CASE NO. 12-12614
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL SCANTLAND, et al.,
Plaintiffs/Appellants,

v.

JEFFREY KNIGHT, INC., d/b/a KNIGHT ENTERPRISES, INC., BRIGHT HOUSE NETWORKS, INC., and JEFFREY D. KNIGHT
Defendants/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Case No. 08:09-cv-01985-EAK-TBM

BRIEF *AMICUS CURIAE* by INTERFAITH WORKER JUSTICE, SOUTHERN POVERTY LAW CENTER, NATIONAL EMPLOYMENT LAW PROJECT AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION In Support of Reversal

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Appeal No.: 12-12614
MICHAEL SCANTLAND, et al. v. JEFFRY KNIGHT, INC., et al.

CERTIFICATE OF INTERESTED PERSONS, CORPORATE DISCLOSURE STATEMENT, AND STATEMENT PURSUANT TO FRAP 29(C)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amici curiae* hereby provide the following disclosure statements:

Interfaith Worker Justice is a non-profit corporation that offers no stock; there is no parent corporation or publicly owned corporation that owns 10 percent or more of this entity's stock.

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Appeal No.: 12-12614
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Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for *amici* certifies that in addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement provided by Appellants/Plaintiffs in their initial brief, the following persons and entities have an interest in the outcome of this case.

Cho, Eunice Hyunhye, attorney for *Amici Curae*

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Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

Dated: August 10, 2012

Respectfully Submitted,

By: __/s/ Kristi Graunke_____
Kristi Graunke, *one of the attorneys for amici*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Material

Other Authorities

INTEREST OF THE *AMICI CURIAE*

Amici write to shed light on the statutory language and historical underpinnings of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. ("FLSA"), specifically the breadth of the definition of "employ" under the FLSA, and to urge this Court to apply this statute consistently with its history. In addition, *amici* propose strong public policy reasons that support a broad application of the FLSA, especially in this era of increasing abuse of the "independent contractor" designation. This issue has broad implications for *amici*, millions of workers in a wide-ranging variety of jobs, law-abiding employers, and local and state government finances.

Interfaith Worker Justice ("IWJ") is a national organization that calls upon religious values to improve wages, benefits, and working conditions for workers by educating and organizing current and future religious leaders, interfaith groups, and worker centers. IWJ supports a network of more than 60 affiliates, including worker centers in Georgia and Florida. Most of the IWJ worker center members are low-wage and immigrant workers working in restaurants, manufacturing, construction, poultry processing, day labor, janitorial, retail, and other service industries. Approximately 80 percent of workers who come to IWJ-affiliated worker centers report having been victims of wage theft. An adverse ruling against the workers in this case would harm IWJ members who too often work in

contingent jobs, are told to sign independent contractor agreements in order to get a job, and fear coming forward to recover unpaid wages. The lower court's misplaced emphasis on the employer's characterization of the employment relationship in this case would hinder efforts to level the playing field for all law-abiding employers and underpaid workers in low-paying and labor-intensive jobs.

Located in Montgomery, Alabama, the nonprofit Southern Poverty Law Center ("SPLC") has provided *pro bono* representation to low income workers in the Southeast since 1971. SPLC has litigated or served as *amicus curiae* in numerous cases to vindicate the rights of low wage workers within the Eleventh Circuit, including several collective action cases involving the rights of contingent workers under the Fair Labor Standards Act. SPLC has an interest in this case because a ruling upholding the lower court's mishandling of the factors applicable to FLSA cases involving alleged independent contractors will adversely affect SPLC's constituents and clients.

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 area of expertise includes 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.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has active affiliates in Florida, Georgia and Alabama. NELA's members litigate daily in every circuit, including the Eleventh Circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

STATEMENT OF THE ISSUES AND SUMMARY OF ARGUMENT

In this case, over 180 cable installation technicians who work for Knight Enterprises, Inc. ("Knight"), a cable installation company, seek unpaid wages and overtime payments under the FLSA. Virtually all technicians have worked over 40 hours per week—typically between 60 to 75 hours a week—and have been ordered to work six days per week. None of the workers have received overtime for work performed over 40 hours per week, as required by the FLSA.

In granting summary judgment, the district court concluded that the cable installation technicians are not employees of Knight, but are instead independent contractors unable to seek protection under the FLSA. This conclusion is in error. Contravening Congress's intent to broadly define the scope of "employ" in the FLSA, the district court ignored the key focus of the independent contractor test—whether a worker is running a business independent of the employer's. *Hopkins v. Cornerstone America*, 545 F.3d 338, 343 (5th Cir. 2008); *Santelices v. Cable Wiring and South Florida Cable Contractors, Inc.*, 147 F. Supp. 1313, 1317 (S.D. Fla. 2001). Instead, the district court engaged in a mechanical reading of factors without weighing the importance of them with regard to the primary question, and improperly considered irrelevant factors in its determination.

Misclassification of workers as independent contractors, moreover, raises key public policy concerns that further support a broad application of the FLSA.

Knight has attempted to classify its workers as independent contractors, enabling the company to underpay and overwork its workers, lower its labor costs and avoid paying payroll taxes and other insurance premiums. The cumulative societal impact of employers' abuse of the independent contractor designation 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 this Court to reverse the district court's decision, and remand to allow the workers to prove their status as employees.

ARGUMENT

I. The District Court's Narrow Interpretation of the Independent Contractor Test Contravenes Congress's Intent in Enacting the FLSA.

A. The Fair Labor Standards Act is a remedial statute, designed to address worker exploitation.

The FLSA is a remedial statute designed to address worker exploitation. *Usery v. Pilgrim Equipment Co., Inc.,* 527 F.2d 1308, 1310 (5th Cir. 1976). Congress passed the FLSA to "lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947). The statute is meant "'to correct and as rapidly as practical eliminate' . . . the 'labor conditions

detrimental to the maintenance of the minimum standard of living necessary to health, efficiency, and general well-being of workers.'" *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987) (citing 29 U.S.C. § 202) (Easterbrook, J. concurring). Courts have thus "consistently construed the [FLSA] 'liberally to apply to the furthest reaches consistent with congressional direction.'" *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959)).

B. Congress broadly defined "employ" to require FLSA compliance by entities who "suffer or permit" others to work.

In light of the FLSA's remedial purpose, Congress adopted an exceptionally broad definition of "employ" to include "to suffer or permit to work." 29 U.S.C. § 203(g). It is "the broadest definition [of employ] that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (*quoting* the FLSA's principal sponsor, Senator Hugo Black, 81 Cong. Rec. 7657 (1937)). Congress chose this expansive definition to include relationships not considered "employment" at common law. *Walling v. Portland Terminal Co.*, 330 U.S. 149, 152 (1947). Under the common law test for employment, courts inquired only whether the alleged employer had the "right to control the manner and means by which the product is accomplished" for purposes of tort liability. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989). 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 the employer. In contrast, the FLSA's definition of "employ" imposes labor standards accountability on businesses well beyond the reach of the common law definition of "employer" to parties "who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

When Congress incorporated this expansive concept of "employ" into the FLSA in 1938, state courts had already applied this definition for decades to enforce child labor prohibitions. *Rutherford Food*, 331 U.S. at 728. Under the "suffer or permit to work" language in these statutes, business owners were held accountable where underage children worked or children of working age put in excessive hours, so long as the work was performed in or in connection with the owner's business. This well-established definition of "employ" was designed to reach businesses that used middlemen to illegally hire and supervise children. *Antenor et al. v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996) (*citing Rutherford*, 331 U.S. at 728). This was true even where the business workers had

used others—including labor contractors—to "employ" workers in the common-law sense.[1]

In general, employers in child labor cases were presumed to have the power to prevent underage children from working, so long as the work as performed in or in connection with the business. As stated by Judge Cardozo:

> [The employer] must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others . . . He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he had delegated "his own power to prevent."

People ex rel. Price v. Sheffield Farms-Slawson Farms-Decker Co., 121 N.E. 474, 475-76 (N.Y. 1918) (internal citations omitted).

Under this test, business owners were responsible for labor conditions within their businesses, whether they used independent contractors to do the work or not. The only limit on this broad prohibition was that the work had been performed with the defendant's business with "knowledge or the opportunity through

[1] By 1907, fourteen states already had on the books child labor laws containing the "suffer or permit to work" language, including Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New York, Oregon, Rhode Island, South Dakota, and Wisconsin. Many other states and territories used the "permit" standard in their child or women's or other protective labor laws: Alabama, Arizona, California, Connecticut, Florida, Kansas, Maine, New Jersey, North Dakota, Oklahoma, Pennsylvania, Vermont, and Wyoming. Bruce Goldstein, et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 1036-37 (1999) (citing Twenty-Second Annual Report of the Commissioner of Labor, 1907: Labor Laws of the United States (1908)).

reasonable diligence to acquire knowledge" that it was being performed. *Id.* at 476; *Lenroot v. Interstate Bakeries Corp*., 146 F.2d 325, 328 (8th Cir. 1945). Thus, a business could defend a child labor case by showing he had taken reasonable steps to prevent the use of children and that the work occurred without his knowledge. *Id.*

In adopting a new law, Congress can be presumed to have knowledge of a term's prior interpretation prior to incorporation. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (citations omitted). By adopting the well-established "to suffer or to permit to work" language in the FLSA, Congress held owners responsible for federal minimum labor standards within their businesses. If business owners suffer or permit individuals to work, they "employ" the workers and are required to afford them statutory protections under the FLSA. Once the prohibited conditions are shown to exist—here, failing to pay proper overtime wages—the only questions are whether the work done under substandard conditions was performed as a regular part of the defendant's business and whether the business was in a position to know of the work. This analysis particularly extends to the determination of whether a worker is an employee or an independent contractor: the FLSA was "designed to defeat rather than implement contractual arrangements," especially for workers who are "selling nothing but their labor."

Lauritzen, 835 F.2d at 1545 (Easterbrook, J., concurring) (concluding that migrant farmworkers are employees under the FLSA).

C. The existence of an employment relationship turns on whether a worker is in business for himself or herself.

As this Circuit has concluded, "an entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependent on the entity." *Charles v. Burton*, 169 F.3d 1322, 1328 (11th Cir. 1999) (citations omitted). The central focus in the test of whether a worker is an employee or independent contractor is whether the worker has his own business, or is in fact economically dependent on the putative employer's business. A court must thus examine "whether the individual is economically dependent on the business to which he renders service or is instead in business for himself." *Hopkins v. Cornerstone America*, 545 F.3d 338, 343 (5th Cir. 2008).[2] Although courts may consider several other factors as "aids-tools" to determine whether an individual is an employee or is in business for himself as an independent contractor, these factors are used

[2] *See also Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518, 523 (6th Cir. 2011) ("in distinguishing between employees and independent contractors, courts have focused on 'whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.'"); *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) (same); *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 570 (10th Cir. 1994) (same); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991) (same); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (same); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir. 1987) (same); *Usery*, 527 F.2d 1308, 1311 (11th Cir. 1976) (same).

because they are indicators of economic dependence "to gauge the degree of dependence of alleged employees on the business to which they are connected." *Usery*, 527 F.2d at 1311.

Given the broad definition of "employ" in the FLSA, the actual, objective relationship between parties ultimately determines whether a worker is an employee or an independent contractor. The requirement to examine the "economic reality" of a working relationship serves as a reminder to look beyond technical distinctions, self-serving statements of subjective intent, contracts, or labels that putative employers give their workers. *Goldberg v. Whitaker House Cooperative,* 366 U.S. 28, 33 (1961); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 755 (9th Cir. 1979).

Here, the district court identified six factors to guide its inquiry,[3] but ultimately failed to give proper weight to the central question: whether the workers

[3] The court considered the following factors in its analysis:

> (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed;
> (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
> (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers;
> (4) whether the service rendered requires a special skill;
> (5) the degree of permanency and duration of the working relationship;
> (6) the extent to which the service rendered is an integral part of the alleged employer's business.

Order at 9-10 (citing *Freund v. Hi-Tech Satellite, Inc.*, No. 05-14091, 2006 WL 1490154 (11th Cir. May 31, 2006)).

run a business separate from that of Knight. It is clear that the cable installers are not in business for themselves as individuals. Knight instructed a number of workers that they could not work for any other company, and the workers have presented undisputed testimony that there was no incentive or time to work for competitors. Order at 30. Virtually all installers worked well over 40 hours in a week at Knight, typically between 60 and 75 hours a week, foreclosing the possibility of another source of income. Order at 4.

Concluding that the workers are not employees of Knight, the district court lost sight of the central test seeking to determine whether the employee has his or her own business— "whether the putative employee depends (or depended) on the alleged employer for their economic livelihood based upon the parties' actual working relationship." *Santelices v. Cable Wiring and South Florida Cable Contractors*, 147 F. Supp. 2d 1313, 1319 (S.D. Fla. 2001) (denying summary judgment on the issue of whether a cable installer was an independent contractor). Instead, the court failed to properly weigh "the final and determinative question" of whether the Knight workers were "so dependent upon the business with which they are connected" that they are entitled to the protection of the FLSA, and are not

"sufficiently independent to lie outside its ambit." *Usery*, 527 F.2d at 1311-12; *see also Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 300 (5th Cir. 1975).[4]

Losing sight of the importance of whether the putative employee is running a separate business when determining employment status, some courts have instead engaged in a mechanical application of factors under the "economic realities" test, resulting in inconsistent rulings in cases with nearly identical fact patterns.[5] This is improper, as "[the] factors are not exhaustive, no can they be applied mechanically

[4] Although the district court cites to *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308 (5th Cir. 1976), in its order, the order fails to engage in any substantive consideration, however brief, of this central test.

[5] *Compare Cromwell v. Driftwood Elec. Contractors, Inc.*, No. 09-60212, 2009 WL 3254467 (5th Cir. Oct. 12, 2009) (finding genuine issue of material fact that cable installation technicians were employees, economically dependent, and not in business for themselves); *Zermeno v. Cantu*, No. 10-1792, 2011 WL 2532904 (S.D. Tex. Jun. 24, 2011) (genuine issue of material fact that cable installer was employee); *Parrilla v. Allcom Constr. & Installation Serv.*, No. 6:08-1967, 2009 WL 2868432 (M.D. Fla. Aug. 31, 2009) (concluding that cable installation technician was employee due to economic dependence); *Muller v. AM Broadband*, No. 07-60089, 2008 WL 708321 (S.D. Fla. Mar. 14, 2008) (finding genuine issues of material fact that cable installation technician was employee); *Santelices v. Cable Wiring*, 147 F. Supp. 2d 1313, 1323 (S.D. Fla. 2001) (finding genuine issues of material fact that cable installation technician was an employee and dependent on company); *Nash v. Resources, Inc.*, 982 F. Supp. 1427 (D. Or. 1997) (concluding that cable installation technician was employee); *with Freund v. Hi-Tech Satellite*, No. 05-14091, 2006 WL 1490154 (11th Cir. May 31, 2006) (concluding cable installers were independent contractors); *Chao v. Mid-Atlantic Installation Serv.*, No. 00-2263, 2001 WL 739243 (4th Cir. Jul. 2, 2001) (upholding grant of summary judgment that cable installers were independent contractors); *Herman v. Mid-Atlantic Installation Serv., Inc.*, 164 F. Supp. 2d 667 (D. Md. 2000) (upholding motion for summary judgment that cable installer was independent contractor); *Dole v. Amerilink Corp.*, 729 F. Supp. 73 (E.D. Mo. 1990) (concluding that installers were independent contractors after bench trial).

to arrive at a final determination of employee status." *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1044 (5th Cir. 1987). This Court would thus give full effect to the purposes of the FLSA by returning the focus of the inquiry to whether the employees in fact operate a separate business. Moreover, the fact-bound approach of the "economic realities" test calls for the district court to proceed to trial and fully weigh the facts of the case. "If we are to have multiple factors, we should also have a trial. A fact-bound approach calling for the balancing of incommensurables, an approach in which no ascertainable legal rule determines a unique outcome, is one in which the trier of fact plays the principal part." *Lauritzen*, 835 F.2d at 1542 (Easterbrook, J., concurring).

D. The actual conditions of the working relationship—not the existence and terms of a contract agreement—determine the existence of an employment relationship.

The district court concluded that the Knight workers are independent contractors based in part on contract language imposed by Knight, while ignoring testimony describing actual working conditions. This is erroneous. The existence of a contract, even where the contract "parrots language in cases distinguishing independent contractors from employees" does not establish an independent contracting relationship. *Real v. Driscoll Strawberry Assoc. Inc.*, 603 F.2d 748, 755 (9th Cir. 1979). Instead, "[e]conomic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA." *Id.* A

court's determination of whether an employment relationship exists "is not circumscribed by formalistic labels," or whether an employer has called its worker an independent contractor. *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 194 (5th Cir. 1983) (abrogated on other grounds); *Rutherford Food Corp. v. McComb*, 331 U.S. at 729 ("putting on an 'independent contractor' label does not take the worker from the protection of the [FLSA]"). Moreover, an employment relationship may exist even if the employer and employee did not intend to create such a relationship, "for application of the FLSA does not turn on subjective intent. It is sufficient that one person 'suffer or permit (another) to work.'" *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974) (alteration in original, citations omitted).

Here, the court dismissed workers' testimony describing the actual working relationship, and instead, credited the language of a contract required by Knight of its workers. For example, the court concluded that Knight exercised little control over the workers because a written agreement required by Knight of its workers provided that installers could reject work orders. In doing so, the court dismissed testimony that in reality, Knight penalized workers for rejecting work orders. Order at 25. Similarly, the court found that Knight's policy of withholding work orders or "downloading" workers without notice did not show control over workers. Instead, the court concluded that "to the extent that this indicates a degree of control, that

control is related to the contractual warranty of quality." *Id.* By improperly crediting the terms of Knight's contract, and dismissing the actual conditions of the working relationship, the district court erred in concluding that the Knight workers are independent contractors without protection of the FLSA.

II. Independent Contracting Misclassification by Knight and Other Employers Imposes Significant Societal Costs, Including Billions of Dollars in Lost State and Federal Government Funds.

In addition to weakened labor standards protections for workers, employer schemes like Knight's that misclassify workers as independent contractors pose serious concern in today's economy. Employers increasingly misclassify employees as independent contractors, denying them protection of workplace laws, robbing unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reducing federal, state, and local tax withholding and revenues. This problem is growing. Between February 1999 and February 2005, the number of workers classified as independent contractors in the United States grew by 25.4 percent.[6] A 2000 study commissioned by the U.S. Department of

[6] U.S. General Accounting Office, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656, App. III. Tbl.4 (2006) (showing changes in size of contingent workforce), *available at* http://www.gao.gov/assets/260/250806.pdf.

Labor found that up to 30% of audited employers misclassified workers.[7] As the United States Government Accountability Office (GAO) has concluded, "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."[8] *See also Craig v. FedEx Ground Package System, Inc.*, 2012 WL 2862030, *7-8 (7th Cir. 2012) (*per curiam* panel noting increase in independent contractor abuses and costs to states and law-abiding businesses)(*unpublished opinion)*.

Federal and state governments suffer significant loss of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums. Between 1996 and 2004, $34.7 billion of federal tax revenues went uncollected due to the misclassification of workers."[9] The Internal Revenue Service's (IRS) most recent estimates of misclassification costs are a $54

[7] Lalith de Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* iii (2000), *available at* http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.
[8] U.S. General Accounting Office, *Employment Arrangements*, *supra* note 6, at 25.
[9] 156 Cong. Rec. S7135-01, S7136 (daily ed. Sept. 15, 2010).

billion underreporting of employment tax, and losses of $15 billion in unpaid FICA taxes and unemployment insurance taxes.[10] Misclassification of this magnitude exacts an enormous toll: researchers found that misclassifying just one percent of workers as independent contractors would cost unemployment insurance trust funds $198 million annually.[11]

State governments also lose hundreds of millions of dollars in unemployment insurance, workers' compensation, and general income tax revenues due to independent contractor misclassification.[12] A growing number of states have thus called attention to independent contractor abuses by creating inter-agency task forces and committees to study the magnitude of the problem. California, for example, found that 29 percent of audited employers had misclassified workers, a figure amounting to $137 million in lost income taxes.[13] A

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[10] 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.

[11] De Silva, *supra* note 7, at iv.

[12] Sarah Leberstein, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (2011), *available at* http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1.

[13] Tax audits conduced by California's Employment Development Department (EDD) from 2006 to 2008 identified 39,494 previously unreported employees. During this 3-year period, EDD recovered $137,563,940 in payroll tax assessments. California Employment Development Department, *Annual Report: Fraud Deterrence and Detection Activities* 20 (2009), *available at* http://www.edd.ca.gov/pdf_pub_ctr/report2009.pdf.

2009 report by the Ohio Attorney General found that the state lost between $12 million and $100 million in unemployment payments, between $60 million and $510 million in workers' compensation premiums, and between $21 million and $248 million in foregone state income tax revenues.[14]

The State of Florida, where Knight is located, has also launched an investigation into a scheme by construction firms who seek to evade payment of workers' compensation premiums by placing a false subcontractor, or "shell company" between the construction firm and the worker.[15] The cost of employee misclassification to the state's unemployment insurance, workers' compensation, and general income tax revenue, is likely significant. In New York—with a population only slightly greater in number to Florida—misclassification of workers resulted in over $175 million of unpaid unemployment taxes per year.[16] Florida's unemployment insurance trust fund, moreover, has run a deficit for more than two

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[14] Richard Cordray, *Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio* (2009), *available at* http://www.faircontracting.org/PDFs/prevailing_wage/Ohio_on_Misclassification.pdf.

[15] Press Release, Jeff Atwater, Chief Financial Officer, Florida Department of Financial Services, CEO Jeff Atwater Calls for Review of Check Cashing Services Aiding in Workers' Comp Fraud (August 3, 2011), *available at* http://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=3924.

[16] Linda H. Donahue et al., *The Cost of Worker Misclassification in New York State* 10 (2007), *available at* http://digitalcommons.ilr.cornell.edu/reports/9/. The 2010 Census counted Florida's population as18,801,310, and New York as 19,378,102. U.S. Census Bureau, Guide to State and Local Geography—Selected Data from the 2010 Census (2011), *available at* http://www.census.gov/geo/www/guidestloc/select_data.html.

years; the state has borrowed more than $2 billion from the federal government to pay unemployment benefits.[17] In light of historic levels of unemployment, employer schemes to evade paying unemployment taxes in past years are an important contributor to this insolvency. Knight's misclassification of its workers as independent contractors hurt low-wage workers and law-abiding businesses. Permitting such schemes to continue permits the wage standards floor to drop, and costs the states billions of dollars in lost payroll and tax revenue.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment, and remand for trial to allow the Knight workers to demonstrate their status as employees.

Dated: August 10, 2012

Respectfully submitted,

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[17] Staff of Fla. Budget Subcomm. on Tranportation, Tourism, and Economic Development Appropriations, Bill Analysis and Fiscal Impact Statement, CS/CS SB 1416, at 7 (2012), *available at* http://www.flsenate.gov/Session/Bill/2012/1416/Analyses/FsmVEe6618Vi05GYHl4uh8p/CQ8=|11/Public/Bills/1400-1499/1416/Analysis/2012s1416.bta.PDF.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief contains 4,744 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as established by the word count of the computer program used for preparation of this brief.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point size Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 10, 2012, true and correct copies of the foregoing Motion for Leave to File an Amicus Brief and accompanying proposed Amicus Brief were served on counsel of record for each of the following parties, by causing same to be deposited in the United States mail properly addressed and with adequate postage affixed thereto, and that the original and six copies of the same were filed via hand delivery to John Levy, Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit, 56 Forsyth St. N.W., Atlanta, Georgia 30303.

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