Nos. 16-1028, 16-1063 & 16-1064

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., DOING BUSINESS AS BFI NEWBY ISLAND RECYCLING,
Petitioner,
v.
THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
CASE NO. 32-CA-160759

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL RESTAURANT ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, COALITION FOR A DEMOCRATIC WORKPLACE AND AMERICAN STAFFING ASSOCIATION ON BEHALF OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel certifies the following:

(A) Parties, Intervenors, and Amici: The Amici are the National Association of Manufacturers, National Restaurant Association, the National Federation of Independent Business, the Coalition for a Democratic Workplace and American Staffing Association ("Amici"). Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Amici certify that no publicly held company owns ten percent or more of any of the Amici, and Amici have no parent companies as defined in the Circuit Rule. Amici are trade associations representing hundreds of thousands of employers.

(B) Rulings Under Review: The rulings under review in this case are (1) the Decision and Order of the Board in Case 32-CA-160759 on January 12, 2016 and reported at 363 NLRB No. 95; and (2) the Decision on Review and Direction of the Board in Case 32-RC-109684 on August 27, 2015 and reported at 362 NLRB No. 186. Review of the Board's Decision and Order in Case 32-CA-160759 includes review of the Decision on Review and Direction in the underlying representation proceeding, Case 32-RC-109684.

(C) Related Cases: Amici are unaware of any related case involving substantially the same parties and the same or similar issues.

/s/ Peter N. Kirsanow
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GLOSSARY OF TERMS

American Staffing Association (ASA)

Coalition for a Democratic Workplace (CDW)

Browning-Ferris Industries of California, Inc. doing business as BFI Newby Island Recyclery (Browning-Ferris)

Leadpoint Business Services (Leadpoint)

National Association of Manufacturers (NAM)

National Federation of Independent Business (NFIB)

National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq*. (NLRA or Act)

National Labor Relations Board (Board)

National Restaurant Association (Restaurant Association)

1947 Taft-Hartley Amendments, Pub. L. 81-101 (Taft-Hartley)

I. INTEREST OF AMICI

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The CDW represents hundreds of employer associations, individual employers and other organizations that together represent millions of businesses of all sizes. The CDW's members employ tens of millions of individuals working in every industry and every region of the United States.

The National Restaurant Association is the leading business association for the restaurant and foodservice industry. The Association's mission is to help members build customer loyalty, rewarding careers, and financial success. Nationally, the industry is made up of one million restaurant and foodservice outlets employing 14 million people—about ten percent of the American workforce. Despite being an industry of mostly small businesses, the restaurant industry is the nation's second-largest private-sector employer.

The NFIB is the nation's leading small business advocacy association, representing more than 350,000 member businesses in all 50 states and the District of Columbia. NFIB's members range from sole proprietors to firms with hundreds of employees, and collectively they reflect the full spectrum of America's small business owners. The NFIB defends the freedom of small business owners to operate and grow their businesses and promotes public policies that recognize and encourage the vital contributions that small businesses make to our national economy.

The ASA is a national trade association comprised of member staffing agencies that recruit, screen, hire, and place employees on temporary assignments with clients on an as-needed basis. ASA represents more than 1,800 staffing agencies operating an estimated 18,000 offices in all 50 states. Nationwide, staffing agencies employee more than three million workers each week, and nearly 16 million annually in virtually every occupation.

Together members of the NAM, Restaurant Association, NFIB, CDW and ASA ("Amici") employ more than a quarter of the entire United States workforce. The diverse members of Amici represent tens of thousands of employers who have substantive experience with staffing agencies, temporary employees and contingent workforces. These employers have spent several decades conforming their

regulations, policies and practices to, and complying with, the joint employer standards set forth by the Board.[1]

As employers under the Act, Amici and their members have a profound interest in national labor policy in general and interpretation of the Act, including the joint employer doctrine, specifically.

II. INTRODUCTION

On August 27, 2105, the Board in a 3-2 decision radically restated the Board's legal standard for joint employer determinations and issued muddled guidance as to how the standard is going to be applied not only going forward but also retroactively. In so doing, the Board abandoned the standard it established more than 30 years ago in *TLI, Inc.*, 271 NLRB 798 (1984), and *Laerco Transportation*, 269 NLRB 324 (1984), which required a showing that the employers jointly exerted ***direct and immediate control*** over the essential terms and conditions of employment in matters such matters as hiring, firing, discipline, supervision, and direction of employees. In its place, the Board adopted a new, much more expansive standard under which ***indirect control*** or even an

1 Pursuant to Fed.R.App.P. 29(c), Amici represent that this brief was not authored, in whole or in part, by any party or party's counsel nor has any party or party's counsel contributed money toward the preparation or submission of this brief.

Counsel for Amici represent that this brief is necessary to detail the manner in which the Board's dramatic departure from Board precedent affects Amici and their respective constituents.

unexercised potential right to control key employment terms can establish joint-employer status.

Not only is the new standard plainly contrary to Congressional intent, its fatal ambiguities wreak havoc on the statutory framework of the Act, destabilize industrial-labor relations, and promote legal and collective bargaining uncertainty. The Act does not expressly define who is an employer, whether joint or sole. Section 2(2) of the Act simply states that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. § 152(2). Thus, both the Board and the courts were left to define what it means to be an employer, which led to inconsistent results. Indeed, prior to *TLI* and *Laerco*, the Board and some Circuit Courts occasionally blurred the concepts of "single employer" and "joint employer" when deciding whether a company had engaged in unfair labor practices through its dealings with employees of a contracted staffing agency. The Third Circuit, in *NLRB v. Browning-Ferris Industries, Inc*., 691 F.2d 1117, 1122-23 (3d Cir. 1982), crystalized the differences between these similar but distinct concepts, noting the following:

> A "single employer" relationship exists where two nominally separate entities are part of a single integrated enterprise so that, for all purposes, there is in fact a "single employer." … Thus, the "single employer" standard is relevant to the determination that "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise. … In contrast, the "joint employer" concept

> does not depend upon the existence of a single integrated enterprise …. Rather, a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be" – independent legal entities that have merely "historically chosen to handle jointly … important aspects of their employer-employee relationship."

By sometimes interchanging these two standards, and the distinct tests developed by the U.S. Supreme Court to aid in deciding if the contractual relationship subjected the company to Section 2(2) of the Act, the Board and some courts unnecessarily sowed confusion among employees, unions, and companies that utilized staffing agency employees in their workplace.

In *Browning-Ferris Industries, Inc.*, the Third Circuit held that the appropriate standard for determining whether a company and a staffing agency are joint employers was set out by the Supreme Court in *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S. Ct. 894, 11 L. Ed. 2d 849 (1964). "Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." *Browning-Ferris Industries, Inc*. at 1123.

Two years later, the Board in *TLI* and *Laerco* adopted the Third Circuit's holding. *TLI* at 798; *Laerco* at 325. The Board also explained what it means for joint employers to "share or co-determine" matters that govern the essential terms and conditions of employment. "To establish joint employer status there must be a

showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *TLI* at 798; *Laerco* at 325. Moreover, the Board made clear that the joint employers' control over these employment matters must be ***direct and immediate***. *TLI*, at 198-99. In other words, even actual but "limited and routine" supervision and direction of another's employees was insufficient to establish joint-employer status. *TLI* at 799; *Laerco* at 326.

The Board's adoption of a standard that requires only a showing of indirect control of key employment terms, or merely an unexercised potential right of contract of such terms, is a profound departure from Board precedent not only in *TLI* and *Laerco*—but also in cases prior to *TLI* and *Laerco* in which the Board relied on indicia of direct and immediate control in applying the common law right-to-control test. Moreover, the Board's new standard both contravenes and upsets the statutory framework of Taft-Hartley, which Congress passed in 1947 to reign in a runaway Board and U.S. Supreme Court that sought to apply an economic realities test rather than a common law right-of-control test. In passing Taft-Hartley, which *TLI* and *Laerco* are grounded upon, Congress unequivocally intended direct and immediate control to be the nexus in determining a joint-employer relationship and specifically precluded the Board from expanding the definition of employer.

By adopting its new joint-employer standard, the Board has jettisoned more than 30 years of clarity and certainty on which employees, employers and unions have relied for labor stability, in favor of obscurity and fatal ambiguity. Accordingly, Amici respectfully submit this Panel should reject the Board's attempt to change the joint employer standard as articulated in *TLI* and *Laerco*.

III. ISSUE PRESENTED

Amici respectfully submit that the issue presented is whether the Board's new test is arbitrary and capricious because it overturns decades of well-settled law and imposes a joint employer definition so broad and unconstitutionally vague that it is impossible for parties to arrange their affairs to achieve predictable legal outcomes.

IV. SUMMARY OF ARGUMENT

The undersigned Amici respectfully submit that the joint employer standard set forth in the Board's decisions in *TLI* and *Laerco* must be maintained. The Board's unsupportable deviation from this standard seriously and adversely affects the nation's manufacturing, restaurant, food servicing, staffing and waste and recycling industries. The factual rationale in support of the *TLI/Laerco* standard remains wholly unchanged. No new circumstances whatsoever have arisen since the issuance of *TLI* and *Laerco* that justify modifying or overturning these decisions. Quite simply, the Board's new standard is a purported solution in search

of a problem; indeed, a solution that would generate myriad insoluble problems for Amici and their members.

The *TLI* and *Laerco* standard adequately safeguarded and promoted employee rights under the Act while also supporting labor stability. The *TLI* and *Laerco* standard also promoted the rights of temporary employees under Section 7 of the Act to engage in meaningful bargaining with the employer—that is, the staffing agency—by ensuring that the company contracting with the staffing agency had ***no role*** in the bargaining process. Furthermore, the *TLI* and *Laerco* standard ensured that the employee was treated fairly by the employer—again, the staffing agency or independent contractor—because the contracting company had ***no influence*** over the employee's terms and conditions of employment. This is central to the concept of the joint employer standard. Companies that seek to avoid joint employer status must avoid having any meaningful effect on the employee's hiring, firing, discipline, supervision and direction. The relative clarity and durability of the doctrine assured that contracting employers, staffing agencies and employees could conform to the Board's standard without unnecessary confusion and conflict.

Conversely, the Board's newly adopted joint-employer standard will have profound deleterious effects on a company's ability to use temporary employees, staffing agencies, leased employees or other contingent workers. This is

particularly so for companies in Amici's industries, which rely on these contingent workers to supplement their own workforces. If the standard is upheld, companies may find themselves held vicariously liable for violations of Section 7 of the Act for depriving a temporary employee's right to form a union and for violations of Section 8(a)(3) of the Act for unlawful discipline or discharge of a temporary employee that are ***committed by entities completely outside of their control***. Additionally, if the staffing agency's employees are represented by a union, these companies may be unwittingly subjected to the staffing agency's collective bargaining obligations under Section 8(a)(5) of the Act.

Other dominoes are likely to fall as well, with unpredictable results. Contracting companies, for example, may find themselves subject to secondary boycotts even though they have no actual or direct and immediate control over the terms and conditions of a staffing agency's employees. Contracting companies may also be subject to millions of dollars in multi-employer pension withdrawal liability if the staffing agency with which they contracted goes out of business. As a result, companies may be compelled to radically change their business models and terminate their contracts with staffing agencies because of their potential harmful and/or unpredictable ramifications. Indeed, the redefinition of the joint employer standard subjects employers and even unions to a panoply of unfair labor practices not contemplated under the Act. Thus, the Board's new standard will not

only have serious and negative implications for employers but also for the very employees the Board purportedly seeks to protect.

TLI and *Laerco* reasonably balanced employee free choice and labor stability. They have provided guidance to all actions in the contingent workforce market for more than three decades. As such, the standard they set should remain undisturbed.[2]

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2 Additionally, while the Board's majority stated that it was adopting the new standard to permit "meaningful collective bargaining," there is absolutely no evidence that violations of the Act have proliferated in recent years involving companies contracting with third parties. In fact, the Board has seen a sharp drop in the number of unfair labor charges and representation petitions being filed. In 2000, the Board received a combined total of 35,249 unfair labor charges and representation petitions. Ten years later, the number had dropped to 25,855. NLRB FY2009 Annual Report, p. 2, Chart 1. Obviously, any revision to the current joint employer standard should be predicated on the fact that temporary employees are being deprived of their Section 7 rights by third-party companies. Revisions to a substantive 30-year standard should not be based merely on whim, caprice or an ostensible benefit to unions.

Moreover, there has been no change of circumstances in the workplace environment sufficient to justify a change in the *TLI* and *Laerco* joint-employer standard. To the contrary, temporary work has shifted away from lower-skilled and lower paying jobs to more highly-skilled, higher paying staffing positions frequently falling outside the confines of Section 2(3) of the Act. Tian Luo, "The Expanding Role of Temporary Help Services From 1990 to 2008," Monthly Labor Review, Bureau of Labor Statistics, Aug. 2010. There simply is no compelling need to broach a change to the joint employee standard based on current economic factors.

V. ARGUMENT

A. The *TLI* and *Laerco* Joint-Employer Standard Protects the Rights of Temporary Employees to Engage in Meaningful Collective Bargaining.

The Board's primary argument in adopting a new joint-employer standard is that *TLI* and *Laerco* significantly and unjustifiably narrow the circumstances where a joint-employment relationship can be found between a contracting company and a staffing agency. There is no evidence whatsoever that the *TLI* and *Laerco* standard impinged on the Section 7 rights of temporary employees or that it permitted a contracting company, as a practical matter, to determine or restrict the terms and conditions of the temporary employees' employment. On the contrary, such evidence would violate the joint employer standard as it is expressed in *TLI* and *Laerco*.

The central purpose of the Act is "to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations." *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609, 113 L. Ed. 2d 675, 111 S. Ct. 1539 (1991). The heart of the Act is Section 7, which "grants employees the right to organize and form labor unions for the purpose of collective bargaining and other concerted activities." *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 255 (4th Cir. 1994). Section 7, however, makes no

reference to the role of the employer in this regard. Nor does it define what an employer is. Rather, Section 2(2) defines an employer as "any person acting as an agent of an employer, directly or indirectly ...." 29 U.S.C. § 152(2). The Supreme Court has explained that Congress "mean[t] to incorporate the established meaning of th[at] ter[m]," and "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94, 116 S. Ct. 450, 133 L. Ed.2d 371. In fact, the Board has the duty of determining whether the relationship between certain parties constitutes an employer-employee relationship within the meaning of the Act. *Browning-Ferris Industries, Inc*., 691 F.2d at 1121.

For more than 30 years, the Board has determined whether two parties are joint employers by applying the *TLI* and *Laerco* standard, which requires a detailed analysis of whether the alleged joint employers share the ability to control or co-determine essential terms and conditions of employment. *See Oakdale Care Center*, 343 NLRB 659, 662 (2004). Essential terms and conditions of employment are those involving such matters as hiring, firing, discipline, supervision, and direction of employees. *Laerco*, at 324. However, the joint employers' control over these employment matters must be ***direct and immediate***. *TLI*, at 198-99.

In *Airborne Express*, 338 NLRB 597, 597 n.1 (2002), the Board stressed that the "essential element in [the] analysis is whether a putative joint employer's control over employment matters is ***direct and immediate***." (Emphasis added.) In other words, "[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties." *AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007). In *AM Property*, the Board further explained that it has "generally found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work." *Id.*, at 1001.

Despite its claim to the contrary, the Board has failed to demonstrate that *TLI* and *Laerco's* requirement that both parties must have direct and immediate control has limited the ability of temporary workers to engage in meaningful collective bargaining. Rather, there is ample evidence to the contrary – that *TLI* and *Laerco* fully protects the rights of temporary employees. *See Texas World Service Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991) (affirming Board order that contractor and subcontractor were joint employers that engaged in unfair labor practices where the contractor directed union election strategy for subcontractor and influenced hiring and firing decisions); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302 (1st Cir. 1993) (affirming Board order that company and

staffing association were joint employers that violated Sections 8(a)(1) and (3) of the Act where company refused to accept employees and assumed supervision over the referred employees); *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004) (affirming Board order that distributor and driver staffing company were joint employers where distributor administered driver applicant road tests, interviewed driver applicants, prevented the hiring of applicants, selected and assigned employees to permanent routes, selected the vehicles they would use, directed them to make special deliveries, made other work assignments, and handled complaints about the drivers).

At the same time, the Board's application of the *TLI* and *Laerco* standard adequately and appropriately took into account various day-to-day realities that are necessarily part of a workplace where a company employs both permanent workers and temporary workers. This provided a degree of reasonableness that allowed companies to protect both the temporary employees as well as themselves. For instance, the *TLI* and *Laerco* standard recognized that "an employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contract at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for." *Southern California Gas. Co*., 302 NLRB 456 (1991) (finding no joint employer relationship even though parties' contract required temporary

employees to do delineated tasks at certain times and required temporary agency to employ adequate number of trained personnel). Limited and routine supervision consisting of "directions of where to do a job rather than how to do the job and the manner in which to perform the work," is typically insufficient to create a joint employer relationship. *G. Wes Ltd. Co*., 309 NLRB 225, 226 (1992); *Island Creek Coal Co*., 279 NLRB 858, 864 (1986). *See also Local 254, Serv. Emps. Intern. Union*, AFL-CIO, 324 NLRB 743, 746-49 (1997) (no joint employer relationship where employer regularly directed maintenance employees to perform specific tasks at particular times but did not instruct employees how to perform their work).

And this is just so. The contemporary workplace is replete with multiple directory arrangements that fall far short of traditional notions of supervisory control. Such arrangements do not implicate Section 7 rights justifying a finding of joint employer status.

Yet, as demonstrated above, it is clear that anything more than nominal supervision will subject a company to joint employer status under the *TLI* and *Laerco* standard. Thus, it promoted the rights of temporary employees under Section 7 of the Act because it sufficiently and appropriately limited the control a contracting company may have over a temporary employee. The Board's unjustified and wholesale change of the 30-year standard seriously disrupts workplace stability and predictability without yielding a commensurate scale of

protections under Section 7. Accordingly, the *TLI* and *Laerco* standard should remain undisturbed.

B. **The Board, Even Prior to *TLI* and *Laerco*, Relied on Actual Control to Determine Joint-Employer Status.**

In adopting a greatly expansive standard under which indirect control or even an unexercised potential right to control key employment terms can establish joint-employer status, the Board stated that, prior to *TLI and Laerco*, its joint-employer decisions "typically treated the right to control the work of employees and the terms of employment as probative of joint employer status. The Board did not require that this right be exercised, or that it be exercised in any particular manner." This is misleading to the point of mendacity. Even a quick review of Board precedent shows that the Board *never* adopted a rule that indirect or unexercised control established joint-employer status, per se. More importantly, the Board as often as not based its decision on a contracting company's direct control over the staffing agency's workforce.

For example, in *Cabot Corp.*, 223 NLRB 1388 (1976), the Board noted that the contracting company entered into a cost-plus arrangement with a staffing agency and that the contracting company reserved the right to remove employees from the job, to require the staffing agency to perform the job in accordance with the company's drawings and job specifications, to count the number of staffing agency employees on duty, and to monitor staffing agency's performance. In fact,

the Board noted, the contracting company actually performed headcounts and monitored performance to ensure the efficacy of its final product. Despite its right under the contract and its execution of those rights, the Board found that the contracting company "*did not exercise the type of control* which would establish a joint employer relationship … [and that the contract company's] policing of the contracts only assured it that [the staffing agency] was actually incurring the expenses for which it claimed reimbursement and that the final product was satisfactory." *Id.* at 1389.

Importantly, the *Cabot* Board discussed the decision in *Ref-Chem*, 169 NLRB 376 (1968), which is one of the decisions cited by the Board in the case at issue for the proposition that, prior to *TLI* and *Laerco*, it did not require a right to control to be exercised or exercised in a particular manner. In distinguishing *Cabot* and *Ref-Chem*—again, a posterchild for the Board's new joint-employer standard—the *Cabot* Board noted: "These cases are factually distinguishable. In *Ref-Chem*, the maintenance contractor was controlled in all aspects of the work and its labor relations policies and, in addition, the financial interests of the maintenance contractor and the owner of the plant were intertwined. The amount of control is much less here and there is no similar intertwining of the financial affairs of the two companies." *Id.*, at 1390, *fn.* 11. There can be no clearer statement of what the Board in *Cabot* and *Ref-Chem* actually found dispositive in

determining joint-employer status, i.e., the *actual control* exerted by the contracting company, not the indirect control or reserved control never exercised.

Similarly, in *Hychem Constructors, Inc.*, 169 NLRB 274 (1968), the Board focused on the actual control of the contracting company, not its indirect control or its reserved rights under a contract with a staffing agency. The Board noted that while the contracting company had the right to approve wage increases and overtime and responsibility to consult with the staffing company proposed layoffs, such controls are "consistent with [the contracting company's] right to police reimbursable expenses under its cost-plus contract and do not warrant the conclusion that [the contracting company] has thereby forged an employment relationship, joint or otherwise, with the [the staffing agency]." *Id.* at 276. "Such a conclusion would likewise be unwarranted with respect to the other controls retained," such as a requirement that staffing agency employees observe plant safety and other plant rules and right to remove an undesirable staffing agency employees. *Id.* "The promulgation of such rules, which seek to insure safety and security, is a natural concomitant of the right of any property owner or occupant to protect his premises." *Id.* *See also Floyd Epperson*, 202 NLRB 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974) (while it noted evidence of the employer's indirect control over wages and discipline, the Board based its finding of joint employer on *direct and immediate* supervision of the employees involved). These decisions

directly contradict and utterly discredit the Board's position that prior to *TLI* and *Laerco* the Board did not require that a right to control be exercised, or that it be exercised in any particular manner.

Finally, prior to *TLI* and *Laerco*, the Board found no joint employer status where putative "employers retained the contractual power to reject or terminate workers;[3] set wage rates;[4] set working hours;[5] approve overtime;[6] determine the manner and method of work performance;[7] inspect and approve work,[8] and terminate the contractual agreement itself at will."[9] *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015) (internal quotes omitted) (members Miscimarra and Johnson Dissent). Plainly, prior to *TLI* and *Laerco*, the Board considered a contracting company's actual control to be dispositive in determining joint-employer status. The only issue, if any, was the *consistency* by which the Board applied those factors. *TLI* and *Laerco* resolved that issue by cementing a

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3 *Cabot Corp.*, 223 NLRB 1388, 1390 fn. 10 (1976), affd. sub nom. *Chemical Workers Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977); *Hychem Constructors, Inc.*, 169 NLRB 274, 276 (1968); *Westinghouse Electric Corp.*, 163 NLRB 914 (1967); *Space Services International Corp.*, 156 NLRB 1227, 1232 (1966).

4 *Cabot*, *supra*; *Hychem*, *supra* at *fn.* 4; *Fidelity Maintenance & Construction Co.*, 173 NLRB 1032, 1037 (1968).

5 *S.G. Tilden, Inc.*, 172 NLRB 752 (1968).

6 *Hychem*, *supra* at 276.

7 *S.G. Tilden, Inc.*, *supra*.

8 *Cabot*, *supra* at 1392; *Westinghouse*, *supra* at 915.

9 *Space Services*, *supra* at fn. 23.

clear and definitive standard that delineated for the Board, as well as employees, employers, and unions, exactly what was permissible and what was not. Those days of certainty and predictability would be over if the Board's practically limitless expansion of the joint-employer standard, which is incapable of definite resolution, is permitted to stand.

C. **The Board has Impermissibly Deviated from Taft-Hartley and Common Law Agency Principles.**

By adopting a standard by which indirect control or even an unexercised potential right to control key employment terms can establish joint-employer status, the Board has impermissibly ignored Congress's intent that direct and immediate control is necessary to find an employment relationship under the Act.

Following the Supreme Court's decision in *NLRB v. Hearst Publishing*, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944), which upheld a Board finding that newspaper distributors were "employees" within the meaning of the Act on the ground that common law principles were not determinative in deciding whether an employment relationship existed, Congress passed Taft-Hartley to amend the definition of "employee" to expressly overrule *Hearst*. Indeed, it is inarguably clear from the Congressional Record that Congress amended the Act to mandate the application of the "ordinary rules [of the] common law of agency." H.R. Rep. No. 510, 80th Congress, 1st Sess. (1947). To ensure the further application of common law agency principles, Taft-Hartley also redefined "employer" to

encompass only individuals who are "acting as an *agent* of an employer," a narrower test than the prior definition of any individual "acting *in the interest* of any employer." *See e.g.*, H.R. Rep. No. 245, 80th Congress, 1st Sess. (1947).

Since Taft-Hartley, the Supreme Court has repeatedly instructed that common law agency principles are to be utilized in determining employee status, and by extension, employer status. *See e.g., NLRB v. Town & Country, Inc.*, *supra.* Moreover, the Board has acknowledged that its interpretation of the Act is restricted to the common law agency standard. For example, in *Roadway Package System, Inc*., 326 NLRB 842 (1998), the Board noted that Supreme Court decisions "teach us not only that the common law of agency is the standard to measure employee status ***but also that we have no authority to change it***." *Id.* at 849 (emphasis added). Nonetheless, that is exactly what the Board has done by adopting the new joint-employer standard, which completely rejects common law agency principles.

Under the adopted standard, whether another company is a necessary party to permit "meaningful" collective bargaining negotiations would require an industry-by-industry and relationship-by-relationship examination of the "economic realities," requiring consideration of such factors as market position, market elasticity, supply and demand, and the other factors generally, if imperfectly, suited for understanding the price and terms of a subcontractor's

service but not for determining whether an employment relationship exists or if bargaining is required under the Act. This is exactly why Congress passed Taft-Hartley in the first place—to prevent the Board from circumventing the plain language of the Act in favor of its unspoken but clearly visible mission to expand union involvement where none is wanted, needed or necessary.

D. Altering the *TLI* and *Laerco* Standard Will Subject Companies to Unmerited and Unexpected Liability.

Although the Board is not constrained by the doctrine of *stare decisis*, (*see NLRB v. Kostel Corp.*, 440 F.2d 347, 350 (7th Cir. 1971)), it should nonetheless consider how adopting the new joint employer standard disrupts the Act's statutory scheme and adversely affects those parties who have relied on the current standard for decades. As Justice Louis Brandeis noted, "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[10]

Since 1984, companies have comported themselves and organized their businesses on the basis of the *TLI* and *Laerco* standard. They did so based on the reasonable assumption that a standard that has been consistently applied for more than three decades without controversy would continue to be applied in the same manner going forward. Any change will jeopardize these companies and the

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[10] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S. Ct. 443, 447, 76 L. Ed. 815, 823 (1932) (overruled on other grounds) (Brandeis, dissenting).

current, stable environment in which contingent employees, unions and companies currently operate. Moreover, the sweeping nature of the change significantly disrupts and is inconsistent with the finely-tuned framework of the Act with myriad (ostensibly) unintended consequences.

For example, the Board has held that when joint employer status is established between a company and a staffing agency, both entities may be liable for the unlawful discipline or discharge of the temporary employees under Section 8(a)(3). *Capitol EMI Music*, 311 NLRB 997 (1993). In addition, the Board has held that a joint employer company shares a staffing agency's duty to bargain with the agency's temporary employees and that it violates Section 8(a)(5) by refusing to do so over its decision to cancel the leasing agreement. *W.W. Grainger, Inc.*, 286 NLRB 94 (1987). As a remedy, the Board orders the company to bargain with the union as well as make whole those employees laid off as a result of the company's unlawful conduct by paying them back wages. *Id.* If the new standard is permitted to stand, companies that would not be considered a joint employer under *TLI* and *Laerco* may inadvertently find themselves held vicariously liable for the actions of third parties they do not control. Although Amici maintain that *TLI* and *Laerco* are the proper standard, as Justice Brandeis wrote, "it is more important that the applicable rule of law be settled than that it be settled right." Amici submit that the joint employer doctrine is settled ***and*** it is "settled right."

E. <u>The New Joint-Employer Standard Would Seriously and Adversely Affect Each of Amici's Industries.</u>

As noted above, the business models of Amici's respective industries rely to an appreciable extent on legal and regulatory certainty. Companies within those industries have developed operational practices and procedures in reliance on the *TLI/Laerco* joint employer standard. Changing the standard to create a legal fiction that a host facility is the "employer" of another wholly independent company's employees—whose employees it does not hire, supervise, discipline, discharge, or pay—will disrupt operations, likely increase costs, and impair Amici's members' ability to respond to changing market conditions and demands.

1. <u>Manufacturing</u>.

Thousands of manufacturers, large and small, across the country utilize staffing agencies and contingent employees to supplement operations and perform tasks both integral and ancillary to the company's core business. The nature of the arrangements vary substantially, depending upon the discrete operational requirements of a given manufacturer. Some of the arrangements involve the manufacturer's supervision not at all; some a bit more, but sporadically and inconsequentially; while others may be so intertwined as to "co-determine . . . the essential terms and conditions of employment" with the staffing agency. *Laerco* at 325. In each instance, the manufacturer makes a reasoned decision on how much

control it needs or wants to exercise, and does so with a full understanding of the ramifications of such control under the Act.

Many, if not most, manufacturers enter into agreements with temporary staffing agencies that contain detailed provisions regarding hiring, firing, discipline, wages, assignment, transfers, overtime, training and other terms and conditions of employment. These agreements were drafted, in part, with the *TLI/Laerco* joint employer doctrine in mind. More importantly, the operational arrangements were developed for purposes of productivity, profitability, and labor (and labor law) certainty and stability. Any change to the joint employer doctrine would adversely and unpredictably affect each of the foregoing factors.

Equally problematic is the effect an expansive indirect control standard would have on the contractor/subcontractor relationship, potentially rendering many, if not most, contractor/subcontractor arrangements "joint employer" relationships. This would severely impair the manufacturing industry, as a substantial percentage of manufacturers contract with third parties to perform a wide variety of functions such as design, molding, set-up, fabrication and assembly. In fact, any given manufactured product may involve the efforts and input of ***several*** contracting entities. Were the Board's adopted joint employer standard permitted to stand, some or all of such subcontractors could be considered joint employers—a catastrophically unmanageable result that would not only

severely impair the manufacturing industry, but generate confusion, interminable litigation, and do violence to labor stability and employees' Section 7 rights.

2. Restaurant and Foodservice.

For many of the same reasons noted above, a change in the *TLI* and *Laerco* standard would disrupt the nation's restaurant and foodservice industry. Because of its labor-intensive nature, the business models of the restaurant and foodservice industry, as much as any other industry, are critically dependent on labor stability and certainty. At the same time, the industry requires a fair degree of flexibility to adapt to emerging trends. A change to the joint employer doctrine would upset that stability and reduce flexibility—harming the industry without enhancing employee Section 7 rights.

This is particularly true in the franchise context, although it certainly applies in most respects to independent operators as well who similarly rely on contracting relationships for everything from key drop deliveries to staffing for special events. A model franchisor often provides considerable business guidance and resources to its franchisees in order to help the franchise flourish and succeed while maintaining the franchisor's standards and enhancing its brand. This works to the advantage of all involved, including employees who benefit from that success.

The resources and guidance provided by franchisors, however, do not result in control of the franchisee employees' wages, hours, terms or conditions of

employment; they do not amount to codetermination of the essential aspects of employment. They have little if any bearing on employees' Section 7 rights. Consequently, it would be wholly contrary to the Act to extend joint employer status to such arrangement.

Expanding the joint employer standard to the franchisor/franchisee model likely would prompt franchisors to abandon the model to the detriment of franchisees and their employees. Expanding this standard would also compromise the ability of independent restaurants and others in the restaurant and foodservice industry to operate their businesses and provide employment opportunities in a stable, predictable environment.

3. Staffing Agencies.

Staffing services encompass a broad range of employment and human resources services. The best known among them—temporary help services—was developed after World War II and has experienced prodigious growth in the past two decades. Staffing agencies providing temporary help typically recruit, train, and test their employees and assign them to customers in a wide range of job categories and skill levels, from construction workers to information technology specialists, accountants, and lawyers. Temporary employees fill in during vacations and illnesses, meet temporary skill shortages, handle seasonal or other special workloads, and help staff special projects.

The advantages of temporary work to individuals are widely recognized by employees, businesses, economists, and policy-makers. Such work affords flexibility, training, and supplemental income for millions of individuals and provides a bridge to permanent employment for those who are just starting out, changing jobs, or out of work. Temporary work also benefits business. The use of temporary staffing provides employers with the flexibility to adjust the size of their work forces to meet business and economic exigencies and seasonal fluctuations quickly and at a predictable cost.

A departure from established common law agency principles and the application of those principles will adversely impact the economy in general and the staffing industry and their clients in particular. Application of the Board's new standard for the determination of joint employer status, particularly since as an "economic realities" test it lacks predictability, will lead to contracting companies' reluctance to use the services of staffing agencies, killing jobs and harming workers and the economy.

Moreover, imposing some sort of "indirect control" test would render it virtually impossible for companies to determine whether they might be deemed a joint employer under the Act by a regional director—who has broad discretion to make such determinations. A refusal to bargain would be followed by years of litigation—all the while subjecting any change that a contracting company makes

to a service contract with a staffing agency to charges of unfair labor practices and potential work stoppages. Put simply, the “indirect control” standard will damage the stability of collective bargaining relationships and economic efficiency—in order to solve a supposed problem for which no empirical evidence even exists.

VI. CONCLUSION

For the foregoing reasons, Amici respectfully submit that *TLI* and *Laerco's* joint employer standard should not be modified or overturned, that Browning-Ferris' petition for review be granted, that the Board's application for enforcement be denied, and the Board's orders be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Peter N. Kirsanow, counsel for Amici and a member of the Bar of this Court, certify pursuant to Federal Rule of Appellate Procedure 32(a)(7(B) that the foregoing brief of Amici, the National Association of Manufacturers, National Restaurant Association, the National Federation of Independent Business, the Coalition for a Democratic Workplace and American Staffing Association, is proportionately spaced, has a typeface of 14 points or more, and contains 6,531 words.

/s/ Peter N. Kirsanow
PETER N. KIRSANOW

CERTIFICATE OF SERVICE

I, Peter N. Kirsanow, counsel for Amici and a member of the Bar of this Court, certify that on June 14, 2016, I caused a copy of the attached *Brief Of Amici Curiae National Association Of Manufacturers, National Restaurant Association, National Federation Of Independent Business, Coalition For A Democratic Workplace And American Staffing Association On Behalf Of Petitioner* to be filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Peter N. Kirsanow
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