in this brief as "the Ordinance."

None of the six other airports saw the increase in wages affect carrier rates.[3] Our analysis looked at average fare costs during periods before and after implementation of the wage standards at the six airports and compared them with national market prices.[4] That comparison of fares from quarter to quarter and annually (e.g, comparing first quarter one year to first quarter the next year to account for seasonality) shows that changes in fares for the affected airports mirror national changes, both before and after the imposition of higher wage standards, with only minor fluctuations.[5] Fares at airports with living wages are not affected by the wage increases; any increases or decreases in fare prices only reflected national trends.[6]

Research has confirmed that price impacts of minimum wage increases in airports have been minimal. Researchers at the University of California, Berkeley found that increased minimum wage costs at that airport amounted to 0.7% of the fare revenue at SFO in one year.[7] This is consistent with a Puget Sound Sage study done prior to the enactment of the Ordinance. That study found that price increases for the products or

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[3] Declaration of Aldo Muirragui (hereafter "Muirragui"), ¶ 11.
[4] *Id.* For an explanation of the methodology of these calculations, *see* Muirragui, ¶ 6–10.
[5] *Id.* at ¶ 11.
[6] *Id.*
[7] MICHAEL REICH ET AL., LIVING WAGES AND ECONOMIC PERFORMANCE: THE SAN FRANCISCO AIRPORT MODEL 9 (Univ. of Cal., Berkeley, Inst. of Ind. Rel., 2003), *available at* http://www.irle.berkeley.edu/research/livingwage/sfo_mar03.pdf.

services provided by airline contractors, food concessions, and retail concessions, due to the increased minimum wage would be in the nature of $1.78 per passenger.[8] This provides no support for Plaintiffs' assertion that the increase in wages directed by the Ordinance would affect *carrier* rates at all.

These findings are also consistent with minimum wage studies in other industries. Extensive, rigorous research has not identified any significant cost increases resulting from minimum wage increases. In 2003, a prospective study of the effects of the San Francisco minimum wage increase estimated that a 25.9 percent increase in the city's minimum wage would result in an increase of operating costs of less than 1% for over three-quarters of the businesses studied.[9] In 2003, the city of Santa Fe, New Mexico increased its minimum wage by 65%.[10] There, a study estimated that the costs to firms amounted to no more than 1% of their

[8] NICOLE KEENAN & HOWARD GREENWICH, THE ECONOMIC IMPACTS OF A TRANSPORTATION AND HOSPITALITY LIVING WAGE IN THE CITY OF SEATAC 12 (Puget Sound Sage, 2013), *available at* http://www.pugetsoundsage.org/downloads/PSSage%20-%20Economic%20Analysis%20of%20SeaTac%20Living%20Wage%20-%209-25-13.pdf.

[9] MICHAEL REICH & AMY LAITINEN, RAISING LOW PAY IN A HIGH INCOME ECONOMY: THE ECONOMICS OF A SAN FRANCISCO MINIMUM WAGE 6 (Univ. of Cal., Berkeley, Inst. for Research on Lab. and Emp't, 2003), *available at* http://www.irle.berkeley.edu/research/minimumwage/minwage_may03.pdf.

[10] NICHOLAS POTTER, MEASURING THE EMPLOYMENT IMPACTS OF THE LIVING WAGE ORDINANCE IN SANTA FE, NEW MEXICO 7 (Univ. of N.M., Bureau of Business and Econ. Research, 2006), *available at* http://bber.unm.edu/pubs/SFLWpt3.pdf.

total sales, noting that businesses could easily absorb these cost increases.[11]

Similarly, price impacts of minimum wage increases have been studied across a number of industries. Most recently, researchers at the University of California, Berkeley, calculated the increase in food costs to consumers of a federal minimum wage increase from the current $7.25 minimum to $10.10.[12] They found that even if all of the costs of the increase were passed through to prices, most consumers would see no price increases at all.[13]

B. The Airlines and Their Contractors Are Capable of Absorbing the Cost of the Mandated Wage Increase

The ADA, by its terms, applies only to "an air carrier that may provide air transportation." 49 U.S.C. § 41713(b)(1). The Ordinance, by its terms, excludes "a certificated air carrier performing services for itself." SeaTac Municipal Code, 7.45.010(M)(1). Plainly, the ADA applies only to the airlines themselves, while the Ordinance only applies to

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[11] ROBERT POLLIN ET AL., A MEASURE OF FAIRNESS: THE ECONOMICS OF LIVING WAGES AND MINIMUM WAGES IN THE UNITED STATES 226 (Cornell Univ. Press, 2008).

[12] CHRIS BENNER & SARU JAYARAMAN, A DIME A DAY: THE IMPACT OF THE MILLER/HARKIN MINIMUM WAGE PROPOSAL ON THE PRICE OF FOOD 9 (Univ. of Cal., Berkeley, The Food Labor Research Center et al., 2012), *available at* http://laborcenter.berkeley.edu/foodlabor/price_food12.pdf. Commerce, Bureau of

[13] *Id.* The exceptions were the labor-intensive industries of restaurant, warehouse and accommodations, where small price increases were identified. The researchers found that restaurant prices would increase 2.5% over three years and retail food prices would increase 1%. Warehouse and storage and accommodations would see a 0.7% increase and administrative and support service 0.9%.

the airline contractors operating at Sea-Tac. Whether borne by the airlines or their contractors, the cost of the Ordinance wage increase is so minimal, compared to operating costs and revenue of the businesses subject to it, that it cannot be said to affect prices for the airlines in any legally significant way.

Should air carriers absorb the cost of compliance with the Ordinance, that cost is negligible for the eight major carriers that handled 90% of total passengers at Sea-Tac in 2012.[14] Estimates based on publicly-available data are that the Ordinance's total present cost, including wages and taxes, equals approximately $23,667,602.[15] That cost is equal to 0.02 % of the eight carriers' total 2012 operating expenses and 0.84% of their total 2012 operating expenses at Sea-Tac.[16] For the Alaska Group, which includes Horizon, meeting the wage standard mandated by the Ordinance will cost an estimated 0.33% of the carrier's 2012 total operating expenses and an estimated 1.09% of the 2012 operating expenses at Sea-Tac.[17] The Alaska Group is a highly profitable business. It doubled its profits since 2010 and has actually expanded service from

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[14] Declaration of Maggie Gribben (hereafter "Gribben"), ¶ 9.
[15] *Id.* at ¶ 8. The methodology of these calculations is available at *Id.*, which includes employer contributions, state and federal taxes, and the estimated number of covered employees.
[16] *Id.* at ¶ 11.
[17] *Id.* at ¶ 12.

Sea-Tac since the adoption of the Ordinance.[18] For the first quarter of 2014, Alaska Group reported an 8% increase in operating revenues with only a 1% increase in operating expenses.[19]

For the other seven carriers, representing a much smaller percentage of airline departures from Sea-Tac, the costs are truly negligible: between zero and 0.03% of the operating expenses across all airports where Delta, Southwest, United/Continental, American, US. Airways, and Virgin American operate.[20] Even assuming that the airlines absorb this entire cost, they can comfortably do so.[21]

Of course, the Ordinance by its terms applies only to the contractors doing business at the airport. These businesses are not covered

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[18] *Id.* at ¶ 15-16; Figure 2.

[19] Coral Garnick, *Alaska Air posts record Q1 profit, but cautious on Delta*, SEATTLE TIMES, April 25, 2014, *available at* http://seattletimes.com/html/businesstechnology/2023461559_alaskaearningsxml.html

[20] *Id.* at Figure 1.

[21] While airlines suffered from flight cancellations due to last winter's bad weather, they nevertheless showed an industrywide profit margin of $1.7 billion in the fourth quarter of 2013. *Running Up the Score: Already having a good decade, U.S. airlines keep getting better*, AIRLINE WEEKLY, Feb. 10, 2014, *available at* http://airlineweekly.com/running-up-the-score-already-having-a-good-decade-u-s-airlines-keep-getting-better/. With the exception of United Airlines, the airlines all reported profitable first quarters for 2014, inspiring American Airlines CEO Doug Parker to boast, "In the entire history of American Airlines, we have never earned $400 million in the first three months of a year, but in the first three months since the merger [with US Airways], we did." David Koenig, *United Loses Money; Other Airlines Post 1Q Profits*, ABC NEWS, Apr. 24, 2014, *available at* http://abcnews.go.com/Business/wireStory/airlines-named-united-great-1q-23454033.

by the ADA.[22] To the extent that this Court chooses to consider the possibility that these contractors might pass along increased labor costs to entities that *are* airlines covered by the ADA, however, that possibility should be rejected as factually unsupported, because the total impact of the wage increase on contractors is too insubstantial to justify any such inference. That is because the available data shows that the contractors are major employers that (i) operate in the largest airports in the world (ii) have thousands of employees, and (iii) generate millions of dollars in revenue.[23]

For example, Menzies Aviation has 645 badges, nearly one quarter of the employee badges at Sea-Tac covered under the Ordinance.[24] It is the world's second largest global aviation services business, operating in 132 airports worldwide.[25] Menzies generated approximately $1.69 billion in revenues in 2012.[26] A second group of contractors, Swissport,

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[22] *See Amerijet International, Inc. v Miami-Dade County*, 2014 U.S. Dist. LEXIS 28090, Case No. 12-22304 (S.D. Fla March 5, 2014); *Ulysse v AAR Aircraft Component Services,* 841 F. Supp. 2d 659, 675 (E.D. N.Y. 2011).

[23] Gribben, ¶ 18. Our research was unable to locate any any reliable reports of annual revenues for Dal Global Services, Bags, Inc., Huntleigh USA Corporation, Flight Services and Systems, Integrated Airline Services, Hanjin Global or Matheson Postal Services.

[24] The Transportation Safety Administration requires that airports issue badges to all employees that work behind the TSA security checkpoint. In practice, not only security officers, wheelchair attendants and baggage handlers, but customer service representatives, line queue agents, crowd control, ticket checkers and curbside skycaps are also badged. Badge numbers can therefore serve as proxy for the number of employees working for a given contractor at SeaTac. *Id.* at ¶ 6.

[25] *Id.* at ¶ 19.

[26] *Id.*

Swissport Cargo Services, and Swissport Fueling Inc., with 336 employee badges at Sea-Tac, has 55,000 employees at over 255 airports on six continents.[27] Swissport reported over $3 billion in worldwide revenue in 2013.[28] Other contractors include AirServ (285 employee badges, revenue $300 million in 2012)[29] recently acquired by ABM (180 employee badges, worldwide revenue $4.8 billion in 2013). ABM is one of the largest facility management services providers in the U.S.[30] These large, often multinational companies, are thriving businesses, for which a wage increase for a relatively small number of employees represents a miniscule cost. In light of that fact, there is no basis for this Court to infer that any portion of the wage increase imposed by the Ordinance will be passed along by contractors to any airline, much less that such a significant wage increase would be passed along that it might cause an airline to raise its ticket prices.

C. Labor Costs at Airports Have Little Relationship to Airline Ticket Pricing

The Plaintiffs' argument that the Ordinance will affect prices rests on the claim that airline prices are directly related to labor costs. In reality, airline prices are based on a complex set of factors; the

[27] *Id.* at ¶ 23.
[28] *Id.*
[29] *Id.* at ¶ 20.
[30] *Id.*

relationship between fares and costs is "tenuous" at best.[31] Calculating airline ticket prices is not, as has been claimed by Plaintiffs here and in other litigation, "a matter of simple economics,"[32] or "simple math."[33] Airline fare pricing is based on "yield management," a unique formula largely controlled by the forces of demand and competition, not costs.[34] The literature on pricing dynamics and revenue management in the airline industry is robust. It illustrates that cost is just one of many factors that determines air fares.

Prior to 1978, the federal government heavily regulated the airline industry, keeping fares higher than the market levels.[35] These regulations stymied competition because new air carriers were severely restricted from entry into the market.[36] In 1978, Congress decided that airline competition would better promote efficiency in the industry and benefit consumers.[37]

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[31] *Morales*, 504 U.S. at 390.
[32] *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77, 84 (2d. Cir. 1997).
[33] Br. of Resp./Cross-App. at 50.
[34] *Abdu-Brisson*, 128 F.3d at 84; *see also Morales*, 504 U.S. at 389 (explaining yield management without using the term "yield management.").
[35] SEVERIN BORENSTEIN & NANCY ROSE, HOW AIRLINE MARKETS WORK…OR DO THEY? REGULATORY REFORM IN THE AIRLINE INDUSTRY 2 (Nat'l Bureau of Econ. Research, Ch. 2, 2013), *available at* http://www.nber.org/chapters/c12570.pdf.
[36] *Id.*
[37] Laurence E. Gessell & Martin T. Farris, *Airline Deregulation: An Evaluation of Goals and Objectives*, 21 TRANSP. L. J. 105, 111 (1992).

After deregulation, air carriers embraced demand-based pricing, ignoring cost and supply in making pricing decisions.[38] The new pricing structure drastically dropped prices and made them more elastic.[39] The lower fares covered marginal costs but could not completely cover overhead, which engendered a focus on yield or revenue management, also known as dynamic pricing.[40]

Airlines currently employ extremely sophisticated computer programs to calculate airline fares on a day-to-day basis in order to optimize profit under the yield management approach.[41] Yield management fine tunes the supply/demand balance by restricting availability of products when high demand exists.[42] Under this system, fares are subject to price variation based on time of booking, popularity of flight, and competition from other carriers. There is generally no set rate for a flight, and operational costs are just one factor among many factors that determine airline pricing.[43] An example of this fluidity is one expert's

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[38] STEVEN KRETSCH, AIRLINE FARE MANAGEMENT AND POLICY IN HANDBOOK OF AIRLINE ECONOMICS, 477, 480 (Darryl Jenkins et al. eds., 1995).

[39] *Id.*

[40] *Id.*

[41] *Abdu-Brisson*, 128 F.3d at 85 (citing Pls.' Addendum at 29, U.S. Supreme Ct. Resp. Br. in *Morales* at 29–30.); Jeffrey McGill & Garrett J. van Ryzin, Revenue Management: Research Overview and Prospects, TRANSP. SCIENCE Vol. 33, No. 2, (1999).

[42] *Id.*

[43] SEVERIN BORENSTEIN & NANCY ROSE, COMPETITION AND PRICE DISPERSION IN THE U.S. AIRLINE INDUSTRY (Nat'l Bureau of Econ. Research, Working Paper No. 3785 (1991), *available at* http://www.nber.org/papers/w3785.pdf?new_window=1.

estimate that American Airlines changes half a million prices per day.[44] It is not uncommon for one-way fares to exceed round-trip prices.[45]

In 1991, the National Bureau of Economic Research (NBER) analyzed dispersion in the prices that an airline charged to different customers on the same route.[46] NBER found that the expected difference in prices paid for two passengers selected at random on a route is more than 35% of the mean ticket price on the route.[47] Dispersion was higher on more competitive routes and lower where there was high market density and high concentration of tourist traffic.[48]

At least one federal court has discussed the role of yield management in airline pricing, holding that enforcement of labor laws at airports is not preempted by the ADA.[49] In *Abdu-Brisson v. Delta Airlines, Inc.*, former Pan Am pilots sued Delta Airlines for violating city and state age discrimination laws. Delta alleged the laws were preempted under the ADA, claiming that compliance would affect its prices. The court found for the pilots, saying, " the total damages sought, including benefits payable in the future, even it all paid at once by Delta, would

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[44] PRESTON MCAFEE & VERA TE VELDEM, DYNAMIC PRICING IN THE AIRLINE INDUSTRY 2 (Cal. Inst. of Tech, 2008).
[45] *Id.*
[46] BORENSTEIN, supra note 43, at 3.
[47] *Id.*
[48] *Id.* at 2.
[49] *Abdu-Brisson*, 128 F.3d at 85; *see also Morales*, 504 U.S. at 389.

amount to about 0.86% of Delta's 1995 expenses and about 0.81% of Delta's revenues."[50] As in the present case, the court in *Abdu-Brisson* found that the cost of compliance with core labor laws had an "inconsequential impact" on Delta's price or services.[51] The court found no preemption.

D. Minimum Wage Increases Help Employers Reduce Costs and Increase Profits, Offsetting the Costs of Wage Increases

Contrary to the arguments commonly made by opponents of minimum wage increases, wage increases benefit business. A study by researchers at the University of California at Berkeley found that wage, benefit, and training standards for service and concessions workers adopted in 2000 through the Quality Standards Program (QSP) at San Francisco International (SFO) Airport substantially reduced turnover rates, increased worker retention rates, and increased customer satisfaction.[52]

Firms operating in SFO under the QSP saw a 30% reduction in turnover rates, from almost 50% per year to 20%.[53] The increase in wages was clearly associated with greater reduction in turnover. For example, before the QSP, an entry-level Screener received $5.90 per hour and had a

[50] *Abdu-Brisson*, 128 F.3d at 85.
[51] *Id.*
[52] REICH ET AL., *supra* note 7, at 52.
[53] *Id.*

turnover rate of 94.7%.[54] After the QSP, an entry-level Screener received $10 per hour and turnover remarkably dropped from 80% to 18.7%.[55]

Reduced turnover saves employers millions of dollars. The SFO study estimates that the decline in annual turnover rate translated into 1,550 fewer turnovers per year at SFO, saving employers an estimated $6.6 million. These savings took the form of reduced costs of employee separation, recruiting, background security checks, training, and other costs of reduced productivity during the new employees' learning phase.

Employer surveys also show that higher wages and better benefits at SFO translated to improved worker performance, employee morale, and reduced absenteeism. The results of the SFO study show that the costs of higher minimum wages are likely to be mitigated by reduced turnover and increased worker performance.[56]

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[54] *Id.* at 54.

[55] *Id.*

[56] Outside of the airport context, there are numerous additional studies that illustrate the cost-saving effect of higher minimum wages. A 2006 article in the Harvard Business Review found that retailer Costco's higher relative wage rate as compared with other retailers resulted in less turnover and employee theft and greater productivity. Wayne Cascio, *The High Cost of Low Wages*, HARVARD BUSINESS REVIEW, Dec. 2006, *available at* http://hbr.org/2006/12/the-high-cost-of-low-wages/ar/1. A 2005 study of a living wage for home care workers in the Bay Area found that the turnover rate fell by 57% over a 5 year period following an increase in wages. CANDACE HOWES, LIVING WAGES AND RETENTION OF HOMECARE WORKERS IN SAN FRANCISCO (Conn. College, Economics Dep't, June 2004), *available at* http://digitalcommons.conncoll.edu/cgi/viewcontent.cgi ?article=1001&context=econfacpub. A 2004 San Francisco study found workers in fast-food restaurants remained employed for longer periods after the minimum wage increase took effect. MICHAEL REICH ET AL., ECONOMICS OF CITYWIDE MINIMUM WAGES THE SAN FRANCISCO MODEL (Univ. of Cal., Berkeley, Inst. of Ind. Rel. 2005), *available at* http://www.irle.berkeley.edu/research/minimumwage/sfminimumwage.pdf.

III. CONCLUSION

A review of existing research and a comparison of actual prices at airports with and without living wages and an evaluation of the revenues and costs of the affected entities in this case, demonstrate that minimum wage increases, like that mandated under the voter-approved Ordinance in this case, have at most a tenuous, remote or peripheral effect on business' prices or costs to consumers. This assessment is confirmed by rigorous academic research, which also finds that businesses—including airport businesses—benefit from minimum wage increases.

Moreover, research on airline pricing shows that it is overwhelmingly based on factors other than labor costs. Conclusory statements that the Ordinance minimum wage is preempted because of its effect on price must be rejected by this Court.

Respectfully submitted this 13th day of May, 2014.

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DECLARATION OF SERVICE

I, Jennifer Woodward, a resident of the County of Snohomish, declare under penalty of perjury under the laws of the State of Washington that on May 13, 2014, I caused a true and correct copy of the Brief Amicus Curiae of National Employment Law Project to be placed in the UPS Overnight mail addressed to:

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