UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

Case 32-RC-109684

Employer

and

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

Employer

and

SANITARY TRUCK DRIVERS AND HELPERS
LOCAL 350, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner

---X

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA

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17512461v.2

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. UNDER THE CURRENT JOINT-EMPLOYER STANDARD, THE REGIONAL DIRECTOR CORRECTLY DETERMINED THAT LEADPOINT BUSINESS SERVICES ("LEADPOINT") IS THE SOLE EMPLOYER 4

II. THE BOARD SHOULD ADHERE TO ITS WELL-ESTABLISHED JOINT-EMPLOYER STANDARD 6

A. The Board Does Not Have The Authority Under The Act To Deviate From The Common Law Of Agency 6

B. There Is No Compelling Reason To Change A Legal Framework Bounded By The Statute, Which Has Offered Predictability And Stability To Contractual Relationships 9

C. The Test Urged By Petitioner Does Not Comport With Traditional Agency Principles And Thus Cannot Be Adopted 10

III. THE FACTS OF THIS CASE DO NOT PROVIDE AN ADEQUATE BASIS TO OVERRULE 30 YEARS OF WORKABLE BOARD PRECEDENT 15

CONCLUSION 16

17512461v.2

TABLE OF AUTHORITIES

Page(s)

CASES

Airborne Freight Co.,
338 NLRB 597 (2002) .... *passim*

Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.,
404 U.S. 157 (1971) 2, 8, 9, 10

Boire v. Greyhound Corp.,
376 U.S. 473 (1964) 2

Carbon Fuel Co. v. United Mine Workers of Am.,
444 U.S. 212 (1979) 9

Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 6

Cmty. for Creative Non-Violence v. Reid,
490 U.S. 730 (1989) 7

Hychem Constructors, Inc.,
169 NLRB 274 (1968) 12, 13

International Association of Machinists v. NLRB,
311 U.S. 72 (1940) 8

John Deklewa & Sons,
282 NLRB 1375 (1987) 10

Laerco Transportation,
269 NLRB 324 (1987) .... *passim*

Management Training Corp.,
317 NLRB 1355 (1995) 14

Morse v. Frederick,
551 U.S. 393 (2007) 15

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992) 3, 7, 9

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 15

NLRB v. Browning-Ferris Industries of Pa.,
691 F.2d 1117 (3d Cir. 1982) 3

NLRB v. Hearst Publications, Inc.
322 U.S. 111 (1944) 7, 8

NLRB v. Town & Country Elec., Inc.,
516 U.S. 85 (1995) 2, 7, 9

NLRB v. United Ins. Co. of Am.,
390 U.S. 254 (1968) 3, 7, 9

Res-Care, Inc.,
280 NLRB 570 (1986) 14

Roadway Package Sys., Inc. & Teamsters Local 63,
326 NLRB 842 (1998) 2, 3, 10

Southern California Gas Co.,
302 NLRB 456 (1991) 3, 5

TLI, Inc.,
271 NLRB 798 (1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985) .... *passim*

STATUTES

29 U.S.C. § 152(2), (3) 7-8

29 U.S.C. § 154(a) 14

OTHER AUTHORITIES

93 Cong. Rec. 4136 (1947) 14

93 Cong. Rec. 6654 (1947) 8

H.R. Rep. No. 245, 80th Congress, 1st Sess. (1947) 8

H.R. Rep. No. 510, 80th Congress, 1st Sess. (1947) 7

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief *amicus curiae* in response to the request of the National Labor Relations Board (the "Board" or "NLRB") for briefs regarding whether the Board should adhere to, or modify, its current standard for determining joint-employer status. For the reasons stated herein, the Chamber urges the Board to maintain the current standard which reflects more than 30 years of settled Board precedent, and which is consistent with the NLRB's authority under the National Labor Relations Act ("NLRA" or "Act"), as amended.

STATEMENT OF INTEREST

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members regularly enter into owner-contractor or contractor-subcontractor agreements that permit the retention of contract labor for the purposes of enabling efficient and flexible business operations, effective cost management, and business development and expansion. In reliance upon controlling Supreme Court precedent and over 30 years of settled Board law, the Chamber's members have structured their business arrangements with the understanding that absent the direct control of an individual's work necessary for a true employer-employee relationship, the owner entity will not be a joint employer under the Act. The current standard thus promotes stability and predictability in business relationships and collective bargaining, which in turn facilitates economic growth and innovation. The sudden and

unwarranted modification to the longstanding joint-employer standard set forth by the Board and applied in many cases, including in *TLI, Inc.*, 271 NLRB 798 (1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985) ("*TLI*"), and *Laerco Transportation*, 269 NLRB 324 (1987) ("*Laerco*"), would have far-reaching and negative consequences for the Chamber's members.

SUMMARY OF THE ARGUMENT

The common law of agency provides the legal framework that underpins the Act's entire structure, both creating bargaining obligations for an "employer" and boundaries that bar secondary activity directed against entities not properly deemed an "employer." There is a clear and unambiguous congressional mandate that requires that before a separate business entity may be deemed a "joint employer" with another, it must be an "employer" of the employees in question. Further, in determining "employer" status, the Supreme Court repeatedly has held, as prior decisions of the Board itself have observed, that the Board is not free to ignore the law of agency. *See, e.g., NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995); *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167-68 (1971); *Roadway Package Sys., Inc. & Teamsters Local 63*, 326 NLRB 842, 849 (1998).

The Board's current joint-employer doctrine comports with the law of agency and thus should not be altered without legislative action. The joint-employer concept recognizes that "two or more business entities are in fact separate, but that they share or codetermine those matters governing the essential terms and conditions of employment." *Laerco*, 269 NLRB at 325; *TLI*, 271 NLRB at 798 (same); *see also, e.g., Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (1964) (joint-employer status turns on whether the entities "exercised common control over the employees" at issue). Applying the familiar framework derived from the common law of agency, the Board has recognized, for more than 30 years, that the extent of an entity's control over the "essential terms and conditions of employment" turns on whether there is "a showing

that the employer *meaningfully affects* matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction." *Laerco,* 269 NLRB at 325 (emphasis added); *TLI,* 271 NLRB at 798 (same); *see also NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1122-25 (3d Cir. 1982) (articulating the common law standard adopted by the Board).

Joint-employer status then turns on the direct and immediate control over the particular employees at issue: the extent to which the purported employer determines matters governing essential terms and conditions of employment, including the right to hire and fire, set work hours, determine start and end times of shifts, directions, compensation, day to day supervision, record keeping and to approve the contractor's employees assigned and devise rules under which these employees were to operate. *Id.* Thus, the "essential element in [each such] analysis is whether a putative joint employer's control over employment matters is direct and immediate." *Airborne Freight Co.*, 338 NLRB 597, 597 fn. 1 (2002) (noting the "indirect control" test was "abandoned" two decades earlier). No single fact is dispositive as a matter of law in determining control, rather the question of joint-employer status must be assessed upon "the totality of the facts of the particular case." *Southern California Gas Co.,* 302 NLRB 456, 461 (1991).[1]

By seeking solutions where there is no apparent problem in the administration of the Act, the Board's invitation raises serious questions regarding the predicate for "changing the rule" pursuant to its administrative power. What is more, the Board invites reconsideration of a well-established NLRA test in a garden variety case, such as this one, presenting no difficult legal

[1] *See, e.g., NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) ("[T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles."); *see also Roadway Package Sys., Inc. & Teamsters Local 63*, 326 NLRB at 849, quoting *United Ins. Co. of Am.*, 390 U.S. at 258*; Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-25 (1992) (setting forth a non-exhaustive list of factors which determine whether an individual is an employee under the common law).

questions or unusual facts not readily accommodated by settled principles. The Board should accept the Regional Director's non-controversial Decision and Direction of Election herein and reject the Petitioner's proposed to alter fundamentally the Board's well established joint-employer standard.

ARGUMENT

I. UNDER THE CURRENT JOINT-EMPLOYER STANDARD, THE REGIONAL DIRECTOR CORRECTLY DETERMINED THAT LEADPOINT BUSINESS SERVICES ("LEADPOINT") IS THE SOLE EMPLOYER

Given the Regional Director's findings of fact, this case is straight-forward and easily decided under the current standard. Browning-Ferris Industries of California ("BFI") does not hire, fire, discipline, supervise or direct Leadpoint employees. Leadpoint has the sole responsibility to recruit, hire, counsel, discipline, review, evaluate, and terminate employees. *See generally BFI*, 32-RC-109684, Decision and Direction of Election. Similarly, BFI and Leadpoint maintain separate supervisors and distinct human resources departments that are physically separated. *Id.* at 5. BFI does not set their wages, administer their benefits, schedule work hours, maintain employment records, or oversee payroll for Leadpoint employees; nor does BFI select particular employees to work particular shifts, schedule shifts, or otherwise provide any day-to-day supervision of their work. *Id.* at 5-6. On these facts, the Regional Director correctly determined that BFI is not a joint employer because it lacks direct and immediate control over the essential terms and conditions of employment of Leadpoint's employees.

Petitioner's scant support for finding BFI a "joint-employer" largely consists of the fact that, under its cost-plus arrangement with Leadpoint, BFI was only obligated to reimburse Leadpoint for wage costs up to a fixed amount for any Leadpoint employee -- a cap that did not dictate what Leadpoint must pay its employees. *See* Opposition to Request For Review of the Regional Director's Decision and Direction of Election ("Opp. to Request") at 7-8, fn. 7 (noting

BFI-Leadpoint contract sets a limit on what BFI agrees to assume as pass-through costs so that it does not pay a service fee for labor in excess of what it would pay a BFI employee in wages for the same task). But as noted below, this limitation on hourly wage cost in a cost-plus arrangement is not a basis for "joint-employer" status. *See infra* pp. 10-15. Other *de minimis* indicia of control alleged by Petitioner were properly rejected by the Regional Director, such as BFI's handling of incidents of alcohol use and vandalism. Certainly, the owner has the right to protect its property in such instances,[2] but BFI, in this case, left the investigation and discipline entirely to Leadpoint. *See* Opp. to Request at 26-27. On all of these facts, there can be little doubt that within the current framework, BFI is not a "joint-employer" of Leadpoint's employees.

Even if there are decisions, such as *Laerco*, 269 NLRB at 324-325 and *TLI,* 271 NLRB at 798-799, that some critics may believe reached the wrong outcome on the particular facts and circumstances of those cases, that provides no basis to discard the Board's current joint-employer standard. On the facts of this case, it is not a close question. And even assuming (without conceding) the Board got the outcomes wrong on the particular facts of *Laerco* and *TLI*, the *legal standard* applied by the Board for determining whether a business is a joint-employer is still the correct one.

[2] An owner "receiving contracted labor services will of necessity exercise sufficient control over the operations ... of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for." *Southern California Gas Co.*, 302 NLRB at 461. The existence of such minimal control, is not in and of itself, a sufficient basis for finding that the customer-employer is a joint-employer of its contractor's employees. *Id.*

II. THE BOARD SHOULD ADHERE TO ITS WELL-ESTABLISHED JOINT-EMPLOYER STANDARD

A. The Board Does Not Have The Authority Under The Act To Deviate From The Common Law Of Agency

Congress has clearly directed and the Supreme Court has held that the Board must rely upon common law agency principles in determining who is an employee and who is an employer under the NLRA. Accordingly, the Board does not have the authority to abandon the common law of agency in determining joint-employer status. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (an "agency[] must give effect to the unambiguously expressed intent of Congress").

Where (as here) Congress uses the term "employee" in a statute and does not define the term, Congress "means to incorporate the established meaning of th[at] ter[m]," and as the Supreme Court has concluded, "'Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" *Town & Country Elec., Inc.*, 516 U.S. at 94 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992), in turn quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)). Although the Board does receive "considerable deference" on its construction of the term "employee" in a particular context, the Board still may not unreasonably "depart[] from the common law of agency." *Town & Country Elec., Inc.*, 516 U.S. at 94 (citing *United Ins. Co.*, 390 U.S. at 256).

Indeed, in 1947 Congress expressly directed in the Taft-Hartley Amendments to the NLRA that the Board is constrained by common law principles of agency when determining who is an employee and who is an employer within the meaning of the Act. Among other changes, the 1947 revisions to the Act narrowed the definition of "employee" to exclude independent contractors. The amendment was designed to overrule the Supreme Court's earlier decision in *NLRB v. Hearst Publications, Inc.* ("*Hearst*"), 322 U.S. 111 (1944), which disregarded common

law principles of agency to find that "independent contractors" could be treated as "employees" under the Act. *See, e.g.*, 61 Stat. 137-38 (1947), 29 U.S.C. § 152(3). The contemporaneous legislative materials confirm that the purpose of the 1947 amendments was to make both employers and unions subject to the ordinary common law rules of agency. *See, e.g.*, H.R. Rep. No. 510, at 36, 80th Congress, 1st Sess. (1947). And the Supreme Court subsequently acknowledged that the "obvious purpose of [the 1947] amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *United Ins. Co. of Am.*, 390 U.S. at 256. Notably, the House Committee Report accompanying the 1947 amendments harshly criticized the Board's finding in *Hearst* that independent contractors were employees under the Act, noting the term "employee":

> according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. . . [and who] work for wages or salaries under direct supervision.
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> It must be presumed that when Congress passed the Labor Act, it intended words it used [such as "employee"] 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. . . . It is inconceivable that Congress, when it passed the act, authorized the board to give to every word in the act whatever meaning it wished.

H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947); *Allied Chem.*, 404 U.S. at 167 (quoting the same report).

Significantly, the 1947 amendments also modified the definition of "employer" to encompass only those persons who are "acting as an *agent* of an employer," 29 U.S.C. § 152(2) (emphasis added), rather than any individual "acting in the *interest* of any employer" as the statute previously read. This change, too, was designed to reinforce the applicability of agency law to the determination of who is an employer within the meaning of the Act. *See, e.g.*, H.R.

Rep. No. 245, at 11, 80th Congress, 1st Sess. (1947) (defining an employer as "'any person acting as an agent of an employer makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions"). In doing so, Congress overruled the Supreme Court's decision in *International Association of Machinists v. NLRB*, 311 U.S. 72 (1940), which held that an employer could be held responsible for the actions of a foreman "even though he might not be under the strict common-law rules of agency," H.R. Rep. No. 245, at 68; 93 Cong. Rec. 6654, at 6672 (1947) ("[n]ow[,] before the employer can be held responsible for a wrong to labor[,] the man who does the wrong must be specifically an agent or come within the technical definition of an agent").

Since the Taft-Hartley Amendments, the Supreme Court has repeatedly instructed that common law principles of agency determine who is an employee, and by extension, who is an employer, under the Act. *See, e.g., Town & Country, Elec., Inc.*, 516 U.S. at 90 (applying, *inter alia,* the Black's Law Dictionary definition of employee, as one in service of another "where the employer has the power or right to control and direct the employee *in the material details of how the work is to be performed*" and common law of agency to determine who is an "employee" within the meaning of Act) (emphasis added); *Allied Chem.*, 404 U.S. at 168 ("1947 Taft-Hartley revision made clear that general agency principles could not be ignored in distinguishing 'employees' from independent contractors"); *United Ins. Co. of Am.*, 390 U.S. at 256-57 (utilizing common-law agency principles to distinguish between employee and independent contractor). *See also Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 216-18 (1979) (applying "the common law of agency" to determine "whether any person is acting as an

'agent' of another person" under Labor Management Relations Act to find international union not liable for "wildcat" strikes).

Accordingly, both the Act and Supreme Court precedent forbid the Board from imposing a bargaining obligation without regard to whether the putative joint-employer is an "employer" under agency law. *See Nationwide Mut. Ins. Co.*, 503 U.S. at 324-25. To do so would burden companies that are not employers with bargaining obligations, enmesh them in ever-widening industrial disputes, and deprive them of the protections against secondary activity afforded under Section 8(b)(4) of the Act. And it would force non-employer entities to participate in collective bargaining where they have no control to set or negotiate terms and conditions of employment and would have no authority to remedy unfair labor practices. *See, e.g., Allied Chem.*, 404 U.S. at 164 (obligation to bargain collectively "extends only to the 'terms and conditions of employment' of the employer's 'employees'. . ."). Precisely because the current joint-employer framework comports with congressional mandates and binding Supreme Court precedent and has fostered the policies and purposes of the Act for decades, the Board not only *must* adhere to the existing joint-employer standard, but has no power to do otherwise.

B. There Is No Compelling Reason To Change A Legal Framework Bounded By The Statute, Which Has Offered Predictability And Stability To Contractual Relationships

Time and again, the Board has rejected efforts to deviate from the long-standing joint-employer doctrine rooted in the text of the NLRA and the common law of agency. In *Roadway Package Sys., Inc. & Teamsters Local 63*, 326 NLRB 842 (1993), *e.g.*, the Board declined to deviate from its well-established test in deciding whether truck drivers were employees or independent contractors, having concluded that the 1947 Taft-Hartley Amendments and Supreme Court decisions clearly required the common law agency test. *Id.* at 849 (noting "common law of agency is the standard to measure employee status [and] also that [the Board has] no authority

to change it."). A decade later in 2002, the Board again declined to deviate from the current legal framework for joint-employers. *See, e.g.*, *Airborne Freight Co.*, 338 NLRB at 597 fn. 1 ("indirect control" test was "abandoned" two decades earlier, and refusing to "disturb settled law" by reverting back to such a test). Now, the Board should once again decline to depart from the current framework. If the current agency test is deemed inadequate, it is up to Congress to change it.

Given the wealth of deliberative decisions under the existing standard, the present framework lends itself to predictability and stability in business and bargaining relationships and does not unnecessarily tie the hands of either the Board or the parties in collective bargaining. The existing, long-established framework promotes the ability of businesses to efficiently utilize a ready supply of labor to meet fluctuating market needs. A change in the administrative rule must be based on some compelling reason or purpose. *See e.g.*, the Board's statement of reasons for changing the rule in *John Deklewa & Sons*, 282 NLRB 1375 (1987). Here, there is no indication of any difficulties in administering the Act due to the present joint-employer standard. If anything, Petitioner's unfounded approach to the joint-employer standard would complicate the administration of the Act.

C. The Test Urged By Petitioner Does Not Comport With Traditional Agency Principles And Thus Cannot Be Adopted

In its Request for Review of the Regional Director's Decision and Direction of Election ("Request for Review"), Petitioner urges adoption of a new, expansive joint-employer standard that is plainly unbounded by common law agency principles, *see Airborne Freight Co.*, 338 NLRB at 597-99 (Liebman, conc.), and which was rejected more than ten years ago by a majority of the Board. *Id.* at 597. This standard would require bargaining with any "company that, as a practical matter, determines the terms and conditions of [] employment." Request for

Review at 35. By the phrase "as a practical matter," Petitioner means in circumstances where the owner, by negotiating the economic terms of a subcontract, exercises "indirect control" over the contractor's employees, merely by setting the price it is willing to pay the subcontractor and the efficiencies in the service it requires. Petitioner urges that an entity should be deemed a joint employer on the grounds that either it is the "ultimate source of any wage increase" for contractor's employees *or* "industrial realities" render one company necessary for "effective" collective bargaining. *Id.* at 35-36. Indeed, central to Petitioner's argument is the false contention that a broader joint-employer standard is required because without "BFI, there can be no meaningful bargaining over wages, as BFI has set a maximum rate for pay and the fees paid to Leadpoint are based on the bargaining unit employees' wages. Any attempted negotiation over wages would be futile or result in a cancelled contract." *Id.* at 36. Thus, under Petitioner's test a business could be deemed a joint-employer notwithstanding that the business freely contracts at arm's length only for the ends to be achieved at a given cost, not the means by which the ends are achieved, and notwithstanding that the business eschews any role in hiring, firing, directing employees, or determining the terms and conditions of their employment.

That is not, and should not be, the law. Without question, cost, efficiency, and quality are at the heart of every owner-contractor or contractor-subcontractor arrangement. The owner will seek out low-cost, highly efficient providers, and the subcontractor will seek to maximize economic gains under their contract. Similarly, franchisors will seek out efficient high quality franchisees who can grow the business to maximize gains. Either party may refuse to enter into an agreement on the terms offered by the other. Just as BFI's customers negotiate the cost they will pay for BFI's service, so too, BFI's contract with Leadpoint bears indirectly on what compensation Leadpoint may negotiate with Petitioner. But this is true in every owner-

subcontractor agreement and may not be used as a basis to render one such entity as an employer absent other indicia of a traditional master-servant employment relationship required under the Act.

The imposition of a limit on costs related to a contract, such as the maximum amount of wages which *BFI* will reimburse under a cost-plus agreement, is "no different from the right of any commercial client to continue to accept, or to reject, a supplier of goods or services based on the consideration of price." *Hychem Constructors, Inc.*, 169 NLRB 274, 276 fn. 4 (1968) (rejecting argument that Texas Eastman's ability to approve any wage increase gives it a veto power over any collecting bargaining negotiations between contractor and its employees). As the Board held: "[w]hile a determination by the client to continue the business arrangement, because the price is favorable to him, might remotely benefit the supplier's work force, the exercise of this right by the client would not establish an employment relationship between the client and the supplier's employees." *Id.*

Board precedent has rejected the contention that any time a subcontractor "has the authority to convince the contractor to renegotiate the terms of their contract, particularly if the subcontractor's cost are affected by collective bargaining, this means that the general contractor is the one having the *de facto* control over the subcontractor's labor relations," and has observed that "if extended to its logical conclusion, [this] would mean that in virtually all contractor-subcontractor relationships, the two companies involved should necessarily be construed as joint employers whenever the employees of the subcontractor are unionized." *Airborne Freight Co.*, 338 NLRB at 606; *see also, e.g., TLI,* 271 NLRB at 799 (owner did not "determine[] the terms and conditions of employment" where owner entity attended bargaining sessions and articulated that without cost savings of approximately $200,000, the lease with contractor "was in

jeopardy," but did not demand specific reductions or make particular proposals, and specific savings were left entirely to contractor and union to negotiate).

The very nature of free competition means that there is always some market force or entity making a demand on the price and terms of services. What Petitioners seek through adoption of a new "joint-employer" standard is the right to negotiate how the owner runs its business, not how the subcontractor pays or manages its employees, and by widening the sphere of collective bargaining, to burden owner-driven innovations that affect the price, quality and ultimately the need for a subcontractor's service. Petitioner's interest in this instance is allied with the subcontractor-employer and in conflict with the putative joint-employer. But by mandating that bargaining obligations attach *only* where employer status exists under common law agency principles, Congress has structured the Act to limit the expansion of industrial disputes in ever widening circles.

The "industrial realities" test formulated by former Member Liebman[3] and also relied upon by Petitioner, implies an assessment of the degree of "economic dependence" in the owner-subcontractor relationship based on the Board's evaluation of the owner's relative economic power to set price and terms in its negotiations with the subcontractor, thereby exerting, in varying degrees, an "indirect" influence on wages, terms and conditions of employment which the subcontractor negotiates for its employees. The upshot of this test would have the Board's decision turn, not on whether the contracting entity is an *employer*, but rather, on an investigation of industry economics and the market for a subcontractor's services. This new analytical

[3] There is an uncomfortable irony in Member Liebman's advocacy for "meaningful collective bargaining" in *Airborne Freight Co.*, whereas such "meaningful collective bargaining" apparently was of little or no concern to the NLRB in *Management Training Corp.*, 317 NLRB 1355 (1995) which overturned a requirement of "meaningful collective bargaining" in *Res-Care, Inc.*, 280 NLRB 570 (1986). The only consistency between these polar positions is that in each instance the Board requires collective bargaining without regard to who is in fact the employer.

framework would quickly devolve into an expensive and time-consuming war of economic experts -- including the type of evidence the General Counsel presented to the ALJ in *Airborne Freight Co.*, 338 NLRB at 611 fn. 24 -- involving a scrutiny of market forces, pricing structures, price elasticity, barriers to entry and alternatives to the subcontractor's services, all under the vague umbrella of "industrial realities."[4] In the end, a putative employer's bargaining obligations under the Act would depend on an assessment of industry and market forces, rather than on the direct, immediate control required to establish an employer-employee relationship under the law. Congress already has rejected such an approach *both* by demanding a common law agency analysis in determining employment status *and,* not incidentally, by *specifically prohibiting* the NLRB from employing any individuals for economic analysis or from resurrecting the now, long defunct, Division of Economic Research. *See, e.g.*, 29 U.S.C. § 154(a); 93 Cong. Rec. 4136, at 4158 (1947). The Board's early penchant for regulation based on economic analysis from 1935 to 1940 by the soon-to-be discredited Division of Economic Research resulted in vigorous and outspoken opposition in Congress regularly from 1940 to 1947 when Congress once and for all capped its opposition to "regulation by economic analysis" by specifically prohibiting it in the Taft Hartley Amendments.

Simply put, Congress and the Supreme Court have directed that the Board use the common law of agency, and not other standards such as "economic reality," Request for Review at 36-37, to decide joint-employer status under the NLRA. Therefore, the Board should reject

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[4] Notably, the ALJ in *Airborne Freight Co.* rejected the testimony of the General Counsel's labor economist as too simplistic, finding the relationship was "complicated." *Airborne Freight Co.*, 338 NLRB at 611 fn. 24.

the Petitioner's request to adopt the broader economic realities test applied to determine joint-employer status under the Fair Labor Standards Act and state labor laws.[5]

III. THE FACTS OF THIS CASE DO NOT PROVIDE AN ADEQUATE BASIS TO OVERRULE 30 YEARS OF WORKABLE BOARD PRECEDENT

The Board does not have the discretion to engage in *sub rosa* rulemaking under the guise of case-specific adjudication. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974). Inviting amicus briefing, which can aid Board deliberations, is not a substitute for the full notice-and-comment rulemaking process. Notice-and-comment rulemaking provides a longer period for comment and involvement by all stakeholders, and greater deliberation by the agency.

The Board's decision here must be tailored to the facts and circumstances of this case, as must be the approach of courts adjudicating cases. *See generally Morse v. Frederick*, 551 U.S. 393, 425 (2007) (the Court "need not and should not decide" difficult issues if a narrower ground will resolve the controversy). This case is an entirely inappropriate vehicle to change the long-standing, workable joint-employer standard. It presents no compelling facts upon which to overrule more than 30 years of settled Board precedent. *See e.g., Airborne Freight Co.*, 338 NLRB at 597 n.1 (refusing to "disturb" 20 years of "settled law"). Even more than the putative joint-employers in *TLI*, *Airborne*, and *Laerco*, BFI lacks the minimal indicia of employer status, rendering this case wholly unsuitable to a proposed change in the analytical framework.

[5]The U.S. Equal Employment Opportunity Commission's arguments in its amicus brief in this matter are specious and do not argue for a test different from the NLRB's current standard.

CONCLUSION

For these reasons, the Chamber respectfully submits that the Board is constrained by the NLRA and controlling Supreme Court precedent to adhere to the current standard in determining joint-employer status, as set forth in longstanding Board authority such as *TLI* and *Laerco*.

Respectfully submitted,

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Dated: June 26, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2014, I caused a true and accurate copy of the foregoing Brief for *Amicus Curiae* The Chamber of Commerce of the United States of America to be filed electronically using the National Labor Relation Board's Electronic Filing System, and that I caused the same to be served electronically via e-mail, upon the following:

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I am over 18 years of age and not a party to this action.

I further certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 26, 2014

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