UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A BFI NEWBY ISLAND RECYCLERY and FPR-II, LLC, D/B/A LEADPOINT BUSINESS SERVICES and SANITARY TRUCK DRIVERS AND HELPERS LOCAL 350, INTERNATIONAL BROTHERHOOS OF TEAMSTERS	Case 32-RC-109684

BRIEF *AMICI CURIAE* OF
COALITION FOR A DEMOCRATIC WORKPLACE, AMERICAN HOSPITAL ASSOCIATION, AMERICAN HOTEL AND LODGING ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, HR POLICY ASSOCIATION, INDEPENDENT ELECTRICAL CONTRACTORS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, INTERNATIONAL FRANCHISE ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALE-DISTRIBUTORS, NATIONAL COUNCIL OF CHAIN RESTAURANTS, NATIONAL FEDERAL OF INDEPENDENT BUSINESS, NATIONAL READY MIXED CONCRETE ASSOCIATION, NATIONAL RETAIL FOUNDATION, SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The following *Amici* jointly respond to the Board's Notice and Invitation to File Briefs ("Notice") inviting *amici* to address whether the Board should revisit its joint employer standard, as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), *enforced without op. sub nom.*, *Gen. Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985) and *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984).

The **Coalition for a Democratic Workplace ("CDW")** represents hundreds of employer associations, individual employers and other organizations that together represent millions of businesses of all sizes. CDW's members employ tens of millions of individuals working in every industry and every region of the United States. CDW has advocated for its members on a number of NLRB issues including protection of employers' private property rights against non-employee access, the right of employers to be free from compelled communication of speech, unit determination issues, and the recent Proposed Rule regarding election procedures.

The **American Hospital Association ("AHA")** is a national not-for-profit association that represents the interests of approximately 5,000 hospitals, health care systems, networks, and other health care providers, as well as 37,000 individual members. It is the largest organization representing the interests of the Nation's hospitals. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed.

The **American Hotel & Lodging Association (AH&LA)** is the sole national association representing all segments of the 1.8 million-employee U.S. lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, state hotel associations, and industry suppliers. The mission of AH&LA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AH&LA serves the lodging industry by providing representation at the national level and in government affairs, education, research, and communications. AH&LA also represents the interests of its members in litigation raising issues of widespread concern to the lodging industry.

Associated Builders and Contractors ("ABC") is a national construction industry trade association representing nearly 21,000 chapter members. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. The vast majority of these contractor members are classified as small businesses. ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

The **Associated General Contractors of America ("AGC")** is a nationwide trade association of construction contractors and their suppliers and related firms. The nation's leading contractors formed the organization in 1918 in direct response to President Wilson's request for their assistance in communicating the nation's defense and other needs to and among the construction firms that would remain indispensable to meeting those needs. Over time, AGC has become the recognized leader of the construction industry, with approximately 25,000 member companies and 93 chapters across the country and in Puerto Rico. The association's members engage in the construction of public and private buildings, including office buildings, apartments, hospitals, laboratories, schools, shopping centers, factories and warehouses. They also construct the public and private infrastructure that serves as the critical starting point for nearly all the nation¹s other economic activity, including highways, bridges, tunnels, airports, power lines, power plants, clean and waste water facilities, and the utilities necessary for housing development.

The **HR Policy Association** is a public policy advocacy organization representing the chief human resource officers of major employers. The HR Policy Association consists of more than 330 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of the HR Policy Association's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

Founded in 1957, the **Independent Electrical Contractors ("IEC")** is a national trade association for merit shop electrical and systems contractors. With 3,000 member companies in 55 chapters throughout the USA, the association serves as the voice of the electrical and systems contracting industry on policies affecting its membership. IEC attempts to further the growth of the U.S. economy through skilled manpower and the principle of free enterprise.

Founded in 1957, the **International Council of Shopping Centers ("ICSC")** is the premier global trade association of the shopping center industry with 63,000 members worldwide, 51,000 in the United States. ICSC has 20,000 owner/developer members and nearly 5,900 retailer members in the United States. Shopping centers account for more than $2.4 trillion in retail sales per year and generate $138 billion in state sales tax revenue. More than 12 million people rely on America's shopping center related industries for employment, making shopping centers one of the largest economic forces in the nation.

The **International Foodservice Distributors Association ("IFDA")** is the trade organization representing 155 members in the foodservice distribution industry and provides the industry perspective on legislative and regulatory matters. IFDA members operate more than 800 distribution facilities in all 50 states across the United States with annual sales of more than $125 billion. These companies help make the food away from home industry possible, delivering food and other related products to restaurants, institutions and other foodservice providers.

The **International Franchise Association ("IFA")** is the oldest and largest trade association in the world devoted to representing the interests of franchising. Its membership includes franchisors, franchisees and suppliers. The IFA's mission is to protect, enhance and promote franchising through government relations, public relations and educational programs, on a broad range of legislative, regulatory and legal issues that affect franchising. IFA's membership currently spans more than 300 different industries, including more than 11,000 franchisee, 1,100 franchisor and 575 supplier members nationwide.

The **National Association of Wholesaler-Distributors ("NAW")** is comprised of direct member companies and a federation of national, regional, state, and local associations and their member firms which collectively total approximately 40,000 companies with locations in every state in the United States. NAW members are a constituency at the core of our economy—the link in the marketing chain between manufacturers and retailers as well as commercial, institutional and governmental end users. Industry firms vary widely in size, employ more than

5.5 million American workers, and account for more than $5.1 trillion in annual economic activity.

The **National Council of Chain Restaurants ("NCCR")**, a division of the National Retail Federation, is the leading organization exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that serves restaurant businesses and the millions of people they employ. NCCR members include the country's most respected quick-service and table-service chain restaurants.

The **National Federation of Independent Business (NFIB)** is the nation's leading small business association, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

National Ready Mixed Concrete Association ("NRMCA") was founded on December 26, 1930, and today represents more than 2,250 companies and subsidiaries that employ more than 125,000 American workers who manufacture and deliver ready mixed concrete. The Association represents both national and multinational companies that operate in every congressional district in the United States. The industry currently includes 68,500 ready mixed concrete trucks and 5,000 ready mixed concrete plants.

The **National Retail Federation ("NRF")** is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's *This is Retail* campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

Founded in 1948, the **Society for Human Resource Management ("SHRM")** is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in more than 160 countries, SHRM is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

INTRODUCTION

The National Labor Relations Board (the "Board" or "NLRB") often has been criticized by the right, the left and Congress for changing positions on key issues. *See* James J. Brudney, *The NLRB in Comparative Context: Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Pol'y J. 221, 222-23 (Winter 2005). In a sea of uncertainty, however, the Board's joint employer standards have remained constant for the past thirty years. That stability and predictability has allowed thousands of business, large and small, to structure their business relationships in a sensible and optimal fashion, subcontracting discrete tasks to other companies with specialized expertise to provide services that would otherwise be far more difficult or costly. At the same time, the current joint employer standard has not denied any employee the right to union representation granted by the National Labor Relations Act (the "NLRA" or "Act"), nor has it prevented any union from bargaining with the employer directly involved in setting the terms and conditions of employment in a workplace.

Recognizing that such stability is essential to large segments of American industry, the Board – through both Democratic and Republican administrations – has consistently adhered to the standards it established in *Laerco Transportation*, 269 NLRB 324 (1984) and *TLI, Inc.*, 271 NLRB 798 (1984) as the appropriate balance between the interests of employers, employees and unions. The Board has deliberately refused to revise those standards, despite the urging of the General Counsel's office and former Chair Liebman during the past decade, and has deliberately refused to revivify the amorphous "indirect control" standard it properly and wisely abandoned 30 years ago.

The rationale that led the Board, three decades ago, to adopt a direct control standard remain fully applicable today. No new facts or industrial developments require that the Board abandon thirty years of established law and depart from an approach it has developed and implemented for the past three decades. The current approach provides ample flexibility to allow the Board to police any improper attempts to evade the requirements of the Act. A return to the "indirect control" standard advocated by Petitioner, by contrast, sweeps too broadly and would enmesh separate businesses in bargaining relationships over which they have no significant control without any materially greater protection of employee rights under the Act. It would also jettison 30 years of well-developed Board law and create massive uncertainty throughout large segments of American industry. There simply is no need to turn the clock back to a test that the Board appropriately abandoned thirty years ago.

For the reasons articulated below, the undersigned *Amici* urge the Board to retain its existing joint employer standard.

ARGUMENT

I. THE BOARD SHOULD NOT CHANGE ITS LONG-ESTABLISHED STANDARDS FOR DETERMINING JOINT EMPLOYER RELATIONSHIPS

For the past three decades the Board has determined whether two separate entities are joint employers under the Act by assessing whether they exert such direct and significant control over the same employees such that they "share or codetermine those matters governing the essential terms and conditions of employment . . . ." *TLI, Inc.*, 271 NLRB at 798; *see also NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117 (3d Cir. 1982). To make this determination the Board evaluates whether the putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" and whether that entity's control over such matters is direct and immediate. *TLI, Inc.*, 271 NLRB at 798 (citing *Laerco Transp.*, 269 NLRB 324).

This standard is clear, rational and has withstood the test of time. While every joint employer case turns on its facts, the Board and reviewing courts have developed a coherent body of law from *Laerco* and *TLI* that elucidates the facts, circumstances and scenarios under which an entity becomes a joint employer. *See e.g.*, *Holyoke Visiting Nurses Ass'n v. NLRB,* 11 F.3d 302, 307 (1st Cir. 1993) (finding joint employer status where the putative joint employer had "unfettered" power to refuse to hire certain employees, monitored the performance of referred employees, assumed day-to-day supervisory control over such employees, gave such employees their daily assignments, reports, supplies, and directions, and held itself out as the party whom employees could contact if they encountered a problem during the work day); *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding that supervision which is "limited and routine" in nature does not support a joint employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.") (citation omitted); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (finding joint employer status where the putative joint employer "exercised substantial day-to-day control over the drivers' working conditions," was consulted "over wages and fringe benefits for the drivers," and "had the authority to reject any driver that did not meet its standards" and to direct the actual employer to "remove any driver whose conduct was not in [the putative joint employer's] best interests."). This body of law affords companies stability and predictability necessary to structure their businesses and workplaces for optimal productivity and minimal labor strife. At the same time, it has allowed effective collective bargaining between unions and the employer that actually sets the terms and conditions of employment.

The Board has heretofore declined to modify its current standard – which it has characterized as "settled law" – despite requests, over the years, from the General Counsel's Office and former Chair Liebman for its reconsideration. *See AM Prop. Holding Corp.*, 350 NLRB 998, 1002 (2007) (finding that "nothing . . . presents a compelling case for revisiting the Board's joint employer standard, which has been well-settled law for approximately 20 years"); *Airborne Freight Co.*, 338 NLRB 597, 597 n.1 (2002) (refusing to revisit the joint employer standard); *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000) (refusing to expand the joint employer test).

Proponents of a change to the standard, including the Petitioner in this case, advocate nostalgically for a return to an "indirect control" standard that purportedly existed prior to *TLI* and *Laerco*. The Board's standards at that time, however, were not at all clear. The Board itself noted that "[p]rior to 1982 when the United States Court of Appeals for the Third Circuit decided *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), the Board's analysis of what constituted a joint employer relationship was somewhat amorphous." *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993). In one case the Board found joint employer status where the joint employer exerted only "indirect control" over the discipline and wages of another entity's employees,[1] whereas in another the Board agreed with the ALJ that "indirect control over wages and hours" is "insufficient to establish a joint-employer relationship."[2] Other cases conflated the joint employer doctrine with the separate "single employer" or "common enterprise" theory, and looked to "industrial realities" even where the entity found to be the joint employer played no role in hiring, firing or directing the employees.[3] In truth, the indirect control "doctrine" which Petitioner advocates was nothing more than a standardless, situational determination unique to the facts of each case, making it impossible for businesses to determine how to approach their relationships in order to comply with governing legal standards.

The standards set forth in *TLI* and *Laerco* were a welcome improvement that has now become a fixture in United States labor law. The same reasons the Board previously declined to jettison its fully developed body of law apply no less strongly today.

A. The Current Standard Serves The Goals of the Act

The NLRA applies to relationships between employers and their employees or the unions that represent them. *See* 29 U.S.C. § 151 et seq. By definition, a putative joint employer is, in fact, a separate and distinct entity from the direct employer of the employees. *Browning-Ferris Indus.*, 691 F.2d at 1122 (distinguishing the joint employer scenario – which "assumes in the first instance that companies 'are what they appear to be' – independent legal entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship'" – from the single employer scenario – which exists "where two nominally separate entities are actually part of a single integrated enterprise") (citation omitted). As such, a putative

[1] *Floyd Epperson*, 202 NLRB 23 (1973), *enforced*, 435 F.2d 1270 (6th Cir. 1974).
[2] *Walter B. Cooke, Inc.*, 262 NLRB 626, 641 n.70 (1982).
[3] *Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968) (citing *Checker Cab Co.*, 141 NLRB 583 (1963), *aff'd*, 367 F.2d 692 (6th Cir. 1966)); *see Browning-Ferris Indus.*, 259 NLRB 60 (1981), *enforced*, 691 F.2d 1117 (3d Cir. 1982) (clarifying that the single and joint employer doctrines are distinct legal theories that apply to different factual circumstances).

joint employer is not subject to the Act with respect to the direct employer's employees except through the joint employer doctrine. *See, e.g.*, *AM Prop. Holding*, 350 NLRB at 1005 (in the absence of a joint employer relationship, there is no basis for attributing to the putative joint employer the antiunion statements made by the actual employer to striking employees); *Airborne Freight*, 338 NLRB at 604 (finding it "obvious" that the only way for the putative joint employer to be "liable under any section of the Act" is if joint employer status is found).

An entity deemed a joint employer is saddled with all of the duties and responsibilities required of direct employers under the Act, not the least of which is the duty to bargain with the employees' representatives. *See* 29 U.S.C. § 158(a)(5). The consequence to a large business of such an obligation, including the time and cost of bargaining with possibly hundreds or thousands of business partners throughout the country, would be enormous. As discussed below, large-scale franchisors who retain only the control required to protect their brand, trade name and trademark could be drawn into hundreds of collective bargaining relationships where they have little or no involvement with the workplace. Joint employers with limited involvement in the workplace would be required by Section 8(a)(5) to execute bargaining agreements and subject themselves to contractual and unfair labor practice liabilities without having any control over day to day operations at myriad locations throughout the country. Rather than accept such liabilities with no control over the workplace, or engage in endless bargaining across the country, many companies undoubtedly will opt to cancel subcontracts or franchise arrangements, or subcontract overseas, thus displacing small businesses and the millions of jobs that small businesses create. The impact upon the economy would be enormous.

Where the putative joint employer has only limited involvement in the material terms and conditions of employment of the employees, it is unreasonable and unfair to saddle it with these contractual and legal responsibilities. Therefore, in deciding whether an entity may be lawfully considered a joint employer, the Board implicitly balances the potential additional protection of employees' rights under the Act that the addition of a second employer affords with the putative joint employer's right to independence from its business associates' labor relations.[4]

The Board's conclusion strikes the proper balance between the employee and employer rights articulated above. Absent direct and immediate control over terms and conditions of employment, a putative joint employer is nothing more than a third party business associate whose business relationship may impose some limits on the terms and conditions of employment. The Board and the courts have consistently found that free and fair collective bargaining is not inconsistent with a situation where business relationships – or even state law – impose outside limits on the outcome of bargaining. *Cf. Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985) (state minimum standards legislation not inconsistent with federal collective bargaining even though such statutes affect terms and conditions of employment). Bargaining always takes place within an economic framework, whether that framework is supplied by state law, contractual arrangements or the competitive marketplace.

Surely the Board would not hold, under the rubric of "industrial reality", that the United States government is a necessary party to collective bargaining for every defense contractor throughout the United States, even though the government's reimbursement level for goods or services provides the backdrop for the wages, hours and working conditions for employees throughout the defense industries. In like fashion, a contractor that enters into a fixed fee or cost-plus subcontract for services merely establishes a business relationship that reflects market

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[4] The Supreme Court recognized, in a different context, the competing objectives under the Act of protecting employee and union rights under the NLRA with shielding employers and others from labor relations concerns that are "not their own." *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692 (1951).

forces and the competitive business background. Significantly, subcontractors are generally not forbidden from paying wages or benefits in excess of reimbursement levels, as illustrated in the relationship between Browning-Ferris and Leadpoint. *See* Regional Director Direction of Election, at 15 (noting that while Browning-Ferris refused to reimburse wages above a certain level, Leadpoint was not forbidden to pay in excess of reimbursement levels.) Unions can thus bargain for any wages they wish, and subcontractors who choose to pay more than reimbursable levels in the contract can always seek contractual amendments to cover the cost of such increases.[5]

A third party business partner, absent more, lacks the power to restrain employee rights, dominate or interfere with unionization, discriminate against an employee, to effectively bargain in good faith, or otherwise engage in conduct required or prohibited by the Act. *See* 29 U.S.C. § 158. By tying joint employer status to direct and immediate control over fundamental aspects of the employment relationship – hiring, firing, discipline, supervision and direction – the standard ensures that the joint employer is actually involved in matters material to the scope of the Act, and is not merely engaged in a market relationship that may have an indirect impact upon employees. By requiring that the control be direct and immediate, the standard assigns joint employer status to only to those entities with actual authority to impact the employment relationship – the subject of the Act – and avoids overreaching of the sort described below.

[5] Amici are well aware that under current law, contractors are allowed to refuse to deal with subcontractors with unduly high costs, even if those costs are the product of collective bargaining. *Plumbers Local 447 (Malbaff Landscape Const.)*, 172 NLRB 128 (1968). While *Malbaff* also has been criticized, *see Airborne Freight Co.*, 338 NLRB at 598 n.1, the Board has not requested briefing on that issue. While Amici believe there are rational reasons for the *Malbaff* rule, that rule stands on its own merits and should not affect the Board's consideration of joint employer standards.

B. <u>The Current Standard Is Clear and Has Been Consistently Applied</u>

Amici are not aware of any credible claim that the *TLI/Laerco* joint employer standard is unclear or unduly challenging to apply. A well-developed body of joint employer law has evolved, establishing and clarifying the facts and circumstances giving rise to a finding of joint employment. Indeed, the Board and reviewing courts have been quite clear and specific about how the direct control test is to be applied. In *Clinton's Ditch Cooperative v NLRB*, 778 F.2d 132, 138 (2d Cir. 1985), for example, the Second Circuit concretely explicated the standard by spelling out five indicia of control which demonstrate joint employer status: (1) did one entity hire or fire the other entities employees; (2) did it directly administer disciplinary procedures for those employees; (2) did it maintain record of hours, handle the payroll, or provide insurance for those employees; (4) did it directly supervise those employees; and (5) did it participate in the collective bargaining process.[6]

Petitioner would have the Board abandon that entire body of law in favor of uncertainty and perhaps additional decades of development, altering business relationships involving hundreds of thousands of companies and affecting the lives and livelihoods of millions of employees and small business owners. The consistency in the Board's decisions offers the stability and predictability businesses require to structure their relationships in a sensible and optimal fashion, without denying any employee the rights afforded by the Act.

C. <u>No Material Changes In Circumstances Justify a Change to Settled Law</u>

Although the Board can and sometimes does change its interpretation of the Act, before disturbing settled law the Board should demonstrate why disruption is necessary and appropriate.

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[6] Amici do not suggest that these tests are exclusive or that the Board is bound to apply the *Clinton's Ditch* criteria in every case. The Second Circuit's decision shows that during the last three decades the Board and the courts have developed a specific and cohesive body of case law defining the attributes of joint employment which should not be abandoned without the strongest of reasons.

SEIU Local 32BJ v. NLRB, 647 F.3d 435, 442 (2d Cir. 2011) ("Where the Board 'departs from prior interpretations of the Act without explaining why that departure is necessary or appropriate,' the Board will have exceeded the bounds of its discretion.") (Citation omitted.) A change in the Board's interpretation may be justified where there has been a material change in the circumstances underlying the rationale. *See Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Boston Med. Ctr. Corp.*, 330 NLRB 152, 169 (1999). In the thirty years since *TLI* and *Laerco* were decided, however, no such change has undermined those holdings.

The nature of the relationship between the contracting entity and its contractor is much the same today as it was thirty years ago. Today, as thirty years ago, contractors negotiate terms with subcontractors, and subcontractors costs are influenced by, *inter alia*, prevailing wage rates and collective bargaining agreements. *See, e.g., Plumbers Local 447 (Malbaff Landscape Constr.)*, 172 NLRB 128, 129 (1968) (holding that "long established law on the subject…has [ ] made plain …that the fact that a general contractor is 'doing business' with a subcontractor does not derogate from the independence of either or subject the employees of one to the control of the other as an employee."); *Airborne Freight Co.*, 338 NLRB 597, 606 (2002) (declining to adopt the position that "any time a subcontractor obtains or has the ability to convince the contractor to renegotiate the terms of their contract…the general contractor is the one having the de facto control over the subcontractor's labor relations."). Further, as has historically been the case, subcontractors can exact leverage in the negotiation of their contract terms due to the difficulty for companies in switching contractors. *Id.* (finding that subcontractors actually hold the balance of power during the life of a contract by playing on a company's "desire not to rock the boat in midstream.") Indeed, the instant case appears to have involved just such a situation.[7]

The cost-plus contract relationship at issue in the instant case is remarkably similar to cost-plus contracts considered in cases decided decades ago. *See e.g.*, *Cabot Corp.*, 223 NLRB 1388 (1976); *All Star Vending, Inc.*, No. 8-CA-19328, 1986 NLRB GCM LEXIS 90 (NLRB Oct. 31, 1986); *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 678 (1993); *Michelin Tire Corp. v. Trs. Of the Warehouse Emps. Union Local 169*, No. CA 95-48009, 1996 U.S. Dist. LEXIS 3817, at *9 (E.D. Pa. Mar. 28, 1996). Indeed, *Laerco* too involved a cost-plus contract relationship with a structure similar to the Respondents' contractual relationship in this case. *See Laerco Transp.,* 269 NLRB at 325.

Contrary to then-Member Liebman's assertion, the supposed "growing practice in today's economy of contracting out essential functions" does not justify a change in the Board's joint employer standard. *Airborne Freight,* 338 NLRB at 597-98. The *frequency* of contracting out has no bearing on the *nature* of contracting relationships, nor, consequently, does it affect the propriety of subjecting an entity to the duties and obligations of jointly employing another entity's employees. The existing standard is well-equipped to handle joint employer issues that arise out of today's contracting relationships, just as it has historically handled those same issues, while preserving the rights of employees to join and form unions and engage in meaningful collective bargaining.

Likewise, competition is not new. Close to forty (40) of Fortune magazine's fifty (50) greatest business rivalries of all time commenced before *TLI* and *Laerco* were decided. *See The*

[7] *See* Browning-Ferris Opposition to Request for Review, at 18-19 (noting that after Leadpoint was required to increase its wages beyond the reimbursable level to comply with a local ordinance, the parties renegotiated their contracts to cover the higher costs).

50 Greatest Business Rivalries of All Time, FORTUNE MAGAZINE (Mar. 21, 2013), http://fortune.com/2013/03/21/the-50-greatest-business-rivalries-of-all-time/ (last visited June 24, 2014). That advantageous relationships with contractors can create an edge in today's competitive marketplace, *see Airborne Freight*, 338 NLRB at 599, says nothing about the aptness of the joint employer standard. It has always been the case that owner-contractor relationships necessarily require that the owner "exercise sufficient control over the operations of the contractor at its facility so that it will be in a position take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for." *S. Cal. Gas Co.*, 302 NLRB 456, 461 (1991). If those relationships become intimate to such a degree that the contracting entity has direct control over material terms and conditions of the contractors' employees, then the relationship is one of joint employment.

Most importantly, to the extent there has been a material change to the way our nation does business during the past three decades, that change has created millions of jobs for American workers. Small business and franchising relationships were the engines of the economic growth that brought this country out of the 2008 recession. The Board would be remiss in ignoring these dramatic and welcome industrial changes. The existing joint employer standard has been and continues to be able to address such changes, *see, e.g.*, *Aim Royal Insulation, Inc.*, 358 NLRB No. 91, 2012-13 NLRB (CCH) P15,596 (July 30, 2012) (finding two companies were joint employers despite a stipulation by the parties that they were not), preserving employee rights and allowing business and the American economy to flourish.

II. ALTERING THE JOINT EMPLOYER STANDARD WOULD HAVE A WIDESPREAD AND DETRIMENTAL IMPACT ON BUSINESSES AND UNNECESSARILY COMPLICATE COLLECTIVE BARGAINING

Companies in a virtually every industry engage in a multitude of business arrangements which they enter into for reasons having nothing to do with the employment or unionization of employees. The economic impact of such business arrangements only indirectly touch upon the terms and conditions of employment in any given workplace, no differently than any other economic forces would impact upon those relationships. Numerous business relationships essential to the American economy risk being swept up by a broadened joint employer standard, complicating the collective bargaining process to the detriment of all parties involved and the economy as a whole.

A. A Broadened Joint Employer Standard Would Severely Impact Franchise Relationships

An expansion of the joint employer standard could massively change if not extinguish franchising relationships in the United States. "Franchising is . . . 'a method of marketing goods and services'" in which a franchisee pays a franchisor for the right to do business under the franchisor's trademark or trade name. Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 Wash. & Lee L. Rev. 417, 420-421 (Spring 2005) (citation omitted). Franchised businesses account for a large segment of the US economy, operating, as of 2007, more than 828,000 establishments and directly providing more than 9.1 million jobs (6.2 percent of all private non-farm jobs), and indirectly providing 17.4 million jobs (11.8 percent of all private non-farm jobs).[8]

In the typical business format franchising relationship,[9] the franchisor circumscribes certain aspects of the franchisee's operations in order to protect its brand, trade name and trademarks. Those restrictions may indirectly affect some of the employees' terms and

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[8] *Economic Impact of Franchised Businesses, Vol. 3*, Int'l Franchise Assoc., at 5, http://www.franchise.org/uploadedFiles/Prospective_Franchisee/News/EconomicImpact11.pdf (last visited June 24, 2014).

[9] "Business format franchises sell the franchisor's product or service, with the franchisor's trademark, and operate the business according to a system provided by the franchisor." *Id.* at 7. "Product distribution franchises sell the franchisor's products and area supplier-dealer relationships." *Id.* Business format franchisers are far more prevalent than product distribution franchises and account for approximately twenty (20) times as many establishments. *Id.*

conditions of employment; for example, franchisor standards may require employees to wear uniforms or to interact with customers in a particular way. But aside from this type of background criteria, the franchisor is not involved in the day-to-day operations of the franchise and does not control critical aspects of the employment relationship such as hiring, firing, disciplining, supervising or directing. Under existing law, franchisors have generally not been considered joint employers. *Speedee 7-Eleven*, 170 NLRB 1332, 1333 (1968) (finding no joint employer relationship despite a policy manual that described "in meticulous detail virtually every action to be taken by the franchisee in the conduct of his store"); *S.G. Tilden, Inc.*, 172 NLRB 752, 753 (1968) (finding no joint employer relationship though the franchise agreement dictated "many elements of the business relationship" because the franchisor did not "exercise direct control over the labor relations of [the franchisee]").

If the Board were to broaden the joint employer standard to include entities that indirectly exert any control over the employees' terms and conditions of employment, business format franchisor relationships might be swept into the expansive definition. For large franchisors with thousands of separate franchise establishments, such an expansion of the joint employer standard could put franchisors in the untenable position of having to manage labor practices and engage in collective bargaining in thousands of separate units all over the country. Franchisors would face the impossible choice of risking economic or operational demise because of the enormously magnified labor law exposure or withdrawing from any involvement in the franchisees operations and risking degradation of a carefully developed brand. Under either scenario franchisors would be forced to charge a higher fee thereby pricing out some percentage of potential new franchisees.

B. <u>A Broadened Joint Employer Standard Would Impede Contractual Mobility And Healthy Competition Across Industries</u>

The detrimental impacts of a decision to expand the Board's joint employer standard would be felt with equal force outside the franchise industry. The breadth of industries potentially impacted by a broadened joint employer standard is demonstrated by the number and diversity of the Amici submitting this brief. Businesses in virtually every industry maintain associations and business relationships that establish the economic background for bargaining, and that thus indirectly touch on the economic terms and conditions of employment of employees of separate businesses without allowing one business to establish the terms and conditions of employment for other businesses.

As noted above, cost-plus contracts and other types of outsourcing relationships are currently and have historically been an integral feature of business operations in this country. So too are leased employee or agency relationships. These types of business arrangements allows companies to access specialized talent, focus on core business activities, and increase business flexibility. *See Outsourcing Comes of Age: The Rise of Collaborative Partnering*, Price Waterhouse Coopers (Mar. 23, 2009), at 6, http://www.pwc.com/gx/en/consulting-services/pdfs/outsourcingcomesofage.pdf (last visited June 24, 2014). Strategic outsourcing allows smaller businesses to utilize specialized expertise from industrial giants such as IBM to handle tasks ranging from human resources and complex benefits issues to sophisticated information technology systems. At the same time, many employers have come to rely upon staffing agencies for highly skilled workers who are essential to their operations. These include many hospitals throughout the country, who rely upon staffing agencies to supply trained nurses to deal with shortages in qualified personnel. *See* Jessica H. May, Gloria J. Bazzoli & Anneliese

M. Gerland, *Hospitals' Responses to Nurse Staffing Shortages*, Health Affairs Vol. 25, No. 4 (July 2006), http://content.healthaffairs.org/content/25/4/W316.full (last visited June 26, 2014).

Adoption of the Petitioner's overbroad joint employer standard could have a particularly destabilizing impact on well settled subcontracting practices in the construction industry. The complexity and specialized skills demanded on many construction projects requires the general contractor or construction manager to be able to use and direct multiple subcontractors without taking on joint employer responsibility. The current Board test has provided a clear standard that has allowed the independence of such subcontracting relationships to be maintained, so long as the prime contractor does not exercise control of the subcontractor's employment relationships through hiring, firing, discipline, supervision, and excessive direction of the work. *Compare C.T. Taylor Co., Inc.*, 342 NLRB 997, 998 (2004) (no joint employer status found in the absence of control over subcontractor's employees) *with Aim Royal Insulation, Inc.*, 358 NLRB No. 91 (finding construction company and employment agency contractor providing workers under constructor's control to be joint employers).

These business relationships are essential to American industry and economic prosperity. The Board should not alter the legal landscape for those relationships absent the most significant of justifications.

C. Expanding Joint Employer Standards Will Complicate The Collective Bargaining Process Unnecessarily

The Act declares that federal policy encourages "the practice and procedure of collective bargaining" and protection of employees' rights to "freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. Achieving these purposes does not require embroiling every entity that touches the employment relationship in some way, however remote, in collective bargaining. Collective bargaining between only one employer and a union can be challenging enough; the addition of a third party into the mix will almost certainly result in unnecessary confusion and delay. Where a putative joint employer has limited or indirect control over the employees' terms and conditions of employment, the injection of that business into the bargaining process provides no material benefit the employees. A simple cost-benefit analysis does not counsel expanding the joint employer standard and requiring bargaining over what essentially are market forces.

Broadening the Board's joint employer standard could significantly impede the contractual mobility and healthy competition manifest in the varied business relationships upon which our nation's economy depends. For instance, a broad joint employer standard may impair the ability to enter into or terminate business associations freely, even where the entity's desire to enter into or terminate the relationship has nothing to do with either party's employees or any term or condition of their employment. Under the current joint employer standard, an entity deemed to be a joint employer must engage in decision and/or effects bargaining with the union representing its business associate's employees before modifying or terminating its relationship with the employer. *W.W. Grainger, Inc.*, 286 NLRB 94 (1987), *enforcement denied*, 860 F.2d 244 (7th Cir. 1988). If the Board expands its joint employer standard, entities with only indirect control over a few terms and conditions of employment may be required to notify and bargain with the union representing another company's employees, at least over the effects, before terminating its relationship with the employer for reasons that have nothing to do with those employees whatsoever.

Expansion of the joint employer doctrine may also put joint employers with little or no control over the workplace in the position of needing to justify economic decisions, including by providing supporting documentation, to unions representing the employers of its business associates. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (requiring an employer to provide financial information relevant to justify its position at the bargaining table). For example, it is not difficult to envision a union requesting that a joint employer justify its decision to reimburse only a certain amount of wages, and to supply information supporting that position. Yet such information may have nothing to do with any employment issues, and may involve business competitive strategies, trends in the market place, overall profit margins, decisions by corporate Boards and other factors that are wholly independent of any workplace issues. Indeed, where such limitations arise from government procurement decisions, as is often the case, the same logic underlying a change in joint employer standards in the name of "industrial reality" would counsel a similar expansion of the universe of parties at the bargaining table to include all entities responsible for any limitation of wages or fringe benefits, including government actors. The result would not begin to resemble the collective bargaining process created by Congress and protected by the Board. An interpretation of the Act to require such "bargaining" is not rational and does not serve the interests of labor or management.

III. THE JOINT EMPLOYER STANDARD APPLIED UNDER OTHER FEDERAL EMPLOYMENT STATUTES IS NOT RELEVANT TO THE STANDARD THAT SHOULD BE APPLIED UNDER THE NLRA

Petitioner asserts in its Request For Review, at 36, that a broader standard is more consistent with the Fair Labor Standards Act ("FLSA"), which applies an "economic realities" test. Assuming *arguendo* that such a test is applied under the FLSA, there is no logical reason to align the joint employer standard under the NLRA with that applied under the FLSA. The goals of the FLSA and the NLRA are quite different and compel a different definition. Under the FLSA, the issue is whether a putative joint employer may be held liable for violations of the minimum wage and maximum hour laws. Those matters are unquestionably economic concerns and it logically follows that the determination of joint employer status under the FLSA is governed by the economic realities.

Under the NLRA, however, the joint employer inquiry is aimed at whether it makes sense to compel the putative joint employer to undertake the myriad duties and responsibilities required under the Act - such as supplying information for the purposes of collective bargaining - where the entity setting the terms and conditions of employment is the direct employer. The broad code of conduct created by the NLRA comes into play in these circumstances, including not only wages and hours, but all of the other terms and conditions of employment. One can only imagine how a large business with hundreds or thousands of contractual relationships would go about ensuring that its business partners comply with the Board's standards for proper social media policies. Compelling a putative joint employer with only indirect involvement in the terms and conditions of employment to police the workplace or face contractual or unfair labor practice liability is unwise and not necessary to meet the goals of the Act.

To the extent the joint employer standard applied under other employment statutes is relevant to the appropriate standard under the NLRA, the Board's current standard aligns well with that applied under other laws. *See e.g., Bristol v. Bd. of County Comm'rs*, 312 F.3d 1213, 1218-1219 (10th Cir. 2002) (applying the Board's test to an ADA claim requiring "significant control" over matters governing the essential terms and conditions of employment (citation omitted)); *Rivera-Vega v. Conagra, Inc.*, 70 F.3d 153, 163 (1st Cir. 1995) (quoting *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993) (requiring significant control over the employees' terms and conditions of employment for a finding of joint employer under Title VII); *Gargano v. Diocese of Rockville Ctr.*, 888 F. Supp. 1274, 1278 (E.D.N.Y. 1995) (interpreting joint-employer status under the ADEA, and evaluating whether factors such as "hiring, firing, discipline, pay, insurance, records, and supervision" demonstrated a putative joint employer had a "significant degree of control" over the terms and conditions of employees) (citation omitted), *aff'd*, 80 F.3d 87 (2d Cir. 1996).[10] At best the Petitioner's assertion establishes that the various employment statutes apply differing standards and each should be evaluated on the basis of the legal considerations governed by the particular statute. *See, e.g.*, *Vance v. Ball State Univ*., 133 S. Ct. 2434, 2445, n.7 (2013) (highlighting different statutory purposes between Title VII and the NLRA); *see also Tipler v. E.I. DuPont deNemours &Co.*, 443 F.2d 125, 128 (6th Cir. 1971) ("Although these two acts are not totally dissimilar, their differences significantly overshadow their similarities.").

IV. THE INSTANT CASE IS AN INAPPROPRIATE VEHICLE FOR ALTERING THE BOARD'S STANDARDS

The record in the instant case shows no significant control – direct or indirect – by Browning-Ferris, the putative joint employer, over the terms and conditions of employment of Leadpoint's employees. The "control" allegedly exercised by Browning-Ferris on wages, hours and working conditions is based upon the parties' cost-plus contract, which the Board has for many years has held is not sufficient to establish a joint employer relationship. *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 678 (1993) (holding that "[a] contractual agreement, between two companies, utilizing cost-plus concepts, is not the type of arrangement which either *Browning-Ferris* or *TLI/Crown-Zellerbach* was discussing."); *Cabot Corp.*, 223 NLRB 1388 (1976)

[10] In an amicus brief previously filed in this case, the Equal Employment Opportunity Commission advocates that the Board adopt the EEOC test for joint employer status, which it asserts is less restrictive than the Board's current test. It is not at all clear, as discussed in the cases in the text, that the standard applied in Title VII cases is different than the NLRB standard. *See also EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, 1997 WL 33159161 (Dec. 3, 1997) with *Capitol EMI Music*, 311 NLRB 997 (1993) (finding a temporary employment agency a joint employer) and *compare EEOC v. Skansa USA Bldg., Inc.*, 550 F. App'x 253 (6th Cir. 2013) (finding construction contractor and subcontractor providing certain workers to be joint employers) with *Aim Royal Insulation, Inc.*, 358 NLRB No. 91 (finding construction company and employment agency contractor providing workers to be joint employers).

(finding that neither the cost-plus contract nor the monitoring of performance to ensure satisfactory performance of the contract involved sufficient control to constitute joint employment); *Michelin Tire Corp. v. Trs. Of the Warehouse Emps. Union Local 169,* No. CA 95-48009,1996 U.S. Dist. LEXIS 3817, at *9 (E.D. Pa. 1996)(a "cost-plus" reimbursement formula between a company and a contractor is not indicative of a joint employer relationship). Significantly, it was undisputed below that Leadpoint had its own human resources department on scene; employed no less than 17 supervisors and leadmen to oversee its workforce; maintained its own payroll; was solely responsible for hiring, discipline and discharge; and is a separate business operating at numerous other locations. Because the relationship between the Respondents in the instant case would not constitute joint employment even if a broader standard were applied, this case is not an appropriate vehicle for altering the Board's standards.

V. ANY CHANGE IN JOINT EMPLOYER STANDARDS SHOULD APPLY ONLY PROSPECTIVELY

As discussed throughout this brief, for three decades millions of American businesses have relied upon the Board's joint employer standards to structure their business relationships. Changing those standards would work a dramatic shift in the legal landscape, and would result in serious consequences that would affect the lives of millions of people. For this reason, Amici would urge the Board, to the extent it chooses to alter the joint employer standard in this case, not to apply that new standard to this case, to any pending case, or to any existing business relationships in place at the time of the decision.

Although the Board generally applies new law to pending cases, the Board has refused to follow this rule where such application would work a manifest injustice upon the parties. *See, e.g., Dresser Indus.*, 264 NLRB 1088 (1982); *Wal-Mart Stores, Inc.*, 351 NLRB 130 (2007); *Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel & Casino,* 355 NLRB 742

(2010). Significantly, numerous appellate decisions, particularly in the D.C. Circuit, have refused to allow the Board to impose retroactive liability upon the parties to a case in which new doctrine is announced. *See, e.g., Epilepsy Found. of Ne. Ohio v NLRB*, 268 F. 3d 1095 (D.C. Cir. 2001); *Consolidated Freightways v NLRB*, 892 F. 2d 1052 (D.C. Cir. 1989); *Retail, Wholesale, & Dep't Store Union v NLRB*, 466 F. 2d 380 (D.C. Cir. 1972).

Amici submit that altering joint employer standards, and abandoning thirty years of settled law, would work such a dramatic change in the legal landscape that application of new standards to pending cases, and to existing relationships, would create manifest injustice and jeopardize the interests of millions of businesses and the tens of millions of people they employ. The Board simply should not do this in the context of resolving one representation case.

In the alternative, Amici suggest that if the Board believes an alteration in the joint employer standard may be appropriate, it should use its rule-making authority to consider the impact such a change will have on business and labor. Amici submit that the impact of this type of change should be explored carefully, and that rule-making is an appropriate method for the Board to consider the widespread impact such a drastic change in the law would create. *See generally* Catherine L. Fisk and Deborah C. Malamud, *The NLRB In Administrative Law Exile: Problems With Its Structure and Function and Suggestions For Reform*, 58 Duke L.J. 2013, 2016-18, nn.12-17 (2014) (extensive citation of materials urging the Board to engage in rule-making prior to making dramatic changes in substantive law). By doing so, the Board will be able to make an informed decision about this critical issue, instead of relying upon the facts of one particular representation case to upset the lives of hundreds of millions of people across the country.

CONCLUSION

Accordingly, for all of the reasons articulated above, the Board should maintain the current joint-employer standard, as articulated in *TLI, Inc.* and *Laerco Transportation* and dismiss Petitioner's Request for Review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 26th day of June, 2014, the foregoing Brief of *Amici Curiae* was filed using the National Labor Relations Board's E-Filing Program. The foregoing brief was also served by email upon the following:

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