NOT YET SCHEDULED FOR ORAL ARGUMENT

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 RECYCLERY,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT/CROSS-PETITIONER

AND

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 350
INTERVENOR

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER/CROSS RESPONDENT BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.

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* Authorities upon which we chiefly rely are marked with asterisks. D.C. Cir. R. 28(a)(2).

GLOSSARY OF ABBREVIATIONS

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

Equal Employment Opportunity Commission (EEOC)

Leadpoint Business Services (Leadpoint)

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

National Labor Relations Board (Board)

National Labor Relations Board's Decision on Review and Direction (DR)

National Labor Relations Board's Final Decision and Order (DO)

Occupational Safety and Health Administration (OSHA)

National Labor Relations Board Regional Director Decision (RD)

Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (Local 350)

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* (Title VII)

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

SUMMARY OF ARGUMENT

The Board and Local 350 attempt to cast the Board's wholesale revision of its 30-year old joint-employer standard as a small step, which merely expands the categories of evidence the Board can consider in deciding whether such a relationship exists under the NLRA.

In fact, the Board's decision (i) ignores the longstanding rule that joint employment does not exist absent the exercise of substantial direct and immediate control by the putative joint employer, (ii) improperly holds that "indirect" or "reserved" control are sufficient standing alone to establish joint-employer status under the common law,[1] and (iii) interprets the concepts of "indirect" and "reserved" control to include notions of economic influence which the Board is prohibited from considering under the distinctive history of the NLRA.[2]

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[1] Local 350 claims that the Board did not adopt a rule under which such evidence could be dispositive in the absence of the exercise of direct control. Intervenor Br. 6, 10. But the dissent thought otherwise, DR-22, and the Board never has denied it.

[2] In its latest joint-employer decision, *Retro Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70 (2016), the Board reiterates many of its flawed control concepts, holding that a putative joint employer need only have sufficient "reserved" control. Slip op. 3. The Board also erred in finding the following facts probative: conditions consistent with reducing premises liability ("safety training"); certifications compliant with government standards ("EPA AHERA certification"); that the contractor may "consult" with the client; that the client had the unexercised right to "request" a worker's removal; that the client "tracks employees' hours;" that the client "dictate[s] the number of workers to be supplied" [*i.e.*, controls costs in a cost-plus arrangement]; and that the client

These conclusions should be reversed for a number of reasons. First, they are precluded by Taft-Hartley's repudiation of *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). Taft-Hartley evidences Congress' intent that an employment relationship under the NLRA be anchored in a substantial quantum of direct and immediate control. The Board's contrary determination revives *Hearst*'s rejected "economic realities" approach. It advances "indirect" and "reserved" control concepts not based on a specific contractual right to displace the contractor and directly control its employees, but on the client's presumed economic influence over a business with actual, discretionary, day-to-day control over its agents. The EEOC's equation of its own joint-employer test with the Board's confirms the impropriety: Title VII embraces the very "economic realities" considerations the Board is forbidden to consider.

Second, the Board's new test ignores this Court's understanding of control factors that distinguish employment from a contractor arrangement — such as the criticality of direct and immediate control, the need for "pervasive" control, and control over the putative employees rather than economic impact upon the contractor.

Third, the Board's new test is contrary to the NLRA's structure and Congress' vision of collective bargaining. The Board cannot define "joint

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"ensure[s prior to performance] that the workers supplied are adequately trained and qualified." Slip op. 3-4 and n. 7.

employment" in a way that is inconsistent with the scope of the "employer" definition in the Act's secondary boycott protections. Nor can it require bargaining where a client does not (co-)control at least wages and hours — the core mandatory subjects explicitly referenced in the Act. More broadly, the Board cannot change the NLRA by eviscerating third-party arrangements that Congress did not intend to undermine. The Board's new standard is so wide-ranging that it casts doubt on the status under the Act of a host of contractor, franchise, labor supply, and separate corporate relationships.

In addition to its facial invalidity, the Board's application of its new standard here ignores substantial contrary evidence and otherwise would be inequitable.

ARGUMENT

I. THE BOARD'S NEW JOINT-EMPLOYER TEST IS CONTRARY TO CONGRESS' INTENT AND THIS COURT'S UNDERSTANDING OF THE COMMON LAW GOVERNING NLRA EMPLOYER RELATIONSHIPS

A. The Board's Articulation Of Common-Law Concepts Is Not Entitled To Deference

Contrary to the Board's argument, NLRB Br. 15-17, its notions of what the common law supposedly entails are entitled to no deference. This Court has given effect to the Board's common-law analysis when "it can be said to have 'made a choice between two fairly conflicting views.'" *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995) (citation omitted). But this is not one of those

situations because the Board has disregarded the controlling views expressed by Congress and this Court.[3]

B. The Board Ignores Congress' Intent Regarding The Common Law Pertinent To NLRA Employer Relationships

The NLRA has legislative history not shared by other federal statutes, such as Title VII. "The Taft-Hartley amendments in 1947 were addressed in part to perceived excesses by the Board[.]" *Conair Corp. v. NLRB*, 721 F.2d 1355, 1391 (D.C. Cir. 1983) (Wald, J. dissenting). For 70 years, Congress has not seen fit to revise the portions of the NLRA relevant here. Under these circumstances, the Board may not resurrect — whether in name or effect — "economic realities" analysis to decide the fundamental question of who qualifies as an "employer" under the Act. Accordingly, the touchstone in this case is whether the Taft-Hartley Congress would have approved of the Board's new joint-employer test. The answer to that question is plainly "no."

In *Hearst*, the Supreme Court recognized that "traditional" common law employment entails "[c]ontrol over 'physical conduct in the performance of the service'" and necessitates a "proximate legal relation of employee to the particular employer involved in the labor dispute[.]" 322 U.S. at 124, 128 (emphasis supplied). The Court rejected this common law test in upholding the Board's

[3] The cases cited by Local 350, Intervenor Br. 4, on the standard of review are irrelevant because they do not involve common-law analysis of employer relationships.

decision that newsboys were employees rather than independent contractors, on the ground that the Act's definitions were given force "by underlying economic facts rather than technically and exclusively by previously established legal classifications." *Id.* at 129. Such "economic facts" [or "realities"] included a putative employer's economic "influences" over an independent contractor or its agents. *Id.* at 131.

In legislative history upon which the Supreme Court and this Court subsequently relied, Taft-Hartley repudiated *Hearst*'s "economic realities" analysis. Congress grounded employment relationships under the NLRA in the common law, and made clear its understanding that they require "direct supervision."[4] *See, e.g., Local 777, Democratic Union Organizing Comm., Seafarers Int'l Union of N. Am., AFL-CIO*, 603 F.2d 862 (D.C. Cir. 1978), and an accompanying opinion denying rehearing, 603 F.2d 898, 903 (D.C. Cir. 1979); *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167 (1971).

Contrary to Local 350, Intervenor Br. 30, we do not deny that proximate control of hiring or wages — also referenced in the legislative history — or similar key indicia are pertinent in addition to control over "physical conduct." The point

[4] Taft-Hartley did not "merely insert[] a surgical amendment" into the Act. Intervenor Br. 31. Congress took the unusual step of repudiating a Supreme Court decision, excoriated the Board, and reiterated an opposing concept of what common-law employment requires in its most essential form.

is the directness of the control — which was reflected in the Board's previous "direct and immediate control" test. The centrality of "physical conduct" and the need for a substantial "proximate" relationship are manifestations of immediacy to be contrasted with the attenuated effects of alleged economic influence upon the contractor ("economic facts"). Taft-Hartley underscored that the latter has nothing to do with common-law agency.

Although the Restatement of Agency cited in *Hearst* referenced a "right to control" as a factor in the common law analysis, it is a secondary factor that no court has found enough to establish an employment relationship. The same is true for "indirect" control. Neither *Hearst* nor the legislative history deemed them important enough to reference. Contrary to the Board's claim that *Hearst* "did not purport to consider" them, NLRB Br. 31-32, it was precisely because the Supreme Court found the common law test lacking that the Court resorted to a policy-based analysis of the NLRA.

Thus, the Board's new joint-employer test is fatally flawed under Taft-Hartley. Not only does it require no direct and proximate control, the Board's theories of "reserved" and "indirect" control at bottom are no different than the economic considerations Congress forbade the Board to consider.[5] The Board

[5] Contrary to the Board, NLRB. Br. 46-47, its new test improperly equates "business realities" with control over employees. *See Local 777*, 603 F.2d at 908

impermissibly proposes that a client's alleged economic influence upon a contractor — an independent business with actual, discretionary, day-to-day control over its employees — is tantamount to dispositive control over those employees.

C. The Board Disregards This Court's Understanding Of Common-Law Employment Relationships Under The NLRA And Their Application To This Case

Tellingly, the Board does not even acknowledge — much less attempt to distinguish — this Court's understanding of common-law employment relationships under the NLRA. Opening Br. 27-31.[6] Because the Board's new joint-employer test and its application here are inconsistent with that understanding, the Board's decision should not be enforced.

1. *The Board's indifference to common-law distinctions between employees and independent contractors is untenable*

In an attempt to justify its disregard of this Court's decisions, the Board contends that the common-law boundaries between employees and independent contractors under the Act have no relation to joint-employer doctrine. NLRB Br.

(finding *Hearst* "economic facts" approach equivalent to responding to "business realities").

[6] This disregard is an especially acute concern where this Court has found that "[t]he Board said it would be justified in refusing to apply the law of any circuit." *Heartland Plymouth Court MI, LLC v. NLRB*, __ F.3d __, No. 15-1034, slip op. 3 (D.C. Cir. 2016) (emphasis in original).

32-33. This is nonsensical. In putative joint-employer situations, the basic issue is the same — namely, whether agents of an independent contractor who perform services for a client are so controlled by that client that an employment relationship is formed. Indeed, the Board has acknowledged that it must successfully navigate the *Hearst*/Taft-Hartley line of authority for its test to be valid. DR-12-13 n. 68, 17.

As the Board concedes, the NLRA "sa[ys] nothing about joint employers." NLRB Br. 32 n. 10.[7] If joint employment is to exist under the Act, it has to be constructed out of the available statutory definitions, subject to the common-law constraints imposed on those definitions. DR-2 ("[T]he Board may find that two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.'") (footnote and citation omitted) (emphasis supplied).

Thus, to be a joint employer, you have to first be an employer—a Section 2(2) employer of Section 2(3) employees, 29 U.S.C. §§ 152(2)-(3), as opposed to something else, such as a business contracting for services undertaken by an independent contractor's agents. You have to separately and "proximately" — as *Hearst* recognized the common law required — be a statutory employer of the

[7] Nor, for that matter, do the portions of the Restatement (Second) of Agency relied upon by the Board (DR-12) in establishing its standard.

individuals in question. Each entity alleged to be a joint employer itself must engage in a sufficient quantum of direct and immediate control to meet that test.

In contrast, the Board theorizes that if certain persons are employees of a statutory employer, it can visit joint-employer status on another entity exclusively through the parties' business relations. NLRB Br. 32-33. But the Board's own test correctly presupposes that each putative joint employer independently must qualify as a statutory employer of the employees in question. D-2. Only then may the Board assess the nature of their joint employment.

The Board's suggestion, NLRB Br. 33, that the employee-versus-independent contractor inquiry is "binary" in a way that joint-employer analysis is not should be rejected. In both situations, the basic query is whether one is a statutory employee of a particular entity or is something else. The core of the common-law control considerations is the same. Opening Br. 52-53.

2. *The need for and centrality of direct and immediate control*

This Court has held that "the extent of actual supervision" is "the most important element to be considered" in assessing employer status. *Aurora Packing Co. v. NLRB*, 904 F.2d 72, 76 (D.C. Cir. 1990) (citation omitted). The Board's new joint-employer standard — which does not require any such evidence — ignores this basic principle. For this reason alone, it should not survive. The Board has pointed to no decision of this Court — or any court — in which

"reserved" and/or "indirect" control alone was found sufficient to establish a joint-employer relationship.[8]

Here, the Board's Regional Director, in evaluating the same record as the Board, concluded that Browning-Ferris did not exercise sufficient direct and immediate control over Leadpoint's employees to jointly employ them. R-___.

The Regional Director determined that:

(i) as to employee discipline, "[t]he [e-mail from Browning-Ferris manager Keck to Leadpoint president Ramirez] language is clear and unambiguous. Keck merely requested that the employees be terminated for creating an unsafe environment in [the] plant. He did not order or direct Leadpoint to terminate the employees." R-__.

(ii) "Nothing in the record supports [the] argument that [Browning-Ferris] controls Leadpoint's employees' daily work functions. While … [Browning-Ferris] operates the speed of the material stream, [it] does not mandate how many Leadpoint employees work on the line, the speed in which the Leadpoint employees work, where they stand on the material stream, or even how they pick

[8] In *Seattle Opera v. NLRB*, 292 F.3d 757 (D.C. Cir. 2002), NLRB Br. 29, the putative employer had extensive direct and immediate control over the employees. 292 F.3d at 759-760, 765 n. 10-11. Conversely, in *Int'l Chem, Workers Union Local No. 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977), where this Court did not find a joint-employer relationship, there was no such evidence. 561 F.2d at 256. The cited decisions from other circuits, NLRB Br. 29-31, also involved the putative employer's substantial exercise of direct and immediate control.

material and contaminates off of the material stream. [Browning-Ferris'] mere ability to change the speed of the material stream, which is based on the quantity of the material alone, does not create a level of control that is sufficiently direct or immediate to warrant a finding of joint control. … [It] is not based on individualized assessments of Leadpoint's employees or evidence of control in the manner in which the Leadpoint employees perform their work." *Id.*__.

(iii) the episodic interactions between Browning-Ferris supervisors and Leadpoint employees were inconsequential: "[T]he record evidence revealed that these instructions from BFI were either routine or routinely ignored. … [T]he record establishes that Leadpoint solely supervises its own employees. In this regard, to the extent that [Browning-Ferris] has a problem with a Leadpoint employee, [it] complains to a Leadpoint supervisor who takes care of the matter using their own discretion. I further note that to the extent that any [Browning-Ferris] employee instructed a Leadpoint employee, the instruction was merely routine in nature and insufficient to warrant a finding that [Browning-Ferris] jointly controls Leadpoint employees' daily work." *Id.*__.

The Board's brief, NLRB Br. 7-12, describes encounters between Browning-Ferris and Leadpoint employees which, as discussed *infra*, either are too infrequent ("sometimes," "on one occasion," etc., over a 5-year span) to be meaningful, or involve interactions recognized by this Court as consistent with a contractor

relationship. The Board's decision impermissibly disregarded substantial evidence that Leadpoint controls its employees' key terms and conditions. Opening Br. 3-8.

3. *The need for a substantial quantum of control*

This Court requires "pervasive control," in contrast to "minor controls" which are "too insubstantial."[9] *Local 777*, 603 F.2d at 901-904. Such a substantial quantum of control is required because of the imprecise boundaries of oversight inherent in any contractor relationship. It further reflects that a reasonable degree of intentionality is required before a client is deemed to have crossed the line into joint-employer status.

The Board's new test fails because it makes no allowances for "minor" or "limited and routine" exercises of control. On the contrary, the Board specifically concluded that "limited and routine" control will not save a putative employer.[10] DR-2.

Similarly, because the Board's articulation of the "essential terms and conditions of employment" that are co-controlled is disjunctive and open-ended,

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[9] *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 566 (D.C. Cir. 2016), Intervenor Br. 15, is not to the contrary. As *Local 777* indicates, the "extent of actual supervision" required is "pervasive." 603 F.2d at 901-904.

[10] Contrary to Local 350's discussion, Intervenor Br. 16-17, the Board's improper disregard for excluding "limited" and "routine" control pre-dated its prior joint-employer test. *See Consol. Freightways*, 144 NLRB 301, 306 (1963) (dissent).

DR-15, joint-employer status may be found if a putative employer co-controls only "direction" affecting a single working condition. *Id.* Such a tripwire veers into the safe haven of "insubstantial" control which this Court has held to be consistent with contractor arrangements.

The Board tries to avoid this conclusion by asserting that it "will find joint-employer status when an entity's control extends to a wider range of employment terms and conditions, such as [a] combination of direct, indirect, and reserved control over multiple aspects of employment[.]" NLRB Br. 35. But the test itself does not say that. It does not require such a "combination," nor delineate any minimum or core "essential terms and conditions." DR-2.

In any event, the Board's own arguments belie any claim that joint-employment status depends on control over a "wider range" of employment conditions. The Board argues that Browning-Ferris' control over line speed is central to its joint-employer determination[11], despite it being a function of fluctuating volume and the types of materials coming into the facility. Opening Br. 5.

Notably, this Court has held that regulating work flow because of business conditions or customer demand is not "control" for purposes of establishing an

[11] *See* NLRB Br. 55 ("One key example of Browning-Ferris's authority over working conditions is its sole control over the speed of the streams."); Intervenor Br. 24-26.

employment relationship. *See, e.g., Aurora Packing Co.*, 904 F.2d at 75-76 (finding if "the primary operator must slow down, curtail, or fundamentally change its own operation, that is actually no control at all."); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009) (finding "constraints imposed by customer demands" not indicative of joint-employer status).

Moreover, Leadpoint's services are only one component of a functionally-integrated facility. As a result, line speed, facility hours, and break times on the line affect operations beyond the scope of the contracted work. The Board's approach would make it impossible to contract for discrete services within a larger workplace over which the client has ultimate control. *See also* Intervenor Br. 3 (arguing a joint-employment relationship exists unless Leadpoint "operate[s] the recycling plant.").

This also illustrates the emptiness of the Board's contention that it is distinguishing between the "results" of work and "the means or manner of employees' work." NLRB Br. 22, n. 3. The analytic outcome depends entirely upon the Board's characterization of the "work." For Browning-Ferris, the "results" are whether Leadpoint has safely, competently, and efficiently sorted the materials on lines calibrated to address variable customer demand during times the recylery is open. In most situations, a contractor is not coming into a formless environment. Performance ends incorporate operational parameters.

4. *Efforts to "monitor," "evaluate," or "improve" the results or ends of "worker performance," responding to "constraints imposed by customer demands," or control "motivated by a concern for customer service" are not evidence of an employment relationship*

This Court has found that (i) policing a service agreement to ensure the client gets the benefit of its bargain; (ii) cost-control initiatives; (iii) assessment of whether the contractor's agents are satisfying customer service goals or agreed-upon performance criteria; and (iv) working conditions shaped by the market or third-party requirements, are not probative of employer status. *See FedEx Home Delivery*, 563 F.3d at 501; *N. Am. Van Lines, Inc. v. NLRB*, 896 F.2d 596, 598-599 (D.C. Cir. 1989); *Local 777*, 603 F.2d 862 at 873, 891, 899, 904.

Thus, the Board's reliance here (NLRB Br. 6-9, 53-55) upon the parties' cost-plus arrangement, and Browning-Ferris' policing of it by tracking productivity, monitoring performance, reviewing Leadpoint's records, and watching over expenses — including headcount and overtime — is in error.[12] *See Local 483*, 561 F.2d at 256-257 (finding cost-plus arrangement did not embody "the type of control which would establish a joint employer relationship."); *Aurora Packing Co.*, 904 F.2d at 75 (concluding no employment relationship

[12] The agreement's limit on the pay rate of certain Leadpoint employees controls costs, while Leadpoint otherwise retains discretion to set wages, as well as benefits and other forms of compensation.

where butchers presented tally to putative employer indicating animals slaughtered).

The Board likewise goes too far in arguing (NLRB Br. 52-53) that Browning-Ferris' right to ensure — prior to performance — that a contractor's agents are qualified is evidence of control. *But see AFGE v. Webb*, 580 F.2d 496, 505 (D.C. Cir. 1978). Incredibly, the Board asserts that its position is bolstered by evidence that Browning Ferris "reports concerns with job performance to [Leadpoint], with the expectation that Leadpoint will address them." NLRB Br. 54. If that is not possible consistent with a contractor arrangement, there are no such arrangements left.

Similarly, the Board culls various "reserved" rights from the parties' service agreement as evidence of joint-employer status. NLRB Br. 5-7, 53-55. However, those rights to scrutinize the qualifications and assess the performance of Leadpoint's agents simply give Browning-Ferris the ability to evaluate a service arrangement, which this Court has found immaterial. *See, e.g., N. Am. Van Lines* and *Aurora Packing*, *supra.*

5. *Alleged economic influence upon a contractor is not control over its employees*

This Court has held that it "will draw no inference of employment status from 'merely the economic controls which many corporations are able to exercise

over independent contractors with whom they contract.'"[13] *N. Am. Van Lines, Inc.*, 896 F.2d at 599 (citations omitted). That is consistent with Taft-Hartley's rejection of *Hearst*'s conclusion that "economic facts" can give meaning to an employment relationship under the NLRA. Opening Br. 23, 42, 45-47. This legislative history distinguishes the Act from other federal statutes, such as Title VII.

Thus, even if a "right to control" could be a secondary, insufficient factor in a joint-employer analysis under the NLRA, it would have to be a right to actually control the contractor's employees — not a right to economically influence the contractor. A contractor makes its own business decisions. If a right to control has any probative value under the Act, it must be a specific contractual right to displace the contractor and exercise direct and immediate control over its employees.[14] *Id.* at 41-47. Moreover, such a reserved right cannot be with respect

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[13] In *Local No. 483*, NLRB Br. 29 and n. 8, this Court agreed with the Board that an at-will, cost-plus arrangement policed for efficiency (which it deemed evidence of joint-employer status here, DR-19) is not probative of a joint-employer relationship. 561 F.2d at 256.

[14] Such assumption of direct and immediate control is reflected in the comments to Section 227 of the Restatement (Second) of Agency. Opening Br. 24-25. Section 220 in contrast, *see* NLRB Br. 26, says nothing about supposed economic influence over a range of potential actions. The holding in *Kelley v. So. Pac. Co.*, 419 U.S. 318 (1974), NLRB Br. 27 n. 5, is grounded in direct and immediate control. 419 U.S. at 329-330. The assertion that borrowed or loaned servant concepts in Section 227 are irrelevant to joint-employer analysis, NLRB Br. 28 n. 7, Intervenor Br. 16 n. 17, is erroneous. *See Al-Saffy v. Vilsack*, 827 F.3d 85, 96 (D.C. Cir. 2016) (assessing joint-employer status, "'at common law, one could be … a borrowed servant who by virtue of being directed or permitted by his

to those factors which this Court recognizes as consistent with a contractor relationship, as discussed herein.[15]

The Board's concept of "indirect" control similarly is irrelevant to a joint-employer finding under the NLRA if it is grounded in claimed economic influence, *e.g.*, the generalized ability to cancel the service agreement sometime in the future, rather than a mandatory directive resulting from enforcing particular contract terms.[16] *Id. See also Local 777,* 603 F.2d at 908 (finding *Hearst* "economic facts" approach equivalent to responding to "business realities").

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master to perform services for another'") (citations omitted). That is precisely the scenario here: the employees indisputably were hired by Leadpoint.

[15] The Board's reliance upon *Local 483*, 561 F.2d 253, misses the mark. NLRB Br. 33-34. Browning-Ferris does not contend that "reserved" control — properly understood — cannot constitute secondary evidence of joint-employer status under the NLRA. Rather, standing alone, it is insufficient. This Court's decisions and Taft-Hartley's legislative history hold that direct and immediate control is essential. In *Local 483* itself, there was such control by the putative employer. *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322, 1327 (D.C. Cir. 1971), NLRB Br. 34 n. 12, only underscores that "reserved" control means that the putative employer has the right to displace the primary employer (*i.e.*, "may intervene in the control of an employee's performance"). In *Teamsters No. 42*, not only did the putative employer exercise significant active control, this Court again found important the existence of "pervasive" control. *Id.*

[16] Contrary to Local 350, Intervenor Br. 20-22, in *Al-Saffy*, 827 F.3d at 97, the recommendation was not an indirect control finding, but memorialized the State Department's direct and immediate control. In *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 211 (3d Cir. 2015), the putative joint employer "demand[ed]" replacement per the arrangement, rather than as here requesting an investigation. *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 413-415 (4th Cir. 2015),

Accordingly, Browning-Ferris' reserved abilities to "request" that Leadpoint's personnel meet or exceed selection standards for its own employees — and make "reasonable" efforts to avoid utilizing any employee who worked for Browning-Ferris — is immaterial. The same is true regarding Browning-Ferris' general guidance to Leadpoint supervisors who then exercise their discretion to determine how to achieve the desired ends. NLRB Br. 5-6, 9-10.

The Board's recitation (NLRB Br. 12) of two isolated incidents since 2009 of Browning-Ferris "requesting" but not requiring that Leadpoint reassign or discharge an employee — which Leadpoint did only after conducting an independent investigation — is also not probative. *See N. Am. Van Lines, Inc.*, 896 F.2d at 598; *Aurora Packing Co.*, 904 F.2d at 76.

Likewise, the Board's theory that "reserved" control is derived from the mere fact of the parties' at-will service agreement, DR-13-14, 18, is unsustainable. *See N. Am. Van Lines, Inc.*, 896 F.2d at 598-599; *Local 777*, 603 F.2d 862, 873, 899, 904. Treating the ability to end a service agreement as significant evidence of "control" is indicative of the Board's overreach. That a party might become displeased with performance cannot be a distinguishing feature of employment. All contracts can be terminated: there is no meaningful difference if this occurs at will, with notice, or on a specified date.

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involved a Title VII "hybrid" test incorporating "economic realities" impermissible under the NLRA.

6. *Control motivated by compliance with governmental requirements is not probative*

This Court also has held that "employer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the means and manner of performance, do not weigh in favor of employee status." *N. Am. Van Lines, Inc.*, 896 F.2d at 599. Despite this case law, the Board improperly based its joint-employer finding in part upon Browning-Ferris' enforcement of safety standards to satisfy OSHA. DR-6, 19; *see also* Opening Br. 6 n. 3. Browning-Ferris' agreement to increase payments to Leadpoint in response to a legally-mandated raise in the local minimum wage, NLRB Br. 6-7, likewise is irrelevant.

D. The Board Mischaracterizes The Third Circuit's *Browning-Ferris* Decision

The Third Circuit's decision in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982) formed the basis for the Board's prior joint-employer test, which, after 30 years, it now has overturned. DR-1. No court has determined that the prior standard was inconsistent with *Browning-Ferris*.

The Board mischaracterizes *Browning-Ferris*. It suggests that the decision supports its revised standard where "reserved" and/or "indirect" control alone can establish joint-employer status. *See* NLRB Br. 30 n. 9. *Browning-Ferris* held no

such thing. What was critical to the Third Circuit there was that the putative employer actually "exert[ed] significant control" over an array of employment terms. Opening Br. 32-33.

Likewise, the Board's reliance upon *Browning-Ferris*' reference to the control "possessed" by the putative employer , 691 F.2d at 1121, derived from *Boire v. Greyhound Corp*., 376 U.S. 473, 481 (1964), is due no weight. The *Boire* Court did not hold that "reserved" control by itself can create joint-employer status. Opening Br. 25-26. Indeed, the Court had no occasion to address that issue because the only issue before it was whether the Board's orders in union certification proceedings are reviewable. 376 U.S. at 476-479. Thus, the Court's use of the word "possessed" was at best dicta. Read in context, it was merely used as a synonym for "had" in relation to the facts in the case, which reflected a combination of direct and immediate control and unexercised contractual control. *Id.* at 475.

II. THE BOARD'S NEW JOINT-EMPLOYER STANDARD IS INCONSISTENT WITH THE STRUCTURE OF THE NLRA ADOPTED BY CONGRESS

The Board's policy determinations cannot govern here because not only are they inconsistent with Congress' intent and this Court's understanding of the common law, they are contrary to the NLRA's structure and demonstrably destabilize Congress' vision of collective bargaining. Opening Br. 40-41, 47-53.

A. The Board's New Test Does Not Meaningfully Describe The Boundaries Of Available Third-Party Arrangements

The Board does not deny that, in enacting the NLRA, Congress did not intend to transform recognized contractor, franchise, and similar arrangements into joint-employer relationships. In fact, one of the Act's premises was that collective bargaining would exist against the backdrop of continued use of these relationships. *Id.* at 40-41.

By creating a new joint-employer standard which does not meaningfully create a safe harbor for traditional third-party arrangements, the Board's test is contrary to the Act's basic structure. Its essentially formless approach, NLRB Br. 40-44, gives insufficient acknowledgment to the contours of joint-employer alternatives developed by the courts. Parties desiring a contractor relationship can have no confidence that they have crafted one outside of the Board's moat of danger.

B. The Board's New Test Demonstrably Destabilizes Collective Bargaining

The Board suggests that the destabilization of collective bargaining posed by Browning-Ferris "would arise under any joint-employer test." NLRB Br. 40 (emphasis in original). Not so.

Note that the Board does not show that the myriad of serious, unsettled concerns emanating from its new joint-employer standard do not exist. Its solution

is to make these effects worse. Pointing to the existence of some prior, far-narrower test is analytically empty.

The Board's revised joint-employer test creates new vistas of uncertainty regarding the Act's elementary operation. Here, its plenary, unlimited bargaining order does not even articulate those subjects over which the Board expects Browning-Ferris to negotiate in relation to Leadpoint.[17] Opening Br. 47-53.

Nor does the Board show that the NLRA permits a joint employer to be ordered to bargain over only a single, discrete employment term which it is found to (co-)control. *See id.* at 50-51. Rather, at a minimum, (co-)control over at least the core subjects identified by Section 8(d) of the Act (29 U.S.C. § 158(d)), "wages [and] hours," is necessary to warrant imposition of a bargaining order.

This Court's decision in *Herbert Harvey, Inc. v. NLRB*, 474 F.2d 770 (D.C. Cir. 1969), NLRB. Br. 41, does not support the Board's opposing position. There, this Court (and the Board) found it significant that a joint employer was "able to bargain effectively in the areas of prospective negotiation — hiring, firing, promotions, wages, benefits and other conditions of employment." 474 F.2d at

[17] The Board offers no substantive response to the fact that under its revised standard: (1) a client will have to engage in an indeterminate bargaining process over its very decision to end the contractor arrangement; and (2) if the contractor and client want to change any aspect of their arrangement, or reallocate between them control/bargaining responsibilities, they first will be subject to a similar process. Opening Br. 51-53.

777 (emphasis supplied). Thus, a critical mass of bargaining capability over a broad range of subjects is required.

Contrary to the Board's assertion, NLRB Br. 42 n. 16, Browning-Ferris does not contend that a joint employer — however properly defined — must be capable of bargaining over all mandatory subjects within the scope of Section 8(d). But *Herbert Harvey* indicates that to be ordered to engage in statutory bargaining, it at least must (co-) control the essential subjects specifically enumerated in Section 8(d) (*i.e.*, wages and hours).[18]

The Board's new test also is invalid because it substantially broadens those employers subject to strikes, picketing or coercive pressure in contravention of Taft-Hartley's secondary boycott prohibitions. Opening Br. 33-37. Structurally, the Board cannot define "joint employment" in a way that is inconsistent with the

[18] *Herbert Harvey* does not otherwise help the Board. This Court found that "very properly . . . the inquiry must extend beyond the language of the contract to the evidence describing the parties' actual practice[.]" Here again, "reserved" control is insufficient to establish joint employment. 424 F.2d at 776-777. Similarly, this Court found "indirect" control based upon supposed economic influence to be irrelevant: "And while Harvey does not, as a matter of practice, discharge employees without consultation with the Bank, the testimony suggests that the practice is designed to avoid displeasing the Bank." *Id.* at 777. In *S.S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969) and *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 531 (9th Cir. 1968), NLRB Br. 41, joint-employer status was derived from "the licensor ha[ving] control over the labor relations of a licensee." 402 F.2d at 530. The Board's reliance upon those decisions, which involve franchise relationships, belie the Board's and Local 350's hollow claim (DR-20 n. 120; Intervenor Br. 7) that the new test is inapplicable to such arrangements. The relevant common-law analysis is not so balkanized.

scope of the "employer" definition used elsewhere in the NLRA. That inconsistency is a serious, fatal flaw.

The Board asserts that this Court should not consider this argument pursuant to 29 U.S.C. § 160(e). But the Board invited the parties and amici to respond to questions related to reconsideration of its joint-employer standard, including broadly: "What considerations should influence the Board's decision in this regard?" It "carefully considered" submitted briefs. DR-1. This presumably included the American Staffing Association's brief, which raised the relationship between the NLRA's secondary boycott provisions and the joint-employer standard. R__.

As the argument was fully addressed by the majority and dissenting opinions, DR-20 n. 120, 47-48, and involves "the limits set out by the Act," *id.* 2, review is appropriate. *See NLRB v. FLRA*, 2 F.3d 1190, 1196-1197 (D.C. Cir. 1993) (finding review proper where agency raised matter *sua sponte* and motion for reconsideration futile); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 n.10 (1979) (authorizing review where Board acting "patently in excess of [its] authority."); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (criticizing Board's *sub rosa* rulemaking through adjudication).

This Court has made clear that it will not "rubber-stamp NLRB decisions[.]" *See, e.g., Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 21 (D.C. Cir. 2012).

Here, the Board's destabilization of the Act's collective bargaining notions is too palpable to be enforced.

III. THE BOARD'S NEW TEST IS ARBITRARY AND CAPRICIOUS

The Board's response (NLRB Br. 42-45) to Browning-Ferris' argument that its new joint-employer standard is arbitrary and capricious boils down to: the test is the test, and we will just figure out its implications for actors after they act through ad hoc decisions.

This approach is unenforceable. Every aspect of the Board's test is open-ended and it does not address fundamental issues regarding its workings.[19] The test fails the most vital requirement of agency law: does it give parties a comprehensible statement of its borders, so that they may lawfully create the relationships they desire, or restructure them? The Board's previous standard, which depended on the exercise of substantial direct and immediate control, met that requirement. Its new test does not.

The Board's banal observations (NLRB Br. 44-45) that there always has been and will be joint-employer litigation, and that a multi-factor standard necessarily involves a degree of uncertainty, are not virtues. They do not mean

[19] The EEOC candidly acknowledges that the Board's new test "carries more uncertainty" than its prior one. EEOC Br. 16.

that any multi-factor test the Board proposes can overcome scrutiny. This Court recognizes there is a tipping point[20], and here the deficiencies cannot survive.

IV. THE EEOC'S BRIEF IS UNHELPFUL TO THE BOARD

The EEOC urges that "the NLRB acted appropriately in bringing its joint-employer standard in line with the EEOC's." EEOC Br. 18. But that only proves Browning-Ferris' point because, for NLRA purposes, the tests cannot be the same.

In *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), abrogated on other grounds by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), EEOC Br. 6-7, the Sixth Circuit concluded that Congress' rejection of *Hearst* through Taft-Hartley was inapplicable to Title VII. As a result, the latter's "employee" definition could encompass the "economic realities" analysis prohibited by the NLRA. 711 F.2d at 1341-42 and n. 7.[21] The test the EEOC has adopted blurs Title VII's "employee" definition with "economic realities" considerations in a "hybrid" manner that is

[20] This Court's decisions cited by the Board, NLRB Br. 43, reflect this awareness. *See LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) ("In the absence of an explanation, the 'totality of the circumstances' can become simply a cloak for agency whim — or worse."); *UFCW, Local 150-A v. NLRB*, 1 F.3d 24, 33 (D.C. Cir. 1993) (upholding Board standard where it "provide[d] more than the 'some' degree of certainty required by the Supreme Court. It establishe[d] rules on which management may plan with a large degree of confidence.") (emphasis supplied). That is precisely what the Board's test here lacks.

[21] This Court has applied two joint-employer tests under Title VII. One, derived from *Spirides v. Reinhardt*, 613 F.2d 826, 831-832 (D.C. Cir. 1979), is a hybrid common-law/"economic realities" test. The other is an exclusively common-law test derived from the Third Circuit's *Browning-Ferris* decision. *Al-Saffy*, 827 F.3d at 96-97.

impermissible under the NLRA. *See* EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed By Temporary Agencies and Other Staffing Firms (December 3, 1997) (retrievable at https://www.eeoc.gov/policy/docs/ conting.html) n. 10.

Moreover, in the Title VII decisions cited by the EEOC, the putative joint-employer in fact exercised significant direct and immediate control over the employees. *See* EEOC Br. 11-13; *see also id.* at 6 n. 2 (EEOC does not inquire into joint-employer status unless entity "failed to take corrective action within its control").

V. BROWNING-FERRIS IS NOT A JOINT EMPLOYER UNDER EITHER THE BOARD'S NEW TEST OR ITS PREVIOUS ONE

Browning-Ferris is facially challenging the Board's new joint-employer standard, as well as its application in this case. Indeed, under either the new test or the Board's previous one, Browning-Ferris is not a joint employer.

The Board's prior standard is in line with the legislative history and this Court's common-law understanding, and was applied by the Board's Regional Director here. As the Board recognizes, NLRB Br. 56 n. 29, it did not evaluate whether Browning-Ferris would be a joint employer under its former test. If this

Court agrees that the new test is unenforceable, a remand would be necessary for the Board to apply this Court's instructions.[22]

Even under the new test, the Board's rejection of the Regional Director's determination was contrary to the substantial evidence cited by Browning-Ferris, Opening Br. 3-8, and discussed further *supra*.

Local 350, in contrast, suggests that the legal standard does not matter because it would have prevailed even under the Board's previous test. Local 350 reaches that conclusion by inexplicably arguing that Browning-Ferris is not contesting the Board's factual findings, or that they somehow are undisputed. Intervenor Br. 1. That simply is not so. *See* Opening Br. 2 (Issue No. 3), 3-8, 16, 56-57 (arguing Board's findings unsupported by substantial evidence). Furthermore, the Board's decision contains no record citations, leaving Local 350 to cherry pick the record in an unconvincing attempt to show that the same result would have been reached regardless of the joint-employer standard applied.

VI. RETROACTIVE APPLICATION OF THE BOARD'S NEW STANDARD WOULD BE INEQUITABLE

Were this Court to enforce the Board's new test, its application here should not be retroactive. Opening Br. 56-57. Browning-Ferris and Leadpoint have had a settled relationship since 2009. For the Board to suggest that they somehow had

[22] Contrary to the Board, *id*., Browning-Ferris argued (Opening Br. 56-57) that the Board's findings were inconsistent with this Court's pertinent control factors for an employer relationship.

"notice" that "the status quo was a known source of controversy," NLRB Br. 57 n. 30, because, *e.g.*, long-departed Board members had opined in the area years earlier, is a breathtaking exemplar of solipsism. In any event, it would render unimportant the Supreme Court's admonition that those living with agency pronouncements must receive "fair warning" of their change. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

CONCLUSION

For the foregoing reasons, and those described in its Opening Brief, Browning-Ferris' petition for review should be granted.

Respectfully submitted,

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October 26, 2016

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Stuart Newman, counsel for petitioner 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 Browning-Ferris Industries of California, Inc. doing business as BFI Newby Island Recyclery, is proportionately spaced, has a typeface of 14 points or more, and contains 6,939 words.

s/ Stuart Newman
STUART NEWMAN

October 26, 2016

CERTIFICATE OF SERVICE

I, Stuart Newman, counsel for petitioner and a member of the Bar of this Court, certify that on October 26, 2016, I caused a copy of the attached Brief of Petitioner/Cross-Respondent Browning-Ferris Industries of California, Inc. doing business as BFI Newby Island Recyclery to be filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served by other means have been served.

s/ Stuart Newman
STUART NEWMAN