Nos. 16-1028, 16-1063, 16-1064

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

Browning-Ferris Industries of California,
doing business as BFI Newby Island Recycling,

Petitioner / Cross-Respondent,

v.

National Labor Relations Board,

Respondent / Cross-Petitioner.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, *amici curiae* certify that they have no outstanding shares or debt securities in the hands of the public, and do not have a parent company. No publicly held company has a 10% or greater ownership interest in the *amici curiae*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

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

OTHER AUTHORITIES

STATEMENT OF AUTHORSHIP

Pursuant to D.C. Circuit Rule 29(c)(5), *amici curiae* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (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 companies and professional organizations of every size, in every industry sector, 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 vital concern to the Nation's business community.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC frequently files amicus briefs on behalf of the retail industry.

The members of the Chamber and the RLC have a strong interest in the outcome of this proceeding. For decades, members of the Chamber and RLC have

relied upon the National Labor Relations Board's long-standing rule that the joint employer doctrine applies only where the putative joint employer exercises actual, direct, and plenary control over another employer's workers. The Board's new standard for joint employment, which requires only a theoretical, indirect, and limited right of control to establish joint-employer status, will destabilize labor relations in many members of the Chamber and the RLC.

SUMMARY OF ARGUMENT

In the decision below, the Board announced a new definition of a "joint employer," which will impose collective bargaining and a host of related obligations on numerous entities that the Board previously considered outside the scope of the NLRA. The Board expanded its prior definition of a joint employer in three respects. First, it overruled its prior decisions holding that *actual* control over employees is required for joint-employer status, announcing instead that mere *potential* control—for instance, a contractual right to control—is sufficient. Second, it overruled its prior decisions which held that *direct* control over employees is required for joint-employer status. Under the Board's new rule, *indirect* control—that is, control over a different employer, which itself has direct control over employees—can confer joint-employer status. Third, the Board rejected prior Board precedent holding that mere "limited and routine" control was insufficient to establish joint-employer status.

Amici agree with the arguments raised by Petitioner in its opening brief that the Board's new standard is contrary to Congress's intent, as reflected in the 1947 Taft-Hartley amendments to the NLRA, to align the definition of "employer" under the NLRA with the common law. Pet. Br. at 22-32. *Amici* submit this brief to explain in greater detail that, although the Board asserted that its changes to the prior definition of a joint employer simply restated the common law, they in fact

ignore the common law. No court has ever adopted the Board's broad definition of a joint employer, and numerous courts have rejected it. Because the Board's interpretation of the common law is incorrect, its decision cannot be enforced.

The Board's decision should be reviewed *de novo*. The Board expressly premised its decision on its (incorrect) understanding of the common law of agency, and this Court has held that the Board's interpretation of the common law of agency must be reviewed without deference. *Int'l Longshoreman's Ass'n, AFL-CIO v. NLRB*, 56 F.3d 205, 212 (D.C. Cir. 1995). Indeed, the rationales for the *Chevron* doctrine are especially inapplicable to this case. *Chevron* is premised on the theory that Congress implicitly delegated the authority to agencies to fill statutory gaps. And the statutory history of the NLRA establishes that Congress did *not* intend to delegate the authority to define an "employee" to the Board, but instead *withdrew* that authority based on its dissatisfaction with the Board's previous deviation from traditional common-law principles. Moreover, the Court should not defer to the Board based on the Board's greater expertise: although the Board may have greater expertise than a court in labor relations, interpretation of the common law is a quintessential judicial responsibility.

The Board erred in holding that the common law supports its expansion of the definition of a joint employer. A common-law rule is necessarily a rule that has achieved a judicial consensus. Yet far from establishing a judicial consensus

in support of its new rule, the Board identified not a single case endorsing any aspect of that new rule. The Board instead relied on ambiguous negative inferences from dicta in cases that had no occasion to consider whether to expand the definition of a joint employer. The Board instead should have relied on the common law's longstanding "loaned servant" doctrine, under which a user company will be deemed the employer of its supplier's employees only if the user company exercises actual control over workers' activities. A multitude of modern common-law cases have similarly held that a joint employment relationship exists only if the putative joint employer exercises actual, direct control over the workers at issue. *See, e.g.*, *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009); *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 379 (2d Cir. 2006); *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 740 (Cal. 2004).

In the absence of any judicial precedent supporting its interpretation, the Board looked instead to the Restatement (Second) of Agency. The Board's reliance on that document was misguided. The Board concluded that potential control over an employee was sufficient to establish joint-employer status, but the Restatement provision cited by the Board dealt with a different question: whether the delegation of power by a *single* employer to an employee could sever the employer-employee relationship, such that the employee did not have *any* employer. The policy considerations underlying that issue do not apply in the joint

employer context, and almost none of the cases discussed in the Restatement arose in that context.

The Board also concluded that indirect control over an employee was sufficient to establish joint employer status based on an analogy to the Restatement's "sub-servant" doctrine, which holds that if a servant has his own sub-servant, then the sub-servant is an agent of both his master and his master's master. But the Restatement's reasoning is wholly inapplicable to the distinct question that the Board actually addressed: whether an employee can have two different masters when those masters are not in a master-servant relationship with each other.

To the extent the Board relied on a restatement at all, the Board should have looked to the Restatement of Employment Law, which does include a section specifically addressing the joint-employer doctrine, rather than rely on portions of the Restatement (Second) of Agency, which did not address the joint-employer issue. The Restatement of Employment Law, like the case law, rejects the Board's new definition of a joint employer. The Board evidently believed that the common law *should* recognize its expanded definition of a joint employer, but the NLRA requires that the Board apply what the common-law rule *is*, not what the Board thinks it should be. In substituting the common-law rule with its own preferred definition of a joint employer, the Board exceeded its statutory authority.

ARGUMENT

I. This Court Does Not Owe Deference To the Board's Interpretation Of The Common Law.

The Board's decision should be reviewed *de novo*. This Court has held that where the Board interprets the common law, the Court should not defer to the Board's legal conclusions. In *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596 (D.C. Cir. 1989), this Court, facing a dispute over whether workers qualified as employees or independent contractors under the NLRA, concluded that it would be inappropriate "to extend any great amount of deference" to the Board's decision. *Id.* at 598 (quotation marks omitted). It reasoned that "Congress intended that traditional agency law principles guide the determination whether workers are employees," and the interpretation of agency law "involve[e]s no special administrative expertise that a court does not possess." *Id.* (internal quotation marks and citations omitted). Similarly, in *International Longshoreman's Ass'n, AFL-CIO v. NLRB*, 56 F.3d 205, 212 (D.C. Cir. 1995), the Court stated that "when confronted with a question regarding the meaning of an NLRA provision incorporating common law agency principles, we need not defer to the agency's judgment as we normally might under the doctrine of [*Chevron*]." In this case, the Board made clear that its new test for joint employer status was based on its understanding of the common law of agency: "In determining whether an employment relationship exists for purposes of the Act, the Board must follow

the common law agency test." *Browning Ferris Industries of California*, 362 N.L.R.B. No. 186 (2015) ("Board Op.") at 12.[1] Therefore, the Court owes no deference to the Board's conclusions.

De novo review of the Board's decision flows directly from the rationales underlying the *Chevron* doctrine. *Chevron* is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). There simply is no "statutory gap" to fill when it comes to understanding the common law. And, here, the statutory history of the NLRA confirms that Congress did *not* intend to delegate to the Board who qualifies as an "employee" under the NLRA.

In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Supreme Court upheld the Board's interpretation of the term "employee" under the NLRA, which "reject[ed] conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,'" in favor of a broader definition grounded in "the purpose of the Act and the facts involved in the economic relationship." *Id.* at 129. The Court held that deference to the Board on the definition of "employee" was warranted, noting that the task of making a "definitive limitation around the term

[1] All citations are to the Board's decision released on August 27, 2015, which begins on page 5 of the document entitled "Underlying Decision in Case" filed in on February 26, 2016.

'employee' … has been assigned primarily to the agency created by Congress to administer the Act." *Id.* at 130.

The Supreme Court's decision in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), explains what happened next:

> Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in § 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.

Id. at 256. Thus, when it enacted the NLRA's current definition of "employee," Congress made clear that the term "employee" did not have any unique meaning under the NLRA. As such, Congress *withdrew*, rather than delegated, the authority to fill statutory gaps. This statutory history supports the application of a kind of anti-*Chevron* doctrine, in which courts must avoid deferring to the agency's rationale, and must instead exercise their own independent judgment in interpreting whether the Board's interpretation of "employee" accords with the common law.

The *Chevron* doctrine is also premised on the theory that "a specific agency's expertise is greater than the court's—and therefore *that* agency is likely to understand congressional purpose, in the zone of its expertise, more profoundly than the Judiciary." *Public Citizen v. Burke*, 843 F.2d 1473, 1477 (D.C. Cir. 1988). That rationale does not apply here, because "the NLRB has no special

expertise applying . . . common law principles; that expertise lies with the Court." *NLRB v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 19*, 154 F.3d 137, 141 (3d Cir. 1998). "Common law" is reflected by the consensus of *judges* on what the law should be. *See* Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 Am. J. Comp. L. 67, 72 (2006) (describing a consensus that "the best evidence of the common law is found in the decisions of the courts"). Judges, not agencies, are the experts in elucidating the common law.

Finally, the Court should not defer to the Board because the Board itself stated that its definition of a joint employer reflected its understanding of the common law. Board Op. at 12. Where an agency eschews any reliance on its own discretionary authority, courts should take the agency at its word and review *de novo*. *Arizona v. Thompson*, 281 F.3d 248, 253-54 (D.C. Cir. 2009) (declining to apply deference because agency "did not purport to exercise discretion"); *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004) (same). Otherwise, the court would contravene the teaching of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), which requires a court to review an agency's actual reasoning in assessing the legality of agency action. *PDK Labs*, 362 F.3d at 798 (citing *Chenery*, 332 U.S. at 200).

II. The Board's Expansive Interpretation Of "Joint Employer" Misconstrues the Common Law.

Under *de novo* review, the Board's expansive new interpretation of "joint employer" is an incorrect interpretation of the common law. The "common law" is derived from the consensus of courts; yet the Board's new definition of a "joint employer" is inconsistent with that consensus as found in the relevant case law. Without precedent to support its position, the Board instead relied on the Restatement (Second) of Agency, but took the provisions of that treatise far out of context. To the extent the Board relied on a Restatement, it should have looked to the Restatement of Employment Law, which specifically addresses the common-law test for joint employment status—and specifically rejects the Board's new rule.

A. The Board's Definition of a Joint Employer Is Remarkably Broad.

In assessing whether the Board's new definition of a "joint employer" comports with the common law, the Court should begin by recognizing the breadth of that definition. The Board broadened its prior definition of a joint employer under the common law in three different respects.

First, the Board concluded that an entity could be deemed a joint employer if it had a contractual right to control workers, even if it did not actually exercise that contractual right. Board Op. at 13-14. It therefore overruled its prior decisions holding that actual control, not potential control, is required for joint employer status. *See TLI, Inc.*, 271 N.L.R.B. 798, 802-03 (1984), *enforcement granted, Gen.*

Teamsters Local Union No. 326 v. NLRB, 772 F.2d 894 (3d Cir. 1985); *Laerco Transp.*, 269 N.L.R.B. 324, 324-25 (1984); *see also* Board Op. at 16 (overruling these decisions).

Second, the Board concluded that an entity could be deemed a joint employer based on mere indirect control of a worker's terms and conditions of employment. *See* Board Op. at 14. It thus overruled its prior decisions holding that "direct and immediate" control is required for joint employer status. *See In re Airborne Freight Co.*, 338 N.L.R.B. 597, 597 (2002); *see also* Board Op. at 16 (overruling this decision).

Third, the Board overruled its prior decisions holding that that an entity could be deemed a joint employer under the common law based only on direct supervision of employees and that "limited and routine" supervision of employees did not establish a joint employer relationship. Board Op. at 16 (overruling *AM Property Holding Corp.*, 350 N.L.R.B. 998, 1001 (2007), *enforcement granted in relevant part*, *SEIU, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011)).

Taking the Board's three holdings together, the Board held that an entity's potential, indirect, and limited control over a worker may be sufficient to brand that entity as an "employer" under the common law, which could in turn require the employer to engage in collective bargaining, and subject it to the numerous related obligations that accompany such a determination under the NLRA.

The Board sought to cabin its new definition by holding that "the existence of a common-law employment relationship is necessary, but not sufficient, to find joint employer status." Board Op. at 12. It concluded that for joint employer status to apply, it must also be that "meaningful collective bargaining, is, in fact, possible." *Id.* at 13.

But that limitation simply illustrates how expansive the Board's interpretation of a "common law" employer actually is. The Board made clear that it believes meaningful collective bargaining is possible over just about anything: not just over "hiring, firing, discipline, supervision, and direction," but also over "conditions of employment," such as "scheduling," and "assigning work." Board Op. at 15. Yet, the Board concluded that the category of common-law joint employers was even *broader* than the category of employers which could engage in meaningful collective bargaining. It determined that there would be some cases in which the common law *would* recognize joint employer status, but where the connection between employer and employee is nonetheless so attenuated that meaningful collective bargaining is impossible, even under its expansive definition of collective bargaining; that is why the Board felt the need to impose a narrowing limitation on the purported common-law rule. Thus, the Board's understanding of common law employment relationships necessarily must encompass an

extraordinarily broad category of economic relationships between workers and other entities.

B. The Board's Definition of a Joint Employer Is Inconsistent With the Common Law.

Notwithstanding the immense breadth of the new definition, the Board repeatedly declared that its approach was permitted, and indeed required, by the "common law." The Board's interpretation of the common law is incorrect.

The "common law" is "[t]he body of law derived from judicial decisions." *Black's Law Dictionary* 334 (10th ed. 2014). A rule is characterized as the "common law" rule if it reflects "the dominant consensus of common-law jurisdictions." *Field v. Mans*, 516 U.S. 59, 70 n.9 (1995). Thus, to show that the "common law" recognizes joint-employer status in the context of a contingent, indirect, or limited relationship, the Board must show a "consensus" of "judicial decisions" recognizing a joint-employer relationship under those circumstances.

Yet the Board identified *no* common-law case supporting *any* aspect of its new definition of "joint employer." It identified no case holding that joint employer status could be found based on potential rather than actual control; no case holding that joint employer status could be found based on indirect rather than direct control; and no case holding that joint employer status could be found based on merely limited and routine control. That, alone, is sufficient to show that the Board's rule does not reflect the "common law." *See Bettis v. Islamic Rep. of Iran*,

315 F.3d 325, 333 n.9 (D.C. Cir. 2003) (rejecting party's interpretation of common law when "no case" supported that interpretation).

The Board insisted that the Third Circuit "endorsed" its test in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), and that the Board was merely returning to the test adopted in *Browning-Ferris*. Board Op. at 10, 13. That is a gross misreading of that 1982 opinion. In that *Browning-Ferris* decision, the court held that two employers are joint employers if they "share or co-determine those matters governing the essential terms and conditions of employment." 691 F.2d at 1123 (alterations omitted). This definition does not support the Board's new rule: When one employer exercises actual, direct, and plenary control over workers, and another exercises only hypothetical, indirect, or limited control, one would not ordinarily characterize the employers as "sharing" or "codetermining" the "essential terms and conditions of employment." Nor do the facts of *Browning-Ferris* support the Board's new rule. The company found to be a joint employer in that case exercised actual, direct control over employees, making it unnecessary for the Third Circuit to consider the outer bounds of the definition of a joint employer. *See id.* at 1120 (noting that company held to be joint employer directed employees' activities and had the power to fire employees).

The Board apparently concluded that because *Browning-Ferris* did not explicitly rule out joint-employer status in the context of hypothetical, indirect, or limited control, it implicitly supported the Board's new rule recognizing joint-employer status in these circumstances. *See* Board Op. at 10. That inference was an unsound basis from which to derive a common law rule. The common law requires that courts examine the *reasoning* of relevant cases. *See In re Heritage Bond Litig.*, 546 F.3d 667, 677-79 (9th Cir. 2008) (concluding that when interpreting federal common law, the court should "look to the reasoning of cases determining the appropriate scope of similar . . . orders"). Yet nothing in *Browning-Ferris*'s reasoning remotely adverts to the Board's expanded definition of a joint employer. Moreover, as the dissent pointed out, since *Browning-Ferris*, courts—including the Third Circuit—have enforced Board orders which used the Board's "direct and immediate" formulation, without identifying any inconsistency with *Browning-Ferris*. *See Servs. Emps. Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 445-46 (2d Cir. 2011); *Gen. Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894, 894 (3d Cir. 1985). *Browning-Ferris* thus does not support the Board's position that the common law requires adoption of its expanded definition of a "joint employer."

The Board also relied on *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), which characterized the joint employer inquiry as whether the putative joint

employer "possessed" sufficient control over its employees' work. *Id.* at 481. In the Board's view, the fact that the *Greyhound* court used the word "possessed," rather than "exercised," is an implicit endorsement of its new rule. Board Op. at 13. The Board's interpretation of *Greyhound* is indefensible. First, the inference drawn by the Board from the verb "possessed" is suspect: One would not say that a person "possesses" an object if he holds hypothetical, indirect, or limited control over that object. *See, e.g., Delta & Pine Land Co. v. Sinkers Corp.*, 177 F.3d 1343, 1350 (Fed. Cir. 1999) (defining possession as "[h]aving control over a thing with the intent to have and *to exercise* such control") (quoting Black's Law Dictionary 1163 (6th ed. 1990)) (emphasis added). More importantly, nothing whatsoever in the facts of *Greyhound* supports an inference that the Court's selection of the verb "possessed" rather than "exercised" shows an intent to broaden the common-law definition of a joint employer. The actual holding of *Greyhound* was that the Board's decision regarding whether a firm was a joint employer was unreviewable in a proceeding to enjoin a representation election; the Court's two-sentence discussion of the joint employer test was dicta. *See* 376 U.S. at 481.

By contrast, as noted in the dissent, there is a venerable common law doctrine, the "loaned servant" doctrine, that is directly relevant to this case. That doctrine addresses the legal status of workers of a "supplier" company who are loaned out to assist another "user" company. Cases involving loaned workers are

the paradigmatic situations in which questions of joint-employer status arise, and the Board stated that the increased number of such workers was the very reason it was reconsidering its prior joint-employer decisions. Board Op. at 11.

"[U]nder the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services.'" *Shenker v. Baltimore & O.R. Co.*, 374 U.S. 1, 6 (1963). The dissent cited several cases from the 1940s and 1950s—the era in which the NLRA's definition of "employee" was enacted—that reached the same conclusion. Board Op. at 28-29. Modern authorities take the same view. *See, e.g.*, *Williams v. Shell Oil Co.*, 18 F.3d 396, 399 (7th Cir. 1994) ("[O]ne cannot be considered a loaned servant unless the power to control the employee is totally given over to the second employer"); *accord McDonald v. Ponderosa Enters., Inc.*, 352 P.3d 14, 19 (Mont. 2015); *Tarron v. Bowen Mach. & Fabricating Co.*, 213 P.3d 309, 316-18 (Ariz. Ct. App. 2009), *judgment aff'd*, 235 P.3d 1030 (Ariz. 2010). Yet, despite its direct pertinence to this case, the Board ignored the loaned servant doctrine altogether.

Modern common-law cases likewise hold that actual, not hypothetical, control is necessary for a finding of joint-employer status. *Doe I*, 572 F.3d at 683 (concluding that Wal-Mart was not the joint employer of workers because its control "[did] not constitute an 'immediate level of 'day-to-day' control . . . so as to create an employment relationship"); *Gulino*, 460 F.3d at 379 (concluding that

the common law employment standard "focuses largely on the extent to which the alleged master has 'control' over the day-to-day activities of the alleged 'servant'" and requires "a relationship where the level of control is direct, obvious, and concrete, not merely indirect or abstract."); *Patterson*, 333 P.3d at 736 (explaining that a franchisor is not the employer of franchisees' employees without "sufficient control of [the] franchisees' day-to-day operations"); *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 414 (4th Cir. 2015) (explaining that a relevant factor in the joint employer inquiry is "day-to-day supervision of the individual, including employee discipline"); *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1256 (11th Cir. 2004) (concluding that no joint employment relationship because there was "no evidence that [the company] had direct control over [the worker], rather than the indirect control over a service provider's employees that a customer may obtain by contracting with that service provider."). The Board labored to try to distinguish some of these cases, which were cited by the dissent, Board Op. at 17 n.94, but did not identify a single case disagreeing with this line of authority or endorsing the Board's view of the joint employer doctrine.

Indeed, when the authorities cited by the majority and the dissent are lined up side by side, this case is not even close. The majority relied on tenuous inferences from dicta in cases not addressing the question presented, while the dissent identified both a long-standing common law doctrine and a line of modern

cases that directly reject the majority's position. The Board's expansion of the definition of a joint employer therefore is an incorrect interpretation of the common law.

C. The Restatement of Agency Does Not Support the Board's Decision.

With no case law to support its position, the Board's common law analysis relied primarily on the Restatement (Second) of Agency. According to the Board, the Restatement's definition of an "employee" supports its view that *potential* control is sufficient for joint employer status. Board Op. at 13-14. And, the Board held, the Restatement's recognition of sub-servant agency relationships supports the Board's view that *indirect* control is sufficient for joint employer status. *Id.* at 14. The Board erred on both points.

1. The Restatement's Definition of "Employee" Does Not Support the Board's Expansion of the Joint Employer Doctrine.

The Board held that even if a putative joint employer did not actually exercise control over a class of workers, the mere potential to exercise control was sufficient to establish joint employer status. *Id.* at 13-14. In reaching that conclusion, the Board cited Restatement (Second) of Agency, Section 2(2), which refers to a master as someone who "controls or has the right to control" another, as well as Section 220(2), which states that "[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right

to control." From these provisions, the Board inferred that the mere "right to control" another, and the existence of a mere "agreement" to exercise control, are sufficient to establish joint-employer status. Board Op. at 13-14.

That inference was improper. Sections 2 and 220 do not address joint employer status, *i.e.*, whether a worker has two employers rather than one. They address whether a worker is an "employee" at all, *i.e.*, whether a worker has one employer rather than none. The comments and illustrations in these sections uniformly discuss the latter question rather than the former question, and the cases cited in the Restatement almost overwhelmingly discuss situations involving only one putative employer.[2]

These two questions are different. The rationale for recognizing an employer-employee relationship based on a mere "right of control" does not extend to the joint-employer context. In assessing whether a worker is an employee of *any* employer, Section 220 of the Restatement recognizes that if an employer retains its right to control an employee, it cannot sever the employer-employee relationship merely by allowing the employee to work autonomously. This is

[2] *Amici* are aware of only two cases cited in Section 220 involving joint employers, out of the dozens included in that provision. In one, the issue was not whether a joint relationship existed, but whether any employment relationship existed at all between a worker and two linked companies. *Estate of Suskovich v. Anthem Health Plans of Va., Inc.*, 553 F.3d 559, 563-69 (7th Cir. 2009). In the other, Section 220 was mentioned only in dicta in a footnote. *See McLandrich ex rel. McLandrich v. S. Cal. Edison Co.*, 917 F. Supp. 723, 730 n.6 (S.D. Cal. 1996).

because Section 220 is located in the section of the Restatement which defines the circumstances in which an employer may be held vicariously liable for an employee's torts. Thus, Section 220 states that if an employer has the right to closely supervise an employee, but does not exercise that right, it is still vicariously liable for the employee's torts. This reflects familiar principles of tort law: if the mere delegation of authority extinguished vicarious liability, employers would have a perverse incentive to supervise their workers *less*, so as to escape liability for workers' actions. That outcome would be inconsistent with one basic goal of the doctrine of vicarious liability, which is to create an incentive for employers to supervise their workers *more*. *Arizona v. Evans*, 514 U.S. 1, 29 n.5 (1995) (explaining that "the risk of *respondeat superior* liability encourages employers to supervise more closely their employees' conduct").

That reasoning does not apply to the joint-employer context, where employees are, by definition, being directly supervised by at least one employer. The vicarious liability doctrine is designed to ensure that employees are supervised by *someone*, not that employees are supervised by multiple entities simultaneously. Notably, the Board's stated rationale for expanding the definition of a joint employer was not to expand the scope of vicarious liability, but instead to increase the number of participants in collective bargaining. Board Op. at 12. There is no

sign that the Restatement considered this rationale to be pertinent in adopting the definition of an employee.

Given that the Restatement's definition of an employee is based on cases involving only one putative employer, it was improper for the Board to reappropriate Section 220's language to the joint-employer context. The Restatement is not a statute, whose text must be followed even in cases the legislature may not have envisioned. It is an effort to restate the common law. If there are no cases establishing a particular proposition, the Restatement—untethered from the underlying case law—cannot be used to support that proposition. *See Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 510 (7th Cir. 1997) (en banc) (Posner, J., concurring and dissenting) (criticizing use of the Restatement as a "surrogate statute"), *judgment aff'd*, 524 U.S. 742 (1998); *Patton Boggs, LLP v. Chevron Corp.*, 825 F. Supp. 2d 35, 41 (D.D.C. 2011) ("[T]he Restatement is not a free-standing body of law that this Court can apply in the absence of state or local law adopting it."). The Board's reliance on the Restatement, without reference to the underlying case law, was therefore contrary to law.

2. The Restatement's Sub-servant Doctrine Does Not Support the Board's Expansion of the Joint Employer Doctrine.

In addition to holding that *potential* control was sufficient to establish joint-employer status under the common law, the Board held that *indirect* control was

sufficient to establish that status. The Board relied on Restatement (Second) of Agency § 5, which sets forth the common law's "sub-servant" doctrine, under which a workman's helper is an agent of both the workman and the employer.

Contrary to the Board's decision, however, the sub-servant doctrine does not support its definition of a joint employer. The sub-servant doctrine applies when both the servant and the sub-servant are servants of a single master: that is, when there is a linear chain linking master to servant, and servant to sub-servant. The Restatement makes clear that the sub-servant doctrine is oriented around the fact that both the servant and sub-servant are servants of a *single* master. It provides:

> The situations in which a subservice relation can be found are few, since normally a servant subject to the master's control as to his physical conduct does not employ one subject to his orders other than a subordinate employed by him for the master. However, there are a few situations in which a servant, although subject to control as to his conduct by his master, is authorized to employ his own assistants, paying them and being responsible to the master for their conduct. In such cases, the basis for the finding of subservice appears to be that the subservants are subject to control, in their physical movements, both by their immediate employer and by the latter's master. The employing servant in this situation is in the position of a master to those whom he employs but these are also in the position of servants to the master in charge of the entire enterprise.

Restatement (Second) of Agency § 5(2), reporter's notes 36. In other words, when a sub-servant's master is himself a servant, the sub-servant will have two masters: his own master, and his master's master. *See Mendoza v. Rast Produce Co.*, 140 Cal. App. 4th 1395, 1405-06 (2006) (explaining that a subagent is the agent of a principal because of a fiduciary duty that flows from the principal, to the agent, to

the subagent); *Schmidt v. Burlington N. & Santa Fe Ry. Co.*, 605 F.3d 686, 689-90 (9th Cir. 2010) ("A plaintiff can proceed under [the sub-servant] theory by showing his employer was the common-law servant of the [master]").

In the joint-employer context, however, one employer is not the servant of the other. Instead of a single line linking master to servant to sub-servant, there are two separate relationships: one between the employee and his first employer, and one between the employee and his second employer. The transitive property that makes a sub-servant the agent of his master's employer, even absent direct control by the employer, does not apply when one servant has two unaffiliated employers.

The Restatement's discussion of the sub-servant doctrine does not support the Board's expansion of the joint employer doctrine. That discussion actually suggests the sub-servant relationship is the *only* circumstance in which a servant can have two masters, thus precluding *any* joint employer doctrine. *See* Restatement (Second) of Agency § 5, reporter's notes 38 ("The conception of two masters to whom the servant must be obedient is perhaps even more difficult than that of an agent with two principals, one of whom at least is not his master. But . . . it would appear necessary to recognize the existence of subservants."). This view is inconsistent with the weight of modern authority, which does recognize a joint-employer doctrine under certain circumstances. It demonstrates, however, that the

Board could not responsibly characterize the Restatement (Second) of Agency as *supporting* its new definition of a joint employer.

D. The Restatement of Employment Law Confirms That the Board's Interpretation of the Common Law is Wrong.

As shown above, the Restatement (Second) of Agency does not specifically speak to the definition of a joint employer and the Board ignored the most relevant case law for determining the definition of an employer in the joint employer context. Moreover, the Restatement of Employment Law, which was released in 2015, contains a section addressing that specific question. The Board cited this newer Restatement in passing, but failed to address that it squarely rejects the Board's approach to the joint-employer doctrine.

In its section addressing the joint employer doctrine, the Restatement of Employment Law gives the following illustration:

> A is a driver of a large concrete-mixer truck owned and operated by the P corporation. The R construction company rents the truck for a particular project. P assigns A to operate the truck in accord with P's mechanical and safety specifications while it is used on R's project. R's supervisors tell A what work they want the truck to accomplish. A's compensation is set by P and is paid by P. If dissatisfied with A, R can request that P assign another driver. Only P can discharge A.
>
> A is an employee of P but not of R. P alone sets the terms of A's compensation and controls the details of how A is to operate the truck in providing service to R.

Restatement of Employment Law § 1.04 illus. 5. This illustration perfectly illustrates the error in the Board's new approach. In this example, R has the power

to terminate an employee of P, but that power is indirect rather than direct: "If dissatisfied with A, R can request that P assign another driver. Only P can discharge A." Moreover, R's direct control is "limited and routine"—R's supervisors merely "tell A what work they want the truck to accomplish," as opposed to directing A on how to perform the work.

Under the Board's prior approach to joint employment status, A would not have been deemed an employee of R, because R's direct power was "limited and routine," and its power to terminate was indirect rather than direct. Under the Board's new approach, however, A is an employee of R, because "limited and routine" control, as well as the indirect power to terminate, are sufficient to establish joint-employer status.

But the Restatement of Employment Law states that in this scenario "A is an employee of P but *not* R." Restatement of Employment Law § 1.04 illus. 5 (emphasis added). In other words, the Board's prior approach was the correct reflection of the common law, as codified by the Restatement of Employment Law, and the Board's new approach is not. This portion of the Restatement of Employment Law, which directly addresses the problem at hand, is far more pertinent than the portions of the Restatement (Second) of Agency cited by the Board, which have nothing to do with joint employer status.

The above example from the Restatement of Employment Law is strikingly similar to *TLI, Inc.*, 271 N.L.R.B. 798 (1984), which the Board overruled in the decision below. *TLI* involved drivers employed by a company, TLI, which performed deliveries on behalf of another company, Crown Zellerbach. *Id.* at 798. Crown instructed the drivers "as to which deliveries are to be made on a given day; however, the drivers themselves select[ed] their own assignments, on a seniority basis." *Id.* at 799. Crown also supplied "incident reports" to TLI in the event of worker misconduct, but did not itself take disciplinary action against workers. *Id.* The Board concluded that Crown was not a joint employer because its control was limited and routine, and because Crown did not hire or fire the workers. *Id.* The Board's *TLI* decision almost perfectly mirrors the logic of the Restatement of Employment Law. *See also Laerco*, 269 N.L.R.B. at 324-25 (concluding that no joint employment relationship existed based on facts nearly identical to *TLI*). Under the Board's new rule however, Crown would be a joint employer. As the Restatement of Employment Law makes clear, *TLI* and *Laerco* were right and the decision below was wrong.

* * *

The Board repeatedly insisted that its broadened definition of a joint employer reflected its interpretation of the common law. Board Op. at 12. But the Board left little doubt that it was not solely motivated by a dispassionate effort to

conform its doctrine to the judicial consensus. The Board stated that the expansion of the temporary services industry spurred it to enact its new rule, emphasizing that the "primary function and responsibility of the Board is that of applying the general provisions of the [NLRA] to the complexities of industrial life." Board Op. at 11 (alterations and quotation marks omitted). And the Board's decision concluded with the following coda: "It is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace." *Id.* at 21. It is clear that, as a matter of policy, the Board felt that the common law *should* recognize a broad joint employer doctrine, and it was motivated by that goal in purporting to expand the NLRA's concept of a joint employer.

Whether the Board's view is good labor relations policy can reasonably be debated. Whether the Board's view accurately reflects the common law, however, cannot. There is no judicial authority at all—much less a judicial consensus sufficient to establish a common-law rule—that joint-employer status can be recognized on mere potential, indirect, or limited control. To recognize a joint employment relationship under those circumstances would contravene Congress's intent that in defining an employee under the NLRA, the Board must follow the common law.

CONCLUSION

The Court should grant the petition for review and deny the cross-petition for enforcement of the Board's order.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

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CERTIFICATE OF SERVICE

I certify that on June 14, 2016, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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