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

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

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.,
d/b/a BROWNING-FERRIS NEWBY ISLAND RECYCLERY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 350,
Intervenor for Respondent/Cross-Petitioner.

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

BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT/CROSS-PETITIONER AND IN FAVOR OF ENFORCEMENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the Equal Employment Opportunity Commission hereby certifies:

A. Parties, Intervenors, and Amici

Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the Brief for Browning-Ferris Industries and/or the Brief for the National Labor Relations Board:

1. Amicus for Respondent/Cross-Petitioner

U.S. Equal Employment Opportunity Commission

2. Amici for Petitioner/Cross-Respondent

Coalition for a Democratic Workplace

National Federation of Independent Business

HR Policy Association

Associated General Contractors of America, Inc.

American Hospital Association

American Hotel & Lodging Association

International Franchise Association

National Association of Home Builders

National Retail Federation

National Restaurant Association

American Staffing Association

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Browning-Ferris Industries.

C. Related Cases

The case under review has not previously been before this Court or any other court. There are no related cases currently pending in this Court or any other court.

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Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII")

Statement of Interest

The EEOC is charged by Congress with interpreting, administering, and enforcing federal laws against employment discrimination, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. These laws apply to "employers," requiring the EEOC to determine when an entity has sufficient control over the terms and conditions of employment to bring it within the scope of the statutes.

Title VII derives from the NLRA, and the two statutes are often interpreted in tandem. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768-70 (1976). The definitions of "employer" in Title VII and the NLRA are virtually identical. *Compare* 42 U.S.C. § 2000e(b) (Title VII) *with* 29 U.S.C. § 152(2) (NLRA). Accordingly, the EEOC's interpretation of Title VII is relevant to the proper interpretation of the NLRA.

The EEOC files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

Statement of the Issue

Should this Court affirm the NLRB's new joint-employer test, which relies on a flexible, fact-specific evaluation to determine the extent to which a putative joint employer controls the terms and conditions of an individual's employment?

Relevant Statutory Provisions

Relevant statutory provisions appear in the Addendum to this brief.

Statement of Facts

A regional director of the NLRB found that Browning-Ferris was not a joint employer with one of its contractors, Leadpoint Business Services. 2013 WL 8480748 (NLRB Aug. 16, 2013). On review of that decision, the NLRB abandoned its then-current joint-employer standard, developed in the mid-1980s, and reverted to its original standard as articulated in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). 362 NLRB No. 186 (Aug. 27, 2015). This standard provides that "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." *Id.* at *19. Under the newly articulated standard, "'[a]ll of the incidents of the relationship must be assessed.'" *Id.* at *21 (citation omitted).

The NLRB rejected the narrower test that it had applied in recent years. That test, the NLRB said, was "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships." *Id.* at *2. Returning to its original standard, the NLRB "will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry. . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status." *Id.*

The NLRB emphasized its "inclusive approach" to defining "essential terms and conditions of employment." *Id.* at *19. Essential terms and conditions include (but are not limited to) wages and hours; dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; assigning work; and determining the manner and method of work performance. *Id.* "Where the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user's guidance, makes specific personnel decisions and

administers job performance on a day-to-day basis, employees' working conditions are a byproduct of two layers of control." *Id.* at *18.

The NLRB grounded its ruling in the common law concept of control. "In cases where the common law would *not* permit the Board to find joint-employer status," the NLRB said, "we do not believe the Board is free to do so." *Id.* at *16. However, the NLRB continued, "Even where the common law *does* permit the Board to find joint-employer status in a particular case, the Board must determine whether it would serve the purposes of the Act to do so, taking into account the Act's paramount policy to 'encourage[ ] the practice and procedure of collective bargaining. . . .' To best promote this policy, our joint-employer standard – to the extent permitted by the common law – should encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible." *Id.*

Acknowledging the dissent's objection that the new standard does not allow "certainty or predictability," the NLRB highlighted the fact-specific nature of joint-employer inquiries. "[I]t is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining. . . . [W]e do not and cannot attempt today to articulate every fact and circumstance that could define the contours of a joint employment relationship," the NLRB said. *Id.*

at *20. "Issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment will undoubtedly arise in future cases – just as they do under the current test – and those issues are best examined and resolved in the context of specific factual circumstances." *Id.*

Applying the new standard to the facts of this case, the NLRB reversed the regional director and found that Browning-Ferris is a joint employer.

Summary of Argument

The EEOC's longstanding joint-employer test is relevant to the appropriate standard under the NLRA because Title VII is based upon the NLRA, the statutes' definitions of "employer" are virtually identical, and both Title VII and the NLRA are remedial in nature. The EEOC has consistently applied a flexible, multi-factor test, based on traditional agency principles under common law, to determine whether an entity has sufficient control over the terms and conditions of employment to qualify as an employer. No one factor is determinative and not all factors apply in any given case.

Among the relevant considerations, the EEOC's joint-employer test looks at an entity's right to control the terms and conditions of employment, as well as its indirect control of the terms and conditions of employment. These factors are also part of the NLRB's newly articulated test. While their weight differs from case to case, they are part of the totality of the circumstances.

Contrary to Browning-Ferris's argument, the EEOC's flexible test is neither vague nor unworkable. Courts have extensive experience applying the EEOC's test and the EEOC is unaware of any case suggesting that a bright-line rule would be better. Flexibility is important because employment relationships take many forms. The NLRB's new test acknowledges this reality.

Argument

The EEOC's joint employer test, which is consistent with the NLRB's newly articulated standard, successfully identifies the entities with meaningful control over the terms and conditions of employment.

The concept of "joint employers" arose in the context of labor relations, *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), and was subsequently imported into the civil rights context. *Armbruster v. Quinn*, 711 F.2d 1332, 1336-37 (6th Cir. 1983), *abrogated on other grounds by Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). The EEOC applies a flexible joint-employer test[2] because employment discrimination statutes are remedial in nature. *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980) ("Title VII should be liberally construed in order to effectuate its policies."); *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 391 (8th Cir.

[2] The EEOC does not inquire into joint employer status unless there is reason to believe that an entity knew or should have known of discrimination by another entity and failed to take corrective action within its control. *See* EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997), 1997 WL 33159161, at *11.

1977) (definition of "employer" in Title VII should be given a "liberal construction"). This Court has relied on Title VII's remedial purpose to interpret the statute's coverage provisions broadly. *See Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (interpreting Title VII to cover individuals "who do not stand in a direct employment relationship with an employer").

Title VII's remedial purpose stems directly from the NLRA. "Since it is clear that the framers of Title VII used the NLRA as its model," the Sixth Circuit has explained, "we find the similarity in language of the Acts indicative of a willingness to allow the broad construction of the NLRA to provide guidance in the determination of whether, under Title VII, two companies should be deemed to have substantial identity and treated as a single employer." *Armbruster*, 711 F.2d at 1336; *see also Trevino v. Celanese Corp.*, 701 F.2d 397, 403 (5th Cir. 1983) (concluding, in light of "the related area of labor relations," that "[t]he term 'employer' as used in Title VII of the Civil Rights Act was meant to be liberally construed").

The definitions of "employer" in Title VII and the NLRA are virtually identical. *Compare* 42 U.S.C. § 2000e(b) (Title VII), *with* 29 U.S.C. § 152(2) (NLRA). This similar language, coupled with the statutes' shared remedial purposes, suggests that the joint-employer test should be the same under both laws.

The EEOC's consistent, long-term test is, accordingly, relevant to the proper interpretation of joint-employer status under the NLRA.

A. The EEOC's test appropriately looks at the totality of the circumstances.

The EEOC has long defined "joint employer" to mean "two or more employers that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer." *Threshold Issues, Covered Parties, Special Issues Regarding Multiple Entities: Joint Employers*, EEOC Compliance Man. § 2-III(B)(1)(a)(iii)(b), 2009 WL 2966755, at text accompanying n.109; *see also* EEOC Dec. No. 71-708, 1970 WL 3548, at *1 (EEOC Dec. 17, 1970) (whether principal "'possessed a sufficient indicia of control'" to be a joint employer is "'essentially a factual issue . . . .'") (quoting *Boire*, 376 U.S. at 481).

To determine whether one or both businesses exercise sufficient control, the EEOC considers factors derived from common law principles of agency. It does so because, when Congress has not clearly defined the term "employee," common law agency principles control. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (citation omitted) (spelling out relevant common law factors and applying them to distinguish between employees and independent contractors); *Ma v. Shalala*, EEOC Dec. Nos. 01962389 & 01962390, 1998 WL 295965, at *7-9 (EEOC May 29, 1998) (applying common law principles as articulated in *Darden*

to distinguish between employees and training fellowship recipients). Once an individual is deemed to be an employee, the same considerations that entered into the initial "employee" analysis also determine which entity or entities are the individual's "employer." EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997), 1997 WL 33159161, at *4-5 (hereinafter "Enforcement Guidance") (applying same common law factors to "employer" analysis as to "employee" analysis).

Thus, the EEOC considers common law principles including who hires and fires, who assigns work, who controls daily activities, who furnishes equipment, where the work is performed, who pays the worker, who provides employee benefits, how the worker is treated for tax purposes, and whether the worker and the putative joint employer believe that they are creating an employer-employee relationship. *Id.* at *4-5 (citing *Darden*, 503 U.S. at 323-24). The EEOC also considers a putative joint employer's right to control the terms and conditions of employment and its indirect control of such terms and conditions. *Id*.; *see infra* at 12-15.

The EEOC does not consider any one factor to be decisive and emphasizes that "it is not necessary even to satisfy a majority of factors. . . . Many factors may be wholly irrelevant to particular facts. Rather, all of the circumstances in the

worker's relationship with each of the businesses should be considered to determine if either or both should be deemed his or her employer." Enforcement Guidance at *5. The Enforcement Guidance specifically criticizes two district court decisions for placing "undue emphasis on daily supervision of job tasks and underestimat[ing] the significance of other factors indicating an employment relationship." *Id.* at n.12 (discussing *Williams v. Caruso*, 966 F. Supp. 287 (D. Del. 1997), and *Kellam v. Snelling Personnel Servs.*, 866 F. Supp. 812 (D. Del. 1994), *aff'd mem.*, 65 F.3d 162 (3d Cir. 1996)).

The EEOC's approach is consistent with common law, which "contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *Darden*, 503 U.S. at 324 (quoting *NLRB v. United States Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)); *see also Ma*, 1998 WL 295965 (applying multi-factor common law test under Title VII).

Under the EEOC's test, staffing firms and their clients generally qualify together as joint employers. Staffing firms usually qualify because

> the firm typically hires the worker, determines when and where the worker should report to work, pays the wages, is itself in business, withholds taxes and social security, provides workers' compensation coverage, and has the right to discharge the worker. The worker generally receives wages by the hour or week rather than by the job and often has a continuing relationship with the staffing firm.

> Furthermore, the intent of the parties typically is to establish an employer-employee relationship.

Enforcement Guidance at *5. Clients of staffing firms also usually qualify during a job assignment because

> the client usually exercises significant supervisory control over the worker. . . . Clients . . . also qualify as employers of the workers assigned to them if the clients have sufficient control over the workers under the [*Darden* factors.] For example, the client is an employer of the worker if it supplies the work space, equipment, and supplies, and if it has the right to control the details of the work to be performed, to make or change assignments, and to terminate the relationship.

Id. at *5-6.

The EEOC's joint employer definition is intentionally flexible. In *EEOC v. Skanska USA Building, Inc.*, 550 F. App'x 253 (6th Cir. 2013), the Sixth Circuit reversed an award of summary judgment to a putative joint employer, the general contractor, based on the EEOC's arguments emphasizing the general contractor's authority to direct the daily activities of a subcontractor's employees, its actual supervision of those employees (in contravention of an agreement that the subcontractor would hire a supervisor), its practical ability to make the subcontractor fire employees by barring them from the worksite (the jobs were project-specific), and the fact that it carried workers' compensation and liability insurance for the subcontractor's employees. In *EEOC v. Papin Enterprises, Inc.*, No. 6:07-cv-1548-Orl-28GJK, 2009 WL 961108 (M.D. Fla. Apr. 7, 2009), in

contrast, the district court denied summary judgment to a putative joint employer, the franchisor, based on the EEOC's argument that the franchisor had authority to insist on a no-facial-jewelry policy for its franchisee's employees. The considerations differ based on the facts of each case.

B. The EEOC's standard correctly allows courts to consider an entity's right to control and indirect control of the terms and conditions of employment.

1. Right to Control

The EEOC considers an entity's right to control the terms and conditions of employment, whether or not it exercises that right, as relevant to joint employer status. For example, the EEOC successfully argued that a hotel owner was a joint employer in part because it retained the right to approve employees hired by a third party "if requested," even though the record did not reflect that the hotel owner had ever exercised that right. EEOC Brief as Amicus Curiae, *Virgo v. Riviera Beach Assocs., Ltd.*, No. 93-4032 (11th Cir.) (filed Oct. 20, 1993), *available at* 1993 WL 13011170; *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1361 (11th Cir. 1994) ("We find that actual control is a factor to be considered when deciding the 'joint employer' issue, but the authority or power to control is also highly relevant."). EEOC administrative decisions have also considered a putative employer's unexercised right to control the terms and conditions of employment. *See Puri v. West*, EEOC Doc. No. 05930502, 1994 WL 1841168, at *5 (EEOC

Mar. 24, 1994) (considering agency's authority to have complainant removed from job "if his performance was not satisfactory to the agency" but deeming this factor alone insufficient to find joint employer status).

The EEOC's Enforcement Guidance on contingent workers considers a putative employer's "*right to control* when, where, and how the worker performs the job." Enforcement Guidance at *4 (emphasis added). The Enforcement Guidance does not say that a right to control must be exercised. *See id.* (considering whether "the firm or the client has the *right to assign* additional projects to the worker" (emphasis added)); *id.* at *6 (considering whether client of staffing firm "has the *right to control* the details of the work to be performed" (emphasis added)).

The EEOC considers the right to control terms and conditions of employment as one factor, among many, relevant to joint employer status. The NLRB's newly articulated standard, which recognizes the right to control as a relevant consideration, is correct.

2. Indirect Control

A putative joint employer exercises indirect control of the terms and conditions of employment by acting through an intermediary. The EEOC has long considered indirect control to be relevant to joint employer status. The Enforcement Guidance provides the following example:

> Example 5: A staffing firm provides landscaping services for clients on an ongoing basis. The staffing firm selects and pays the workers, provides health insurance, and withholds taxes. The firm provides the equipment and supplies necessary to do the work. It also supervises the workers on the clients' premises. Client A reserves the right to direct the staffing firm workers to perform particular tasks at particular times or in a specified manner, although it does not generally exercise that authority. Client A evaluates the quality of the workers' performance and regularly reports its findings to the firm. *It can require the firm to remove the worker from the job assignment if it is dissatisfied. The firm and the Client A are joint employers.*

Enforcement Guidance at *5, at Question 2, example 5 (emphasis added).

EEOC cases regularly look at indirect control. For example, in *Complainant v. Johnson*, EEOC Doc. No. 0120160989, 2016 WL 1622535, at *3 (EEOC Apr. 14, 2016), the EEOC found it relevant that "if the agency does not wish a staffing firm employee to continue on the contract, it communicates this to the staffing firm Project Manager, who facilitates the termination." That arrangement, the EEOC found, gives the agency "de facto power to terminate Complainant, a significant factor weighing in favor of a finding that the Agency jointly employed Complainant." *Id*.; *see also Rina F. v. McDonald*, EEOC Doc. No. 0120160808, 2016 WL 1729906, at *3 (EEOC Apr. 21, 2016) (relevant facts include that Complainant was interviewed by both contractor and agency, and contractor did not hire Complainant "until it received word from the Agency official"); *Complainant v. McHugh*, EEOC Doc. No. 0120140999, 2014 WL 3697464, at *5 (EEOC July 15, 2014) (relevant facts include "whether the Agency indirectly

controlled Complainant's job through the on-site coordinator"); *Lee v. McHugh*, EEOC Doc. No. 0120112643, 2013 WL 393519, at *7 (EEOC Jan. 24, 2013) (relevant to joint employer analysis that contractor terminated complainant because agency "wanted him fired").

C. Contrary to Browning-Ferris's argument, a broad, fact-specific inquiry is neither vague nor unworkable.

Given the complexity and variety of the situations implicating joint employer status, the NLRB correctly declined to rank the elements of its test in order of importance. *See* Enforcement Guidance at *5 ("The determination of who qualifies as an employee of the worker cannot be based on simply counting the number of factors. Many factors may be wholly irrelevant to particular facts."). As the EEOC has consistently said, "all of the circumstances in the worker's relationship with each of the businesses should be considered to determine if either or both should be deemed his employer." *Id.*

Based on experience with Title VII, courts are well equipped to address the nuances of a fact-specific joint employer determination. In *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 215 (3d Cir. 2015), for instance, the Third Circuit scrutinized all aspects of the putative joint employer's control over the plaintiff to conclude that "a rational jury applying the *Darden* factors could find that Faush and Tuesday Morning had a common-law employment relationship and, therefore,

that Faush was Tuesday Morning's employee for purposes of Title VII . . . ." Likewise, in *Casey v. Department of Health & Human Services*, 807 F.3d 395, 404-05 (1st Cir. 2015), the First Circuit cited fifteen "non-exhaustive" factors in the EEOC's Compliance Manual and observed that "these factors are to be weighed in their totality" in determining the existence of a joint employer relationship. The court noted that "[i]n a thirty-one page written decision, the magistrate judge carefully considered the relevant EEOC Manual factors and concluded that Casey was not an employee of the DHHS." *Id.* at 405. After conducting its own analysis, the First Circuit affirmed. *Id.*

The EEOC's flexible joint-employer test, like the NLRB's, carries more uncertainty than the NLRB's now-discarded rule, which looked only at authority exercised directly and immediately. Uncertainty, however, is no basis for rejecting a rule that is consistent with statutory language, common law, and legislative purpose. *See Coleman v. Donahoe*, 667 F.3d 835, 861 (7th Cir. 2012) (rejecting "bright-line numeric rule" for when temporal proximity between protected conduct and adverse action is probative evidence of retaliation under Title VII); *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003) (rejecting "bright-line rule about the timing of retaliation" under 42 U.S.C. § 1983); *Gulf States Utils. Co. v. FERC*, 922 F.2d 873, 876 (D.C. Cir. 1991) (definition of "qualifying facility"

under Public Utilities Regulatory Policies Act "is not susceptible to any bright line rules").

Browning-Ferris argues that the uncertain nature of a multi-factor test will make it difficult for organizations to anticipate whether they will be deemed joint employers and "to understand the contours of compliance." Browning-Ferris Br. at 54. This uncertainty, Browning-Ferris says, "deprives employers of their right to due process." *Id.* at 51. Particular facts may support a due process challenge as applied. *Cf. NLRB v. W. Temp. Servs., Inc.*, 821 F.2d 1258, 1263 (7th Cir. 1987) (respondents argued that they were denied due process when NLRB determined that they were joint employers because they had not received prior notice of the joint employer issue). However, the joint-employer test itself does not violate due process. The Supreme Court in *Darden* effectively rejected Browning-Ferris's argument here. "To be sure," the Court said, "the traditional agency law criteria offer no paradigm of determinacy. But their application generally turns on factual variables within an employer's knowledge, thus permitting categorical judgments about the 'employee' status of claimants with similar job descriptions." 503 U.S. at 327.

Conclusion

The NLRB's newly articulated standard is consistent with the EEOC's longstanding joint-employer test. Because Title VII and the NLRA have virtually

identical language and similar remedial purposes, the NLRB acted appropriately in bringing its joint-employer standard in line with the EEOC's. For the foregoing reasons, the EEOC urges this Court to deny Browning-Ferris's petition for review and to grant the NLRB's application for enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,864 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Times New Roman, size 14 point.

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Statutory Addendum

National Labor Relations Act, 29 U.S.C. § 152(2):

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 *et seq.*], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Title VII, 42 U.S.C. § 2000e(b):

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

CERTIFICATE OF SERVICE

I certify that on this 14th day of September, 2016, I filed the foregoing brief electronically in PDF format through the Court's CM/ECF system and sent eight paper copies to the Clerk of the Court via UPS. I further certify that that I served the foregoing brief electronically in PDF format through the CM/ECF system this 14th day of September, 2016, to all counsel of record who are participants in the CM/ECF system, and that I served the following individuals, who are not participants in the CM/ECF system, with paper copies via UPS:

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