Case No. 15-1915

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Mario Salinas, William Ascencio, Bernaldino Salinas, Franklin Henriquez,

Plaintiffs–Appellants,

v.

Commercial Interiors, Inc.,

Defendant–Appellee.

Appeal from the United States District Court
for the District of Maryland, Honorable J. Frederick Motz
D.C. No. 8:12-cv-01973-JFM

BRIEF *AMICUS CURIAE* BY NATIONAL EMPLOYMENT LAW PROJECT, LABORERS' INTERNATIONAL UNION NORTH AMERICA MID-ATLANTIC REGIONAL ORGANIZING COALITION, CENTRO DE LOS DERECHOS DEL MIGRANTES IN SUPPORT OF PLAINTIFFS-APPELLANTS FOR REVERSAL

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CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-1915 Caption: Mario Salinas et al v. Commercial Interiors, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Employment Law Project
(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Catherine Ruckelshaus Date: February 11, 2016

Counsel for: Amici

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I certify that on February 11, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1915 Caption: Mario Salinas et al v. Commercial Interiors, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Laborers' International Union North America Mid-Atlantic Regional Organizing Coalition
(name of party/amicus)

who is Amicus, makes the following disclosure:
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No. 15-1915 Caption: Mario Salinas et al v. Commercial Interiors, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Centro de los Derechos del Migrante
(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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STATEMENT OF INTEREST OF AMICI

Amici write not to repeat arguments made by the parties, but to shed light on the historical underpinnings of the broad definitions of employment in the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. ("FLSA"), and to urge this Court to apply the statute consistently with its history. *Amici* submit this brief pursuant to Federal Rule of Appellate Procedure 29.[1]

The National Employment Law Project ("NELP") is a non-profit organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP has litigated directly and participated as *amicus* in numerous cases addressing the rights of subcontracted workers under state and federal labor laws.

The Laborers' International Union of North America ("LIUNA") Mid-Atlantic Regional Organizing Coalition ("MAROC") is a coalition of Laborers' District Councils within the Mid-Atlantic Region of the Laborers' International Union of North America, formed for the purpose of coordinating and leading

[1] Parties' counsel did not author this brief, nor did a party or any party's counsel contribute money intended to fund the preparation or submission of the brief. No person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief.

LIUNA's organizing efforts in the Region. MAROC's jurisdiction consists of Pennsylvania, West Virginia, Virginia, Maryland, Washington D.C., and North Carolina, and includes nearly 40,000 members. MAROC represents employees in cases under the Fair Labor Standards Act, and often encounters joint-employer and contractor-subcontractor situations.

Centro de los Derechos del Migrante, Inc. ("CDM") is a migrant rights organization headquartered in Mexico City, with offices in Baltimore, Maryland. CDM's mission is to improve the working conditions of low-wage workers in the United States and to remove the border as a barrier to justice for migrant workers. CDM works with some of the over 66,000 workers who travel to the United States as guestworkers on H-2B non-agricultural visas to work in a range of industries, including landscaping, seafood processing, construction, carnivals, and hospitality, including in Maryland, Virginia, and North Carolina. These workers are contracted by employers in the U.S. through a non-uniform, complex, and often informal chain of agents, intermediaries, and contractors. In 2015, the Fourth Circuit states of Virginia, Maryland and North Carolina were among the top ten states receiving H-2B workers, combining for a total of 11,115 workers.

Collectively, amici represent the interests of thousands of workers within the Fourth Circuit (and elsewhere) who are routinely employed by two or more

employers concurrently, under subcontracting and other arrangements; these employees are often denied the full protections of the FLSA, and are harmed by the district court's erroneous decision that ignores the breadth of the FLSA's statutory language and coverage.

SUMMARY OF ARGUMENT

FLSA's requirements are imposed on business owners where they "suffer or permit" work performed in their businesses, an expansive standard that goes far beyond the common law right to control the manner in which the work is performed. FLSA' s minimum standards are imposed on a business despite its use of labor contractors and other intermediaries that provide, pay, and directly supervise workers. The District Court erred by explicitly refusing to apply the statutory "suffer or permit to work" language that defines the Act's employer coverage.

The trial court ignored the child labor origins of the FLSA's statutory language, the fact-based standard for its implementation, and the limitations that preclude its application to all subcontracting arrangements.

Commercial Interiors, Inc., a drywall finishing company, contracted with JI General Contractors, Inc. to provide drywall installation on a residential construction project where plaintiffs worked. The district court granted

Commercial summary judgment in the workers' FLSA and state law action, conceding that "[u]nder the FLSA undoubtedly, plaintiffs' case is sympathetic." *Salinas v. Commercial Interiors, Inc*.**,** 2014 WL 6471638 at 2. And yet, in its decision, the district court set aside the FLSA's distinct statutory definition of "employ," which "includes to suffer or permit to work," 29 U.S.C. § 203(g), fearing that it would make any employee of a subcontractor also an employee of the contracting business like Commercial. Instead of examining the historical meaning and limitations of the "suffer or permit to work" definition, which derives from state child labor statutes, the court improperly held that plaintiffs could not be Commercial's FLSA employees "merely because Commercial suffered or permitted them to work." *Salinas, supra,* at 2.

In lieu of the statutory definition, the court simply listed a five-factor test to determine employer coverage that focuses mostly on whether the subcontracted arrangement itself was used in an abusive fashion. This focus on the motivation of the parties to a purported employment relationship is not pertinent to a finding of employer coverage under the Act.

The FLSA's broad reach requires companies to be responsible for work done within their integrated business operation, but they may contract with whom they choose for any lawful purpose and are free to require their subcontractors to indemnify them for FLSA liability. Subcontracting is increasing in industries

including construction, and this makes it even more important for the Court to establish a clear standard for joint employer responsibility.

ARGUMENT

I. This Court should interpret FLSA's statutory definition of "employ" consistent with its source in state child labor laws and controlling Supreme Court authority.

When interpreting the scope of employment relationships regulated by federal laws, courts must apply common law agency principles *unless* the federal law contains definitions expressing a contrary Congressional intent. *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 445 (2003) (interpreting the ADA); *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322, (1992) (interpreting the ERISA). For example, this Court recently defined the scope of joint employment under Title VII of the Civil Rights Act of 1964. *Butler v. Drive Automotive Industries of America, Inc*., 793 F.3d 404, 408 (4th Cir. 2015).

The FLSA's statutory definition of "employ" has a particular meaning, distinct from and broader than common law agency principles, and this Court should interpret and implement this meaning. Under *Darden, supra*, 503 U.S. 318, this Court may not be constrained by notions of common law control. In construing a statute, courts must begin with the ordinary meaning of the language used. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d Cir. 1992). And when this language has a common understanding either at common law or in other statutes,

courts are to give the language that same meaning, unless Congress specifically indicates otherwise.[2]

The "suffer or permit to work" definition of "employ" in section 203(g) of the FLSA at issue in this case was taken from state child labor statutes that existed in most states and had been applied for many years before the FLSA was adopted in 1938. *Rutherford Food Corporation v. McComb*, 331 U.S. 722, 728 (1947); *Darden, supra*, 503 U.S. 318, 326 (1992); Bruce Goldstein et al*, Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 1089-1090 (1999).[3] This definition is of "striking breath," the broadest ever used to encompass employment relationships, and includes relationships not considered "employment" under

[2] *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary."); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882*)* ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."); *Sekhar v. United States*, 133 S.Ct. 2720, 2724 (2013) (quoting Justice Frankfurter, "'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" Some Reflections on the Reading of Statutes, 47 Colum. L.Rev. 527, 537 (1947)).

[3] Courts applying definitions of employment, including the definition found in the FLSA, start with the statutory language, and use fact-based tests to determine whether an employment relationship exists. *See,* Wage and Hour Div., U.S. Dep't of Labor, Adm'r Interp. No. 2016-1, Joint Employment under the Fair Labor Standards Act 4 (2016) (hereafter AI on Joint Employment).

common law agency principles. *Barfield. v. New York City Health and Hospitals Corp.,* 537 F.3d 132, 141 (2d Cir. 2008).

The history and functions of the "suffer or permit" language in the child labor laws show how broad the language is meant to be and what relationships it is intended to encompass. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987, J. Easterbrook, concurring).

II. State child labor laws predating the FLSA prohibited "permitting" or "suffering" children to work in or in connection with a business, even when the children were not engaged to work by the business itself, but were employed by independent contractors.

Congress ensured "sufficiently broad coverage" of the FLSA by including a definition of "employ" from state child labor laws[4], designed to reach businesses that used middlemen that illegally hired and supervised children. *Antenor et al. v. D & S Farms*, 88 F.3d 925, 930 (11th Cir. 1996) (*citing Rutherford*, 331 U.S. at 728); *Darden*, 503 U.S. at 322-24. Under these laws, it was - and remains today - no defense to say that the business owner was not responsible for the violations

[4] According to FLSA sponsor Senator Hugo Black, FLSA's administrative provisions "have been based upon the most carefully drawn State statutes which have already been before the courts. Perhaps the most important sections have been borrowed from the New York minimum wage statute." Hugo Black, Speech on NBC Radio 15 (on June 7, 1937) (Papers of Hugo L. Black, Box 160, Senatorial File Labor Legislation-Radio, on file with the manuscript division, Library of Congress). The New York State Labor Law, stated, "'employed' includes permitted or suffered to work." 1921 N.Y. Laws ch. 50, 2(7). By 1938, 32 states and the District of Columbia included this definition. *Rutherford*, 331 U.S. at 728 n. 7.

because the workers were employed by a separate business. To the contrary, for decades leading up to 1938 most states had statutes prohibiting specified businesses from "employing" and also "suffering or permitting" the work of underage children "in or in connection with" their businesses, with no exception for children employed by persons or entities considered independent contractors under common law agency principles.[5]

With minor exceptions, if the work was either performed on the business premises or in connection with the business, it was "suffered or permitted" by the business owner and the owner was presumed to be in a position to ensure that the child labor law was followed. Massachusetts' child labor statute, for example, prohibited "the employment of a girl under 21 years of age or permitting her to work in, about, or in connection with" certain specified establishments after 10 o'clock in the evening. When a restaurant owner was convicted of child labor violations due to work performed by girls working for an independent contractor the court held:

> The fact that the performers were employed by an independent contractor is not a defense. The offense was committed if the defendant permitted them to work in his establishment within the prohibited time.

Commonwealth v. Hong, 158 N.E. 759, 759-760 (Mass. 1927).

[5] 46 UCLA Law Review 983 at 1089-93 (1999).

Similarly, the Supreme Court of Montana held a company responsible for a child labor violation where work on the company premises was performed by the subcontractor of the company's contractor, two layers removed from the company under common law rules:

> Under our statute and those of similar import, it is held that the fact that the boy was employed by, and working for, an independent contractor, is immaterial; it is the fact that the child under the forbidden age is permitted to perform services or labor in a dangerous place which gives rise to liability or prosecution, and not the fact of hiring.

Daly v. Swift & Co. 300 P. 265, 268 (Mont. 1931).

The New York Court of Appeals held that the fact that a boy was himself an independent contractor at common law did not preclude finding a child labor violation by a construction company, because the law prohibited not just employing but also permitting or suffering a child's work. *Vincent v. Riggi & Sons, Inc*., 30 N.Y. 2d 406, 334 N.Y.S. 2d 406, 285 N.E. 2d 689, 691 (1972).[6] Perhaps the most renowned of state child labor cases upheld the conviction of a dairy for child labor violations, arising from the work of a child who assisted one of the dairy's milk delivery drivers. The New York child labor law provided:

> No child under the age of fourteen years shall be employed or permitted to work in or in connection with any mercantile establishment [specified in the preceding section].

[6] *See also Gorczynski v. Nugent*, 402 Ill. 147 (1948) (holding racetrack liable for child labor violations though the child was employed by an independent business entity working on racetrack premises).

People, on Inf. of Price, v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 27 (1918).

The Court explained that the child labor prohibitions went beyond rules governing employers at common law, saying "he must neither create nor suffer *in his business* the prohibited conditions." *Id* at 29 (emphasis added). The lower New York court also explained how the broad suffer or permit to work language of the child labor laws achieved its goal, saying the:

> [p]urpose and effect … is to impose upon the owner or proprietor of a business the duty of seeing to it that the condition prohibited by the statute does not exist. He is bound at his peril so to do. The duty is an absolute one, and it remains with him whether he carries on the business himself [or] entrusts the conduct of it to others.

People, on Inf. of Price, v. Sheffield Farms-Slawson-Decker Co., 167 N.Y.S. 958, 960 (N.Y.App. Div. 1917).

This same "suffer or permit to work" breadth of coverage was adopted by Congress in the FLSA to achieve its desired results: the elimination of work performed for substandard wages, 29 U.S.C. §§ 206 & 207, and elimination of child labor nationwide, 29 U.S.C. § 212. Unlike the structure of state child labor laws, however, the FLSA did not expressly prohibit child labor and substandard pay for work performed "in" a company's business facility, or "in connection with" the facility.

In 1947, this language and its scope was examined and defined by the Supreme Court in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The *Rutherford* Court relied on certain facts, now described as "factors," in concluding that "the operations at a slaughterhouse constitute[d] an integrated economic unit," so that meat boners were employees of the slaughtering plant along with the subcontractor under the FLSA. *Rutherford Food Corp. v. McComb*, 331 U.S. at 726, 730.[7] Thus, *Rutherford* established the standard to be met by persons trying to show they were "employed" by a business entity operating through a subcontractor: whether plaintiffs worked in an integrated or "single operation under 'common control'" of the purported employer. *See Reyes, et al., v. Remington Hybrid Seed Co*., 495 F.3d 403, 408 (7th Cir. 2007) (finding that *Remington's* raising of hybrid seeds was "a single operation under its 'common control'" and holding that the seed company "employed" field workers in light of the *Rutherford* factors, although its labor contractor had contracted to be the sole employer who hired, paid, and supervised the workers). *See also Antenor et al. v. D & S Farms*, 88 F.3d 925, 930-

[7] Whether (1) the workers did a specialty job on a production line; (2) the company had the same contract with each of the intermediary independent contractors; (3) the workers worked on the company's premises using its equipment; (4) the workers had an independent business organization that could or did shift from one company to another; (5) the company's managers kept in close touch with the work being performed by plaintiffs; (6) the earnings of the workers was hourly pay or determined by their piece work productivity, not by the business acumen of the subcontractor. *Id.* at 730.

31 (11th Cir. 1996) ("In determining whether the operator suffered or permitted the boners to work, the [*Rutherford*] Court emphasized that the boners were "part of the integrated unit of production," citing *Rutherford*, 331 U.S. at 729); *Fahs v. Tree–Gold Co-op. Growers of Florida, Inc.,* 166 F.2d 40, 44-45 (5th Cir. 1948) (holding that the contractors and crewmembers' services "constituted a part of an integrated economic unit" controlled by the packinghouse operator).

This Court should reject the lower court's refusal to apply the FLSA's particular definition of "employ" and give meaning to the definition as it was understood at its source and as it has been defined and applied by the Supreme Court.

III. FLSA's "suffer or permit to work" definition of "employ" does not deem *all* employers to be joint employers, and contracting companies operate under this coverage already without impacting business flexibility.

The broad scope of the FLSA's employment definitions does not sweep in all contracting arrangements. And even those relationships that are deemed to be joint employment do not have to burden the contracting company, which is free to contract and to protect itself in cases where the subcontractors engage in wage theft.

1. *Limits to the "suffer or permit" scope*.

While FLSA's expansion of the common law scope of employment precluded a business from denying FLSA accountability simply by showing it had

contracted with an "independent contractor" at common law, its scope is not so broad as to make employees of *all* independent contractors also employees of the contracting business:

> There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees.

Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947).

Not all work performed under subcontracts is integrated into the functions of the contracting company. As explained by Judge Easterbrook, some independent contractors, rather than providing a labor force, provide instead "a defined product (such as a working elevator or a legal brief)" or engage in "a distinct activity--for example, plumbing repairs--conducted by an independent contractor who appears, does a discrete job, and leaves again." *Reyes, et al., v. Remington Hybrid Seed Co*., 495 F.3d 403, 408 (7th Cir. 2007). DOL notes in its recent Guidance on joint employment that, "[c]ertainly, not every subcontractor…relationship will result in joint employment." AI on Joint Employment*, supra,* at p. 2. Where the work has not been integrated into and therefore is not performed in the contracting company's business, it is performed independently as part of the subcontractor's business and there is no joint employment.

In this case, Commercial, an interior finishing contractor, used a separate contractor JI for labor to perform drywall hanging, a function that is fully integrated

into the business that Commercial runs. JA 185-87, 267-68, 687.[8] Commercial provided the tools, supplies, and close supervision of the workers while they performed the work over a substantial period of time. JA 332-33, 340-42, 380-83, 452, 800-01. In contrast, had Commercial also been awarded a contract on the same site to provide flooring, and had it subcontracted the job to a specialized flooring contractor, the result would likely be different. The flooring contractor would likely provide its own flooring material and equipment needed to perform the job. In addition the flooring contractor presumably would do the specialized work with little supervision by Commercial, which lacks flooring expertise as a finishing contractor, and move on to its next job for another customer; in this way, the work of the flooring workers would not be integrated into Commercial's business.

2. *Requiring companies to be responsible for work done within their integrated business operation still permits them to contract with whom they choose and to require their subcontractors to indemnify them for FLSA liability*.

Plaintiffs perform work that is an integrated part of Commercial's business. Perhaps the best evidence of this integration is that the work was performed on premises controlled by Commercial, with Commercial's managers controlling JI and in turn the plaintiff drywall intstallers. Significantly, Commercial and not JI kept plaintiffs' time records, and it provided all materials and major equipment. JA

[8] References to the Joint Appendix are cited as "JA".

313-14, 329-31, 397-401, 433, 480-85, 566-68. Commercial also employs a number of its own drywall installers as its own direct employees. JA 188-92.

Commercial's decision to use a labor contractor to hire some of its drywall installers on its jobs is not improper under the FLSA. But contracting businesses like Commercial have FLSA obligations that do not end with the decision to contract out their work. "The duty is an absolute one, and it remains with him whether he carries on the business himself of [sic] entrusts the conduct of it to others." *People, on Inf. of Price, v. Sheffield Farms-Slawson-Decker Co*., 121 N.E. at 474.

Subcontracting can and will continue – even when business owners are required to make sure their contractors comply with the law. As explained below by Judge Easterbrook, indemnification agreements and holdbacks of payments are common and will offer protection, so long as the contracting company subcontracts out work to a viable entity that can both defend any future litigation and also pay any resulting judgments. Commercial can investigate the wherewithal of its contractors and if it fails to do so, it is only fair that Commercial should suffer the consequences of its actions -- not the workers who were underpaid.

As Judge Easterbrook notes,

> If everyone abides by the law, treating a firm such as Remington as a joint employer will not increase its costs. Recall that it must pay any labor contractor enough to cover the workers' legal entitlements. Only when it hires a fly-by-night operator, such as Zarate, or one who plans

> to spurn the FLSA (as Zarate may have thought he could do), is Remington exposed to the risk of liability on top of the amount it has agreed to pay the contractor… [B]ut as between Remington and the workers Remington is in much the superior position to ensure Zarate's compliance with the FLSA.

Reyes, 495 F.3d at 409.

Holding businesses accountable for substandard conditions when workers are supplied by contractors will only discourage those contracting arrangements whose cost savings are attributable to substandard conditions. The FLSA does not limit subcontracting. It only requires that those who use subcontracting as an integrated part of their business assure that the workers are paid their statutorily mandated overtime pay. Firms commonly monitor subcontractors' compliance with laws, execute indemnification agreements with subcontractors to protect against liability, and engage in a range of less formal measures reflecting their responsibility for working conditions.[9]

Labor subcontracting is prevalent in many other sectors of our economy: garment jobbers have done it for over a hundred years,[10] and it is also found in the

[9] Cynthia Estlund, "*Rebuilding the Law of the Workplace in an Era of Self-Regulation*," 105 COLUM. L. REV. 319 (March 2005) (cataloguing rise of business self-regulation); *see also*, Aaron Bernstein, "Nike's New Game Plan for Sweatshops," Business Week, September 24, 2004 (describing Nike's "elaborate program" for labor compliance around the world).

[10] *See, e.g., R.M. Perlman, Inc. v. New York Coat, Suit, Dresses, Rainwear & Allied Workers' Union Local 89-22-1*, 33 F.3d 145, 153 (2d Cir. 1994).

janitorial,[11] home health care[12], computer software,[13] and public sectors,[14] to name a few. And these businesses must continue to comply with employment laws as most firms do.

Because the suffer or permit to work definition of "employ" encompasses work performed by some but not all subcontractors, this Court's role is to determine which subcontractors' employees are included and which are not. The import of this definition under child labor laws and guidance from the Supreme Court in *Rutherford* provides the test and a list of non-exclusive factors used to implement the test. As seen under the child labor laws, it is the objective economic reality of the relationships, not the subjective intent of the parties that counts.

IV. The intent of the owner was not pertinent to finding child labor violations, just as contracting companies' motivation is not relevant to whether they "employ" workers under the FLSA.

The point of the broad FLSA standard is that the employer's reasons for subcontracting are immaterial – what matters is whether the employer is in a

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[11] *See, e.g., Vega v. Contract Cleaning Maintenance*, No. 03C9130, 2004 U.S. Dist. LEXIS 20949 (N.D. Ill. Oct. 18, 2004); *Zavala v. Wal-Mart Stores, Inc*., 393 F. Supp.2d 295 (D.N.J.2005).

[12] *See, e.g., Bonnette v. California Health & Welfare Agency*, 704 F2d 1465 (9th Cir.1983).

[13] *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1189 (9th Cir. 1997) *cert. denied*, 522 U.S. 1098 (1998).

[14] *E.g.,* Philip Matera, "*Your Tax Dollars At Work . . . Offshore: How Foreign Outsourcing Firms are Capturing State Government Contracts*," http://www.goodjobsfirst.org/pdf/offshoringtext.pdf, by Good Jobs First, July 2004.

position to prevent any workplace standards violations. Under the FLSA as under the child labor law statutes upon which it was based, "[t]he question of [the employer's] intent [was] immaterial." *People v. Taylor*, 85 N.E. 759, 760 (N.Y. 1908).

The FLSA does not regulate strategic decisions made by businesses -- whether to subcontract labor for instance, or to require that workers wear a uniform or show up at a certain time – but the workers must be treated lawfully. Motivation for making business judgments is not relevant under the statute. Just as calling an "employee" an "independent contractor" does not absolve the employer of its responsibilities under the FLSA,[15] an employer's subjective reason for subcontracting does not weigh in a court's determination about whether that employer is responsible for FLSA violations. FLSA looks to actual conditions (economic reality) and not the reasons for an employer's actions.

At no place in the text of the FLSA did Congress suggest that the broad definition of employ should be subordinated where a company has legitimate business reasons for contracting out some of its functions. To the contrary, "[t]he FLSA is designed to defeat rather than to implement contractual arrangements," if needed to secure compliance with the Act. *Lauritzen*, at 1544-45.

[15] *Rutherford, 331 U.S. at 729* ("[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act").

Though Congress has carved out dozens of exceptions to coverage in the Act,[16] no exception is made for "legitimate" as opposed to "illegitimate" contracting by companies, and an employer's intent with respect to its contracting relationships is therefore irrelevant. *See, e.g. Partida v. Brennan* 492 F.2d 707 (5th Cir. 1974) (holding that intent to evade FLSA plays no role in determining laundromat attendees' employee status under FLSA); *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508 (5th Cir. 1969) (rejecting the shrimp company's argument that it was not liable because it had no actual knowledge of its employees' age because this argument would "place[] the employment relationship, and through it the very coverage of the Act itself, at the mercy of an employer's subjective understanding.")

When Congress wanted intent to be considered in the application of the FLSA, it so specified. Thus, the statute of limitations is extended from two to three years for "willful" violations, 29 U.S.C. § 255(a); an absolute defense is provided to an employer where its acts or omissions were "in good faith in conformity with" written regulations or interpretations of the Department of Labor, 29 U.S.C. § 259(a); and liquidated damages can be disallowed by the court where an employer can show it acted in good faith and had reasonable grounds to think its actions did not violate the Act. 29 U.S.C. § 260. The absence of any consideration of good faith or business

[16] *See*, 29 U.S.C. § 213.

necessity by Congress in the defining responsible employers under the Act means that such considerations are not relevant to employer status.

In child labor cases, whenever an underage child was found to be working on the business premises or in connection with a business, the business owner was held responsible because he was required to ensure that the prohibited work did not occur. *People, on Inf. of Price, v. Sheffield Farms-Slawson-Decker Co*., 121 N.E. at 474. It was no defense to show that the business had been acting in good faith and had taken reasonable precautions to ensure that children were not being "employed," or even that the owner relied on the parents and children who sometimes lied about the child's age. *American Car & Foundry Co. v. Armentraut*, 73 N.E. 766, 768 (Ill. 1905) (refusing to instruct the jury that it was a defense that a 12-year-old boy misled his employer about his age).[17]

[17] *See also Swift v. Illinois Cent. R.R. Co*., 132 F.Supp. 394, 398 (W.D. Ky. 1955) (under Kentucky child labor law, an employer is not relieved from liability because a child misrepresents his age); *De Soto Coal, Mining & Dev. Co. v. Hill*, 60 So. 583, 585 (Ala. 1912); *Inland Steel Co. v. Yedinak*, 87 N.E. 229, 236 (Ind. 1909) ("Appellant was bound at its peril to know that while in its service youth was not within the inhibited age."); *People v. Taylor*, 85 N.E. 759, 760 (N.Y. 1908) ("The owner, by or for whom the child is employed in violation of the statute, is liable, because such employment is prohibited. *The question of intent is immaterial*." (emphasis supplied)); *Krutlies v. Bulls Head Coal Co.,* 94 A. 459, 462 (Pa. 1915) ("[T]he act does not provide that employers shall not knowingly take into their service a minor under the prohibited age …"); and cases cited in 46 UCLA Law Review 983 at 1046-1047 n. 252 (1999).

The court below improperly suggests that Commercial's motivation behind the subcontracting is relevant. The court notes, "This evidence, however, gives rise only to a suspicion that Commercial was abusing its relationship with JI [the subcontractor], and suspicion is not sufficient to withstand a summary judgment motion." *Salinas v. Commercial Interiors, Inc*., 2014 WL 6471638 at 3. Neither this "abuse" test for joint employment, nor the factors announced by the lower Court derive from the statute, Supreme Court, Fourth Circuit precedent,[18] or an analysis of decisions in other circuits. [19] The test must be rejected.

Contrary to the suggestion by the district court in this case, no subterfuge was found in *Rutherford,* nor was the motivation of the company to contract out work considered a pertinent factor. The *Rutherford* trial court had specifically found that "the contracts with Reed [the contractor] and his successors were not sham and

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[18] On two occasions, this Court has visited FLSA joint employment issues, *Schultz v. Cap. Intern. Sec., Inc.,* 466 F.3d 298, 305-6 (4th Cir.2006); *Howard v. Malcolm,* 852 F.2d 101, 105 (4th Cir. 1988), and in both cases the Court has referenced the U.S. Department of Labor's "joint employment" regulations. 29 C.F.R. § 791.2(a) & (b). In neither case did this Court suggest that, absent some form of "abuse," any form of subcontracting immunizes the contracting entity from the FLSA.

[19] In *Zheng v Liberty Apparel*, 355 F.3d 72 (2d Cir. 2003), the Second Circuit, without citing authority, suggested that FLSA's broad definition of "employ" was not intended to encompass contracting that had a legitimate business purpose and was only intended to reach subterfuges designed to circumvent the FLSA (355 F. 3d at 72, 76). This subjective approach, which could exonerate employers after examining their good and bad intentions, finds no support in *Rutherford*, and was disavowed by the Second Circuit in *Barfield. v. New York City Health and Hospitals Corp*., 537 F.3d 132, 146 (2nd Cir. 2008).

deceptive arrangements, but were necessitated by the exigencies of the situation confronting Kaiser [the slaughterhouse] when it entered into the contract with Reed." *Walling v. Rutherford Food Corporation*, 156 F.2d 513, 518 (10th Cir. 1946). These findings were not disturbed by the 10th Circuit or the Supreme Court in reversing the legal conclusion drawn by the trial court.

V. Subcontracting is increasing in industries including construction, making it even more important for the Court to establish a clear standard for joint employer responsibility.

Outsourcing--whether through layers of contracting, hosting staffing firms on-site, or misclassifying employees as independent contractors--is on the rise in many of our economy's high-growth and labor-intensive jobs.[20] These include temporary help[21], health services, construction, manufacturing, transportation, and warehousing.[22] Many of these occupations are projected to expand rapidly from 2012 to 2022.[23] These fast-growing industries are marked by high rates of outsourcing. This is important because, as the DOL recently notes, "[w]hether an

[20] *The Low-Wage Recovery: Industry Employment and Wages Four Years into the Recovery* NELP (April 2014), available at http://www.nelp.org/page/-/Reports/Low-Wage-Recovery-Industry-Employment-Wages-2014-Report.pdf?nocdn=1.
[21] Temp and staffing placements have shifted from clerical and other white-collar work to more hazardous construction and manufacturing work. Michael Dey, Susan Houseman & Anne Polivka, *Manufacturings' Outsourcing Staffing Services*, Indus. & Lab. Rel. Rev., July 2012.
[22] *Id.* at 5.
[23] Personal care and home health aides, food preparation and service workers, janitors and cleaners, and construction laborers are all within the top ten occupations by growth rate. Occupations with the most job growth, Bureau of Labor Statistics (Dec. 9, 2013), http://www.bls.gov/emp/ep_table_104.htm.

employee has more than one employer is important in determining employees' rights and employers' obligations under the FLSA…" AI on Joint Employment, *supra,* at 2.

An estimated 37 percent of janitorial workers are now hired by staffing firms or labor contractors rather than directly by the company for whom they clean.[24] Second-tier subcontractors shave labor costs by evading payroll taxes and workers' compensation, minimum wage, and overtime requirements at the workers' expense.[25] One study found that janitorial workers suffered a seven percent wage penalty from 1983 to 2000 as a result of outsourcing in the industry.[26] A recent academic survey of low-wage workers found that at least 26 percent of building service and ground service workers had not received minimum wage payments, and 71 percent had not received overtime pay.[27]

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[24] Arindarajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. & LAB. REL. REV. at 287 (2010); Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research* (Univ. of Cal. Berkeley: Inst. for Research on Labor and Emp't, Working Paper No. 100-12, 2014). *See, also, Awuah v. Coverall No. Amer.*, 554 F.3d 7 (1st Cir. 2006).

[25] David Weil, *Market Structure and Compliance: Why Janitorial Franchising Leads to Labor Standards Problems* (2011)(unpublished manuscript)(on file with (Boston Univ. School of Mgmt); Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, NY TIMES, July 13, 2005, at A19.

[26] Dube, *supra*, note 24.

[27] 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.

Construction contractors interviewed for one study reported that as much as 95 percent of workers on their worksites were employed by subcontractors.[28] The industry is described in that report as "a fiercely competitive contract industry, characterized by slim profit margins, high injury and comp rates, comprised largely of numerous small to medium-sized companies whose numbers and size may make them more likely to operate beyond the view of state regulators."[29] A leading survey of low-wage workers in New York, Chicago and Los Angeles found that 12.7 percent of workers in the residential construction industry experienced a minimum wage violation; 70.5 percent suffered an overtime violation; and 72.2 percent worked off-the-clock without receiving pay.[30] Similarly, a study of the construction industry in Austin, Texas found one in five workers was denied payment for their work, and 50 percent were not paid overtime, while only 11 percent of workers reported that they were able to recover their unpaid wages.[31]

Outsourcing has reshaped the warehouse and logistics industry with the use of "third party logistics" firms, highly integrated companies with the capacity to handle goods at several different points in a supply chain. A reported 77 percent of

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[28] Workers Defense Project, *Building Austin, Building Injustice: Working Conditions in Austin's Construction Industry*, at 11 (June 2009), *available at* http://www.buildaustin.org/Building%20_Austn_Report.pdf ("*Building Austin*").
[29] *Id.*
[30] Annette Bernhardt et al., *supra,* note 27, at 32, 34, 35.
[31] *Building Austin* at 17.

Fortune 500 companies use third-party logistics firms.[32] These logistics companies, in turn, contract with staffing agencies, which hire workers to unpack, load, and ship goods to retail facilities across the country.[33] Logistics firms encourage bidding wars among motor carriers and staffing firms, placing continual pressure on contractors to provide cheaper services. These lower rates are passed on in the form of decreased prices for truck drivers (who are often misclassified as independent contractors) or decreased wages for warehouse workers.[34] As one study of subcontracted and temporary logistics workers in New Jersey found, more than one in five workers earned incomes below the federal poverty level.[35]

By inserting subcontractors or labor brokers between themselves and workers, contracting companies can more successfully avoid liability for violations of workplace laws that apply only to their "employees," even as they benefit from,

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[32] Tom Gorman, *How to Manage an Outsourced Workforce*, MATERIAL HANDLING MANAGEMENT (2009).

[33] Jason Rowe, *New Jersey's Supply Chain Pain: Warehouse and Logistics Work Under Wal-Mart and Other Big Box Retailers* (2012); Jason Sturna, et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, POLICY MATTERS: A QUARTERLY PUBLICATION OF THE UNIVERSITY OF CALIFORNIA, RIVERSIDE (2012).

[34] Michael Belzer, *Technological Innovation and the Trucking Industry: Information Revolution and the Effect on the Work Process*, 23 JOURNAL OF LABOR RESEARCH 375 (2002).

[35] Rowe, note 33, *supra*. *See also, Carrillo v. Schneider Logistics, Inc*., 823 F. Supp.2d 1040 (C.D. Cal. 2011)(court found that Schneider jointly employed warehouse workers under federal and state wage and hour laws, along with direct lower-level subcontractors, and denied Walmart's motion to dismiss it as an employer from the case).

and have the right to control the work itself.[36] The ambiguous legal status of many workers in contracted jobs is one of the central factors driving lower wages and poor working conditions. Median hourly wages are $10 or less for workers in janitorial, fast food, home care and food service, all sectors characterized by extensive contracting and franchising.[37] Once outsourced, workers' wages suffer as compared to their non-contracted peers, ranging from a 7 percent dip in janitorial wages, to $6 an hour in food service, to 30 percent in port trucking, to 40 percent

[36] Roland Zullo & Immanual Ness, Privatization and the Working Conditions of Health Care Support Staff, 32(2) International Journal of Public Administration, 152-165 (2009); Alison Davis-Blake Happy Together? How Using Nonstandard workers affects exit, voice and loyalty among standard employees, 46(4) Academy of Management Journal, 475-484 (2003); Rosemary Batt & Hiroatsu Nohara, How Institutions and Business Strategies Affect Wages: A Cross-National Study of Call Centers, 64 (4) Industrial and Labor Relations Review, 533-522 (2009); Soon Ang & Sandra Slaughter, Work Outcomes and Job Design for Contract versus Permanent Information Systems Professional on a Software Development Teams 25(3) MIS Quarterly, 321-350 (2001); Mary S. Logan et al., Outsourcing a satisfied and committed workforce: a trucking industry case study, 15 (1) International Journal of Human Resource Management, 147-162 (2004).

[37] U.S. Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013: Janitors and Cleaners, Except Maids and Housekeeping Cleaners* (2013) note 9*, available at* http://www.bls.gov/oes/current/oes372011.htm#ind; Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013: Food Preparation and Serving Related Occupations (*2013) note 43, *available at* http://www.bls.gov/oes/current/oes350000.htm; The Paraprofessional Healthcare Institute, *Home Care Aides at a Glance* (2014), *available at* http://phinational.org/sites/phinational.org/files/phi-facts-5.pdf.

in agriculture.[38] These same jobs routinely see wage theft: 25 percent of workers report minimum wage violations, and more than 70 percent are not paid overtime.[39]

CONCLUSION

This Court should reverse the trial court, remanding, or find that plaintiffs were "employed" by Commercial under the broad scope of the FLSA.

Dated: February 11, 2016

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[38] Arindarijt Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Wage Service Occupation? Evidence from Janitors and Guards*, 63 INDUS. & LAB REL. REV. 287 (2010); Mary McCain, *Serving Students: A Survey of Contracted Food Service Work in New Jersey's K-12 Public Schools* (Rutgers Center for Women and Work, 2009), *available at* http://www.seiu.org/images/pdfs/seuiRutgersReport.pdf; Rebecca Smith et al., *The Big Rig: Poverty, Pollution and the Misclassification of Truck Drivers at America's Ports*, (Nat'l Emp't Law Project & Change to Win, 2010), *available at* http://www.nelp.org/page/-/Justice/PovertyPoluutionandMisclassification.pdg?nocdn=1.

[39] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 29 – 39 (2009), *available at* http://nelp.org/page/-/BrokenLawsReport2009.pdf?nocdn=1.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   ☑ this brief contains 6,899 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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(s) /s/ Catherine Ruckelshaus

Attorney for Amici

Dated: February 11, 2016

CERTIFICATE OF SERVICE

I certify that on February 11, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Catherine Ruckelshaus
Signature

February 11, 2016
Date