ORAL ARGUMENT NOT YET SCHEDULED
Case 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.,
D/B/A BFI NEWBY ISLAND RECYCLERY, *et al.*,
Petitioner/*Cross-Respondent*,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/*Cross-Petitioner*.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FPR-II, LLC D/B/A LEADPOINT BUSINESS SERVICES,
Respondent.

On Petition for Review and Cross-Petition for Enforcement of Orders of the National Labor Relations Board

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Dated: June 14, 2016

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties and *Amici.* All parties, intervenors, and *amici* appearing before this Court are listed in the Certificate as to Parties, Rulings, and Related Cases filed by Petitioner Browning-Ferris of California, Inc., except for Washington Legal Foundation (WLF), which is filing this *amicus curiae* brief in support of Petitioner. Other potential *amici curiae* include Coalition for a Democratic Workplace, Associated Builders and Contractors, National Association of Manufacturers, Microsoft Corporation, Associated General Contractors of America, Inc., National Federation of Independent Business, HR Policy Association, American Hospital Association, National Restaurant Association, American Hotel & Lodging Association, International Franchise Association, National Association of Home Builders, and National Retail Federation.

Rulings Under Review. The rulings under review are set for in the Certificate as to Parties, Rulings, and Related Cases filed by Browning-Ferris.

Related Cases. Counsel for WLF is unaware of any related cases before this Court or any other court.

/s/ Richard A. Samp
Richard A. Samp

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that proposed *amicus curiae* Washington Legal Foundation (WLF) is a non-profit corporation; it has no parent corporations, and no publicly-held company has a 10% or greater ownership interest.

Pursuant to Circuit Rule 26.1(b), WLF describes its general nature and purpose as follows. WLF is a public-interest law and policy center that regularly appears in this Court in cases raising public policy issues. WLF has no financial ties with any party to these petitions.

/s/ Richard A. Samp
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TABLE OF CONTENTS

Page

CERTIFICATION AS TO PARTIES, RULINGS, AND RELATED CASES i

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

GLOSSARY vii

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 10

I. THE BOARD'S NEW JOINT-EMPLOYER STANDARD IS CONTRARY TO LAW BECAUSE IT DEFINES THE EMPLOYER-EMPLOYEE RELATIONSHIP FAR MORE BROADLY THAN DOES THE NATIONAL LABOR RELATIONS ACT 10

A. The NLRA Requires the Board to Adhere to Common-Law Agency Principles in Defining the Employer-Employee Relationship 12

B. The Common Law Has Never Recognized an Employer-Employee Relationship in the Absence of Evidence that the Putative Employer Exercised Direct Control over the Workers' Terms and Conditions of Employment 16

Page

II. THE NLRB'S NEW JOINT-EMPLOYER STANDARD IS NOT ENTITLED TO DEFERENCE FROM THE COURTS 22

A. The NLRB's Interpretations of the Common Law Are Not Entitled to Deference 22

B. *Chevron* Deference Is Inapplicable When a Federal Agency Addresses a Statutory Issue that Has Already Been Definitively Decided by the Courts 24

C. An Agency's Interpretation of a Statute Is Not Entitled to Deference When the Agency Proposes to Impose Its Interpretation Retroactively in a Manner that Would Unfairly Surprise the Regulated Community 27

III. THE NLRB'S NEW JOINT-EMPLOYER STANDARD THREATENS LIABILITY TO A WIDE VARIETY OF ENTITIES ON THE BASIS OF OVERLY VAGUE STANDARDS 28

A. The NLRB's New Standard Promotes Economic Inefficiency by Discouraging Firms from Contracting for Specialized Services . . . 30

B. The NLRB's New Standard Deprives Small Businesses of Entrepreneurial Opportunities 31

CONCLUSION 31

TABLE OF AUTHORITIES

Page

Cases:

AT&T v. NLRB,
67 F.3d 446 (2d Cir. 1995) 18, 19, 26

* *Aurora Packing Co. v. NLRB*,
904 F.2d 73 (D.C. Cir.) 17, 23

C.C. Eastern, Inc. v. NLRB,
60 F.3d 855 (D.C. Cir. 1995) 23

Chevron USA Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 22, 24

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012) 9, 27

Clinton's Ditch Co-op Co. v. NLRB,
778 F.2d 132 (2d Cir. 1985), *cert. denied*, 479 U.S. 814 (1986) . . . 15, 18, 19, 26

Doe I v. Wal-Mart Stores, Inc.,
572 F.3d 677 (9th Cir. 2009) 1, 21

Kolander v. Lawson,
461 U.S. 352 (1983) 30

Laerco Transportation,
269 N.L.R.B. 324 (1984) 3, 4, 5, 11, 27, 29

* *Local 777, Democratic Union Organizing Committee v. NLRB*,
603 F.2d 862 (D.C. Cir. 1978) 14, 17

Miles v. University of District of Columbia,
2013 WL 5817657 (D.D.C. 2013) 29

NLRB v. Browning-Ferris Industries of Pennsylvania, Inc. [*"NLRB v. BFI"*],
691 F.2d 1117 (3d Cir. 1982) 11, 19, 20

NLRB v. Hearst Publications, Inc.
322 U.S. 111 (1944) 12, 13, 14, 17

* *NLRB v. United Ins. Co. of America*,
390 U.S. 254 (1968) 6, 14, 23

N. Am. Van Lines, Inc. v. NLRB,
896 F.2d 596 (D.C. Cir. 1989) 18

* Authorities on which we chiefly rely are marked with asterisks

Page(s)

Redd v. Summers,
232 F.3d 933 (D.C. Cir. 2000) 19
* *Service Employees Int'l Union, Local 32BJ v. NLRB*,
647 F.3d 435 (2d Cir. 2011) 8, 19
TLI Inc.,
271 N.L.R.B. 798 (1984) 3, 4, 5, 11, 27, 29
* *United States v. Home Concrete & Supply, LLC* ,
132 S. Ct. 1836 (2012) 9, 25
Yellow Taxi Co. of Minneapolis v. NLRB,
721 F.2d 366 (D.C. Cir. 1983) 17, 26

Statutes and Constitutional Provisions:

Civil Rights Act of 1964, Title VII 29

National Labor Relations Act (NLRA),
29 U.S.C. § 151 *et seq.* 2, 5, 6, 7, 8, 10, 12, 13, 14, 22, 26, 27, 29, 30
29 U.S.C. § 152(3) 14

* Taft-Hartley Amendments, Pub. L. 80-101 (1947) 6, 7, 13, 14

Miscellaneous:

House Conf. Report No. 510, 80th Cong., 1st Sess. (1947) 6, 14

H.R. Rep. 245, 80th Cong., 1st Sess. (1947) 14, 17

Restatement (Second) of Agency 7

GLOSSARY

Act	National Labor Relations Act
Board	National Labor Relations Board
Browning-Ferris	Browning-Ferris Industries of California, Inc.
DR	NLRB Decision on Review and Direction, August 27, 2015
Leadpoint	FPR-II, LLC d/b/a/ Leadpoint Business Services
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
WLF	Washington Legal Foundation

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation is a public-interest law firm and policy center with supporters in all 50 States.[1] It devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared before this and other federal courts in numerous cases related to the responsibilities of businesses with respect to those claiming to be their "employees." In particular, WLF has participated in litigation concerning whether a business should be deemed a "joint employer" of individuals nominally employed by another business. *See, e.g., Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009).

WLF is concerned that the new joint-employer standard adopted by Respondent National Labor Relations Board (NLRB) in this case threatens to impose new, unanticipated liability on large portions of the regulated community. Worse still, the new standard is inherently vague and deprives companies of the ability to accurately predict the circumstances under which their activities will subject them to liability.

WLF agrees with Petitioner Browning-Ferris Industries of California, Inc.

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[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

(Browning-Ferris) that the NLRB's joint-employer standard is based on definitions of "employer" and "employee" that conflict with the meaning of those terms established by Congress in the National Labor Relations Act as amended (NLRA, or the Act), 29 U.S.C. § 151 *et seq.* WLF writes separately to emphasize that, under the facts of this case, the NLRB's interpretation of the Act is not entitled to deference from the Court.

STATEMENT OF THE CASE

The facts of this case are set out in detail in Petitioner's brief. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Browning-Ferris owns and operates the BFI Newby Island Recyclery in Milpitas, California. It has contracted with an unrelated business entity, Leadpoint Business Services, to perform several functions within the recycling facility, including sorting, screen cleaning, and housekeeping. Pursuant to that contract (which took effect in 2009), Leadpoint hires and manages the personnel necessary to perform its assigned functions. The facts surrounding the relationship between Browning-Ferris and Leadpoint are largely undisputed; all agree that the contract delegates to Leadpoint direct authority over recruiting, applicant screening, hiring, training, supervising, scheduling, compensating, counseling, promoting, disciplining, and terminating its Newby Island employees.

In 2013, Intervenor ("Local 350") filed a petition with the NLRB, seeking a representation election for a bargaining unit consisting of the sorters, screen cleaners, and housekeepers at the Newby Island facility (*i.e.*, all the employees paid by Leadpoint). The petition alleged that Browning-Ferris and Leadpoint were joint employers of those employees.

Following a hearing, the Regional Director determined that Leadpoint was the sole employer of those employees. Applying the NLRB's then-current standard—set forth in *TLI, Inc.*, 271 N.L.R.B. 798 (1984), and *Laerco Transportation*, 269 N.L.R.B. 324 (1984)—the Regional Director concluded that Browning-Ferris's very limited involvement in determining the employees' "essential terms and conditions of employment" did not justify classifying Browning-Ferris as a "joint employer" of those employees.

In an August 27, 2015 Decision on Review and Direction (DR), the NLRB rejected the Regional Director's position and concluded that Browning-Ferris "is a statutory joint employer of the sorters, screen cleaners, and housekeepers at issue." DR-18. It did not dispute the Regional Director's factual findings, nor did it conclude that Browning-Ferris qualified as a joint employer under the *TLI*/*Laerco Transportation* standard. Instead, the NLRB voted 3-2 to abandon its 32-year-old standard, concluding that the old standard:

> [L]eave[s] the Board's joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes.

DR-1.

In place of the *TLI*/*Laerco Transportation* standard, the NLRB adopted a new standard that significantly broadens the circumstances under which a "user" company should be deemed a joint employer of workers nominally employed by a "provider" company. It stated that the putative joint employer's "control" of the employment relationship was "central" to the joint-employer inquiry. DR-2. In describing its new standard, the Board emphasized two significant changes from the prior standard:

> We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercises* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry. ... Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.

DR-2.

The NLRB concluded that Browning-Ferris qualified as a joint employer under the new standard. DR-18 to DR-20. While conceding that Browning-Ferris did not participate on a "day-to-day" basis on such employment issues as hiring, firing,

discipline, supervision, direction of work, hours, and wages, the NLRB determined that Browning-Ferris nonetheless at least "indirectly" controlled certain aspects of those issues and reserved the right to control other aspects. *Ibid*.

Members Miscimarra and Johnson dissented from the Board's decision. They would have retained the *TLI*/*Laerco Transportation* standard and determined that Browning-Ferris was not a joint employer under that standard. DR-21 to DR-50. They concluded that the new standard is inconsistent with the NLRA's definitions of "employer" and "employee" (as amended in 1947), DR-22, and replaces "a longstanding test that provided certainty and predictability" with "an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships." *Ibid*.

Following the August 27, 2015 Decision on Review, Local 350 was certified as bargaining representative for the sorters, screen cleaners, and housekeepers at the Newby Island facility. Browning-Ferris declined to bargain with Local 350, and the NLRB on January 12, 2016 issued a Decision and Order (DO), finding that Browning-Ferris committed an unfair labor practice by declining to bargain. Browning-Ferris filed a timely petition with this Court, seeking review of the DO.

SUMMARY OF ARGUMENT

The Court should grant Browning-Ferris's petition for review. The NLRB's

determination that Browning-Ferris is a joint employer of the workers in question was based on a joint-employer standard that is inconsistent with provisions of the NLRA, as amended by the Taft-Hartley Amendments of 1947. In particular, the 1947 amendments narrowed the definitions of employer/employee for purposes of the NLRA. Disapproving a 1944 Supreme Court decision that had endorsed the NLRB's very broad reading of "employee," Congress decreed that henceforth the term's meaning should be construed by reference to "the ordinary tests of the law of agency" as established by the common law—tests that Congress deemed to be considerably narrower in scope. House Conf. Report No. 510, 80th Cong., 1st Sess., 536. *See also NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968) (stating that "[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles.").

The 1947 amendment to the definition of "employee" focused on whether a worker should be classified as an "employee" or an "independent contractor"—not on whether the worker should be classified as an "employee" of a "joint employer." Nonetheless, subsequent court decisions have unanimously concluded that the amendment is fully applicable to the joint-employer issue, and that whether a worker is an "employee" of a "joint employer" must be determined on the basis of common-law understandings of "employee" and "employer."

Indeed, the NLRB concurs with that conclusion. Its Decision on Review states explicitly, "In determining whether an employment relationship exists for purposes of the Act, the Board must follow the common-law agency test." DR-12. The NLRB went astray, however, in analyzing the common law. Based on out-of-context citations to isolated provisions of the Restatement (Second) of Agency, the NLRB concluded that the common law historically has embraced an extremely broad definition of "employer"—one that encompasses any entity that possesses some authority to control the terms and conditions of a worker's employment without regard to whether: (1) the entity actually ever exercises that control; or (2) the entity's control is indirect and extremely remote.

Glaringly absent from the NLRB's common-law analysis, however, are citations to *any* court decisions finding that an entity is an "employer" despite failing to exercise its contractual rights to control the conditions of employment of workers nominally employed by another, or despite the lack of authority to *directly* control conditions of employment. That absence of case citation speaks volumes. By definition, a doctrine is not deemed part of the common law unless it is grounded in prior court decisions applying that doctrine.

In the 70 years since adoption of the Taft-Hartley Amendments, numerous federal courts hearing NLRA claims have examined the common law of employment

as it relates to whether a worker should be deemed an employee of an entity for which it provides services. None of those courts has determined that the common law (and thus the NLRA) recognizes an employee-employer relationship in the absence of evidence that the putative employer actually exercises more-than-negligible *direct* control over essential terms and conditions of employment. Those courts that have addressed the "joint employer" issue directly have held that an entity cannot be deemed a "joint employer" in the absence of evidence that the entity exercised "immediate control over the employees." *See, e.g., Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011).

The NLRB's new joint-employer standard is not entitled to any deference by the Court, for three distinct reasons. First, the standard is based on the NLRB's analysis of the common law of agency, not on an analysis of the NLRA itself. While an agency's interpretation of a statute it is charged with administering is often entitled to deference from the courts, deference is unwarranted for administrative agencies' analyses of the common law—assessments for which agencies possess no special expertise. Second, even if the NLRB could plausibly claim that its abrupt change in how it evaluates joint-employer claims could somehow be deemed to be based on a new interpretation of the NLRA, the new interpretation would not be entitled to deference because the federal courts have already rejected that interpretation. Once

a statutory-interpretation issue has been decided by the federal courts, administrative agencies are not free to "overrule" those judicial decisions by re-interpreting the statute and then demanding that the courts defer to the new interpretation. *See United States v. Home Concrete & Supply, LLC* , 132 S. Ct. 1836, 1843-44 (2012). Third, by applying its new standard to existing contractual arrangements, the NLRB is imposing significant obligations on businesses that structured their operations in reliance on the Board's prior, less-expansive standard for imposing joint-employer liability. As the Supreme Court recently explained, judicial deference is unwarranted in such circumstances, because "to defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct" to be prohibited or required. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

The NLRB's new joint-employer standard should also be rejected on the ground that it is arbitrary and capricious. It significantly expands the scope of the joint-employer doctrine, yet is so vague that regulated entities cannot confidently predict whether the new standard will result in the doctrine being applied to their future operations.

Although this case arises in the context of a user/supplier relationship involving the use of contingent employees, there can be little doubt that the new standard applies

to *all* business models in which one entity arguably exerts some control over another entity's employees. These include, among others, franchise arrangements, parent corporations and their subsidiaries, contractors and subcontractors, banks whose loans include financing terms that impose performance requirements on borrowers, and even consumers who dictate terms of performance for contractors who come into their homes. In the absence of any suggestion from the NLRB that it intends to develop separate joint-employer standards for each of these business models, all businesses can fairly conclude that they are subject to the Board's new standard. Yet, the Board's multi-factor standard fails to provide any meaningful guidance, and also grants the Board virtually unlimited discretion to make a "joint employer" determination any time two businesses enter into a close contractual relationship. Such standards are textbook examples of arbitrary and capricious rulemaking.

ARGUMENT

I. THE BOARD'S NEW JOINT-EMPLOYER STANDARD IS CONTRARY TO LAW BECAUSE IT DEFINES THE EMPLOYER-EMPLOYEE RELATIONSHIP FAR MORE BROADLY THAN DOES THE NATIONAL LABOR RELATIONS ACT

The joint-employer concept recognizes that two or more business entities, although they are in fact separate entities, under appropriate circumstances may both be deemed "employers" of a specified worker because "they share or codetermine

those matters governing the essential terms and conditions of employment" for that worker. *Laerco Transportation* at 3. The NLRB in 1984 established a standard for determining whether an entity qualifies as a joint employer and thus can be made subject to the obligations imposed on an "employer" by the NLRA:

> [W]e find that to establish such [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, Inc. at 1 (citing *Laerco Transportation*) (emphasis added). The NLRB explained that it was basing its standard on the standard set forth by the Third Circuit in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.* [*"NLRB v. BFI"*], 691 F.2d 1117 (3d Cir. 1982). *Ibid*. The NLRB determined in both *TLI* and *Laerco Transportation* that the "user" firms were not joint employers of drivers provided to them by the "provider" firms—even though the user firms exercised "some" control over the drivers and had sufficient economic power to dictate to the provider firms the essential terms and conditions of the drivers' employment—because the user firms had never actually attempted to dictate those terms and conditions.

The NLRB adhered to its *TLI*/*Laerco Transportation* standard for 32 years before repudiating it in connection with this case. The NLRB concluded that adopting a broader definition of "joint employer": (1) comported with its congressional

mandate; and (2) was warranted by a need to bring its labor regulations "[into] step with changing economic circumstances." DR-1, 12. The NLRB is wrong on both counts. The Board's newly expanded definition of the employer-employee relationship is inconsistent with the definition set forth in the NLRA. Any decision to alter that definition in light of "changing economic circumstances" must come from Congress, not the NLRB.

A. The NLRA Requires the Board to Adhere to Common-Law Agency Principles in Defining the Employer-Employee Relationship

As this Court has repeatedly recognized, proper construction of the NLRA's definitions of "employer" and "employee" requires an understanding of a 1947 amendment to the Act adopted in response to a 1944 Supreme Court decision. That amendment made clear that the NLRB was to look solely to common-law agency principles in determining whether an employer-employee relationship exists for purposes of the Act.

In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Supreme Court upheld an NLRB determination that workers to whom Los Angeles newspapers sold their papers (for resale on the city's streets) were "employees" of the newspapers for purposes of the NLRA (and thereby entitled to collective-bargaining rights), notwithstanding the Court's recognition that the common law would have classified

the workers as independent contractors, not employees. The Court stated that Congress intended the NLRA to apply to workers whenever "the economic facts of the relation" between the workers and those from whom they received compensation were such that collective bargaining would be "appropriate and effective for the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions"—such as when there exists "[i]nequality of bargaining power in controversies over wages, hours, and working conditions." *Id.* at 127. The Court concluded that the NLRA applied to such relationships, notwithstanding that the relationships might not fit within "the narrow technical relation of 'master and servant,' as the common law had worked this out in all its variations." *Id*. at 124.

Congress responded to *Hearst* in 1947 by expressing its strong disagreement with the Court's broad definitions of "employer" and "employee" and by amending the NLRA to reverse the outcome of that case. The House Report accompanying the 1947 Taft-Hartley Amendments stated:

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the [NLRB], means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying on the theoretic "expertness" of the Board, upheld the Board. ... It must be presumed that when Congress passed the Labor Act,

> it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. ... "Employees" work for wages or salaries *under direct supervision*.

H.R. Rep. 245, 80th Cong., 1st Sess. 18 (emphasis added) (quoted in *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 905 (D.C. Cir. 1978)). To make explicit its disagreement with *Hearst*, Congress amended the NLRA's definition of "employee" in 1947 as part of the Taft-Hartley Amendments, by adding a provision stating that "[t]he term 'employee' ... shall not include ... any individual having the status of an independent contractor." 29 U.S.C. § 152(3).[2]

The Supreme Court later concluded that "the obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968). Moreover, federal courts that have addressed the NLRA's definitions of "employer" and "employee" in other contexts (*i.e.*, in contexts other than determining whether the worker is an independent contractor and thus not a party to an employer-employee relationship) have similarly

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[2] The House Conference Report accompanying the Taft-Hartley Amendments explained that Congress was amending the statutory definition of "employee" in response to *Hearst*, which the report criticized for holding "that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act." House Conf. Report 510 at 536-7.

looked to the common law in determining whether such a relationship exists. *See, e.g.*, *Clinton's Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138-140 (2d Cir. 1985) (overturning NLRB determination that a joint employer relationship existed).

Indeed, the Board concurs that the NLRA mandates that the common law of agency provides the appropriate standard for determining whether an entity is a joint employer and thus has established an employer-employee relationship with workers nominally employed by another company. *See* DR-12 ("In determining whether an employment relationship exists for purposes of the Act, the Board must follow the common-law agency test.") The Board concluded, however, that the common law presents no obstacle to its adoption of a significantly expanded joint-employer standard, because (it concluded) the common law historically has embraced an extremely broad definition of the employer-employee relationship. According to the Board, the common-law definition of "employer" encompasses any entity that possesses some authority to control the terms and conditions of a worker's employment, without regard to whether: (1) the entity actually ever exercises that control; or (2) the entity's control is indirect and extremely remote. DR-13 to DR-14.

B. The Common Law Has Never Recognized an Employer-Employee Relationship in the Absence of Evidence that the Putative Employer Exercised Direct Control over the Workers' Terms and Conditions of Employment

As explained in detail by Browning-Ferris in its opening brief, there is no merit to the NLRB's assertions that the common law has broadly interpreted the terms "employer" and "employee." WLF will not repeat that explanation in full here. We instead focus on several points that merit special notice.

First, by definition, a doctrine is not deemed part of the common law unless it is grounded in prior court decisions applying that doctrine. Thus, one would expect the NLRB's common-law analysis to include numerous citations to court decisions. Yet, glaringly absent from the NLRB's analysis are citations to *any* court decisions finding that an entity is an "employer" despite failing to exercise its contractual rights to control the conditions of employment of workers nominally employed by another, or despite the lack of authority to *directly* control conditions of employment. That absence of case citations speaks volumes.

This Court has recognized that when Congress amended the definition of "employee" in 1947, it was adopting a common-law definition of the employer-employee relationship— a definition based on the understanding that "'[e]mployees' work for wages or salaries under *direct supervision*"— that was far narrower than the

definition espoused in *Hearst*. *Local 777*, 603 F.3d at 905 (quoting H.R. Rep. 245) (emphasis added). Ignoring that explicit limitation, the NLRB now asserts that the common law permits a finding of joint-employer status even in the absence of evidence of any "direct supervision" of workers by the putative joint employer.

Indeed, if one accepts the NLRB's broad reading of the common law, all would-be independent contractors could properly be classified as employees, because the economic realities of every contract are such that the user company has the potential to indirectly control the conduct of the independent contractor (by, for example, threatening to terminate the contract). Yet, this Court and other federal courts have repeatedly relied on common-law standards in upholding independent-contractor status in spite of NLRB claims that the putative employer at least indirectly controlled the terms and conditions of employment.

Thus, in *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75-76 (D.C. Cir. 1990), the Court held that "[t]he extent of the actual *supervision* exercised by a putative employer over the 'means and manner' of the workers' performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees" and concluded that the workers were not employees because the supervision actually exercised by the putative employer was not extensive. *See also Local 777*, 603 F.2d at 873, 893; *Yellow Taxi Co. of*

Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); *N. Am. Van Lines, Inc. v. NLRB*, 896 F.2d 596, 599 (D.C. Cir. 1989) (stating that "evidence of unequal bargaining power" between the worker and the putative employer—and the ability of the putative employer to use that power to exercise economic control over its relationship with the worker—is not, without more, evidence that the putative employer is exercising "control over the manner and means of the worker's performance.").

Other circuits have explicitly rejected the NLRB's broad reading of the common law in the context of joint-employer claims. In *AT&T v. NLRB*, 67 F.3d 446 (2d Cir. 1995), the Second Circuit refused to enforce an NLRB bargaining order that was based on the Board's determination that AT&T was a joint employer of workers nominally employed by a cleaning contractor retained by AT&T. The court rejected the NLRB's contention that evidence of AT&T's participation in collective-bargaining negotiations demonstrated, by itself, "the type of control necessary to establish a joint employer," explaining:

> In *Clinton's Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985), *cert den.*, 479 U.S. 814 (1986), we held that "an essential element of any determination of joint employer status in a subcontractor context is ... sufficient evidence of immediate control over the employees." In determining immediate control, we weigh whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process.

Id. at 451. The Second Circuit continues to adhere to its narrow understanding of the circumstances under which the common law recognizes the existence of a joint-employer relationship. *See, e.g.*, *Service Employees Int'l Union,* 647 F.3d at 442-43 (affirming the requirement of *Clinton's Ditch* that no joint-employer determination is permissible in the absence of evidence of "immediate control" over the workers in question).

Indeed, there is every reason to conclude that the common law requires *stronger* evidence of direct and immediate control to support a finding that workers are "employees" in the joint-employer context than in the employee/independent contractor context. As this Court has explained, a worker designated as an "independent contractor" has far less recourse to collective action than a worker designated as the employee of only one employer instead of two, and thus far more reason to challenge her designation:

> Where the plaintiff is herself either an employee of only one employer or an independent contractor, ... classification as the latter leaves her with no protection against employment discrimination. But Redd, even if not an employee of the [putative joint employer], clearly enjoyed protection against employment discrimination by Aspen, which was indisputably her employer.

Redd v. Summers, 232 F.3d 933 (D.C. Cir. 2000).

The NLRB asserts that the Third Circuit's decision in *NLRB v. BFI* is consistent

with its expansive view of the common-law definition of the employer-employee relationship. Not true. The Third Circuit explained that its joint-employer standard is "a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers," and requires a finding "that one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." 691 F.2d at 1122-23.

It is instructive to examine the evidence that the Third Circuit deemed sufficient to meet its facially exacting joint-employer standard. The evidence demonstrated that the top supervisor of the putative joint employer "considered himself 'boss' and acted as 'boss' with respect to the employees' functions," going so far as to individually approve all hires and to unilaterally discharge employees with whom he was dissatisfied. *Id.* at 1124-25. Similar evidence was conspicuously absent in this case, an absence for which the NLRB compensated by adopting a new joint-employer standard that relies on evidence of indirect control and does not require that control ever actually be exercised.

Unlike the NLRB majority, the dissenting Members cited case law to support their contention that there is little support for the majority's expansive reading of

common law. *See, e.g.*, DR-28 to DR-30. The NLRB provided no meaningful response to that case law. For example, the dissenting Members cited *Doe I v. Wal-Mart Stores*, 572 F.3d at 682-83, for the proposition that California law does not permit a retailer to be deemed a joint employer of its suppliers' employees, in the absence of evidence that the retailer had the right to exercise an "immediate level of day-to-day control" over the employees. DR-30.

In response, the majority merely asserted that *Wal-Mart* was not a "close" case because there allegedly was little evidence that the retailer exercised *any* control over the employees. DR-17 n. 94. But that response does not dispute that California does, in fact, require a showing of an "immediate level of day-to-day control" in order to prevail on a joint-employer claim. Moreover, the majority was wrong on its facts: the plaintiffs' complaint alleged that the retailer exerted substantial control (albeit indirect control, by means of its economic power over its suppliers) over the conditions of employment. The *Wal-Mart* decision directly supports Browning-Ferris's assertion that the common law does not permit a joint-employer finding based on evidence of "control" that is not day-to-day in nature and is asserted primarily through indirect means.

In sum, there is no credible evidence that the NLRB's broad joint-employer standard is consistent with limits on the scope of the employer-employee relationship

imposed by the common law. In light of the NLRB's concession that the NLRA requires it to abide by common-law limitations, the Board's determination that Browning-Ferris is a joint employer cannot stand.

II. THE NLRB'S NEW JOINT-EMPLOYER STANDARD IS NOT ENTITLED TO DEFERENCE FROM THE COURTS

The NLRB is likely to assert, in its response to the Petition, that its newly minted interpretation of the NLRA—an interpretation that authorizes it to expand significantly the scope of its joint-employer standard—is entitled to *Chevron* deference. *See Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court should reject any such assertion, for at least three reasons.

A. The NLRB's Interpretations of the Common Law Are Not Entitled to Deference

Chevron explained that the existence of ambiguities in statutes is often an indication that Congress has delegated to an agency authority to fill the gap in a reasonable fashion. Reviewing courts generally defer to an agency's reasonable construction of the statute, even if they would have filled the gap in a different fashion, because they infer that doing so best effectuates Congress's intent. *Chevron*, 467 U.S. at 843-44.

But as the preceding section of this brief explains, Congress did *not* delegate to the Board authority to define the terms "employer" and "employee." Rather,

Congress made clear—particularly when it amended the definition of the term "employee" in connection with the 1947 Taft-Hartley Amendments—that it intended those terms to be defined as they traditionally have been defined under the common law. The decision below fully accepts this limitation on the Board's interpretive authority. DR-12 ("In determining whether an employment relationship exists for purposes of the Act, the Board must follow the common-law agency test.").

Of course, that formulation of the rule requires the NLRB to attempt to discern the content of the common law, which is nowhere etched in stone. But when the NLRB's attempts to do so are challenged, reviewing courts are under no obligation to defer to the NLRB's conclusions. This Court and other federal courts have repeatedly stated that the NLRB's conclusions regarding the common-law definitions of "employer" and "employee" are not entitled to judicial deference. *See, e.g., Aurora Packing Co.*, 904 F.2d at 75. Indeed, even if a reviewing court agrees that the NLRB has accurately described the pertinent common-law rules, the court is under no obligation to defer to the Board's application of the law to the facts of a particular case. As the Supreme Court explained in *United Ins. Co.*, "such a determination of pure agency law involved no special administrative expertise that a court does not possess." 390 U.S. at 260. *Accord, C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858

(D.C. Cir. 1995).[3]

The NLRB's radically enlarged joint-employer standard rises or falls on the Board's determination that the common-law meanings of "employer" and "employee" are significantly broader than past Boards had asserted. That determination is entitled to no judicial deference.

B. *Chevron* Deference Is Inapplicable When a Federal Agency Addresses a Statutory Issue that Has Already Been Definitively Decided by the Courts

As noted above, *Chevron* deference is unwarranted in this case because, as the NLRB acknowledges, its analysis conveys its view on the common law of agency, not on the meaning of the NLRA. But even if the NLRB could plausibly claim that its abrupt change in how it evaluates joint-employer claims should somehow be deemed based on a new interpretation of the NLRA, that new interpretation of the statute would still not be entitled to judicial deference. That is so because the courts have already determined that there is no "gap" in the NLRA—they have already provided a definitive interpretation of the NLRA. Once a statutory-interpretation issue has been decided by the federal courts, administrative agencies are not free to "overrule" those judicial decisions by re-interpreting the statute and then demanding that the courts

[3] The Board's *factual* findings should be upheld if supported by substantial evidence, but WLF is unaware of significant factual disputes regarding the relationship among Browning-Ferris, Leadpoint, and the workers at issue.

defer to the new interpretation.

The Supreme Court's decision in *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012), is illustrative. That case addressed whether the applicable limitations period was three years or six years when the Government seeks to assess an income-tax deficiency on a taxpayer for under-reporting its capital gain by overstating the basis of the property it sold. In a 1958 decision, the Court held that the limitations period was three years. The statute has remained in force without amendment, but in 2010 the Treasury Department adopted a regulation that sought to interpret the statute in the Government's favor—such that the limitations period would become six years.

Home Concrete rejected this effort by the Government to adopt a regulation designed to overturn the 1958 decision. 132 S. Ct. at 1843-44. The Court explained that once a federal court has construed the meaning of a statute in a manner that it believes best comports with congressional intent (and has not simply provided a default rule designed to fill a perceived gap in the statute that has not yet been addressed by a federal agency), that construction is final and is not subject to being overruled by the agency charged with administering the applicable statute. *Id.* The Court held that the rule against administrative overruling of court decisions applies without regard to whether the administrative agency agrees with the court's

interpretation.

Similarly, the NLRB's new joint-employer rule replaces a narrower interpretation of its "employer" authority, an interpretation that had been well accepted by federal courts for decades. The D.C. Circuit has repeatedly stressed the limited scope of the NLRA's definition of "employer" and "employee" and on occasion has been highly critical of the NLRB for ignoring those limitations. *See, e.g.*, *Yellow Taxi Co.*, 721 F.2d at 382 (terming the NLRB's conduct in the case a "thinly veiled defiance" of D.C. Circuit employer/independent contractor decisions and charging that "[f]or the Board to predicate an order on its disagreement with the court's interpretation of a statute is for it to operate outside the law.").

The Second Circuit's joint-employer case law explicitly holds—directly contrary to the NLRB's new standard—that a joint-employer determination under the NLRA is impermissible in the absence of evidence that the putative joint employer exercised "immediate control over the employee." *AT&T*, 67 F.3d at 451. There is no indication in its joint-employer decisions that the Second Circuit believed that it was simply providing a default rule designed to fill a perceived gap in the NLRA that had not yet been addressed by the Board; indeed, both *Clinton's Ditch* and *AT&T* overturned Board findings that joint employers existed. Under those circumstances, even if the Board could plausibly assert that its new joint-employer standard

constitutes a new interpretation of the NLRA (which it cannot), the new interpretation would still not be entitled to *Chevron* deference.

C. An Agency's Interpretation of a Statute Is Not Entitled to Deference When the Agency Proposes to Impose Its Interpretation Retroactively in a Manner that Would Unfairly Surprise the Regulated Community

Deference to the Board's actions is unwarranted for the additional reason that their net effect is to impose retroactive liability on entities that were provided no advance warning of the liability. The Supreme Court recently held that judicial deference to a revised Department of Labor interpretation of its own regulations was unwarranted because the new interpretation caught many in the regulated community by surprise—even though the Court acknowledged that the interpretation "ordinarily" would have been entitled to deference. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). The Court explained that "to defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct" to be prohibited or required. *Ibid.*

Browning-Ferris entered into its contract with Leadpoint in 2009, at a time when the NLRB—applying the *TLI*/*Laerco Transportation* standard—would not have determined that Browning-Ferris was a joint employer of the sorters, screen cleaners,

and housekeepers at issue. By adopting its new joint-employer standard and applying it retroactively to Browning-Ferris's existing contractual relationships, the NLRB is attempting to impose liability on Browning-Ferris without fair warning. That unfair surprise provides an additional ground for refusing to defer to the Board's conclusion that it is statutorily authorized to adopt its new standard.

III. THE NLRB'S NEW JOINT-EMPLOYER STANDARD THREATENS LIABILITY TO A WIDE VARIETY OF ENTITIES ON THE BASIS OF OVERLY VAGUE STANDARDS

Perhaps the most troubling aspect of the NLRB's new joint-employer standard is that it eliminates a longstanding test that provided certainty and predictability and replaces it with "an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships." DR-22. The new standard announces numerous factors that may be taken into account in determining whether a company will be deemed a joint employer of the employees of firms with which it enters into business arrangements, but it foments uncertainty by failing to provide any guidance regarding how much weight is to be afforded to the various factors in its multi-factor balancing test.

Although this case arises in the context of a user/supplier relationship involving the use of contingent employees, everything about the new joint-employer standard suggests its applicability to *all* business models in which one entity arguably has the

power to exert control—whether direct or indirect—over another entity's employees. Among the types of contractual relationships most likely to be affected by the new standard are franchise arrangements, parent corporations and their subsidiaries, contractors and subcontractors, banks whose loans include financing terms that impose performance requirements on borrowers, and even consumers who dictate terms of performance for contractors who come into their homes.[4] Moreover, because the terms "employer" and "employee" can have but a single meaning as used throughout the NLRA, the new standard will affect a wide variety of issues that can arise under the Act, such as the secondary boycott provisions of the Taft-Hartley Amendments. *See* Petitioners Br. 33-37.[5]

The *TLI*/*Laerco Transportation* standard focused on evidence of direct-and-

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[4] Consumers who allow contractors into their personal residences are highly likely to insist on contractual provisions that grant them authority to control, if necessary, the manner in which the contractor's employees perform their work. Even if they only occasionally exercise that authority, such contractual terms could expose them to joint-employer liability under the NLRB's new standard.

[5] If, as is likely, other agencies follow the NLRB's lead in expanding the joint-employer doctrine, the regulated community will be exposed to a whole new array of potential liability—both in tort actions and from a wide variety of federal agencies, from the Equal Employment Opportunity Commission to the Occupational Safety and Health Administration. For example, courts routinely consult NLRB joint-employer standards in determining whether two or more employers are joint employers for purposes of employment discrimination suits filed under Title VII of the Civil Rights Act of 1964. *See Miles v. University of District of Columbia*, 2013 WL 5817657 at *8 (D.D.C. 2013) (collecting cases).

immediate control of essential terms of employment, thereby establishing a discernable and rational line between what does and does not constitute a joint-employer relationship under the NLRA. In sharp contrast, the new standard makes no effort to create any safe harbors or draw clear lines of demarcation, thereby depriving companies of any means of predicting whether or when they might be subjected to joint-employer liability. Such vague regulatory standards raise serious due process concerns, both because they fail to provide fair notice of potential liability and because they invite arbitrary enforcement. *See, e.g.*, *Kolander v. Lawson*, 461 U.S. 352, 357-58 (1983).

A. The NLRB's New Standard Promotes Economic Inefficiency by Discouraging Firms from Contracting for Specialized Services

WLF is particularly concerned by the new standard's failure to take into account the reasons why a company might wish to hire contractors to perform a portion of the company's work. For example, if the contractor performs highly specialized work, it likely is far more economically efficient for a company to contract out the work rather than seek to attract its own specialized workforce. Yet, by raising the threat of a joint-employer determination in connection with any of these specialized contracts, the NLRB's new standard discourages use of such contracts and thereby promotes economic inefficiency.

B. The NLRB's New Standard Deprives Small Businesses of Entrepreneurial Opportunities

Finally, WLF is concerned that the new standard hits small businesses the hardest. Small businesses often get their start by finding niches where they can provide a larger company with services at a cost lower than the larger company's costs of performing the services itself. By adopting a rule that discourages larger businesses from hiring niche firms to perform a portion of their work, the NLRB is destroying valuable business opportunities for start-up firms.

CONCLUSION

WLF respectfully requests that Browning-Ferris's petition for review be granted, that the NLRB's application for enforcement be denied, and that the NLRB's order be vacated. WLF takes no position on the NLRB's application for enforcement of its order against Leadpoint (No. 16-1063).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,941, not including the certificate as to parties, table of contents, table of authorities, glossary, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

June 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2016, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court of the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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