ORAL ARGUMENT NOT YET SCHEDULED
Nos. 16-1028, 16-1063, 16-1064

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC. D/B/A BFI NEWBY ISLAND RECYCLERY,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,
TEAMSTERS LOCAL 350,
Intervenor.

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

AMICI CURIAE BRIEF OF MICROSOFT CORPORATION AND HR POLICY ASSOCIATION IN SUPPORT OF PETITIONER/CROSS-RESPONDENT

Tom Burt
Dev Stahlkopf
Jack Chen
Annjanette Cooper
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052

Roger King
HR POLICY ASSOCIATION
1100 13th Street NW
Suite 850
Washington, D.C. 20005

Robert M. Loeb
Naomi Mower
Jeremy Peterman
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th St. NW
Washington, D.C. 20005
(202) 339-8475
rloeb@orrick.com

Counsel for Amici Curiae *Microsoft Corporation and HR Policy Association*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *Amici Curiae* certify the following:

(A) Parties, Intervenors, and Amici. Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the Brief for the Petitioner/Cross-Respondent. Amici are Microsoft Corporation and HR Policy Association; National Association of Manufacturers, National Restaurant Association, National Federation of Independent Business, and Coalition for a Democratic Workplace; Associated Builders and Contractors, Associated General Contractors of America, American Hospital Association, American Hotel & Lodging Association, International Franchise Association, National Association of Home Builders, and National Retail Federation; Chamber of Commerce of the United States of America; American Staffing Association; Greg Abbott, Governor of the State of Texas; Washington Legal Foundation.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief for the Petitioner/Cross-Respondent.

(C) Related Cases. Amici Microsoft Corporation and HR Policy Association are unaware of any related case involving substantially the same parties and the same or similar issues.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *Amici Curiae* certify the following:

Microsoft Corporation is a publicly held corporation that develops, manufactures, licenses, supports, and sells computer software, consumer electronics, personal computers, and related services across the globe.

Microsoft Corporation has no parent company, and no publicly held company has a 10% or greater ownership interest in it.

HR Policy Association is a membership organization and trade association dedicated to representing employers and their chief human resources officers throughout the United States.

HR Policy Association has no parent company and no publicly held company has a 10% or greater ownership interest in it.

Microsoft Corporation and HR Policy Association filed a representation of consent to file a brief as *amici curiae* on May 20, 2016.

Dated: June 14, 2016

Respectfully submitted,

s/ *Robert M. Loeb*
Robert M. Loeb

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES v

GLOSSARY OF ABBREVIATIONS xi

INTEREST OF AMICI CURIAE 1

ARGUMENT 7

I. Corporate Social Responsibility Serves A Critical Role 7

A. CSR Initiatives Allow Firms To Promote A Wide Range Of Policy Goals 8

B. CSR Initiatives Are Most Effective When They Extend Throughout Supply Chains. 11

II. The Board's Flawed Decision Will Deter Companies From Adopting CSR Initiatives That Can Potentially Affect A Worker's Conditions. 17

A. CSR Initiatives That Set Supplier Eligibility Criteria Are Not Probative Of Joint Employment. 17

B. The Board's Adoption Of An Ill-Defined And Overbroad Standard Will Deter Companies From Adopting CSR Initiatives 25

CONCLUSION 32

RULE 29(c)(5) CERTIFICATION

RULE 29(d) CERTIFICATION

RULE 32 CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES*

Page(s)

Cases

Browning-Ferris Indus. Of Cal., Inc., D/B/A BFI Newby Island Recyclery, 362 N.L.R.B. No. 186 (2015) 1, 23, 25, 26

C.C. E., Inc. v. NLRB, 60 F.3d 855 (D.C. Cir. 1995) 23, 24

Carnation Co. v. NLRB, 429 F.2d 1130 (9th Cir. 1970) 23

Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) 17

Clinton's Ditch Coop. Co. v. NLRB, 778 F.2d 132 (2d Cir. 1985) 18

**Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) 20, 21, 24

**FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) 17, 23

Int'l Chem. Workers Union Local 483 v. NLRB, 561 F.2d 253 (D.C. Cir. 1977) 18, 19, 21

Int'l Longshoremen's Ass'n, AFL-CIO v. NLRB, 613 F.2d 890 (D.C. Cir. 1979) 29

**Local 777, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978) 18, 22, 24

* Authorities upon which we chiefly rely are marked with asterisks.

N. Am. Van Lines, Inc. v. NLRB,
869 F.2d 596 (D.C. Cir. 1989) 18, 19, 20, 22

NLRB v. United Ins. Co. of Am.,
390 U.S. 254 (1968) 16

Radio City Music Hall Corp. v. United States,
135 F.2d 715 (2d Cir. 1943) 21

S. Cal. Gas Co.,
302 N.L.R.B. 456 (1991) 26

Teamsters Local 688 (Fair Mercantile),
211 N.L.R.B. 496 (1974) 30

Statutes, Rules, and Regulations

29 U.S.C. § 152(2) 32

29 U.S.C. § 158(a)(5) 17

29 U.S.C. § 159(b)(4)(ii)(B) 29

40 U.S.C. § 3141 *et seq.* 31

41 C.F.R. § 60-2.1 31

79 Fed. Reg. 9851, Exec. Order No. 13658 31

Exec. Order No. 13706 31

Proposed Legislation

H.R. 152, 110th Cong. (2007) 10

H.R. 932, 114th Cong. (2015) 11

H.R. 1286, 113th Cong. (2013) 11

H.R. 1876, 112th Cong. (2011) 10

H.R. 1902, 109th Cong. (2005) 10

H.R. 2460, 111th Cong. (2009) 10

H.R. 4575, 108th Cong. (2004) 10

H.R. 5727, 112th Cong. (2012) 11

S. 497, 114th Cong. (2015) 11

S. 631, 113th Cong. (2013) 11

S. 910, 110th Cong. (2007) 10

S. 932, 109th Cong. (2005) 10

S. 984, 112th Cong. (2011) 10

S. 1085, 109th Cong. (2005) 10

S. 1152, 111th Cong. (2009) 10

S. 2252, 112th Cong. (2012) 10

S. 2520, 108th Cong. (2004) 10

Other Authorities

Richard L. Alfred et al., *How Will* Browning-Ferris *Change the Test for Joint-Employer Status for Union and Non-Union Employers* (Aug. 27, 2015), http://www.seyfarth.com/publications/MA082715-LE 28

Apple, *Inclusion & Diversity*, http://www.apple.com/diversity/ 15

Champions of Change: Working Family Champions of Change, Champions of Change Blog, https://www.whitehouse.gov/champions/working-family-champions-of-change 4

CR's 100 Best Corporate Citizens 2016, Corporate Responsibility Magazine (Mar./Apr. 2016), http://www.thecro.com/wp-content/uploads/2016/04/100best_1.pdf 2

CR's 100 Best Corporate Citizens 2015, Corporate Responsibility Magazine (Mar./Apr. 2015), http://www.thecro.com/files/100%20Best%20List%202015.pdf 2

CVS, *Prescription for a Better World: 2015 Corporate Social Responsibility Report*, http://cvshealth.com/sites/default/files/2015-csr-report.pdf. 12

Tara E. Daub, et al., *What* Browning-Ferris *means to you: The NLRB's new test for joint employer status* (Aug. 28, 2015), http://www.nixonpeabody.com/Browning-Ferris-NLRB-new-test-for-joint-employer-status 27

Jennifer L. Field et al., Strategies to Minimize Joint Employer Liability Post Browning-Ferris (Sept. 16, 2015), http://www.bakermckenzie.com/ALUSJointEmployerLiabilitySep15/ 27

Google Diversity, https://www.google.com/diversity/hiring.html 15

M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 Colum. L. Rev. 571 (2009) 9, 11, 24

Valerie Jarrett, *Champions of Change: Advocating for Working Families*, White House Blog (Apr. 17, 2015), https://www.whitehouse.gov/blog/2015/04/17/champions-change-advocating-working-families 3

Mark Kramer & John Kania, *Changing the Game*, Stanford Social Innovation Review, (Spring 2006), *available at* http://ssir.org/articles/entry/changing_the_game 16

Supriya Kumar, et al, *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent-Based Model*, 103 Am. J. Pub. Health 1406-1411, *available at* http://www.ncbi.nlm.nih.gov/pubmed/23763426 14

Michael Lotito et al., *NLRB Imposes New "Indirect Control" Joint Employer Standard in* Browning-Ferris (Aug. 28, 2015), https://www.littler.com/publication-press/publication/nlrb-imposes-new-indirect-control-joint-employer-standard-browning 27

Microsoft Ranked #1 in Best Corporate Social Responsibility Programs, Continues Dedication to Citizens and Communities, The Official Microsoft Blog (Jan. 2, 2013), https://blogs.technet.microsoft.com/boston/2013/01/02/microsoft-ranked-1-in-best-corporate-social-responsibility-programs-continues-dedication-to-citizens-and-communities/ 2

Microsoft's 2015 Citizenship Report, https://www.microsoft.com/about/csr/transparencyhub/citizenship-reporting/ 2, 9, 12, 15

Paid time off matters: Ensuring minimum standards for the people at our suppliers, The Official Microsoft Blog (Mar. 26, 2015), http://blogs.microsoft.com/on-the-issues/2015/03/26/paid-time-off-matters-ensuring-minimum-standards-for-the-people-at-our-suppliers/#sm.01a3rr1o19buf3010ob2dcxz4lmxo. 3, 5, 15

David Millon, *Shareholder Social Responsibility*, 36 Seattle U. L. Rev. 911 (2013) 7

Satya Nadella, *Empowering people to do great work*, The Official Microsoft Blog (April 17, 2015), http://blogs.microsoft.com/blog/2015/04/17/empowering-people-to-do-great-work-2/ 4, 15, 16

Ved P. Nanda, What is Corporate Social Responsibility, 1 Transnational Business Transactions (2015) 8

Tom Perez, *#LeadOnLeave Notes from the Road: Seattle*, U.S. Department of Labor Blog (Apr. 1, 2015), http://blog.dol.gov/2015/04/01/lead-on-leave-tour-seattle/ 4

Remarks by the President in Working Mothers Town Hall, Office of the Press Secretary (Apr. 15, 2015), https://www.whitehouse.gov/the-press-office/2015/04/15/remarks-president-working-mothers-town-hall 16

Remarks by the President At Working Families Champions of Change Event, Office of the Press Secretary (Apr. 16, 2015), https://www.whitehouse.gov/the-press-office/2015/04/16/remarks-president-working-families-champions-change-event 4, 11, 29

David I. Rosen, et al., *What Browning-Ferris Means to Union and Non-Union Employers* (Sept. 2015), http://www.sillscummis.com/Repository/Files/2015_September_Alert.pdf 28

Ethical Sourcing: Coffee, Starbucks, http://www.starbucks.com/responsibility/sourcing/coffee 13

Temporary Workers of America, (Oct. 23, 2015) http://temporaryworkersofamerica.blogspot.com/2015/10/request-for-microsoft-to-attend.html 5, 28

Temporary Workers of America (TWA) Timeline 2011-2015 (Oct. 1, 2015), http://lionbridgeunion.blogspot.com/search/label/TWA%20Timeline%202011%20-%202015 ..... 6, 29

Kelsey Timmerman, *The Blog: Why Now is the Time to Start Drinking Fair Trade Coffee*, Huffington Post (Jan. 23, 2014), http://www.huffingtonpost.com/kelsey-timmerman/drinking-fair-trade-coffee_b_4646960.html 13

GLOSSARY OF ABBREVIATIONS

CSR..... Corporate Social Responsibility

NLRA..... National Labor Relations Act

NLRB or Board ..... National Labor Relations Board

INTEREST OF AMICI CURIAE[1]

Amici Curiae Microsoft Corporation and HR Policy Association are leaders in the advancement of strong corporate social responsibility ("CSR") practices. Such practices are a critical platform for corporations to promote social values and provide important benefits to shareholders, consumers, and local communities. *Amici* submit this brief to describe how the Board's new, open-ended "joint employer" standard, which deviates from the common law, will deter companies from adopting these critical initiatives.

Simply put, the breadth of the Board's new joint employer standard issued in *Browning-Ferris Indus. Of Cal., Inc., D/B/A BFI Newby Island Recyclery*, 362 N.L.R.B. No. 186 (2015) ("*BFI*") will cause companies to question whether CSR initiatives will contribute to findings of joint employment relationships, and ultimately deter adoption of such initiatives.

Microsoft. Microsoft is the worldwide leader in software, services, devices, and solutions for individuals and businesses. It is also a recognized leader in CSR. In 2012, Reputation Institute—a firm that

[1] The parties have consented to the filing of this brief.

analyzes corporate reputations across a number of metrics—ranked Microsoft number one in CSR programs in recognition of its philanthropy efforts.[2] In both 2015 and 2016, Corporate Responsibility Magazine ranked Microsoft at the top of its list of best corporate citizens.[3] Microsoft's CSR polices are aimed at maintaining ethical and sustainable business standards for itself, its partners, and its suppliers.[4]

In March 2015, Microsoft announced a new CSR initiative: It would do business with large suppliers only if they provided certain

---

[2] *Microsoft Ranked #1 in Best Corporate Social Responsibility Programs, Continues Dedication to Citizens and Communities*, The Official Microsoft Blog (Jan. 2, 2013), https://blogs.technet.microsoft.com/boston/2013/01/02/microsoft-ranked-1-in-best-corporate-social-responsibility-programs-continues-dedication-to-citizens-and-communities/.

[3] *CR's 100 Best Corporate Citizens 2016*, Corporate Responsibility Magazine (Mar./Apr. 2016), http://www.thecro.com/wp-content/uploads/2016/04/100best_1.pdf; *CR's 100 Best Corporate Citizens 2015*, Corporate Responsibility Magazine (Mar./Apr. 2015), http://www.thecro.com/files/100%20Best%20List%202015.pdf.

[4] Microsoft's 2015 Citizenship Report describes these efforts in detail. *See* https://www.microsoft.com/about/csr/transparencyhub/citizenship-reporting/.

employees with at least 15 days of paid leave annually.[5] As Microsoft explained in its blog post on March 26, 2015:

> Over the past year there has been increasing debate about income inequality and the challenges facing working people and families. While this is often discussed as a general topic, at times individuals have raised pertinent questions for companies in the tech sector, including Microsoft. This has led us to step back and think anew about the types of benefits policies we want to have with our suppliers.[6]

This new policy was the first of its kind. It represents Microsoft's public pledge to "doing business with companies that share a commitment to providing these types of strong benefits for employees."[7]

This policy drew the immediate attention of President Obama, who honored Microsoft's CEO, Satya Nadella, as a "Working Family Champion of Change" in recognition of the initiative.[8] This honor

---

[5] The initiative is limited to those employees of certain suppliers with nine-month tenures who perform substantial work for Microsoft. *Paid time off matters: Ensuring minimum standards for the people at our suppliers*, The Official Microsoft Blog (Mar. 26, 2015), http://blogs.microsoft.com/on-the-issues/2015/03/26/paid-time-off-matters-ensuring-minimum-standards-for-the-people-at-our-suppliers/#sm.01a3rr1o19buf3010ob2dcxz4lmxo.

[6] *Id.*

[7] *Id.*

[8] Valerie Jarrett, *Champions of Change: Advocating for Working Families*, White House Blog (Apr. 17, 2015), https://www.whitehouse.gov/blog/2015/04/17/champions-change-advocating-working-families

focuses on individuals who "support working families and help make change in their companies or communities."[9] President Obama highlighted the "great work Microsoft is doing on behalf of working families."[10] He explained that it is "critical that we recognize that government has a role, but [that] … business" also has "a part to play in making sure that everybody has got a fair shot in this society."[11] The President recognized Microsoft's leading role in this effort, explaining, "for a company as big as Microsoft, that one change will mean greater security and peace of mind for thousands of families, *and hopefully inspire more companies to do the same for their workers*."[12]

(President Obama's remarks are available in the video linked at the bottom of the page); *see also* Satya Nadella, *Empowering people to do great work*, The Official Microsoft Blog (April 17, 2015), http://blogs.microsoft.com/blog/2015/04/17/empowering-people-to-do-great-work-2/.

[9] *Champions of Change: Working Family Champions of Change*, Champions of Change Blog, https://www.whitehouse.gov/champions/working-family-champions-of-change.

[10] *Remarks by the President At Working Families Champions of Change Event*, Office of the Press Secretary (Apr. 16, 2015), https://www.whitehouse.gov/the-press-office/2015/04/16/remarks-president-working-families-champions-change-event.

[11] *Id.*

[12] *Id.* (emphasis added). Secretary of Labor Tom Perez similarly recognized that this policy demonstrates Microsoft's "commitment to working families." *#LeadOnLeave Notes from the Road: Seattle*, U.S.

Microsoft recognizes that its CSR initiatives will have a greater effect if adopted across many enterprises, and thus seeks "to share [its] experiences with those who are interested."[13] Unfortunately, the Board's unprecedented new joint employer standard, and subsequent events stemming from it, have deterred others from joining Microsoft in this important effort.

The fear that the NLRB's new standard will impose adverse consequences on companies that adopt such beneficial policies is not just hypothetical. Shortly after Microsoft announced its new CSR initiative, a union representing employees of one of Microsoft's suppliers demanded that Microsoft engage in collective bargaining with the union. Relying on *BFI*, and citing Microsoft's paid leave eligibility criteria for suppliers, the union argued that Microsoft was now a "joint employer" subject to the National Labor Relations Act's collective bargaining requirements.[14] Microsoft declined on the basis that it is not

---

Department of Labor Blog (Apr. 1, 2015), http://blog.dol.gov/2015/04/01/lead-on-leave-tour-seattle/.

[13] *Paid time off matters*, *supra* n.5.

[14] *See Request for Microsoft to attend a collective bargaining meeting as a joint employer*, Temporary Workers of America (Oct. 23, 2015),

a joint employer of the supplier's employees. The union responded by filing an unfair labor practice charge against Microsoft with the NLRB.[15] That charge remains pending. Microsoft's CSR efforts have thus lead to substantial and growing legal expenses and great uncertainty.

HR Policy Association. HR Policy Association represents the most senior human resource executives in more than 360 of the largest corporations doing business in the United States, including Microsoft. Collectively, these companies employ more than ten million employees in the United States, nearly nine percent of the private sector workforce. It represents corporations which have matters pending before the Board, and the Association is strongly opposed to the Board's decision in this case for reasons expressed in *amicus curiae* briefs filed by other business organizations. In addition to those concerns, while the Association does not take a position on specific CSR initiatives, it

---

http://temporaryworkersofamerica.blogspot.com/2015/10/request-for-microsoft-to-attend.html.

[15] *Temporary Workers of America (TWA) Timeline 2011-2015* (Oct. 1, 2015), http://lionbridgeunion.blogspot.com/search/label/TWA%20Timeline%202011%20-%202015.

shares Microsoft's concern about the new joint employer standard's potential to affect its members' CSR efforts as well as other policies and actions that those companies view are in the best interests of their own employees as well as others.

Microsoft and HR Policy believe that the confusion stemming from the Board's expansive new "joint employer" standard already has deterred and will continue to deter companies from adopting the socially beneficial policies the President recently praised, or other CSR initiatives that might otherwise provide broad social benefit. *Amici* therefore submit this brief in support of reversing the Board's decision. *Amici* further ask this Court to address this uncertainty by confirming that CSR initiatives which do not dictate how employees do their jobs are not probative of joint employment relationships.

ARGUMENT

I. Corporate Social Responsibility Serves A Critical Role

Many corporations choose to act as good corporate citizens by adopting ethical standards that exceed their legal obligations. Such policies and practices are generally referred to as "corporate social responsibility" initiatives. David Millon, *Shareholder Social*

Responsibility, 36 Seattle U. L. Rev. 911, 920-921 (2013). Firms use CSR initiatives to promote the social good. Understanding CSR initiatives and companies' incentives for adopting such policies provides important context for appreciating the consequences of the Board's broad joint employer standard.

A. CSR Initiatives Allow Firms To Promote A Wide Range Of Policy Goals.

CSR initiatives come in all shapes and sizes, ranging from corporate accountability initiatives to human rights provisions to environmental stewardship. Ved P. Nanda, What is Corporate Social Responsibility, 1 Transnational Business Transactions § 1A:2 (2015). A grocery store, for example, might commit to selling fish caught using only sustainable fishing techniques. An apparel manufacturer might decide to make its sweatshirts only in countries with a strong record of fair labor practices and respect for human rights. Or a firm may—as Microsoft does—choose to work only with certain suppliers that provide their employees with at least fifteen days of annual paid leave.

Microsoft's policies illustrate the breadth of CSR. Microsoft targets a broad range of issue areas, including community empowerment, human rights, responsible sourcing and manufacturing,

and environmental sustainability.[16] Microsoft's comprehensive environmental strategy, for example, combats climate change and pollution through carbon neutrality, datacenter efficiency, waste reduction, and the use of recycled content in packaging.[17]

A company may adopt a CSR initiative for a number of reasons. It might act for altruistic reasons—believing that sourcing from sustainable fisheries is the right thing to do. It might also act to develop a socially conscious brand reputation to appeal to consumers. Or it may believe that paid time off produces healthier workplaces and a stronger society. Whatever the motivation, in each case the company works to further the social good by adhering to a higher standard than the law requires.

CSR initiatives allow companies to drive social change. Unlike the government, which legislates through broad consensus, corporations can act quickly and autonomously, pursuing niche areas of social change. Often, CSR initiatives address issues that are already in the public eye and will give the corporation, its investors, and consumers a

[16] Microsoft 2015 Citizenship Report, *supra* n.4.
[17] *Id.* at 59.

chance to make real change on vital issues, such as human rights and sustainability, on which they otherwise may feel powerless. Other CSR initiatives target and address social problems that may be otherwise invisible to the public. These initiatives can move issues to the forefront and provide consumers a mechanism to make meaningful change by choosing to do business with enterprises whose core values and policies they support. *See* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 Colum. L. Rev. 571, 595 (2009).

Microsoft's new eligibility criteria for suppliers illustrates how corporations can act as good corporate citizens and advance the social good even without government involvement. Since 2004, there has been substantial debate over whether the federal government should impose a minimum paid leave requirement, with no legislation enacted by Congress.[18] Thus, whether one favors or opposes such federal

[18] Numerous legislative proposals regarding such a mandate stalled out. *See* H.R. 4575, 108th Cong. (2004); S. 2520, 108th Cong. (2004); H.R. 1902, 109th Cong. (2005); S. 932, 109th Cong. (2005); S. 1085, 109th Cong. (2005); H.R. 152, 110th Cong. (2007); S. 910, 110th Cong. (2007); H.R. 2460, 111th Cong. (2009); S. 1152, 111th Cong. (2009); H.R. 1876, 112th Cong. (2011); S. 984, 112th Cong. (2011); S. 2252, 112th Cong.

mandates, it is clear that the paid-leave issue, at least for now, has been left to the private sector to address.

Advancing its view on the issue and seeking to promote both its business interests and the public good, Microsoft took action to make certain minimum paid leave standards a key eligibility criterion to qualify as a Microsoft supplier. Microsoft committed to working only with suppliers that share its values regarding the provision of a minimum of fifteen days of paid leave annually. One month after Microsoft announced this new eligibility criterion for its suppliers, President Obama honored Microsoft's CEO, Satya Nadella, as a "Champion of Change" for working families. He explained that companies like Microsoft "create models and templates for success in expanding opportunity" and "promoting diversity."[19]

B. CSR Initiatives Are Most Effective When They Extend Throughout Supply Chains.

Companies can enhance the effectiveness of their CSR efforts by directing these efforts down their supply chains. *See* Henderson, *supra*

(2012); H.R. 5727, 112th Cong. (2012); H.R. 1286, 113th Cong. (2013); S. 631, 113th Cong. (2013); H.R. 932, 114th Cong. (2015); S. 497, 114th Cong. (2015).

[19] *Champions of Change Remarks by the President*, *supra* n.10.

at 590-92. By doing business only with other enterprises that share their CSR goals, firms can ensure that their policies gain broader effect. For instance, a company's internal environmental sustainability initiatives will have diminished effect if the company contracts with manufacturers that use unsustainable raw materials. This is why Microsoft works not only to ensure that its own practices are carbon-neutral, but also participates in the Carbon Disclosure Project Supply Chain Program to educate its suppliers about climate change.[20] The same is true of companies that seek to improve worker well-being. For example, CVS delivers comprehensive benefits and compensation to its own employees, and works only with suppliers that provide their respective employees with fair wages.[21]

When corporations magnify the effects of CSR initiatives by directing them down their supply chains, they enhance their brands as socially conscious, responsible corporate citizens. This is true across a broad range of CSR policies. Starbucks, for example, has cultivated

---

[20] Microsoft 2015 Citizenship Report, *supra* n.4 at 54, 56.
[21] CVS, *Prescription for a Better World: 2015 Corporate Social Responsibility Report* at 103, http://cvshealth.com/sites/default/files/2015-csr-report.pdf.

relationships with farmers in developing countries that supply it with coffee beans.[22] It pays them fair trade prices, which ensures their livelihood while fostering their independence.[23] Starbucks advertises its ethical sourcing to consumers, which has gained positive attention in the press.[24]

Firms with internal CSR initiatives also find that applying these policies to their supply chains enhances the initiatives' effectiveness. Microsoft's paid leave CSR initiative demonstrates how this occurs. Through the initiative, Microsoft—a company that provides industry-leading benefits to its own employees—commits to doing business only with suppliers sharing its commitment to providing paid leave. Microsoft believes that the initiative benefits the company in a number of material ways, by enhancing its brand, affording it more stable and consistent supplier support, and even enhancing the health and welfare of Microsoft's own employees by reducing their exposure to illness.

---

[22] *Ethical Sourcing: Coffee*, Starbucks, http://www.starbucks.com/responsibility/sourcing/coffee; Kelsey Timmerman, *The Blog: Why Now is the Time to Start Drinking Fair Trade Coffee*, Huffington Post (Jan. 23, 2014), http://www.huffingtonpost.com/kelsey-timmerman/drinking-fair-trade-coffee_b_4646960.html.

[23] *Id.*

[24] *Id.*

Without supplier involvement, Microsoft believes, it would not be able to realize these same benefits.[25] In Microsoft's experience, which may not be shared by all companies, when a supplier's employee comes to work sick and contagious with the flu because he or she has no access to paid sick leave, and then comes into contact with a Microsoft employee, Microsoft doubly suffers. The ill supplier-worker's performance is subpar, and on top of that, the worker spreads the flu virus through Microsoft's own workforce. Microsoft has accordingly decided that it is in its interest to work only with suppliers that provide paid leave to ameliorate those real and substantial costs.[26] By working only with suppliers who provide paid leave, Microsoft enhances the

---

[25] HR Policy Association represents companies with a diversity of views on how much paid leave should be provided to employees and whether providing paid time off should be a qualification criteria for suppliers. This diversity of approaches is one of the benefits of a legal framework that enables companies to freely adopt CSR initiatives without adverse legal consequences. Under such a framework, companies would be permitted to innovate and seek to differentiate themselves with CSR initiatives that meet their customer demands and support their own values.

[26] Supriya Kumar, et al, *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent-Based Model*, 103 Am. J. Pub. Health 1406, 1406-1411, *available at* http://www.ncbi.nlm.nih.gov/pubmed/23763426 (measuring relationship between paid leave and flu transmission).

stability and productivity of its own workforce and lowers its healthcare costs.[27]

Microsoft's supply chain policy can also help to combat the effect that the lack of paid leave benefits has on lower wage earners. Microsoft developed its policy in part to address disparities in access to paid time off between the bottom quarter of earners and the top quarter. Microsoft believes that this affects minority populations most heavily.[28] By committing to work only with suppliers who provide paid leave, Microsoft believes that it is able to fight this inequity and thus promote greater access to paid leave amongst a diverse range of workers in the technology industry.[29] Microsoft expects that the policy's effect will be wide-ranging, given the large number of suppliers with which it interacts. As the President explained, "a big company like Microsoft can start influencing some of their subcontractors and

---

[27] Satya Nadella, *Empowering people to do great work*, *supra* n.8.
[28] *Paid time off matters*, *supra* n.5.
[29] Microsoft has embraced a broad commitment to diversity through its Global Diversity and Inclusion initiative. *See* Microsoft 2015 Citizenship Report, *supra* n.4 at 24. Others in the technology industry have done so as well. *See, e.g., Google Diversity*, https://www.google.com/diversity/hiring.html (describing efforts to hire a diverse workforce); Apple, *Inclusion & Diversity*, http://www.apple.com/diversity/ (discussing inclusive hiring practices).

suppliers down the chain. That can end up having a huge impact."[30] By ensuring that Microsoft works only with companies that let their employees take paid leave when needed, Microsoft believes that the policy helps create a healthy, inclusive work environment that "values diverse perspectives, experiences and backgrounds."[31]

In all, CSR initiatives like Microsoft's, and those of CVS, Starbucks, and others, provide "powerful benefits to society" while distinguishing the companies that create them. Mark Kramer & John Kania, *Changing the Game*, Stanford Social Innovation Review, at 29 (Spring 2006), *available at* http://ssir.org/articles/entry/changing_the_game. CSR initiatives often have a greater effect, and companies are accordingly more likely to adopt them, when they extend throughout companies' supply chains. Although companies may differ on the CSR initiatives they choose to extend throughout their supply chains, they agree that it is critical to ensure that laws and regulations do not

[30] *Remarks by the President in Working Mothers Town Hall*, Office of the Press Secretary (Apr. 15, 2015), https://www.whitehouse.gov/the-press-office/2015/04/15/remarks-president-working-mothers-town-hall.
[31] Satya Nadella, *Empowering people to do great work*, *supra* n.8.

discourage companies from selecting suppliers that share a commitment to the same CSR initiatives that the companies hold themselves.

II. The Board's Flawed Decision Will Deter Companies From Adopting CSR Initiatives That Can Potentially Affect A Worker's Conditions.

A. CSR Initiatives That Set Supplier Eligibility Criteria Are Not Probative Of Joint Employment.

A company's CSR initiative governing eligibility to provide supplier services is not indicative of a common-law employment relationship with the employees of the suppliers that follow the initiative. The NLRA requires a company to bargain collectively only with its "employee" representatives. 29 U.S.C. § 158(a)(5). The Act requires the Board and the courts to look to common-law agency principles when determining whether to classify a worker as an employee. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495-96 (D.C. Cir. 2009); *see also NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

Under the common law, "control is the principal guidepost" in determining whether there is an employer-employee relationship. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003). As this Court has explained, the applicable common-law test is

"a right-to-control." *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989). That "test requires an evaluation of all the surrounding circumstances." *Id.* "[T]he extent of the actual supervision exercised by a putative employer over the 'means and manner' of the workers' performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees." *Id.* (quoting *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 873 (D.C. Cir. 1978)). Thus, in determining whether an entity is a joint employer, courts look to the common law and examine whether the putative employer exerts a "substantial degree of control over the manner and means" of the putative employees' performance. *Int'l Chem. Workers Union Local 483 v. NLRB*, 561 F.2d 253, 256 (D.C. Cir. 1977); *see also Clinton's Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985) (analyzing whether there was "sufficient evidence of immediate control over the employees"). That common-law standard does not sweep in social responsibly standards that govern supplier eligibility. Such standards do not exert control—much less direct control—over workers' performance. Indeed, it is well-settled that setting standards does not

make an enterprise a "joint employer" of its suppliers' employees. There is simply no substantial basis in the law for the NLRB's new "joint employer" standard.

A company does not exert the requisite "substantial," "immediate control" when it sets eligibility criteria for suppliers to provide services. As an initial matter, that is so because setting the parameters and standards for a supplier to meet in rendering services does not establish an employment relationship, *Int'l Chem. Workers*, 561 F.2d at 256, and setting supplier *eligibility* criteria is one step further removed from setting the parameters and standards of the job eligible suppliers may perform.

Setting and enforcing basic job parameters and standards is "fully compatible with the relationship between a company and an independent contractor." *N. Am. Van Lines*, 869 F.2d at 599. In *North American Van Lines*, for example, a trucking company exerted global oversight over drivers with whom it contracted to deliver a third party's products. It developed a detailed system of incentives and penalties to encourage higher productivity, and it communicated with drivers regarding perceived faults in their performance. 869 F.2d at 602-03.

This Court held that the company was not a joint employer because this significant oversight was not control over the "means and manner of the worker's performance of the task." *Id.* at 602. Rather, the trucking company used these systems to "ensure that the drivers' overall performance me[t] the company's standards." *Id.* at 603.

In *Wal-Mart*, the Ninth Circuit determined that a CSR initiative establishing and monitoring implementation of a code of conduct for suppliers did not exert the "comprehensive and immediate level of 'day-to-day' authority over employment decisions" necessary to establish employment relationships. *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682 (9th Cir. 2009) (citation omitted). There, Wal-Mart required "foreign suppliers to adhere to local laws and local industry standards regarding working conditions like pay, hours, forced labor, child labor, and discrimination." *Id.* at 680. Wal-Mart even monitored and inspected suppliers to verify compliance with the code. *Id.* The Ninth Circuit declined to find that Wal-Mart established a common-law employment relationship with its suppliers' foreign workers, reasoning that Wal-Mart engaged in this monitoring to ensure that "suppliers

were meeting their contractual obligations, not to direct the daily work activity of the suppliers' employees." *Id.* at 683.

Such oversight and standard-setting is commonplace in a supplier contracting relationship and is not the type of control that can support a finding of joint employment. *See Int'l Chem. Workers*, 561 F.2d at 256 (finding no joint employment relationship under NLRA when user firm conducted daily head count of supplier's employees, monitored the results of their work, and supervised their work for a short period of time); *Radio City Music Hall Corp. v. United States*, 135 F.2d 715 (2d Cir. 1943) (theater company was not a common-law employer of its vaudeville acts when its actions, although occasionally exerting direct control over actors, were confined largely to shaping the bounds of the ultimate show).

When a company establishes supplier eligibility criteria that promote the public interest as part of a CSR initiative, those criteria are even less relevant to the joint employer analysis. This Court has recognized the value in respecting such policy choices and has declined to find such actions probative of joint employment. In *Seafarers*, for example, a company's decision to scrutinize the qualifications of its

contractors to protect the public from "hazards" was a policy "in the public interest … [that was] not indicative of that control that influences a determination of employee status." 603 F.2d at 901-02.

As in *Seafarers*, companies do not create across-the-board social responsibility policies to control their suppliers' workers. Rather, they determine supplier contract eligibility requirements to reflect their values, social ethos and ethical branding preferences. If, per *North American Van Lines*, a company can promote worker productivity with a detailed incentive system without becoming a joint employer, it should be able to promote the ethical treatment of its suppliers' workers without altering its legal status. Either way, the company seeks to ensure that its suppliers meet certain baseline standards consistent with its goals, without interfering in the "manner and means of that performance." *N. Am. Van Lines*, 869 F.2d at 600.

Of course, suppliers may choose to adjust their practices to meet a user firm's eligibility requirements. But this is nothing new, and such response is not considered probative of joint employment. As this Court explained in *FedEx*, such adjustments made by suppliers are merely "[e]vidence of unequal bargaining power," which "d[oes] not establish

control" over the suppliers—let alone their employees. 563 F.3d at 497. For example, a homeowner having a kitchen redone may insist that the contractor use experienced, trained workers (and not minimum wage day workers), to complete a big project in a short time frame. Those demands on the contractor may very well affect the staffing and pay of the workers. But even the *BFI* majority indicated that the homeowner would not be exercising the requisite control over the workers' performance of their jobs to be treated as a "joint employer" of the contractor's workers under the common law. *BFI*, 362 N.L.R.B. No. 186, at 20.

CSR initiatives are further irrelevant to the joint employment analysis because they are driven by "customer demands" for socially conscious goods and branding. *C.C. E., Inc. v. NLRB*, 60 F.3d 855, 859 (D.C. Cir. 1995); *see also FedEx*, 563 F.3d at 501; *Carnation Co. v. NLRB,* 429 F.2d 1130, 1134 (9th Cir. 1970) ("[E]vidence of economic control … oriented toward brand-name protection and market penetration" is not probative of an employment relationship.). The market demand for altruism drives the design of the product, services,

and the brand itself. *See* Henderson, *supra*, at 575 ("[P]eople 'purchase' altruism like they do other goods.").

As in *Wal-Mart*, such ends-driven policies are not probative of joint employment, even when they affect working conditions. *Wal-Mart*, 572 F.3d at 683. In *C.C. Eastern*, for example, this Court explained that a company's control over its drivers' pickup and delivery schedules was not probative of the existence of an employment relationship, because it was "motivated by a concern for customer service." 60 F.3d at 859. Therefore, while consumer demand for ethically produced products may influence working conditions, it does not make those conditions any less a part of the contracted-for ethical product. In these circumstances, the company's oversight over consumer-driven results is consistent with a supplier relationship.

In all, CSR policies that set supplier eligibility criteria reflect no control at all; they are even farther removed from the "pervasive … control over the means and method" of the work performance of suppliers' employees than the potential "indirect control" at issue in *Seafarers*, which was insufficient to create an employment relationship under the common law. *Seafarers*, 603 F.2d at 899 (cab company's

opportunity to exercise "indirect control" through short-term leases not probative of employment relationship). Under Microsoft's initiative, for example, Microsoft will engage suppliers only if the suppliers provide at least fifteen days of paid leave annually to their employees. Microsoft is not seeking to control or manage the suppliers' workers. As noted above, Microsoft seeks to stabilize supplier support, promote the health and welfare of Microsoft's own employees, and enhance the Microsoft brand by responding to a market eager for socially conscious products and services. Suppliers maintain the relevant control and management of their employees and choose whether and how to implement this CSR standard, including whether to exceed Microsoft's paid-leave floor.

B. The Board's Adoption Of An Ill-Defined And Overbroad Standard Will Deter Companies From Adopting CSR Initiatives.

The Board's ruling in this case improperly abandoned the common-law joint employment test, which focuses on direct and immediate control over workers' performance. Now, instead, the Board may deem companies joint employers if they merely "affect[] the means or manner of employees' work and terms of employment … through an intermediary." *BFI*, 362 N.L.R.B. No. 186 at 21. This broad, ill-defined

standard creates substantial uncertainty and risk as to whether CSR initiatives will be considered probative of joint employment relationships.

Notably, the Board suggests that a company may be a joint employer if it merely "retain[s] the contractual right to set a term or condition of employment." *Id.* at 19 n.80. Similarly, the Board indicates that a user firm that sets broad job parameters through intermediaries and checks that suppliers comply might be labeled a joint employer. *Id.* at 14 & n.44 (discussing *S. Cal. Gas Co.*, 302 N.L.R.B. 456, 461-62 (1991)). Under that approach, unions can be expected to argue that CSR initiatives relating to workers' treatment show a joint employment relationship because they set the broad parameters of the job and take measures to verify compliance. Companies with existing CSR initiatives now have a strong incentive to terminate them, and others considering such policies will be more likely to table their plans.[32]

[32] Microsoft continues to believe that its CSR initiatives are not probative of joint employment relationships even under the Board's *BFI* decision, but this does not detract from the deterrent effect of the Board's decision.

It comes as no surprise, then, that numerous law firms responded to the Board's ruling by issuing alerts cautioning companies to limit requirements that they impose on their business partners affecting those partners' employees to avoid inadvertently creating joint employment relationships. For example, lawyers at Baker & McKenzie cautioned clients to "[e]valuate 'control' language in contracts relating to labor and working terms and conditions, and eliminate those which … are not truly necessary." Jennifer L. Field et al., *Strategies to Minimize Joint Employer Liability Post* Browning-Ferris (Sept. 16, 2015), http://www.bakermckenzie.com/ALUSJointEmployer LiabilitySep15/. A Nixon Peabody client alert likewise suggested that "language regarding employee specifications for third-party contractors or franchisees be amended to be suggestive rather than mandatory." Tara E. Daub, et al., *What* Browning-Ferris *means to you: The NLRB's new test for joint employer status* (Aug. 28, 2015), http://www.nixonpeabody.com/Browning-Ferris-NLRB-new-test-for-joint-employer-status. Many law firms have followed suit with similar alerts.[33]

[33] Michael Lotito et al., *NLRB Imposes New "Indirect Control" Joint*

The risk that *BFI* will encourage joint employment claims by unions is no longer speculative. For example, a union representing employees of Lionbridge Technologies, a Microsoft supplier, recently relied on *BFI* and Microsoft's paid leave initiative governing supplier eligibility to assert that Microsoft is a joint employer of Lionbridge's workers.[34] When Microsoft declined to join the union's collective bargaining negotiations with Lionbridge, the union filed an unfair labor practice charge in the NLRB against Microsoft. Rather than being

---

Employer Standard in Browning-Ferris (Aug. 28, 2015), https://www.littler.com/publication-press/publication/nlrb-imposes-new-indirect-control-joint-employer-standard-browning ("Employers will need to revisit and revise their current business practices to eliminate the risk of being found a joint employer under the NLRA, though the Board has given little guidance on how to guarantee non-joint status under the new standard."); David I. Rosen, et al., *What Browning-Ferris Means to Union and Non-Union Employers* at 2-3, (Sept. 2015), http://www.sillscummis.com/Repository/Files/2015_September_Alert.pdf ("In light of the Board's decision, employers should review carefully their contracts with staffing agencies and consider eliminating potential examples of shared control or of the right to control the staffing agencies' workers."); Richard L. Alfred et al., *How Will* Browning-Ferris *Change the Test for Joint-Employer Status for Union and Non-Union Employers* (Aug. 27, 2015), http://www.seyfarth.com/publications/MA082715-LE (suggesting that businesses "attempt to protect themselves" by "[r]eview[ing] and modify[ing] service agreements with third parties").

[34] *See Request for Microsoft to attend a collective bargaining meeting as a joint employer*, *supra* n.14.

dismissed out of hand—as it should have been—the complaint is currently moving forward through the NLRB process.[35]

Thus, on one hand, the United States President has praised Microsoft for its market-leading CSR initiative that predicates supplier eligibility on the suppliers' provision of paid leave to their workers, and encourages others to do the same.[36] On the other hand, the NLRB has adopted a joint employment standard that encourages unions to use the same policy to bring an unfair labor practices claim against Microsoft and against other companies that create similar CSR initiatives establishing eligibility criteria for suppliers.

Joint employer status carries consequences that extend beyond collective bargaining obligations. For example, Section 8(b)(4)(ii)(B) of the NLRA prohibits labor unions from striking and picketing neutral employers, but permits strikes and pickets against the primary employer with whom the union has a dispute." *Int'l Longshoremen's Ass'n, AFL-CIO v. NLRB*, 613 F.2d 890, 900-902 (D.C. Cir. 1979). A company labeled a "joint employer" may now face boycotts that would

---

[35] *Temporary Workers of America (TWA) Timeline 2011-2015*, *supra* n.15.
[36] *Champions of Change Remarks by the President*, *supra* n.10.

otherwise be banned as secondary economic coercion. *See Teamsters Local 688 (Fair Mercantile)*, 211 N.L.R.B. 496, 496-497 (1974) (union's picketing of joint employer not an unfair labor practice). Therefore, if the Board concludes that Microsoft's CSR initiative renders it a joint employer, Microsoft could paradoxically be picketed because it chose to work only with suppliers that treat their workers well.[37]

An interpretation of the NLRA that deters firms from adopting CSR initiatives has the perverse effect of harming the interests of workers and the public more generally. Deterring such policies by the private sector is particularly strange when the federal government itself routinely issues rules imposing similar eligibility requirements on its own suppliers that exceed statutory minimums.[38] Congress has long

---

[37] The Board's broad new standard may also have deterrent effects extending beyond the NLRA, as it may influence future interpretations of other statutory employment relationships implicating the common law. This includes interpretations under the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, and Title VII of the Civil Rights Act, to name a few.

[38] Whether or not the government should be advancing such policies by Executive Order is not at issue here. But particularly in light of the federal government's approach in these instances, the law should not penalize private-sector companies that choose to adopt CSR initiatives.

required federal contractors to pay laborers and mechanics working on public buildings and public works based on locally-prevailing wages and benefits for similar works. 40 U.S.C. § 3141 *et seq*. And by Executive Order and regulation, the President has imposed on federal contractors and suppliers paid leave requirements (Exec. Order No. 13706, Establishing Paid Sick Leave for Federal Contractors (Sept. 7, 2015)), minimum wage standards (79 Fed. Reg. 9851, Exec. Order No. 13658, Establishing a Minimum Wage for Contractors (Feb. 12, 2014)), and affirmative action programs (41 C.F.R. § 60-2.1), just to name a few.[39]

HR Policy Association strongly opposes the recent use of the federal contracting process to pursue changes in federal employment policy.

[39] Ironically, Executive Order 13706—Establishing Paid Sick Leave for Federal Contractors—essentially mirrors the approach taken by Microsoft's paid leave policy:

> This order seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually, including paid leave allowing for family care. Providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees. These savings and quality improvements will lead to improved economy and efficiency in Government procurement.

Given that the federal government chooses to advance social policies by establishing across-the-board eligibility standards for its suppliers, private companies should be free to do so without adverse legal consequences in implementing their own CSR initiatives.

* * *

Thus, this Court should reverse *BFI*, which is so unmoored from the common law that it will dissuade well-meaning, socially conscious companies from adopting CSR initiatives that determine supplier eligibility and that might affect their suppliers' employees. In any event, it should make clear that CSR initiatives predicating supplier eligibility on the ethical treatment of employees cannot properly be considered as probative of the existence of a joint employer relationship.

CONCLUSION

For the foregoing reasons, the petition for review should be granted, the Board's application for enforcement should be denied, and the Board's orders should be vacated.

Yet the federal government escapes entirely the uncertainty created by the new joint employer standard in *BFI* only because the NLRA does not apply to government employees. *See* 29 U.S.C. § 152(2).

Dated: June 14, 2016

Respectfully submitted,

Tom Burt
Dev Stahlkopf
Jack Chen
Annjanette Cooper
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052

Roger King
HR POLICY ASSOCIATION
1100 13th Street NW
Suite 850
Washington, D.C. 20005

s/ *Robert M. Loeb*
Robert M. Loeb
Naomi Mower
Jeremy Peterman
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th St. NW
Washington, D.C. 20005
(202) 339-8475
rloeb@orrick.com

Counsel for Amici Curiae *Microsoft Corporation and HR Policy Association*

RULE 29(c)(5) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), undersigned counsel certifies the following:

1. No party's counsel authored this brief in whole or in part;

2. No party or party's counsel contributed money intended to fund preparing or submitting this brief;

3. No person, other than the *amici curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

RULE 29(d) CERTIFICATION

Microsoft confirmed that a "single brief," under D.C. Circuit Rule 29(d), between Microsoft and other *amici curiae* is not practicable, because Microsoft's and HR Policy's special interest in corporate social responsibility initiatives stands apart from the general interests of the other movants-*amici*.

Dated: June 14, 2016

Respectfully submitted,

s/ *Robert M. Loeb*
Robert M. Loeb

RULE 32 CERTIFICATE OF COMPLIANCE

Counsel for amicus curiae certifies that the brief contained herein has a proportionally spaced 14-point typeface, and contains 6,079 words, based on the "Word Count" feature of Word 2013, including footnotes and endnotes. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this word count does not include the words contained in the Certificate of Interest, Table of Contents, Table of Authorities, and Statement of Related Cases.

Dated: June 14, 2016

Respectfully submitted,

s/ *Robert M. Loeb*
Robert M. Loeb

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2016, I caused the foregoing Amici Curiae Brief of Microsoft Corporation and HR Policy Association to be filed electronically with the Clerk of the Court using the CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: June 14, 2016

s/ *Robert M. Loeb*
Robert M. Loeb

Counsel for Amici Curiae *Microsoft Corporation and HR Policy Association*