[ORAL ARGUMENT NOT YET SCHEDULED]
CASE NO. 24-1003
[Consolidated with Nos. 24-1014, 24-1016, 24-1021, 24-1022]

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

ALPHABET WORKERS UNION-COMMUNICATION WORKERS OF AMERICA, LOCAL 9009,
Petitioner,

- v. -

NATIONAL LABOR RELATIONS BOARD,
Respondent,

COGNIZANT TECHNOLOGY SOLUTIONS U.S. CORPORATION; GOOGLE LLC,
Intervenors for Respondent.

On Petition for Review from the National Labor Relations Board
373 NLRB No. 9 (Jan. 3, 2024)

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL RETAIL FEDERATION, AND COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF GOOGLE LLC AND COGNIZANT TECHNOLOGY SOLUTIONS U.S. CORPORATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the Chamber of Commerce of the United States of America ("Chamber"), National Retail Federation ("NRF"), and Coalition for a Democratic Workplace ("CDW") certify as follows:

A. Parties and Amici

Except for the Chamber, NRF, and CDW, all parties, intervenors, and amici appearing before the National Labor Relations Board and this Court are listed in the Initial Brief of Petitioners/Cross-Respondents.

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Chamber, NRF, and CDW hereby state as follows:

The Chamber is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

NRF identifies the following (1) parent companies and (2) publicly held corporations with an ownership interest of 10 percent or more in NRF: None.

CDW hereby identifies the following (1) parent companies and (2) publicly held corporations with an ownership interest of 10 percent or more in CDW: None.

B. Rulings Under Review

The ruling under review is the Decision and Order of the National Labor Relations Board in the matter styled *Cognizant Technology Solutions U.S. Corp.,*

Google, LLC and Alphabet Workers Union-Communication Workers of America, Local 9009, NLRB Case No. 16-CA-326027, reported at 373 NLRB No. 9, dated January 3, 2024 ("Decision and Order"). In that Decision and Order, the Board took notice of its findings denying Petitioners' request for review in the underlying representation proceeding, NLRB Case No. 16-RC-305751, reported at 372 NLRB No. 108, dated July 19, 2023 ("Original Decision").

C. Related Cases

Google LLC's ("Google") and Cognizant Technology Solutions U.S. Corporation's ("Cognizant") petitions for review were transferred to this Court by the Fifth Circuit. *See* Transfer Order, *Google, LLC v. NLRB*, No. 24-60019 (5th Cir. Jan. 26, 2024). None of the consolidated cases have previously been before this Court, and counsel for the Chamber, NRF, and CDW are unaware of any other related cases pending before this Court or any other court.

/s/ Pratik A. Shah
Pratik A. Shah

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 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 curiae briefs in cases, like this one, that raise issues of vital concern to the business community in the United States.

Established in 1911, the National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF provides courts with the prospective of the retail industry on important legal issues impacting its members.

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

To ensure that the retail community's position is heard, the NRF often files *amicus curiae* briefs expressing the views of the retail industry on a variety of topics.

The Coalition for a Democratic Workplace (CDW) represents millions of businesses that employ tens of millions of workers across the country in nearly every industry. Its purpose is to combat regulatory overreach by the National Labor Relations Board, which though expansive interpretations of its own authority has harmed employers, employees, and the national economy.

Amici have a strong interest in the outcome of this proceeding. For decades, *amici* and their members have relied on the National Labor Relations Board's longstanding rule that the joint employer doctrine applies only to the common-law meaning of "employer" and thus does not ordinarily create a joint-employment relationship with the workers of an independent contractor. *Amici* have a strong interest in preserving that appropriate line because their members frequently litigate claims of joint employment under the National Labor Relations Act. Indeed, *amici* recently prevailed in their challenge to the Board's latest attempt to erase the line between routine contracting and joint employment through its 2023 rulemaking. *See Chamber of Com. v. NLRB*, No. 6:23-cv-00553, 2024 WL 1203056, at *7 (E.D. Tex. Mar. 18, 2024) (setting aside the Board's "Standard for Determining Joint Employer Status," 88 Fed. Reg. 73,946 (Oct. 27, 2023)). A ruling that incorrectly expands the scope of the joint-employer doctrine by permitting a finding of joint employment

based on routine aspects of contracting would effectively erase that line, and subject *amici* and their members to costs and litigation that Congress never intended. It also would destabilize labor relations for many members of *amici*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the National Labor Relations Act, Congress carefully circumscribed the test for determining who is and is not an "employer" of an "employee" under the Act. Many rights and obligations flow from status as an employer or employee under the Act, including the obligation to bargain collectively the terms and conditions of employment. Congress had sound policy reasons for engaging in this careful line drawing, because not every working relationship could accommodate collective bargaining. Most pertinent here, Congress did not want to force contractors into collective bargaining relationships with individuals over whom they lacked sufficient control to negotiate the terms and conditions of employment. Congress thus opted to significantly narrow the scope of employment under the Act to individuals with common-law agency relationships.

The same careful line drawing applies when more than one entity is on the scene. The Act does not expressly address whether an employee may have more than one employer. The Board and the courts nevertheless have held that two entities may be "joint employers" of the same employees—and thus must each collectively bargain—if they both exercise substantial, direct, and immediate control over

working conditions. But the common law has never permitted a joint-employment finding based on the quotidian aspects of common-law contracting relationships. Indeed, almost every contracting relationship requires setting basic parameters, defining the terms of those contracts, or collaborating with a third party in achieving common goals.

Thus, six years ago, this Court held that the Board's joint-employer test must "hew to the relevant common-law boundaries that prevent the Board from trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts." *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1219-1222 (D.C. Cir. 2018) ("*Browning Ferris II*"). The Board then defined the boundaries between employers and company-to-company contractors in its 2020 rule on joint employment.

This case involves those very boundaries: a routine contracting relationship between Google and Cognizant that falls well outside the boundaries of common-law employment. Yet the Board swept Google's day-to-day contracting decisions into a "joint employment" relationship with Cognizant. To make matters worse, the Board ordered Google to bargain with Cognizant's employees over their terms and conditions of employment without so much as considering whether Google had sufficient control over those terms to meaningfully negotiate a comprehensive collective bargaining agreement.

That is simply not how joint employment works. By blurring the line between contracting and employment relationships, the Board's application of its rule inevitably imposes collective bargaining obligations on entities that the Act declares off limits. The Board's amorphous conception of joint employment here would collapse long-established and routine contracting practices into unworkable collective bargaining relationships that disincentivize parties from contracting at all. In applying its rule in this way, the Board issued an order in this case that is not only contrary to law, but also arbitrary and capricious.

ARGUMENT

I. THE BOARD'S JOINT-EMPLOYER FINDINGS MUST COLOR WITHIN THE LINES OF THE COMMON LAW

A. Common-Law Agency Principles Govern the Employment Relationship Under the NLRA

Almost 90 years ago, Congress enacted the National Labor Relations Act to "promot[e] stable collective-bargaining relationships" by giving employees freedom of association and imposing obligations on employers to bargain collectively with employee representatives. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). But the Act originally gave little guidance on who is an "employee" or "employer."

In 1944, the Supreme Court in *NLRB v. Hearst Publications, Inc.* construed employee and employer under the Act based on "economic" and "policy" considerations within the labor field, rather than "technical concepts" sounding in

the common law of agency. 322 U.S. 111, 129, 132 (1944). The Court reasoned that "the broad language of the Act's definitions . . . reject[s] conventional limitations," such that employment relationships should be "determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." *Id.* Under that economic-realities test, the Act's reach was "not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'" *Id.* at 126.

Congress responded to *Hearst*'s economic-realities test by amending the Act in 1947. In the Taft-Hartley Amendments, Congress first amended the statutory definition of "employer." That definition previously covered persons "acting in the interest of any employer," but Congress changed the definition to those "acting as an agent of an employer." 29 U.S.C. § 152(2). Congress then changed the definition of "employee" to specifically exclude an independent contractor. *Id.* § 152(3).

As the Supreme Court later explained, "[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). For good reason: employers needed to be able to exercise substantial control over their employees' terms and conditions of employment to meaningfully bargain. *See* 29 U.S.C.

§ 158(d) (requiring employers to bargain "wages, hours, and other terms and conditions of employment").

Courts must therefore "apply the common law agency test here in distinguishing an employee from an independent contractor." *United Ins.*, 390 U.S. at 256; *see also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (explaining that Congress "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine"); *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 880 (D.C. Cir. 1978) (noting that the Taft-Hartley Act's legislative history provides "clear evidence that Congress did not intend that an unusually expansive meaning should be given to the term 'employee' for the purpose of the Act").

B. Common-Law Principles Also Apply to "Joint Employment"

These principles apply equally to determining who is a "joint employer." The Board and the courts have held that two entities may be joint employers of the same employees—and thus must each collectively bargain. *See, e.g.*, *Franklin Simon & Co.*, 94 N.L.R.B. 576, 579 (1951); *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). But the Act does not expressly define "joint employer." Instead, like the definition of "employer" or "employee," Congress expected the Board and the courts to apply common-law agency principles. *See Community For Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989).

In *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982) ("*Browning-Ferris I*"), the Third Circuit articulated a joint-employer standard around which both the Board and many courts (including this Court) began to coalesce. *See, e.g.*, *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325 (1984); *see also Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 440 (D.C. Cir. 2004). That standard focused on whether each alleged employer substantially and directly affected matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *Browning-Ferris I*, 691 F.2d at 1122. It also drew from the common law a straightforward framework: firms were "joint employers" if they exercised "direct," "immediate," and "substantial" control over the same employees' essential terms of employment. *Id.* And the standard preserved the critical distinction between "contracting" and "employment" under the common law. Some control over a "subcontractor's work [would] not eliminate the status of each as an independent contractor or make the employees of one the employees of the other." *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689-690 (1951).

That was the landscape until 2015, when the Board decided in *Browning-Ferris* that "compelling policy reasons" warranted a different approach. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 1600, 1611 (2015). The Board announced a new test for joint employment, stating the issue in similar terms to

Hearst's economic-realities test—as an update to reflect "the current economic landscape." *Id*. at 1599. The Board applied its revised standard to a "supplier firm" (Leadpoint) that contracted to sort materials and clean and maintain equipment and premises for a "user firm" (BFI) that operated a recycling plant. *Id.* at 1600. From this limited relationship, the Board concluded that BFI was the joint employer of Leadpoint's employees. *Id*. at 1617-1618.

This Court later reversed in part, holding that the Board failed to differentiate between those aspects of control "relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships." *Browning-Ferris Indus. II*, 911 F.3d at 1220-1222. In particular, the Court concluded that the Board failed to "erect some legal scaffolding that keeps the inquiry within traditional common-law bounds and recognizes that '[s]ome such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees.'" *Id.* at 1220 (alteration in original) (quoting *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 718 (2d Cir. 1943)). Such terms were "far too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis." *Id.*

In response to *Browning-Ferris II*, the Board largely reinstated the longstanding joint-employer standard that had been in place for decades until 2015. *See* 85 Fed. Reg. 11,184 (Feb. 26, 2020), codified at 29 C.F.R. § 103.40 ("2020

rule"). The 2020 rule provides that an entity is "a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment." 29 C.F.R. § 103.40(a) (2020). To meet that test as to another employer's employees, the second entity "must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." *Id*.

In 2023, a newly constituted Board attempted to adopt a new interpretation that would have erased the longstanding distinctions codified in the 2020 rule. The Board's newfound interpretation would have imposed joint employment on firms merely for possessing the authority to control (whether directly, indirectly, or both) one or more broadly defined terms and conditions of employment. And the Board claimed this sweeping interpretation required reversal of the 2020 rule promulgated just three years earlier. But in March 2024, the U.S. District Court for the Eastern District of Texas set aside the Board's 2023 rule and preserved the Board's 2020 rule. Notably, the court held that the 2023 rule "would treat virtually every entity that contracts for labor as a joint employer because every contract for third-party labor has terms that impact, at least indirectly, at least one of the specified 'essential terms and conditions of employment.'" *Chamber of Com.*, 2024 WL 1203056, at

*14. That "reach," the court concluded, "exceeds the bounds of the common law and is thus contrary to law." *Id.*[2]

II. THE BOARD'S APPLICATION OF THE JOINT EMPLOYER RULE SWALLOWS THE COMMON-LAW DISTINCTION BETWEEN ROUTINE CONTRACTING AND EMPLOYMENT

Everyone (including the Board) agrees that the 2020 rule should govern this case. In promulgating that rule, the Board conscientiously preserved the distinction between "joint-employer status and routine features of company-to-company contracting." 85 Fed. Reg. 11,212. That made sense. The Supreme Court recognized that one of the core purposes of the Taft-Hartley Amendments was to have "courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *United Ins. Co.*, 390 U.S. at 256. The Court later held that distinguishing contractors from employees requires considering the hiring party's control over "the manner and means by which the product is accomplished." *Nationwide Mut. Ins. Co., v. Darden*, 503 U.S. 318, 323-324 (1992) (quoting *Reid*, 490 U.S. at 751-752). Citing these common-law principles, this Court recognized that any "joint employer" rule promulgated by the Board must recognize that "[s]ome such supervision is inherent in any joint undertaking, and does not make

[2] The Board initially appealed to the Fifth Circuit, but has since moved to dismiss its appeal voluntarily. *See National Labor Relations Board, et al. v. Chamber of Commerce, et al.*, Case No. 24-40331, Dkt. 30 (5th Cir. July 19, 2024).

the contributing contractors employees." *Browning-Ferris II*, 911 F.3d at 1220 (alteration in original).

Yet, in its order here, the Board ignored that key principle. It determined that Google was a joint employer of Cognizant's employees largely because Google creates the "training charts," maintains "digital tools and processes that Cognizant employees use," requires a "minimal level of benefits" (that substantially track legal requirements), and schedules work around Google's operating hours and needs. Original Decision at 1-2. But, as Petitioners argued (Br. at 16-22), that rationale involves the same kind of problematic blurring of the common-law lines between employment and contracting that Congress and the Board's 2020 rule rejected.

That Google's contract set the benefits for which it would reimburse Cognizant is irrelevant to joint employment. *See* Original Decision at 3 ("This contract requires that Google pay Cognizant for personnel, based on monthly rates provided"). This type of arrangement—a so-called "cost-plus" contract—is "a frequent feature of third-party contracting and sub-contracting relationships." *Browning-Ferris II*, 911 F.3d at 1220-1222. And this Court and the Board have rejected the use of such arrangements as evidence of joint employment. *Id.*; *see also* 29 C.F.R. § 103.40(c)(1) (2020) ("An entity does not exercise direct and immediate control over wages by entering into a cost-plus contract (with or without a maximum reimbursable wage rate).").

It also makes no difference that Google may have set objectives, basic ground rules, and expectations for Cognizant's employees. *See* Original Decision at 1 (noting Google "drafts and maintains 'workflow training charts' which govern the details of employees' performance of specific tasks," and provides "quality 'rubrics'"). This Court has held that "employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status." *Browning-Ferris II*, 911 F.3d at 1220. Indeed, courts and the Board have long understood that a contractor's mere oversight over a subcontractor's work does "not eliminate the status of each as an independent contractor." *Denver Bldg. & Constr. Trades Council*, 341 U.S. at 689-690; *see also Southern Cal. Gas Co.*, 302 N.L.R.B. 456, 461-462 (1991) (Although "[a]n employer receiving contracted labor services will of necessity exercise" a certain amount of control over the contractor, that "is not in and of itself, sufficient justification for . . . a joint employer finding.").

Although the Board here relied on minimum standards required by Google's contract with Cognizant to find joint employment, the Board's rule excludes those standards from consideration. For example, the Board should not have even considered whether Google required Cognizant to provide employees "paid sick days per year," "paid parental leave," "tuition reimbursement," or "employee assistance program support sessions."" Original Decision at 2. The Board expressly

stated in its rulemaking that establishing minimum "standards set by contract," 85 Fed. Reg. at 11,203, where (like here) the "direct employer is permitted to pay more," cannot be used as evidence of joint employment, *Id.* at 11,193.

The same goes for "establishing an enterprise's operating hours or when it needs the services provided by another employer." 29 C.F.R. § 103.40(c)(3) (2020). Accordingly, Google's determination of work hours is beside the point. Similarly, regardless whether Google set "minimal standards of performance or conduct," or required compliance with "government regulation," the Board's rule recognizes that none of that has any bearing on joint employment. *Id*. §§ 103.40(c)(4)-(5); *see generally* 85 Fed. Reg. at 11,194 ("wage floors, or other measures to encourage compliance with the law or to promote desired business practices generally will not make joint-employer status more likely under the Act. Typically, such provisions will constitute the setting of basic ground rules or expectations for a third-party contractor.").

The Board sidestepped those limitations required by its rule and made no effort to distinguish the facts it invoked to justify its joint employer finding from the routine aspects of contracting that do "not count under the common law" test for employment. *Browning-Ferris II*, 911 F.3d at 1221. The Board's lack of explanation is unsurprising. These facts are indistinguishable from the kind of "global oversight" that this Court has held to be "fully compatible with the

relationship between a company and an independent contractor." *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599-600 (D.C. Cir. 1989).

The Board's approach here smacks of the Supreme Court's pre-1947 approach of determining employer status based on "underlying economic facts rather than technically and exclusively by previously established [common-law] legal classifications" (*i.e.*, independent contractors versus employers). *Hearst Publ'ns*, 322 U.S. at 129. But Congress soundly rejected that approach in the Taft-Hartley Amendments. *See Local 777*, 603 F.2d at 905 (Congress labeled *Hearst* approach "fanciful"); *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167 (1971) ("Congress reacted" to *Hearst* by amending the NLRA.). The Board should not be permitted to resurrect it here.

III. THE BOARD'S APPLICATION OF THE JOINT EMPLOYER RULE IS PROBLEMATIC FOR ENTITIES ACROSS INDUSTRIES.

The Board's application of the joint-employer test here not only sets a precedent that distorts its own rule and discards the common-law distinction between employment and routine contracting; it also creates serious practical problems.

To begin, the Board's application creates the same inconsistencies for routine contracting relationships that Member Kaplan recognized in his opinion dissenting from the now-vacated 2023 rule. That is especially true for staffing firms like Cognizant that "play a significant role in the economy by recruiting and hiring employees and placing them in temporary assignments with a wide range of clients

on an as-needed basis." 88 Fed. Reg. at 74,002. Hospitals, construction companies, and technology firms use contracted labor to fill staffing gaps in critical workers who perform essential services in the economy. *Id.* As Member Kaplan explained, such contractor relationships "necessarily involve exercise of control" over another employer's workers. *Id.* at 73,995 n.452. Thus, the 2020 rule removed from the joint-employer question decisions concerning necessary "staffing levels to accomplish tasks" or "minimal hiring standards." *Id*. at 73,990. But under the Board's application here, "virtually every client of a staffing firm predictably will be the joint employer of that firm's supplied employees." *Id*. at 74,002.

That result repeats the problems threatened by the Board's 2023 rule, "particularly the prospect of getting trapped in a contractual relationship" from which a contractor like Google "cannot readily extricate itself." 88 Fed. Reg. at 74,002. As Member Kaplan recognized, rather than "run the risk of incurring joint-employer status of a staffing firm's employees," entities may "well decide to bring their contracted-out work in-house, to the detriment of staffing firms generally and the broader economy." *Id*. And where the costs of "bringing work in-house exceed the costs of contracting out that work," the impact is often most "felt by the [former contractor's] own employees" through "reduced headcount or other cost-saving measures that could impact workers." *Id*. Those consequences surely cannot be

reconciled with Congress's intent in amending the NLRA to preserve the distinction between contractors and employees.

Nor can the unworkable consequences to collective bargaining that the Board's application here would create. If the Board's order is enforced, Google could be required to bargain with Cognizant's employees over their terms and conditions of employment. *See* Decision and Order at 3. But, as Petitioners argued (Br. at 37-38), the Board made no effort to determine whether Google had sufficient control over those terms and conditions to negotiate a comprehensive collective bargaining agreement—even though the Board's own rule required such a finding before ordering Google to bargain. *See* 29 C.F.R. § 103.40(a), (d) (2020) (requiring "substantial direct and immediate control" with "a regular or continuous consequential effect on an essential term or condition of employment" so as to "meaningfully" permit collective bargaining"). Taken to its logical conclusion, the Board's application of the rule would mean firms like Google, with no meaningful interest and no real leverage, will find themselves at the bargaining table. That result cannot be squared with the policy that federal labor law "is chiefly designed to promote—the formation of the collective [bargaining] agreement and the private settlement of disputes under it." *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966).

Indeed, the Board's findings here have the opposite effect. In his dissent from the now-vacated 2023 rule, Member Kaplan gave the following illustration:

> CleanCo is in the business of supplying maintenance employees to clients to clean their offices. . . . CleanCo supplies employees to one hundred clients, and . . . each CleanCo-client contract contains a provision that gives the client the right to prohibit, on health and safety grounds, CleanCo's employees from using particular cleaning supplies.

88 Fed. Reg. at 73,987.

Just as in the vacated 2023 rule, the Board's findings here would render CleanCo and its many clients joint employers simply due to their contracting relationship that set terms and conditions for CleanCo's employees. That result could mean that all one hundred CleanCo clients—like Cognizant's many clients—would be compelled to participate in collective bargaining with CleanCo's employees. But so large a bargaining table would "frustrate rather than facilitate reaching agreements." 88 Fed. Reg. at 73,999. The competing interests of all one hundred joint employers "might well be in conflict," *id.* at 73,999, and the parties may quickly conclude they have "exhausted the prospects of concluding an agreement" and declare an impasse. *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 20 (D.C. Cir. 2012) (quoting *Taft Broad. Co.*, 163 N.L.R.B. 475, 478 (1967)).

Although an employer cannot control every uncertainty that might influence collective bargaining, control over the essential terms and conditions of employment is critical to bargaining. As Member Kaplan explained, Congress's goal in requiring

bargaining was to create "a process that could conceivably produce agreements." 88 Fed. Reg. at 73,999. The object of collective bargaining under the NLRA is "an agreement between employer and employees as to wages, hours and working conditions." *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523 (1941). Absent shared control over those essential terms and conditions of employment, putative joint employers could not negotiate such a comprehensive collective bargaining agreement.

Indeed, Member Kaplan warned against this outcome, describing a "scenario in which an undisputed employer has exercised complete control over every aspect of its employees' essential terms and conditions," and "a second entity possesses, but has never exercised, a contractual reservation of right to codetermine the employees' wages." 88 Fed. Reg. at 73,999. Such a result conflicts with Congress's purpose of leaving collective bargaining to the free flow of economic forces and forbidding the Board from "either directly or indirectly, compel[ling] concessions or otherwise sit[ting] in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). The Board's joint-employment finding here ignores the negotiating tradeoffs between employers and employees inherent in bargaining and imposes an obligation on Google despite its undisputed lack of control over essential terms and conditions of employment necessary to make informed tradeoffs.

If anything, firms like Google—which have little control over the many subjects their contractors could be required to bargain—could only engage in piecemeal bargaining. Piecemeal bargaining is the predictable result of compelling to the bargaining table an entity that lacks control over most essential terms and conditions of employment. Yet the Board and this Court have recognized that the fundamental "statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining." *E.I. Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1317 (D.C. Cir. 2007) (quoting *E.I. Dupont de Nemours & Co.*, 304 N.L.R.B. 792, 792 n.1 (1991)); *see id.* (a party has a "right to insist on negotiating an entire contract rather than engaging in piecemeal negotiation over particular issues"). Indeed, allowing piecemeal bargaining and piecemeal implementation of labor agreements "would empty the duty to bargain of meaning"—the core purpose of the Act. *Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 997-999 (7th Cir. 2000).

* * * *

The Board purported to apply its 2020 rule requiring an entity to "possess and exercise such substantial direct and immediate control" over the essential terms and conditions of employment to be considered a joint employer. But the Board left little doubt that it was cherry-picking routine aspects of company-to-company contracting and recharacterizing them as "direct and immediate" control over essential terms and

conditions. That is precisely what this Court and other courts have admonished the Board not to do. It is also contrary to the Board's own rule.

There is no judicial authority—much less a judicial consensus sufficient to establish a common-law rule—that the routine contractor-to-contractor decisions here, even taken together, are enough to create a joint-employment relationship. To the contrary, those decisions are at the heart of the common-law independent contractor relationship that Congress excluded from the definition of employment under the Act. To recognize a joint-employment relationship under those circumstances would contravene Congress's intent that in defining the employment relationship under the Act, the Board must follow the common law.

CONCLUSION

The Court should grant Petitioners' petition for review in No. 24-1003, and deny the Board's cross-application for enforcement.

Respectfully submitted,

/s/ Pratik A. Shah

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 4,698 words, and thus complies with Federal Rule of Appellate Procedure 32(a) and Circuit Rule 32(e)(1).

Dated: July 22, 2024

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CERTIFICATE OF SERVICE

I hereby certify that, on July 22, 2024, I served the foregoing brief upon counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

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