

**IN THE SUPREME COURT  
OF THE  
STATE OF VERMONT**

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Docket No. 2005-367

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FLEECE ON EARTH,

Appellant,

v.

VERMONT DEPARTMENT OF LABOR,

Appellee.

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On Appeal from Employment Security Board  
Appeal No. C-02-05-172-01

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**BRIEF OF *AMICI CURIAE* NEW ENGLAND LEGAL FOUNDATION  
FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS LEGAL FOUNDATION IN SUPPORT OF APPELLANT**

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By their attorneys,

John A. Facey, III  
Kenlan, Schweibert & Facey, P.C.  
71 Allen Street, Suite 401  
P.O. Box 578  
Rutland, VT 05702  
(802) 775-3300

Martin J. Newhouse  
Andrew R. Grainger  
New England Legal Foundation  
150 Lincoln Street  
Boston, MA 02111  
(617) 695-3660

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**Issues for Review**

*Amici Curiae* New England Legal Foundation (“NELF”) and National Federation of Independent Business Legal Foundation (“NFIB Legal Foundation”) adopt the Issues for Review as stated in the brief of the appellant Fleece on Earth (“FOE”). In particular the brief of the *amici* will address FOE’s second issue for review:

Did the ESB err when it determined that FOE’s home knitters and sewers were employees, rather than independent contractors, because they were not free from control or direction over the performance of their services?.....page 4

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## INTEREST OF THE *AMICI*

*Amicus Curiae* the New England Legal Foundation (“NELF”) is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF’s mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF’s more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Kelo v. City of New London, Connecticut*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 2655 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358 (1999); *American Pelagic Fishing Company v. United States*, 379 F.3d 1363 (Fed. Cir. 2004); *Adams v. United States*, 391 F.3d 1212 (Fed. Cir. 2004); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996); *Preseault v. United States*, 66 F.3d 1190 (Fed. Cir. 1995).

The National Federation of Independent Business Legal Foundation (“NFIB Legal Foundation”) is a nonprofit public interest law firm established to protect the rights of America's small business owners. It is the legal arm of the National Federation of Independent Business (“NFIB”), the Nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all 50 states. NFIB has 600,000 members, including over 2,000 located in Vermont. NFIB’s members own a

wide variety of small businesses, including restaurants, family farms, neighborhood retailers, service companies, and small manufacturers.

The members of both NELF and NFIB are affected by the business climate in New England and the nation as a whole. One aspect of a healthy business climate is allowing parties the freedom to contract, within the bounds of the law. Indeed, the Vermont Supreme Court has recognized the importance of this principle when it noted that the test for independent contract status under Vermont's unemployment compensation law is not so narrow as to "hamper those who undertake to do business together as independent contracting parties." *Burchesky v. Department of Employment Training*, 154 Vt. 355, 361, 577 A.2d 672, 675 (1989). Both the members of NELF and of the NFIB are concerned that the decision that is being appealed in this case may inappropriately hamper this freedom of contract. For that reason, NELF and NFIB Legal Foundation believe that it will be helpful to the Court for them to present their members' perspective on the issues presented by this case.

#### **STATEMENT OF THE CASE**

*Amici Curiae* NELF and NFIB Legal Foundation adopt the Statement of the Case as stated in the brief of the appellant FOE. However, because they are central to Part I of *Amici*'s argument, *Amici* restate here the following facts:

At issue in this appeal is whether four knitters and one sewer who work in their own homes to make the clothing that FOE sells are FOE's employees or are independent contractors within the meaning of Vermont's unemployment compensation statute. 21 V.S.A. § 1301(6)(B). *In re matter of Fleece on Earth*, Vermont Employment Security

Board, Appeal No. C-02-05-172-01 (July 26, 2005) (“ESB Decision”), Appellant’s Brief at 1.

As the ESB found, and FOE does not dispute, FOE specifies the items of clothing that it wishes these individuals to make, and provides them with patterns and yarn for those specified products. ESB Decision at 5, *P.C. 152*. FOE pays the workers only for finished products that substantially meet its specifications. *Id.*

The record also establishes, however, that FOE does not control the manner in which this work is performed. It does not mandate the equipment used. Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C. 121-125*. It does not provide the tools. *Id.* It does not impose deadlines. *Id.*, ALJ Transcript 18, *P.C. 25*. It does not require work be done on any specific schedule. Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C. 121-125*. It does not require that the knitting or sewing be done in any particular way. *Id.*, ALJ Transcript 25, *P.C. 32*. It does not control whether the knitters/sewers hire people to assist them. Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C. 121-125*; ALJ Transcript 25, *P.C. 32*. It does not require any particular routine or work pattern and, therefore, does not control the hours of the day or on which days of the week the workers work. Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C. 121-125*. It does not mandate any particular sequence in doing the work. *Id.* Each knitter has his or her own way of knitting, or makes adjustments to the pattern to suit the way they knit. *Id.*

While FOE provides patterns to the home workers, it does allow the knitters and sewers to deviate from the patterns so long as the final product are substantially in compliance. ALJ Transcript 19, 25, *P.C. 26, 33*. The testimony of the knitters

themselves was that they are not always given a pattern by FOE and that they often deviate from the pattern. Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C. 121-125*. FOE pays the workers on a per piece basis. ALJ Decision 2, *P.C. 3*.

## ARGUMENT

### **I. IN ERRONEOUSLY CONCLUDING THAT FLEECE ON EARTH FAILED PART A OF THE “ABC” TEST, THE ESB CONFUSED CONTROL OVER THE RESULTS OF THE WORKERS’ EFFORTS WITH CONTROL OVER THEIR PERFORMANCE**

When the ESB determined that FOE failed to meet Part A of the “ABC” test, it mistakenly confused specification of the results of the workers’ services with control of the manner in which the services are performed.

The sole issue in this case is whether, under Vermont’s unemployment compensation statute, 21 V.S.A. § 1301 *et seq.*, FOE is required to make unemployment compensation contributions for the home workers who make the clothing that it sells. Because the statute only obligates employers to pay unemployment contributions for wage earners<sup>1</sup> who are employees, the question that must be decided is whether the home workers are FOE’s employers or are, as FOE and the workers themselves believe,<sup>2</sup> independent contractors for whom no contributions are required.

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<sup>1</sup> As a threshold matter, the statute only applies to “[s]ervices performed by an individual for wages . . . .” 21 V.S.A. §1301(6)(B). 21 V.S.A. §1301(12), in pertinent part, defines “wages” to mean “all remuneration paid for services rendered by an individual including commissions and bonuses and the cash value of all remuneration paid in any medium other than cash.” Under this definition, the home knitters and sewers were paid wages by FOE and, therefore, the unemployment statute is applicable.

<sup>2</sup> For the home worker’s belief that they are independent contractors, *see, e.g.*, the transcript included in the record of the interview of Ruthie Nichols, one of the home workers in this case. When asked whether she ever filed for unemployment against FOE, Nichols replied: “I never applied against Fleece on Earth because I knew I was a subcontractor running my own knitting business.” Ex. 2.1, *P.C. 121*.

Under the unemployment compensation statute, the State initially bears the burden of establishing that the alleged “employees” perform services for wages. 21 V.S.A. § 1301(12). Once this is shown, the burden shifts to the employer to prove the “employees” are independent contractors under the three parts of the so-called “ABC” test.<sup>3</sup> *Vermont Securities, Inc. v. Unemployment Compensation Commission*, 118 Vt. 196, 200, 104 A.2d 915 (1954). Part A of the test requires that the employer demonstrate that the individual in question “has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact.” 21 V.S.A. §1301(6)(B)(i). Part B requires that the employer demonstrate that the individual’s “service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of the enterprise for which such service is performed.” 21 V.S.A. §1301(6)(B)(ii). Finally, part C requires a showing that the individual “is customarily engaged in an independently established trade, occupation, profession or business.” 21 V.S.A. §1301(6)(B)(iii).

The ESB affirmed the ALJ’s finding that FOE does not meet the requirements of Parts A and C with respect to its home knitters and sewers.<sup>4</sup> With respect to Part A, the

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<sup>3</sup> This ABC or tri-partite test is not unique to Vermont’s unemployment compensation statute, but is similar or identical to the employment/independent contractor test contained in the unemployment compensation statutes of other states. *See, e.g.*, Massachusetts General Laws c. 151A, § 2, which provides a virtually identical three part test to determine whether an individual is an employee or independent contractor for purposes of unemployment benefits.

<sup>4</sup> The ESB reversed the ALJ’s conclusion that FOE also had not passed Part B, finding that FOE had met this requirement because the workers work in their own homes. The ALJ held that, because FOE sells its products throughout the state of Vermont, any home knitter working within the boundaries of the state was working within FOE’s place of business. The ESB corrected this expansive construction of the Part B test, noting that

ESB found that “the employer failed to show that the individuals were free from control and direction over the performance of their services.”<sup>5</sup> The ESB explained:

When all is said and done, the individuals involved had no more control or discretion in how to knit, stitch, or sew for the employer by performing the work in their homes as they would have had had the employer had a shop or factory at which they performed these identical services. The employer’s argument that the individuals were free to knit, stitch, or sew the items in question in any manner they saw fit is, at best, disingenuous. *They were given the materials and the patterns by the employer. The employer agreed to pay them only for a finished product which used those materials and conformed to those patterns. In short, making products with those materials and to the specifications of the patterns provided is what the employer engaged the services of these individuals for.* Whether or not they could make the final products however they choose, and we consider the employer’s argument in this regard to be a purely semantic one, without substance or merit, *the reality of the situation is that the individuals involved made what and only what they were told by the employer to make, and had no discretion whatsoever in this regard if they wished to be paid for their services.*

ESB Decision 5, P.C. 152 (emphasis added).

The italicized language in the above quote makes it clear that the ESB concluded that FOE failed part A because FOE specified what products should be delivered to it by the home workers, provided materials for those products, and only paid for products that substantially met its specifications. The ESB focused solely on the control that FOE exercised over the results of the home workers’ services, thereby ignoring the actual statutory language which specifies that the test of control is with regard to the “performance” of the services, not their result. 21 V.S.A. §1301(6)(B)(i) (“[s]uch

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“services performed in an individual’s home are performed outside of all places of business of the employer.”

<sup>5</sup> With respect to Part C of the test, the ESB agreed with the ALJ that FOE had not met its burden of proof. FOE has also appealed this part of the ESB’s ruling. While *Amici* support FOE’s appeal of the finding on Part C, because a determination under Part C is a purely factual matter based on the evidence that was placed in the record by FOE and this issue has been thoroughly covered by FOE in its brief, *amici* do not address Part C in this *amicus* brief.

individual has been and will continue to be free from control or direction over the *performance* of such services. . . .” (emphasis added))

The statute’s wording which specifically and exclusively refers to performance plainly tracks the common law definition of independent contractor status, in which the key concept is the right to control the performance of work, not the right to control the result. As this Court stated in *Kelley’s Dependents v. Hoosac Lumber Co.*, 95 Vt. 50, 53, 113 A. 818, 820 (1921), under the common law, “if the [employer] may specify the result only, and the [worker] may adopt such means and methods as he chooses to accomplish that result, then the latter is not an employee, but an independent contractor.” *See also*, *Reed v. Glynn*, 168 Vt. 504, 724 A.2d 464, 466 (1998) (citing *Kelley’s Dependents* for common law definition of employee); *Minogue v. Rutland Hospital*, 119 Vt. 336, 125 A.2d 796, 798 (1956) (to determine whether a person is the servant of another, “the essential test is whether he is subject to the latter’s control or right of control with regard not only to the work to be done but also to the manner of performing it”); *Thomas v. United States*, 204 F. Supp. 896, 898 (D. Vt. 1962) (“[t]he main distinguishing factor between a servant or employee on the one hand and an independent contractor on the other, is that of control over the details of the actual performance of the worker’s duties.”).

To be sure, as this Court pointed out in *State v. Stevens*, 116 Vt. 394, 77 A.2d 844 (1951), the three parts of the ABC test, taken together, yield a statutory definition of “employment” broader than that under the common law, effectively narrowing the independent contractor exception. As the Court stated, “the three concomitant conditions

bring under the definition of ‘employment’ many relationships outside of the common law concepts of the relationship of master and servant.” 116 Vt. at 397-8

This, however, does not change the fact that Part A of the tri-partite test directly tracks the common law definition and that, under it, the criterion is control over performance, not results. This part of the test has been so interpreted by the courts of other jurisdictions that also utilize the ABC test and whose unemployment compensation statutes, taken as a whole, also broaden the common law definition of employment. *See, e.g., Athol Daily News v. Board of Review of the Division of Employment and Training*, 786 N.E.2d 365 (Mass. 2003) (finding adult newspaper carriers to be independent contractors, while acknowledging the distinction from common law; although the required results of their work were specified, how they performed the work was not).<sup>6</sup>

Not only is Part A’s consonance with the common law definition well-established in the cases, it also makes logical sense. Simply put, if the criterion under Part A were whether an employer exercises control over the results of the workers’ services, no

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<sup>6</sup> *See also F.A.S. International, Inc. v. Reilly*, 427 A.2d 392, 396-97 (Conn. 1980) (the ABC test is not a statutory expression of the more restrictive common-law, nevertheless “Part A of the test invokes essentially the same criteria as the independent contractor test at common law...[and] ‘depends upon the existence or nonexistence of the right to control the means and methods of work’” (citation omitted)); *Commissioner of Labor v. Lyric Company, Inc.*, 397 N.W.2d 32 (Neb. 1986) (finding wholesale jewelry business exempt from unemployment taxes under “narrow” restriction provided by then-current ABC test); *Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor*, 593 A.2d 1177, 1189 (N.J. 1991) (overturning labor department’s determination that a carpet retailer failed the control prong of the test because it set the time and guaranteed the quality of a carpet installation); *Barney v. Department of Employment Security*, 681 P.2d 1273, 1275-1276 (Utah 1984) (under the ABC test drywall nailers and finishers were not performing services “in employment”). *See also Johnson v. Montana Department of Labor & Industry*, 783 P.2d 1355, 1358 (Mont. 1989) (finding that carpenter who worked on home remodeling project was an independent contractor under Montana’s two-part AB test where homeowner “controlled the result of the carpenters’ work, not the methods...used to accomplish the end result”).

person in Vermont could be considered to be an independent contractor under the unemployment compensation law. This is because businesses will always specify the results of work for which they have hired an independent contractor. A business will always hire an individual for a specific task or to produce a defined result, and will only pay the worker if the result meets the specifications. By enacting the ABC test the Legislature defined independent contractor status in Vermont, and certainly did not abolish it altogether. Indeed, this Court recognized as much when it observed that the test for independent contract status under Vermont's unemployment compensation law is not so narrow as to "hamper those who undertake to do business together as independent contracting parties." *Burchesky v. Department of Employment Training*, 154 Vt. 355, 361, 577 A.2d 672, 675 (1989). *Accord, Erspamer Advertising Co. v. Department of Labor*, 214 Neb. 68, 75, 333 N.W. 2d 646, 650 (1983) ("[t]he exemption [under Nebraska's unemployment compensation statute] becomes meaningless if it does not exempt anything from the statutory provision.")

Once attention is focused on the proper criterion, *i.e.*, whether FOE exercised control over the workers' performance of their services, the evidence in the record compels the conclusion that FOE met the requirements of Part A. As described above, FOE does not mandate the equipment used by the home workers. Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C. 121-125*. It does not provide them with tools. *Id.* It does not impose deadlines upon them for the work to be done. *Id.*, ALJ Transcript 18, *P.C. 25*. It does not require work be done on any specific schedule, *i.e.* it does not specify which hours or days of the week the home workers should work. . Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C. 121-125*. It does not require that the knitting

or sewing be done in any particular way. *Id.*, ALJ Transcript 25, *P.C.* 32. It does not control whether the knitters/sewers hire people to assist them. Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C.* 121-125; ALJ Transcript 25, *P.C.* 32. It does not require any particular routine or work pattern. Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C.* 121-125. It does not mandate any particular sequence in doing the work. *Id.* Each knitter has his or her own way of knitting, or makes adjustments to the pattern to suit the way they knit. *Id.*

Further, while FOE customarily provides patterns to the home workers, it does allow the knitters to deviate from the pattern so long as the final product is substantially the same. ALJ Transcript 19, 25, *P.C.* 26, 33. The testimony of the knitters themselves was that they are not always given a pattern by FOE and that they often deviate from the pattern when it is provided. Exhibit 2.6D, Ex. 2.1, Ex. 2.6A, Ex. 2.6B, Ex. 2.6C, *P.C.* 121-125. FOE pays the workers on a per piece basis. ALJ Decision 2, *P.C.* 3.

In sum, contrary to the conclusion reached by the ESB, FOE meets the requirements of Part A of the ABC test because it does not control or direct “the performance”, 21 V.S.A. §1301(6)(B)(i), of the home knitters and sewers who make the children’s clothing that it sells.

## **II. PUBLIC POLICY DISFAVORS LOWERING THE ALREADY LOW LIABILITY THRESHOLD FOR EMPLOYERS UNDER VERMONT’S UNEMPLOYMENT INSURANCE STATUTE**

As noted above, this Court has already recognized in *Burchesky v. Department of Employment Training*, *supra*, 154 Vt. at 361, 577 A.2d at 675, that the Legislature did not intend, when it enacted the ABC test, to “hamper those who undertake to do business together as independent contracting parties.” Indeed, the existence of the exemption for

independent contractors indicates the Legislature's awareness of the importance of preserving the ability of employers and workers to contract with each other on an independent contractor basis. In our modern economy, independent contractors serve a variety of functions that are not easily performed by employees.<sup>7</sup> They are a resource for owners of small businesses who need to hire someone with a skill that is needed by the business for a short period of time or on an occasional basis. It is not unusual for a business to have a variety of jobs arise during the year that cannot be handled with the current work force but that do not require hiring an additional employee. By hiring an independent contractor, a business owner can have the job performed promptly without having to hire someone who may very soon be discharged. The availability of independent contractors allows small businesses to be more flexible and more competitive. *See* John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always A Rose*, 8 HOFSTRA LAB. L.J. 337, at 339-341 (1991) (discussing the trend towards a service-based economy and changing consumer patterns).

A recent study commissioned by the United States Department of Labor has concluded that an increasing number of self-employed persons desire the benefits of becoming an independent contractor, including being their own boss and being able to work out of their homes on flexible schedules. UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING SERVICES ADMINISTRATION, INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS (Feb.

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<sup>7</sup> *See*, on this subject, the Testimony given by Diana A. Ehrlich to the Governor's Task Force on Independent Contractor Status (Albany, NY 2004), available at <http://www.bcnys.org/inside/sb/ictest.htm>. Ehrlich, a staff member at that time of the Business Council of New York State, testified as to the confusing plethora of definitions for independent contractors in that state, but also to the reasons why independent contractors often fill a business's needs.

2000) (“DOL Study”).<sup>8</sup> With respect to what motivates any individuals to become an independent contractor (“IC”), the DOL Study reported the following findings:

In the [Bureau of Labor Statistics (“BLS”)] surveys, there is little evidence that workers were forced to leave their regular full-time jobs to start working for themselves as ICs. According to the BLS, independent contractors are ‘somewhat more likely to have voluntarily left their previous employment than were traditional workers.’ ‘Among men, most said they worked as an independent contractor because they liked being their own boss’, whereas the common reasons given by women for being an IC included ‘the flexibility of scheduling and the ability to meet family obligations that the arrangement afforded.’” The [BLS’s Current Population Survey (“CPS”)] showed the vast majority of ICs (76%) cited personal reasons for becoming ICs. Less than 10% cited economic reasons. Nearly 84% of ICs stated that they preferred their alternative arrangement to a more traditional one. . . . ICs do not view their work as contingent, because they see their primary work relationship begin with their occupation and other colleagues in their professional network, and not with any specific employer or organization. Nor do they view their current job arrangement as temporary.

*Id.*, at 28-29. Independent contractors are found in a wide variety of industries and usually control their own hours, work with their own equipment, and are not subject to the direct control of a business owner. See “A Rose Is Not Always a Rose”, *supra*, at 365-375 (reviewing the characterization of sales professionals, agricultural workers and service sector workers) and Scott R. Sier and Molly E. Slaughter, *The Employee/Independent Contractor Dichotomy in South Dakota for Unemployment Compensation and Workers’ Compensation Purposes: And Examination and Suggested Analytical Framework*, 43 S.D.L. REV. 56, 59-60, at 77-88 (1998) (discussing persons and occupations not entitled to employee status).

As the DOL Study, at 2, reported, “[a]s the economy continues to change, communications technology advances and more workers search for alternative ways of

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<sup>8</sup> This report is available at <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

living their lives, there is greater interest in independent and part-time work.” Technological advances now allow individuals to work at home, in the car, or from just about any other location. The fastest growing segment of the small business community is female, and the fastest growing part of the female segment operates out of the home. *See* DOL Study at 33 (“[m]ore women are joining the ranks of independent contractors. . . [b]etween 1988 and 1996, the number of self-employed women grew at five times the rate of self-employed men and three times the rate of salaried women”). *See also Face to Face With the IRS, What’s Washington Doing to Make Life Easier – or Harder – for Small Business*, BUSINESS WEEK (March 18, 1996), available at <http://www.businessweek.com/1996/12/b346727.htm>.<sup>9</sup> If, on the other hand, regulating entities continue the trend of classifying independent contractors as employees, businesses will be forced to cut back on the number of people to whom they can afford to offer work because the attendant costs of hiring a full-time employee, including unemployment insurance, disability insurance, workers’ compensation, and other benefits will diminish their competitive advantage. Christopher J. Cotnoir, *Employees or Independent Contractors: A Call for Revision of Maine’s Unemployment Compensation*, 46 ME. L. REV. 325, 344 (1994). *See also* Erlich Testimony, *supra*.

In sum, it is clear that independent contractors perform a legitimate and useful function in our economy. The Vermont Legislature’s recognition of this fact is embodied in the statutory exemption that it enacted for independent contractors in the unemployment

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<sup>9</sup> This is an interview with Internal Revenue Commissioner Margaret M. Richardson and National Federal of Independent Business President Jackson Faris. In the interview, Commission Richardson acknowledged that “[o]ne of the concerns we’ve heard is that maybe our training materials are biased against agents ever classifying anybody as a contractor, not recognizing there are legitimate instances when people aren’t employees.”

compensation statute. The ESB's misapplication of the control test, by effectively eliminating independent contractor status, violates both legislative intent and good public policy.

### **CONCLUSION**

For the foregoing reasons, the Court should reverse the ESB's decision that FOE did not meet the requirements of Part A of the ABC test set forth in the unemployment compensation statute, 21 V.S.A. §1301(6)(B)(i).

Dated at Rutland, Vermont, this \_\_\_ day of November, 2005.

Respectfully submitted by:

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John A. Facey, III  
Kenlan, Schweibert & Facey, P.C.  
71 Allen Street, Suite 401  
P.O. Box 578  
Rutland, VT 05702  
(802) 775-3300

Martin J. Newhouse  
Andrew R. Grainger  
New England Legal Foundation  
150 Lincoln Street  
Boston, MA 02111  
(617) 695-3660

*Attorneys for Amici Curiae  
New England Legal Foundation and  
National Federation of Independent  
Business Legal Foundation*

