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

CORRECTED BRIEF FOR THE GOVERNOR OF TEXAS AS AMICUS CURIAE SUPPORTING PETITIONER/CROSS-RESPONDENT AND SUPPORTING A GRANT OF THE PETITION FOR REVIEW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before this Court of which the Governor is aware are listed in the brief of Petitioner/Cross-Respondent or in the notices of intent to participate as amici curiae filed by the respective amici.

B. Rulings Under Review

The rulings under review are listed in the brief of Petitioner/Cross-Respondent.

C. Related Cases

Counsel for the amicus curiae is not aware of any related case involving substantially the same parties and the same or substantially similar issues.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

* Authorities upon which this amicus brief chiefly relies are noted with asterisks

INTEREST OF AMICUS CURIAE[1]

Greg Abbott is the 48th Governor of the State of Texas. As the Chief Executive Officer of the State, Governor Abbott represents more than 27 million Texans and serves the countless businesses, communities, and families that call Texas home. Texas and its economy are experiencing rapid growth: five of the ten U.S. cities with the largest population gains in 2014 were in Texas,[2] and Texas had the second-fastest growing GDP in 2014, with a gain of 5.2%.[3] Governor Abbott has made the Texas economy a primary focus of his Administration, and the National Labor Relations Board decision at issue in this case threatens to bring unnecessary confusion and instability to the labor market in Texas and around the Nation.

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[1] No party or party's counsel authored any part of this amicus brief. No party or party's counsel contributed money towards the preparation of this amicus brief. And no person or entity, other than the amicus curiae, contributed in any manner towards the preparation of this amicus brief. *See* FED. R. APP. P. 29(c)(5). As indicated in Governor Abbott's notice of intent to file an amicus brief, no party opposed the filing of this amicus brief. *See* D.C. CIR. R. 29(b).

[2] Press Release, U.S. Census Bureau, Five of the Nation's Eleven Fastest-Growing Cities are in Texas (May 19, 2016) *at* https://www.census.gov/newsroom/press-releases/2016/cb16-81.html.

[3] CNN, Americas 6 Fastest Growing State Economies (June 12, 2015) *at* http://money.cnn.com/gallery/news/economy/2015/06/11/6-fastest-growing-states/5.html.

SUMMARY OF ARGUMENT

The NLRB orders contravene the National Labor Relations Act and the Taft-Hartley amendments to that Act, they are inconsistent with decisions of the U.S. Supreme Court and of this Court, and they reflect the NLRB's abandonment of the joint-employer standard that the NLRB itself has used for more than thirty years. The NLRB orders seek to replace a clear, settled standard with a new standard full of unknowns, which the NLRB suggests can be sorted out in administrative proceedings and litigation sometime down the road. These orders thus serve as a prime example of the difficulties posed when administrative agencies stray from their lawful purposes and instead attempt to make or amend the law based on policy preferences that Congress does not share. The Court should grant the petition for review, deny the NLRB's application for enforcement, and vacate the orders of the NLRB.

ARGUMENT

I. THE COURT SHOULD VACATE THE NLRB ORDERS BECAUSE THEY ARE INCONSISTENT WITH CONGRESS'S TAFT-HARTLEY AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT

The NLRB decision marks a significant change from the previous thirty years of NLRB rulings. More significantly, the NLRB's attempt to incorporate into the joint-employer standard (1) what it perceives to be the

"economic realities" and (2) the mere potential right to exercise control over employees constitutes an impermissible refusal to follow federal statute.

In 1944, the Supreme Court acknowledged—but declined to apply—the traditional test (direct and immediate control) for determining whether an employer-employee relationship existed in the context of independent contractors. *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 128-29 (1944) (upholding a NLRB decision that newspaper distributors were employees under the NLRA and suggesting that the NLRA's "applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications"). Congress responded with the Taft-Hartley amendments. As was its prerogative, Congress rejected the Supreme Court's decision that considered the "economic realities" of these business relationships. In the Taft-Hartley amendments, Congress amended the definition of "employee" to specifically exclude independent contractors. Congress also amended the definition of "employer." Whereas the previous version described those persons "acting in the interest of any employer," Congress changed the definition to those "acting as an agent of an employer." 29 U.S.C. § 152(2), (3). In reviewing the Taft-Hartley amendments, the Supreme Court accepted that "[c]ongressional reaction to [*Hearst*] was adverse," and the Court recog-

nized that "[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors . . . . Thus there is no doubt that we should apply the common law agency test here in distinguishing an employee from an independent contractor." *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968). The House Committee Report for the Taft-Hartley amendments makes clear that direct and immediate control is required to establish an employer-employee relationship, and the Report seemingly foreshadows the latest NLRB intrusion on the proper standard. The Report explained that:

> [a]n employee, according to . . . the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire . . . . Employees work for wages or salaries under direct supervision . . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up.

H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947).

This Court has likewise held that the test for what constitutes an employee focuses on direct and immediate control over terms of employment. *E.g.*, *Aurora Packing Co. v. NLRB*, 904 F.2d 72, 76 (D.C. Cir. 1990) (explaining that "the extent of the actual supervision exercised by a putative employer over the means and manner of the workers' performance is the

most important element to be considered") (internal quotations omitted); *Local 777, Democratic Union Organizing Comm., Seafarers Int'l Union of N. Am., AFL-CIO v. NLRB*, 603 F.2d 862, 880 (D.C. Cir. 1978) (finding that Taft-Hartley's legislative history provides "clear evidence that Congress did not intend that an unusually expansive meaning should be given to the term 'employee' for the purpose of the Act").

Despite these cases, the NLRB decision articulates the issue here in terms remarkably similar to the Supreme Court's *Hearst* opinion. The NLRB decision claims that the question here is whether the joint-employer standard "should be revised to better effectuate the purposes of the Act, *in the current economic landscape*." DR-1 (emphasis added).[4] The NLRB claims the current standard is "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships," DR-1, and that "[t]his development is reason enough to revisit the Board's current joint-employer standard," DR-11.

The NLRB decision purporting to update the joint-employer test amounts to an agency attempt to revise federal statute. The NLRB's power is necessarily subservient to congressional power; the NLRB cannot take ac-

[4] To maintain consistency with the Petitioner's brief, citations to the National Labor Relations Board's Decision on Review and Direction (August 27, 2015) will be "DR-[page number(s)]."

tions beyond those authorized by Congress. *N. Am. Van Lines, Inc. v. NLRB*, 896 F.2d 596, 598 (D.C. Cir. 1989) ("[T]he Board exercises power only within the channels intended by Congress."). And not only is it the general rule that it is for Congress, not agency officials, to amend the law if circumstances warrant, Congress reaffirmed that principle in this context. As the Board's dissenting members in this case explained, the NLRB majority decision is "motivated by a policy concern [regarding the existence of] an imbalance of leverage reflected in commercial dealings between the undisputed employer and third-party entities." DR-28. The majority of the Board members "desire to ensure that third parties that have 'deep pockets,' compared to the immediate employer," are compelled to participate in bargaining. *Id.* But Congress has already made the policy decision regarding the appropriate balancing of interests: "Congress has forbidden the Board from applying an economic realities or statutory purpose rationale in defining employer and joint-employer status under the Act." *Id.* Moreover, a desire to fit the Board's decision to a particular policy outcome *is the very same error* Congress corrected with the Taft-Hartley amendments. *Local 777*, 603 F.2d at 907 (explaining that Congress rejected the "vice" of *Hearst*, which was that "[i]nstead of first determining that the workers in question were within the 'legal classification' of employees as that word is normally

understood . . . [the NLRB] began by inquiring whether 'economic forces'" justified an extension of the NLRA).

Allowing the NLRB decision to stand would effectively permit the NLRB to redefine the employer-employee relationship in the NLRA. The Court should reject the NLRB's attempt to alter the joint-employer standard because that new standard circumvents Congress's insistence that agency principles, rather than NLRB's views on "economic realities," govern the determination whether a worker is an employee. The Supreme Court has cautioned that courts "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision" to an administrative agency. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Where, as here, Congress has once before corrected an agency's mistaken view of the law, common sense instructs that Congress has not delegated, and would not delegate, to the agency the ability to revive its mistaken view of the law.

II. THE COURT SHOULD VACATE THE NLRB ORDERS BECAUSE THE NLRB'S NEW JOINT-EMPLOYER STANDARD REPLACED DECADES-LONG STABILITY WITH VAGUENESS AND UNCERTAINTY

Even if the NLRB decision were not contrary to the NLRA provisions governing employers and employees, the NLRB decision would still deserve

to be promptly vacated because it will breed confusion and uncertainty when the NLRA requires stability.

1. The NLRB decision undermines the NLRA's and the Taft-Hartley amendments' crucial purpose of stabilizing labor relations. The Supreme Court has explained that "[t]o achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act." *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949). Likewise, an "important theme" of the Taft-Hartley amendments "was to stabilize collective-bargaining agreements." *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 186-87 (1971). Setting aside a thirty-year-old standard—regardless of the virtues of the new standard—threatens to cause disruption in any number of ways. That alone is reason enough for this Court to review the NLRB orders. However, as explained below, the NLRB orders at issue here will cause confusion far beyond the fact that they are new.

2. The NLRA commands that the Board must act to stabilize labor relations. The NLRB's new joint-employer standard leaves too many questions unanswered for the NLRB to credibly defend its orders as consistent with that NLRA requirement.

The Board's decision makes numerous statements in a feeble attempt to suggest that its ruling is a narrow one. For example, the Board claims that this particular decision does not address franchisor-franchisee, purchasers of services, corporate parents/subsidiaries, and other common business relationships. DR-20 n.120. Similarly, the Board's decision leaves open questions such as what happens when joint employers disagree with each other during the bargaining process, which of the joint employers will be selected to be "the employer" entitled to be heard by the NLRB during NLRB election proceedings, and many other issues identified by the dissenting Board members. DR-38-41. Perhaps worst of all, although the Board recognizes that a joint employer must not be required to bargain over the terms and conditions that the joint employer has no authority to control, the Board offers no guidance as to how unions and multiple employers with non-identical areas of control are supposed to negotiate. The effect will be piecemeal negotiations. But terms and conditions of employment are intertwined—they are not each a discrete and unrelated term or condition. Issue-by-issue, piecemeal bargaining has thus correctly been criticized by the courts and, until now, the NLRB itself. DR-43.

The Board's assurance that these unanswered questions pose only "challenges" for future parties to "navigate," DR-20, is plainly insufficient.

The Board's new joint-employer test is thus not one that employers can predictably rely on going forward. As this Court has provided:

> [t]he need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication. The open-ended rough-and tumble of factors . . . can lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which is less so, and why. In the absence of an explanation, the totality of the circumstances can become simply a cloak for agency whim---or worse.

LeMoyne-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004); *see also id.* at 61 ("Requiring an adequate explanation of apparent departures from precedent . . . serves the purpose of ensuring like treatment under like circumstances, but also facilitates judicial review of agency action in a manner that protects the agency's predominant role in applying the authority delegated to it by Congress."). The Board's new test, which leaves so many questions to be decided in future cases, is indefensible, and the suggestion that the Board need not provide any of the answers at this time is incorrect. As the Supreme Court has noted, "[t]he evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application and effective review of the law by the courts." *Allentown Mack Sales & Servs. v. NLRB*, 522 U.S. 359, 375 (1998).

3. Finally, applying the NLRB's new standard retroactively to business relationships that were formed when the NLRB gave the term joint-employer a very different meaning will unsettle countless business relationships and create instability in the labor market as businesses begin to fit their existing relationships into NLRB's new framework.

The Supreme Court has explained that "certainty beforehand" is vital not just to employers, but to unions and workers as well, when it comes to the parameters of negotiation. Employers are entitled to "reach decisions without fear of later evaluations labeling conduct an unfair labor practice," and unions likewise must have clarity as to what conduct is permissible and what conduct is not. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 678-79, 684-86 (1981). The NLRB decision takes away that which the Petitioner and countless other businesses nationwide had relied upon for decades. And the NLRB's new vague standard practically ensures that in future disputes, the NLRB will do so again. Such a significant shift in labor law, if it is to come from NLRB at all (rather than from Congress), should not be given retroactive effect. *See Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001).

CONCLUSION

The Court should grant the petition for review, deny the NLRB's request for enforcement, and vacate the NLRB's orders.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I, Adam W. Aston, counsel for Governor Greg Abbott and a member of the bar of this Court, certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) that this amicus brief contains 2432 words.

/s/ Adam W. Aston
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Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I, Adam W. Aston, counsel for Governor Greg Abbott and a member of the bar of this Court, certify that on June 15, 2016, I caused this amicus brief to be filed with the Clerk through the Court's electronic filing system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Adam W. Aston
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