INTERNATIONAL FRANCHISE ASSOCIATION

December 7, 2022

Via electronic submission: http://www.regulations.gov

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Re: Proposed Standard for Determining Joint-Employer Status
RIN 3142-AA21

Dear Ms. Rothschild:

On behalf of the International Franchise Association ("IFA") and its members, we submit these comments in response to the National Labor Relations Board ("NLRB" or "the Board")'s Notice of Proposed Rulemaking on the Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (September 7, 2022) (the "NPRM" or "proposed rule").

IFA is the world's oldest and largest organization representing franchising worldwide. Celebrating over 60 years of excellence, education and advocacy, IFA works through its government relations and public policy, media relations and educational programs to protect, enhance and promote franchising. Through its Open for Opportunity campaign, IFA promotes the economic impact of the more than 775,000 franchise establishments, which support nearly 8.2 million jobs and $787.7 billion of economic output for the U.S. economy.[1] IFA members include franchise companies in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law and business development. The standard for determining joint-employer status under the National Labor Relations Act ("NLRA" or "the Act") is of direct and immediate concern to all members of the franchise community, insofar as an overly broad standard threatens to fundamentally upend the successful franchise business model in almost all instances.

Indeed, the intent of the proposed rule appears to be to put franchisors in the position of choosing between (1) taking away from franchisees the support they thought they would receive by joining a franchise system; or (2) taking away the independence of franchisees and making them effectively managers of corporate stores, rather than

[1] *See* Oxford Economics, *The Value of Franchising* (September 2021) at 7 (attached hereto as Exhibit A).

independent business owners. This is made immediately clear by the NLRB's identification of franchisees as one of five business models targeted by the rule and its stated position that "Franchisors generally exercise some operational control over their franchisees, which potentially renders the relationship subject to application of the Board's joint-employer standard." 87 Fed. Reg. 54660.

As detailed herein, the proposed rule violates both the NLRA and the Administrative Procedure Act ("APA"). In order to best assist the Board as it contemplates a proposed restoration and expansion of the *Browning-Ferris* joint-employer standard, IFA's comments: (1) summarize the proposed rule, and highlight the experience of the franchise community under the *Browning-Ferris* standard; (2) explain in detail the nature of the franchise business model; (3) describe the devastating consequences the Board's *Browning-Ferris* standard had on the operations of franchise businesses, which the proposed rule threatens to exacerbate immeasurably; and (4) demonstrate the flaws in the proposed rule, as a matter of substance under both the NLRA and the APA. Finally, IFA sets forth its concern with propriety of participation in this rulemaking by certain members of the Board.

Summarized briefly, the proposed rule would provide that "two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment." Proposed Rule § 103.40 (b), 87 Fed. Reg. at 54663. In making the determination of whether two entities "share or codetermine" these matters, the proposed rule provides that:

> (c) To "share or codetermine those matters governing employees' essential terms and conditions of employment" means for an employer to *possess the authority to control (whether directly, indirectly, or both)*, or to exercise the power to control (*whether directly, indirectly, or both*), one or more of the employees' essential terms and conditions of employment.
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> (d) "Essential terms and conditions of employment" will generally include, *but are not limited to*: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; *and work rules and directions governing the manner, means, or methods of work performance*.
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> (e) Whether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment is determined under common-law agency principles. *Possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly.* Control exercised

through an intermediary person or entity is sufficient to establish status as a joint employer.

Id. (emphases added). In adopting a standard under which indirect control, or the reserved right of control (even if never exercised), is sufficient to warrant a joint-employer finding under the Act, the proposed rule largely seeks to restore the flawed standard the Board adopted in its 2015 *Browning-Ferris Industries* decision. *See Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Recyclery*, 326 NLRB 1599 (2015) (hereinafter, "*Browning-Ferris*"). This standard, if adopted, would eviscerate the right of a franchisor to audit and evaluate the performance and compliance of its franchisees with their franchising agreement.

Given this, the proposed rule expands the definition of joint employer beyond that which even *Browning-Ferris* contemplated by making indirect or reserved control in and of itself sufficient to support a joint-employer finding—a step even the *Browning-Ferris* Board did not take. Moreover, by expanding the definition of "essential terms and conditions of employment" to encompass potentially every aspect of the work experience (in a non-exclusive list), and jettisoning the requirement that a putative joint employer's control over these terms and conditions must be of the sort that allows for meaningful collective bargaining to support a joint-employer relationship, the proposed rule threatens to turn the most routine and common features of the franchise business model into indicia of joint employment.

That the proposed rule seeks to adopt and expand an already flawed standard is particularly troubling where, as here, the Board is not writing on a blank slate, and has been expressly instructed by the courts to ensure that any joint-employer rule it adopts hews to the requirements of the common law. In December 2018, in *Browning-Ferris Industries of California v. NLRB*, the D.C. Circuit Court of Appeals, in a 2-1 decision, partially affirmed the Board's *Browning-Ferris* decision, but denied enforcement of the Board's order in the case. *See* 911 F.3d 1195 (D.C. Cir. 2018) (hereinafter, *"BFI"*). In *BFI* the appeals court concluded an employer's reserved right to control and its indirect control over employees' terms and conditions of employment could be *probative* of joint-employer status, but denied enforcement of the *Browning-Ferris* decision because the Board did not sufficiently confine its consideration of indirect control. Specifically, the *BFI* Court concluded that the *Browning-Ferris* decision "obscure[d] the line" between "global oversight" and "[w]ielding direct and indirect control over 'the essential terms and conditions' of employees' work lives." *Id.* at 1220. The court acknowledged that the former constitutes a "routine feature of independent contracts," but the latter does not. Consequently, the *BFI* Court remanded the case to the Board, instructing that, among other things, it apply a standard that does not take into consideration "routine components of a company-to-company contract." *Id.* at 1221. IFA respectfully submits that the proposed rule wholly fails to do so, and in fact compounds the errors the court identified in the Board's analysis. It also throws the entire franchise business model to

the wind and would effectively require a franchisor to either forfeit any right to audit compliance under its franchise agreements or risk being deemed a joint employer.

As predicted by the dissenters in *Browning-Ferris*, the Board's expansion of the joint-employer standard caused significant operational and economic harm to franchising, both for franchisors and franchisees, stifling the creation of business ownership and family equity, two of the essential benefits to franchising. Indeed, according to an economic analysis commissioned by IFA, during the time in which it was the operative standard, the *Browning-Ferris* decision cost the franchising sector as much as $33.3 billion annually and resulted in as many as 376,000 lost job opportunities.[2]

In fact, *Browning-Ferris* did little to advance the protection of workers, but much to increase litigation against employers. In the wake of *Browning-Ferris*, joint-employer charges and petitions increased dramatically at the NLRB, fueled by a union-led corporate campaign against nationwide quick-service restaurant franchises, and various other franchising systems and services. This was particularly prevalent in the franchise segment, where employers in franchisor/franchisee relationships saw a 93% increase in charges or petitions filed alleging joint employment under the Act. The expansion of the joint-employer standard by way of *Browning-Ferris* led to an increase in charges and petitions alleging joint employment, as demonstrated below:

Charged Parties or Respondents referenced in charge or petition filed with NLRB	**# of charges or petitions filed between 7/29/2010 and 7/29/2014**	**# of charges or petitions filed between 7/29/2014 and 7/29/2018**	**Percentage increase**
Alleged joint employer (franchisor and franchisee)	122	236	**93.44%**
All non-franchise alleged joint employers	618	924	**49.51%**
All alleged joint employers (including all franchisors)	740	1,160	**56.75%**

This substantial proliferation of joint-employer charges and petitions, and the lack of clarity over the *Browning-Ferris* standard, resulted in increased costs across the franchise industry. More important, it underscored the need for the Board to adopt a joint-employer rule that provided consistency and clarity for the franchising industry, which IFA maintains it achieved in its 2020 final rule.

[2] *See* Ronald Bird., Ph.D., "Statement Regarding the Economic Impact of the Prospective NLRB Public Policy Decision Regarding the Definition of Joint Employer," (attached hereto as Exhibit B, and discussed in detail in section II, *infra*).

The franchise business community's experience under *Browning-Ferris* makes clear that the proposed rule—which would adopt a "*Browning-Ferris* on Steroids" standard—will wreak havoc on the franchise business model, to the detriment of franchisors, franchisees, employees in the franchise sector and the consuming public. In fact, franchise employees earn 2.2-3.4 percent higher wages, more than 65% of franchise workers are offered health insurance (a greater proportion than among small establishments in general) and more than three-quarters of franchise workers (76%) are offered vacation, holiday, and sick leave.[3] Indeed, in its comments on the proposed rule, the Small Business Administration ("SBA")'s Office of Advocacy specifically noted that the proposed rule could significantly affect franchisor and franchisee relationships, and highlighted that an essential element of the franchise business model is the reservation of certain controls in franchise agreements to protect the business operations of a franchised brand.[4] As SBA observed, an "expanded standard can potentially target any third-party contractual relationship that involves indirect or reserved control."[5]

Moreover, as detailed in these comments, an expanded joint-employer standard will do little to protect workers—who in fact lost substantial job opportunities while *Browning-Ferris* was in place. Rather, it seems disingenuous not to recognize that the only parties who truly stand to "benefit" from an expanded standard are those labor unions which have aggressively pressed the Board to overreach in this area, in a patently transparent effort to increase the reduced ranks of unionized workers in the private sector, and, unsurprisingly, the dues these members pay for the "privilege" of their membership in the union.

We respectfully take this opportunity to express our concern with the participation of Members Wilcox and Prouty in this rulemaking. Immediately prior to joining the Board, Member Prouty served as General Counsel of the SEIU's Local 32BJ. Indeed, in his capacity as General Counsel, Member Prouty signed and submitted extensive commentary in opposition to the joint-employer standard proposed by the Board in 2018 and adopted (with modification) in 2020. In his comments at the time, Member Prouty explicitly urged the Board to reject its proposed position that control must be "exercised" to establish to a joint-employer finding, and instead stressed his view that an employer's wholly unexercised control over another employer's workers is sufficient to establish joint-employer status. This is exactly the position taken in the proposed rule that Member Prouty voted to advance. It is difficult to imagine a more compelling example of an individual having "adjudged the law in advance of hearing it." Accordingly, Member Wilcox, previously served as a partner in the law firm Levy Ratner, P.C. and Associate General Counsel to 1199SEIU United Healthcare Workers East. Like Member Prouty, Member Wilcox, through her law firm, submitted detailed comments in response to the Board's 2018 proposed joint-employer standard. These comments directly urged the

[3] Oxford, *supra* note 1, at 17.
[4] Comment of Small Business Administration Office of Advocacy on Proposed Rule (November 29, 2022), at 3.
[5] *Id.*

Board to recognize that the "right to control" and reserved or indirect control, should be sufficient to support a joint-employer finding – again, the position the proposed rule embraces wholly and unequivocally.

For the reasons set forth herein, we believe that both Member Wilcox and Member Prouty should have recused themselves from the consideration of the proposed rule, and, lacking that, should be recused from participating further in this rulemaking or the consideration of any final rule.

Overall, IFA urges the Board to reject this proposed rule, and submits rather that the joint-employer final rule issued by the Board in 2020 (the "2020 rule")—which was put in place by the Board less than three years ago—should be maintained insofar as it provides a clear and workable standard for determining joint-employer status that balances the policies of the Act with the practicalities and real-world operation of franchise businesses in the 21st century, or, at a minimum, unless and until the Board is able to identify flaws in its application, which the proposed rule wholly fails to accomplish. In the alternative, the Board should do nothing more than rescind the 2020 final rule—without adopting the proposed rule—and continue resolving joint-employer issues via a case-by-case adjudicatory approach.

I. The Franchise Business Model

"Franchising is a method of marketing goods and services" that depends upon the existence of the franchisor's control over a trademark, other intellectual property or some other commercially desirable interest sufficient to induce franchisees to pay to participate in the franchisor's system by distributing goods or services under the franchisor's trademark or name.[6]

There are two principal explanations given for the popularity of franchising as a method of distribution. One is that it "was developed in response to the massive amounts of capital required to establish and operate a national or international network of uniform product or service vendors, as demanded by an increasingly mobile consuming public."[7] The other is that "franchising is usually undertaken in situations where the franchisee is physically removed from the franchisor, and thus where monitoring of the performance and behavior of the franchisee would be difficult."[8] These two motivations are consistent with a business model in which the licensing and protection of the trademark rests with the franchisor and the capital investment and direct management of day-to-day operations of the retail outlets are the responsibility of the franchisee, which owns, and receives the net profits from, its individually-owned franchise unit.

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[6] Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 Wash. & Lee L. Rev. 417, 420-21 (2005).
[7] Kevin M. Shelley & Susan H. Morton, *"Control" in Franchising and the Common Law*, 19 Fran. L. J. 119, 121 (1999-2000).
[8] Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J. Law & Econ. 223, 226 (1978).

It is typical in franchising that a franchisor will license, among other things, the use of its name, its products or services, and its reputation to its franchisees. Consequently, it is commonplace for a franchisor to impose standards on its franchisees, necessary under the federal Lanham (Trademark) Act to protect the consumer. Such standards are essential for a franchisor that seeks to ensure socially desirable and economically beneficial oversight of operations throughout its network. These standards allow franchisors to maintain the uniformity and quality of product and service offerings and, in doing so, to protect their trade names, trademarks and service marks (collectively the "Marks"), the goodwill associated with those Marks, and most importantly, the protection of the consumer. They also help protect consumers by allowing them the ability to know they are dealing with a reputable business that offers a quality product.

Because the essence of franchising is the collective use by franchisees and franchisors of Marks that represent the source and quality of their goods and services to the consuming public, action taken to control the uniformity and quality of product and service offerings under those Marks is not merely an essential element of franchising, it is an explicit requirement of federal trademark law. The Lanham Act, the federal law regulating trademarks, service marks, and unfair competition, mandates that owners of trademarks must maintain sufficient control of the licensee's use of the mark to assure the nature and quality of goods or services that the licensee distributes under the mark.[9] Moreover, because the Lanham Act provides that a trademark can be deemed "abandoned" when "any course of conduct of the owner . . . causes the mark . . . to lose its significance,"[10] franchisors have a strong incentive to control the nature and quality of the good or services sold by their franchisees. As a result, franchisors are compelled to establish and monitor brand standards and provide global oversight with regard to their franchisees.

Likewise, it is imperative that franchisees protect their franchisors' brands, and the trademark value of those brands. A franchisee, functioning as an independent operator under a Brand License, is trusted and relied upon (by the franchisor) to protect the trademark value in implementing brand standards and exercising day-to-day management over the operation, since the franchisor is not present at every individual franchise location. Because franchising requires the collective use by franchisees and franchisors of Marks, all stakeholders affiliated with a brand collectively share risks and rewards. For example, if a franchisee fails to take adequate steps to protect the brand or otherwise engages in an action that injures the brand's reputation, the damage inflicted on the brand impacts all of the brand's stakeholders, including all other franchisees and the consuming public. With that being the case, it is essential to franchising that all of the stakeholders agree on brand protection standards and take all necessary action to ensure that those standards are met. Furthermore, these rights and obligations are enunciated in well-drafted franchise agreements and reviewed in advance under a prescribed set of mandated disclosures.

[9] *See* 15 U.S.C. § 1064(5)(A).
[10] 15 U.S.C. § 1127.

A person need not be a franchise expert to recognize that the ability of a customer to identify a certain level of quality and uniformity in the products or services offered by disparate franchisees within a system has led to the explosive growth of franchising. A patron may enter a chain restaurant in New York, Mexico City, or Hong Kong and expect and receive virtually the same food. The uniformity and quality of products offered under a single brand is a prime factor in the success of the franchising concept. Without uniform standards, franchisees could build and operate units in whatever dissimilar fashions they chose, resulting in different buildings, uniforms, food, consumer service standards, and supply chain issues which could raise health concerns, ultimately causing the destruction of the franchisor's concept.[11]

A franchisor's exercise of control limited to brand standards is not day-to-day management over the business operations of its franchisees. Further, this exercise of control is not merely reflective of the legal realities imposed by trademark law, the FTC Franchise Rule,[12] and pervasive state and federal regulation. It is also a value-added proposition for franchisees and consumers, which is entirely consistent with the fact that franchisees are independent entrepreneurs who invest substantial capital in their businesses, control their labor relations, and dream to build equity in an independently owned business for the benefit of themselves, their families, and their communities. For a franchisee, the purchase of a franchise means avoiding those costs of market entry that are ameliorated by the franchisor's extensive guidance and training in many aspects of the operation of the franchised business. It also means enjoying the goodwill generated by the use of the franchisor's Marks, brand and system collectively with other franchisees and company-operated outlets. Dependence by the franchisee on the detailed brand standards and methods of operation honed by franchisor experience is therefore a basic part of what a franchisee bargains for in acquiring a franchise. The use of Marks that project to members of the consuming public that they will enjoy a quality and predictable consumer experience at each outlet operated under those Marks—even though each is independently owned and operated—is the other principal part of the equation, which again benefits both franchisees and consumers.

A 2021 analysis by Oxford Economics commissioned by the IFA demonstrates that, put simply, the franchise business model works. Franchise businesses tend to be larger than their non-franchise peers, and, on average, report sales 1.8 times as large and provide 2.3 times as many jobs as their non-franchise counterparts.[13] Franchise sales and jobs exceed non-franchised businesses across all demographics, including gender and race, and almost one-third of franchise business owners report that they would not own a business if they were not franchises (with even higher numbers for female

[11] *See* Shelley & Morton, *supra* note 7, at 121.
[12] Published by the Federal Trade Commission, the Franchise Rule provides prospective purchasers of franchises information they may use to weigh the risks and benefits of a franchise investment, and requires franchisors to provide potential franchisees with specific items of information about the offered franchise, its officers, and other franchisees.
[13] Oxford Economics, *supra* note 1, at 5.

franchise owners and those for whom a franchise was their first business).[14] Finally, franchise firms—often accused in certain segments of underpaying workers—pay 2.2-3.4% higher wages than similar non-franchises.[15]

In that light, it bears particular note that the proposed rule, which would appear to adopt a vastly expanded joint-employer standard, is especially harmful to diverse franchisees. As explained by the Southern Christian Leadership Conference (SCLC), "Franchises are a true symbol of economic opportunity with over 20 percent of franchises being owned by minorities."[16] There is a higher minority ownership rate among franchised businesses than in non-franchised businesses. Indeed, IFA's recent study showed that in 2012, 30.8% of franchises were owned by minorities, compared to 18.8% of non-franchised businesses. Between 2007 and 2012, the minority ownership rate for franchised businesses increased by 50% and female ownership increased by 49%. During that time period, Black ownership of franchises increased by 66% and Hispanic ownership of franchises more than doubled.

The SCLC emphasized, however, that "the expanded policy over what it means to be a joint employer has centralized the franchise systems, providing fewer opportunities for [minorities] to take control of their destiny and build wealth for their families." This view is shared by the National LGBT Chamber of Commerce, which explained that the expanded joint-employment standard "impede[s] upon the crucial business opportunities afforded to diverse and marginalized business communities, and in turn, reduce[s] their opportunities to build and sustain generational wealth."[17] Historically disadvantaged populations that did not have the same opportunities and resources to gain the necessary business, managerial, or industry experience that franchisors are seeking in prospective franchisees are indirectly impacted when franchisors consider that lack of experience in deciding whether to offer a franchise opportunity. Reasonably so, franchisors must choose prospective franchisees who have compatible experience with the system, or risk mistakes that could damage the brand, consumer safety, and experience, or result in litigation.

The proposed rule, which threatens the viability of all franchise businesses, will be especially harmful to minority, female, and LGBTQ franchise operators. The negative impact of the overly broad joint-employer standard, which the proposed rule seeks to reimpose and expand, is discussed below.

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[14] *See id.*
[15] *See id.* at 14.
[16] *See* Statement of Southern Christian Leadership Conference (October 2, 2017) (attached hereto as Exhibit C).
[17] *See* Statement of National LGBT Chamber of Commerce (March 8, 2018) (attached hereto as Exhibit D).

II. The Devastating Impact of the *Browning-Ferris* Standard on Franchise Businesses

Prior to adopting its 2015 *Browning-Ferris* standard, the Board had routinely held that franchisor brand standards and necessary controls did not subject a franchisor or licensor to joint-employer liability absent direct and substantial control over labor relations with the franchisee's or licensee's employees.[18]

The *Browning-Ferris* Board majority's expansion of the joint-employer standard to encompass "indirect influence or contractual reservations of authority" as sufficient to establish joint employment significantly prejudiced the franchising method. Given the breadth of that joint-employment standard, franchisors justifiably were fearful that providing the same services to franchisees that they provided prior to *Browning-Ferris*—such as training, store inspections and compliance audits and operational advice—could result in charges that they were joint employers with their franchisees, and thereby liable for their franchisees' actions.

This is an obvious risk to the consuming public, and again contravenes the intent of the Lanham Act's requirements. For example, a franchisor that provides training to its franchisees regarding the prevention of sexual or other unlawful workplace harassment should not have to run the risk that doing so might lead to a charge and litigation over whether it is a joint employer. Nor should a franchisor have to run the risk of undermining its Lanham Act obligations out of a concern over joint-employer liability when, for example, the franchisor conducts an in-store visit of a franchisee and provides feedback and recommendations based on the visit, or a franchisor shares operational advice based on its years of industry experience to protect its brand. Further risk should not follow if a franchisor also requires certain actions and activity to protect is Marks and brand, either with respect to customer service or the quality of the goods those customers may receive.

These are not merely academic or theoretical concerns. In conjunction with the Board's 2018 joint-employer rulemaking, IFA's members, both franchisors and franchisees, shared their experiences in the wake of the *Browning-Ferris* decision with IFA. Their combined experiences demonstrated that *Browning-Ferris* directly caused great uncertainty in the franchising world and had a devastating impact on the manner in which franchisors and franchisees operated.

In this process, IFA participated in 77 interviews with its members—including franchisors, franchisees, and law firms or consultants that provided advice and counseling to franchisors—to investigate the practical challenges that *Browning-Ferris* had on their operations. Professor Ronald Bird, Ph.D., an economist with extensive experience

[18] *See, e.g.*, *Speedee 7-Eleven*, 170 NLRB 1332, 1333 (1968) (policy manual that described "in meticulous detail virtually every action to be taken by the franchisee in the conduct of his store" is not evidence of joint-employer relationship); *S.G. Tilden, Inc.*, 172 NLRB 752, 753 (1968) (finding no joint-employer relationship even though the franchise agreement regulated "many elements of the business relationship" because there was no clear indication that the franchisor "intended to, or in fact did, exercise direct control over the labor relations of [the franchisee]").

conducting similar economic fact-finding surveys, including for federal government regulatory agencies, designed and supervised the interviews.[19] The IFA member interviewees' experiences confirmed that the *Browning-Ferris* standard was unworkable when it was in place. Its resurrection and expansion by way of the proposed rule will once again dramatically threaten the franchising method.[20]

A. *The Crippling Impact of Browning-Ferris on Franchisors*

As explained above, a critical component of franchising is the ability of franchisors to enhance and protect their brands. Given the breadth of the *Browning-Ferris* decision, franchisors were forced to distance themselves from their franchisees—at the risk of jeopardizing their brands and creating unnecessary risks to the consuming public.

1. Resolving Crises That Jeopardize Franchisor Brands

Several franchisors relayed to IFA the predicament that an expanded joint-employer standard imposed on them when the actions of a franchisee's employee could adversely affect the brand. In the franchising world, many customers and members of the general public cannot distinguish between a franchisor and a franchisee. Franchisors and franchisees are commonly confused as being part of the same enterprise because they use common Marks and rely on the same branding. As a result, it is often public perception that the actions of a franchisee are imputed to the franchisor.

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[19] Dr. Bird holds a Ph.D. degree in economics (University of North Carolina at Chapel Hill, 1974), and has over 25 years of experience conducting and reviewing economic analyses of the benefits and burdens of government policies, regulations and information-collection mandates. He presently serves as Senior Regulatory Economist with the United States Chamber of Commerce. Previously, he served as Chief Economist of the United States Department of Labor (2005-2009), Chief Economist for The Employment Policy Foundation (1999-2005), Chief Economist for Dyncorp Information Technologies, a regulatory and policy analysis support contractor to Federal agencies (1992-1999), and Senior Economist for Jack Faucett Associates, a regulatory and policy analysis support contractor to Federal agencies (1989-1992). He has held faculty appointments in economics at North Carolina State University (1973-1975 and 1982-1987), The University of Alabama (1975-1982), Meredith College (1986-1987), Wesleyan University (1987-1989), The George Washington University (2018-present), and Georgetown University (2018-present).

[20] It is appropriate for the Board to rely on employers' experiences for purposes of rulemaking. *See New York v. U.S. EPA*, 413 F.3d 3, 31 (D.C. Cir. 2005) (finding Environmental Protection Agency's reliance on industry anecdotes may be sufficient for issuance of rule in the absence of comprehensive data because "[i]ncomplete data does not necessarily render an agency decision arbitrary and capricious, for '[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion'") citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *see also NextEra Energy Res., LLC v. FERC*, 898 F.3d 14 (D.C. Cir. 2018) (permitting Federal Energy Regulatory Commission to "base its market predictions on basic economic theory, given that it explained and applied the relevant economic principles in a reasonable manner").

This creates a significant problem when a franchisee's employee engages in public misconduct. For example, one IFA franchisor member was alerted to a video in which an employee of a franchisee mistreated a customer's pet. In today's digital age, such video footage of an employee committing misdeeds can be disseminated easily, broadcast to the entire world within a matter of seconds. Consequently, the franchisor was left with the difficult choice of either: (a) doing nothing and hoping that the franchisee would address and resolve the situation in a manner that was satisfactory to the franchisor; or (b) communicating with the franchisee to ensure that the situation would be resolved without damage to the brand.

Under the proposed rule, were the franchisor to recommend any particular action—much less a proposed disciplinary action against the employee who engaged in the misconduct—the franchisor would expose itself to joint-employment liability. However, the option of doing nothing is untenable. A franchisor cannot reasonably be expected to sit idly by when its name becomes associated with scandals or negative publicity. To do so risks the brand. The amorphous "indirect" or "reserved right of" control test runs counter to the business certainty necessary for those in franchising to thrive.

Other franchisors identified this issue as a practical reality they faced under *Browning-Ferris*. Several franchisors relayed instances where they received reports of franchisee employees using offensive or derogatory language in the presence of customers. Again, in such instances, these franchisors were forced to decide between doing nothing and thereby risking public backlash and damage to the brand, or communicating with the franchisee about a potential strategy moving forward to resolve the situation and thereby risking a joint-employer finding. Nor is the individual franchisee and putative joint employer the only one that suffers: this risk likewise threatens other franchisees in the system who rely on each other's performance under the brand standards, and trust that the franchisor will exercise the necessary controls over those standards to protect their individual investments in the system.

Browning-Ferris effectively handcuffed franchisors in situations in which actions were taken by franchisee employees that could damage the franchisor's brand. Members Miscimarra and Johnson's prediction that *Browning-Ferris* would be "momentous and hugely disruptive" to the franchising method proved to be correct. The proposed rule only exacerbates these problems and will further discourage franchisors from taking actions to protect their brand.

2. Eliminating or Curtailing Training and Support to Franchisees

Franchising is a business growth method based on dissemination of best practices through a network of small businesses. An expanded joint-employer standard such as that proposed by the Board has been shown to undermine franchising by discouraging brands from sharing information and best practices with their franchisees.

In Dr. Bird's analysis, 92.2%—including all 28 franchisors interviewed—reported that franchisors implemented defensive distancing behaviors in the wake of the *Browning-Ferris* decision. This was reflected in the dwindling amount of services franchisors offered to their franchisees following the expansion of the joint-employment standard. A loss of franchisor services and guidance weakened the ability of franchisees to protect and grow the equity they count on to support their families and their communities, and to ensure that consumers are receiving a safe and positive experience.

Relying on well-settled Board law prior to *Browning-Ferris*, many franchisors provided a broad array of training and support to their franchisees on a number of subjects—such as Human Resources practices, legal updates, and technology. In the wake of that decision, however, numerous franchisors ceased or curtailed providing such training and support due to concerns that offering such services would trigger joint-employer liability. Examples of behaviors that ceased in light of *Browning-Ferris* include:

- Franchisors sharing best practices from franchisees or corporate restaurants that have the highest engagement scores or lowest turnover, to improve the employment experience system wide;

- Franchisors collecting and sharing wage and benefits benchmarking in a way that demonstrates the important of offering premium wages and fulsome benefit programs, so as to attract and retain staff; and

- Franchisors providing support to franchisees during the COVID-19 pandemic which helped protect jobs, and which they would likely not provide under the proposed rule for fear of joint-employer status.

Franchisors also drastically altered their training practices for franchisees following the expansion of the joint-employer doctrine. Franchisors elected to leave franchisees to their own devices to seek whatever training the franchisees believed would assist the franchisees' employees. Other franchisors chose to cease providing training on Human Resources-related subjects.

Those franchisors understood that providing less training places their brand at risk. One franchisor stated the downside of this approach is that it impedes consistency because franchisees receive advice from a number of different sources without any input or advice from the franchisor. The same franchisor stated that some franchisees were receiving insufficient training. The consequence of this cessation of training was that it increased the risk that franchisees or their employees would engage in some activity that damages the consumer and the brand.

Still other franchisors elected to offer training through third parties, which provided such training without any input or direction from the franchisors. However, doing so comes at a cost for the franchisors. One franchisor estimated that its training costs increased 300-400% due to its decision to outsource the training because of joint-employer concerns.

Finally, many franchisors simply stopped providing advice or guidance to franchisees who requested assistance with regard to personnel matters—such as compensation or disciplinary actions. Prior to the expansion of the joint-employer standard, most franchisors embraced franchisee requests for assistance. However, after *Browning-Ferris*, many franchisors chose not to provide such advice upon request out of concern that doing so would trigger joint-employer liability. Rather, some franchisors resorted to merely providing franchisees with options for consideration, but without making any recommendations. Others refrained entirely from responding and instead referred franchisees to other resources, such as an attorney.

The expanded joint-employer standard resulted in numerous franchisors curtailing other forms of support and guidance they previously provided to franchisees, such as with model employee handbook and personnel policies. In short, a broadened joint-employer standard, such as *Browning-Ferris*, was directly harmful rather than beneficial to the populations the proposed rule now purports to seek to protect.

3. Increased Litigation and Litigation Costs

Nearly all of the franchisors that provided information to IFA advised that under *Browning-Ferris*, they experienced a significant increase in joint-employer claims across all spectrums of the law—wage and hour claims, tort litigation (*e.g.*, personal injury cases), and harassment or discrimination claims. Very few of these franchisors were named as parties to joint-employer complaints prior to *Browning-Ferris*. Plaintiff's attorneys have since utilized the broadened joint-employer doctrine to target franchisors, which are typically viewed as having "deeper pockets" than franchisees.

A number of franchisors advised IFA of the increase in joint-employment litigation they experienced under *Browning-Ferris*. One franchisor reported that it had received almost double the amount of joint-employment complaints or charges in a given year since the decision was issued. Another franchisor, which had not been alleged to be a joint employer prior to *Browning-Ferris*, received approximately seven demand letters alleging that it is a joint employer with a franchisee in the wake of the decision. Yet another estimated that it has been named as an alleged joint employer at least 40 times since the *Browning-Ferris* decision issued, in contrast to the rare instances in which this occurred under prior law. Indeed, several franchisors advised IFA that they were never alleged to be a joint employer in any context until the *Browning-Ferris* decision was issued.

Franchisors that successfully defended against joint-employer allegations prior to *Browning-Ferris* have found that courts and agencies were much less inclined to dismiss joint-employer allegations under the decision's expanded joint-employer standard. One franchisor was able to successfully remove itself from joint-employer litigation by filing motions to dismiss immediately after it was served with a complaint. Since then, it has had two such motions to dismiss denied, which has required the franchisor to engage in discovery in order to demonstrate that it has no employment relationship with the

plaintiff. As a result, that franchisor incurred over $100,000 in litigation expenses for discovery and motion practice that it would not have been required to undergo prior to *Browning-Ferris*.

Because complainants are more inclined to pursue the perceived deeper pockets and will have wider latitude to pursue joint-employer theories under the proposed rule, IFA has seen that many franchisors have chosen to be more selective with regard to selecting franchisees with which it can or will do business. Under *Browning-Ferris*, these franchisors were less inclined to work with newer franchisees or economically disadvantaged franchisees given the heightened risk of joint-employer liability. Specifically, if a prospective franchisee did not have a background in the type of service that a franchise system offers, those franchisors that curtailed their services were less likely to offer the franchise opportunity out of fear that the prospective franchisee would need more guidance and coaching than the franchisor would have been able to offer under the expanded joint-employer standard. These franchisors reported strong reluctance to offering franchise opportunities to inexperienced franchisees, who might otherwise be quality and qualified candidates for a specific system, because the inexperienced franchisee would not have adequate access to the franchisor's support that is necessary for success in the system, nor the business experience to rely upon when those services and guidance are not provided. One franchisor compared this to sending a new franchisee into a boxing match with his hands tied behind his back. Another franchisor, which has over 20% of its franchisees from economically disadvantaged backgrounds, simply ceased expanding relationships with such franchisees unless those franchisees demonstrate greater economic long-term stability. One franchisor rejected a potential lower-income franchisee that it would have approved pre-*Browning-Ferris*, but upon which it would not take a risk given joint-employer concerns. Yet another franchisor, because of joint-employer concerns, considered eliminating a program in which it provides an opportunity for successful general managers at franchisor-owned stores to rent the store property and equipment, hire their own staff, and share in the profits of the store. Still others opted to stop expanding their franchisee base and instead open franchisor-owned stores.

4. Compromised Relationships with Franchisees

The manner in which *Browning-Ferris* increased litigation and caused franchisors to limit their services offered to franchisees has impaired many relationships between franchisors and franchisees. Sixty-nine of the 77 interviewees reported that franchisees complained to franchisors about the curtailment of services offered to franchisors in the wake of *Browning-Ferris* because of joint-employment considerations. Indeed, most of these franchisee complaints focused predominately on franchisees' perceptions that they were receiving reduced value out of the franchising relationship than they did prior to the decision even though franchisor royalties have either stayed the same or increased.

Many franchisees complained to franchisors that they had to incur increased costs because they were compelled to seek outside guidance through attorneys or other

consultants on matters in which the franchisor used to assist. Some of those franchisees notified the franchisor that they cannot afford counsel to provide guidance and assistance with regard to Human Resources matters.

B. *The Devastating Impact of Browning-Ferris on Franchisees*

IFA's interviews revealed that *Browning-Ferris* also caused unease among franchisees and, more importantly, significant economic losses to them.

1. Loss of Franchisor Benefits

As explained above, 71 out of the 77 franchisees interviewed reported that their franchisors curtailed the services and support they provided to their franchisees after *Browning-Ferris*. This has had a significant impact on the operations of franchisees.

2. Lack of Advice and Training

The curtailment of franchisor training, in-store observations, and willingness to provide general advice occasioned by *Browning-Ferris* harmed franchisees. In light of franchisors no longer providing such services, franchisees were forced to either invest in obtaining or offering such training for themselves or to act without receiving the benefit of any such training. Finding adequate training is not easy for every franchisee. Not all training is available on the internet or other remote resources, and some franchisees based in rural parts of the United States have difficulty obtaining affordable training that can be provided locally.

Given the curtailment of franchisor support, franchisees were forced to incur new expenses. Several franchisors retained attorneys to assist them with drafting employee handbook and personnel policies—which typically cost several thousand dollars at a minimum. Such costs are especially burdensome on economically disadvantaged franchisees and rural franchisees that lack access to experienced employment law counsel.

3. Loss of Collaboration

For many franchisees, *Browning-Ferris* effectively resulted in the elimination of collaboration between franchisees and franchisors. Prior to *Browning-Ferris*, many franchisors provided in-store observations in order to provide advice intended to assist franchisees with their operations. Franchisors often used such observations, as well as store training and sample personnel materials (such as model employee handbooks or personnel policies), to guide franchisees and help strengthen and protect the franchisor's brand. As a result, franchisors offered advice on best practices—obtained through many years of experience working with multiple franchisees and operating corporate-owned businesses—through myriad channels. Beyond that, franchisor training sessions and meetings with franchisees often resulted in franchisees creating a network among themselves through which they could communicate with one another to share operational

ideas. Many franchisors also rewarded successful franchisees with recognition awards designed to encourage compliance with the franchisor's branding expectations but have stopped doing so in light of *Browning-Ferris*.

As franchisors rolled back such services, franchisees were left to their own devices to develop successful operational practices. Many of the franchisees, without the benefit of in-store observations, were left wondering whether they were competently performing basic operational tasks, such as scheduling, marketing, or Human Resources tasks. Because of this, and because franchisors were hesitant to audit compliance, many franchisees did not know whether they were operating in a manner that satisfies their franchisor's branding expectations.

As a consequence, franchisees were forced to rely on their own experiences. This was especially difficult and challenging for newer franchisees who had little experience owning or managing a business. They effectively were tasked with operating their stores, complying with their franchisors' expectations, complying with the law, and trying to run a profitable operation all on their own. Again*, Browning-Ferris* put the essence of the franchise business model at risk.

4. The Severe Economic Impact of *Browning-Ferris* on Franchisees

Based on the IFA interviews referenced above, Dr. Bird conducted a detailed economic analysis regarding the impact of the *Browning-Ferris* decision on franchising.

According to Dr. Bird, "the 'distancing' behavior by franchisors from franchisees has resulted in franchisees experiencing lost sales or increased costs equivalent to yearly lost potential output between [2.55% and 4.93%]." He concluded that the output loss for franchisees in the United States as a result of *Browning-Ferris* is in the range of $17.2 billion to $33.3 billion per year. He further determined that *Browning-Ferris* resulted in anywhere from 142,000 to 376,000 lost job opportunities.

The losses for franchisees individually have been significant. Dr. Bird concluded that "[f]or the 233,000 small business franchisees nationwide, [assuming a 4.93% loss in output], the average franchisee [has] experience[d] an annual revenue loss of $142,000 per year" since *Browning-Ferris*. Dr. Bird notes that, "[t]hese amounts [have] significant impacts on small franchise businesses in which average annual revenue is only $2.9 million and average profit including return on the entrepreneur's own labor is $433,000."

Dr. Bird opined at the time that if the Board maintained its *Browning-Ferris* joint-employment standard it "will have a significant adverse impact on the U.S. economy, equivalent to a loss of output of $17.2 billion to $33.3 billion annually for the franchise business sector and likely multiple times that for all sectors affected." These lost revenues do not take into consideration other increased costs that have been incurred as a result of the expansion of the joint-employer doctrine. Such increased costs include:

- *Additional litigation and legal costs incurred by franchisors and franchisees*. Dr. Bird's analysis revealed that in the four years following *Browning-Ferris*, "The number of joint-employer claims under NLRB jurisdiction involving franchise businesses have increased five-fold" and that there have been other significant increases in non-NLRB matters, such as wage and hour disputes.

- *Increased non-litigation attorney costs*. Franchisor respondents to IFA's interviews "reported increases in both internal and outside counsel legal costs to help them adapt their operations to the new liability environment associated with the *Browning-Ferris* ruling." Similarly, franchisee respondents "incurred additional legal counsel costs to replace services and guidance that franchisors previously provided to them."

- *Training costs*. Franchisors and franchisees reported incurring additional costs to revise or outsource training materials.

- *Costs associated with reduced or eliminated on-site inspections*. As explained above, many franchisors reduced or eliminated the use of on-site inspections of its franchisees. As noted in Dr. Bird's report, "[t]he subsequent erosion of brand quality may have decreased the market value of the franchise brand."

- *Quality of service*. In Dr. Bird's words, "[i]n cases where joint employer risk has caused deterioration in quality of service, consumers have likewise suffered an economic loss in comparison to the quality of service received from franchisees prior to the *Browning-Ferris* decision."

Finally, Dr. Bird concluded that "[T]he adverse impacts that have already been observed since [Browning-Ferris] will continue and likely become increasingly severe in future years as the effect of the NLRB definition spreads to other jurisdictions and contexts at the federal, state and local levels through administrative rules and litigation outcomes."

The analysis of the practical effect that *Browning-Ferris* had on the franchise industry remains as relevant today as it did four years ago. Indeed, as the proposed rule goes even further than *Browning-Ferris* in expanding the scope of joint-employer status, while providing even fewer meaningful touchstones by which franchise employers may model their behaviors, it is highly likely that this analysis understates the negative economic impact of the proposed rule.

III. The Proposed Rule Is Inferior to the 2020 Rule and Should Be Abandoned.

The Board should abandon the proposed rule for several reasons, notably, because the 2020 rule provides certainty and stability. The Board's longstanding case-by-case adjudicatory approach is also preferable to the proposed rule. At a minimum, the Board should modify the proposed rule in several ways.

A. *The Board's 2020 Rule Provides Certainty and Stability Regarding the Joint-Employer Relationship.*

The Board states that the proposed rule will "establish[] a definite, readily available standard" that "will assist employers and labor organizations in complying with the Act," and that the proposed rule will "reduce uncertainty and litigation over the basic parameters of joint employer status." 87 Fed. Reg. at 54645. But there is nothing specific, certain, or definite about the Board's proposed rule. For example, the proposed rule fails to clearly define a common-law employment relationship, includes an unlimited list of essential terms and conditions of employment, and fails to attempt to describe the types of routine contract terms that are not probative of joint employer status. *See id.* at 54650-51. As explained directly by the SBA in its comments, the proposed rule "is too ambiguous and broad, providing no guidance for contracting parties on how to comply or avoid liability."[21]

By contrast, the Board's 2020 rule already "foster[s] predictability and consistency regarding the determinations of joint-employer status in a variety of business relationships" and "enhance[es] labor-management stability" because it provides clear guidance to parties subject to the NLRB's jurisdiction: they will be held to be joint employers only if they meet definite, enumerated criteria. 85 Fed. Reg. at 11888. Specifically, the 2020 rule already identifies "the general types of control that will render one company the joint employer of another's workers," sets forth a definite list of essential terms and conditions of employment, and also "provides specific examples with respect to each essential employment term." 87 Fed. Reg. at 54645 (Members Kaplan and Ring, dissenting).

Applying the Board's own metric for providing certainty and clear guidance to regulated parties—a reduction in litigation (*id.* at 54645)—the Board's 2020 rule has been a success, because the Board has never been required to apply the 2020 rule to a single case. Indeed, not having applied the 2020 rule to a single Board case, there is *no* evidence to suggest that the benefits of the 2020 rule have not been realized by management and labor alike – nor has there been any court precedent postdating the 2020 rule's publication or any factual developments justifying the Board's abandonment of the 2020 rule in favor of the proposed rule. *See* 87 Fed. Reg. at 54642 (dissent). For these reasons, the Board should abandon the proposed rule and leave the 2020 rule in place.

B. *A Return to Case-by-Case Adjudication is Preferable to the Proposed Rule.*

Even assuming the Board wishes to discard the 2020 rule, it should return to case-by-case adjudication instead of imposing the proposed rule. The Supreme Court has explained that whether a company possesses "sufficient indicia of control to be an 'employer' is essentially a factual issue" to be decided on a case-by-case basis (and not a rulemaking of general of general applicability. *Boire v. Greyhound Corp.*, 376 U.S. 473,

[21] SBA Comment, *supra* note 4, at 1.

481 (1964). The Notice of Proposed Rulemaking makes a more compelling case for returning to such adjudication than it does for the proposed rule itself:

> For nearly the entirety of the Act's history, the Board has developed its joint-employer jurisprudence through case-by-case adjudication… In comparison to rulemaking, adjudication possesses a number of benefits when determining joint-employer relationships. The issue of common-law joint-employer status is a highly fact-specific one, which may be better suited to individualized determination on a case-by-case basis. Further, an exhaustive "once-size-fits-all" rule may be an inappropriate mechanism to address the complex and fact-specific scenarios presented by sophisticated contracting arrangements in the modern workplace.

87 Fed. Reg. at 54644 (dissent).

Further, aside from criticizing the 2020 rule, the Board has not sufficiently explained *why* the proposed rule is superior to the Board's longstanding method of case-by-case adjudication of joint-employer issues. The reasons the Board gives for adopting a new rule (instead of returning to adjudication) are insufficient to justify the proposed rule. For example, the Board claims that the 2020 rule "wrongly departs from common-law agency principles," *id.* at 54644-45, but even if that were true (it is not), that rationale at best justifies rescinding the 2020 rule.

Next, the Board asserts that the proposed rule "responds to the District of Columbia Circuit's invitation for the Board to 'erect some legal scaffolding' to ensure that the joint-employer standard appropriately focuses on forms of reserved and indirect control that bear on employees' essential terms and conditions of employment." *Id.* at 54645. But the D.C. Circuit did not instruct the Board to engage in rulemaking; indeed, it does not even *suggest* that the Board should do so.

Moreover, the proposed rule does not address the issues the D.C. Circuit instructed the Board to clarify. *Compare BFI,* 911 F.3d at 1220-21 (D.C. Cir. 2018) (remanding to the Board to "differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third party relationships") *with* 87 Fed. Reg. at 54650-51 (noting that the Board's proposed rule "does not purport to exhaustively detail the universe of business arrangements that bear on the existence of a common-law employer-employee relationship" and inviting the public to suggest types of contracting relationship that do not create an employment relationship). Instead, the Board proposes a standard that is broader and vaguer than that which the D.C. Circuit rejected in 2018.

Finally, the proposed rule's complete lack of specificity regarding a number of crucial issues only reinforces that an adjudicatory approach is preferable to the instant rulemaking. Indeed, the proposed rule's provisions almost appear designed to invite litigation. For example, and as noted above, the proposed rule does not define the term

"common law employment relationship." Instead, the NPRM states that it proposes to modify 29 CFR § 103.40(a) to state only that an employer is an entity that "has an employment relationship with [particular] employees under common-law agency principles." 87 Fed. Reg. at 54645. The proposed rule provides no further elucidation of these principles, instead referring readers to a variety of sources that will inevitably be mined for citations in future Board litigation over the application of the joint-employer standard.

The proposed rule likewise fails to provide a definitive list of essential terms and conditions of employment and does not define what it means to exercise control over those terms and conditions. It therefore provides *no* meaningful guidance to for businesses to use in organizing their relationships with other companies to minimize joint-employment risk. The proposed rule's use of an unbounded, expansive list of essential terms and conditions of employment is unique among other federal and state joint-employer standards, which also seek to reflect common-law principles. Additionally, the proposed rule's list of essential terms and conditions of employment includes "work rules and directions governing the manner, means, or methods of work performance," *id.* at 54646, which casts a tremendously wide net over independent contractors. The list also includes "workplace health and safety" but the proposed rule fails to explain why health and safety is an essential term or condition of employment in the joint-employer analysis, or if it has been historically regarded as such under common law. Nor is there any standard definition of "health and safety"—the phrase could potentially include anything that might impact employee health (physical or mental), from stress to unlawful harassment, and anything that may impact safety (which may be interpreted more broadly than bodily or physical safety).

In short, the proposed rule fails to provide meaningful guidance on a variety of crucial issues. As such, there is no justification for proceeding by rulemaking rather than adjudication.

C. *The Board Should Modify the Proposed Rule in Several Ways.*

Finally, if the Board is intent on moving forward with rulemaking, it should alter the proposed rule in several key respects:

First, the Board should specify that indirect control and reserved but unexercised control are insufficient to establish joint-employer status in the absence of direct and immediate control over one or more essential terms and conditions of employment, instead of simply and vaguely directing parties to the common law.

Second, the Board should add to the proposed rule the second step of the analysis it adopted in *Browning-Ferris*. Specifically, prior to finding joint-employer status, the Board should determine "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." 363 NRLB 1599, 1600 (2015). Doing so is necessary to ensure that

the Board's rule is not just a theoretical or philosophical exercise but is instead relevant to real labor-management relationships under the NLRA.

Third, the Board should substantially narrow the proposed rule's definition of "essential terms and conditions of employment" to correspond to the list of essential terms and conditions enumerated in the 2020 rule (*i.e.*, wages, benefits, work schedules/hours, hiring, termination, discipline, assignment of work, and instruction). Doing so would add clarity and predictability to the proposed rule and would save the Board's resources by avoiding substantial future litigation over what qualifies as an "essential term and condition of employment." This accords with SBA's recommendations, as does the removal of any "catch all" provision which would make virtually any contract term to subject an employer to joint-employment liability.[22]

Fourth, the Board should clarify that contractual terms requiring uniformity of operations in a franchising system, terms requiring legal compliance, and "social responsibility" provisions common to arm's length commercial contracts are not probative of joint-employer status. At a minimum, a list of exceptions should be added to any final rule, including the franchisor's express ability to audit for compliance with its contractual agreements.

As to uniformity of operations, the Board should codify *Love's Barbeque* and the other pre-1984 Board decisions that limited franchisors and franchisees from being found to be joint employers under the Act. *See, e.g., Love's Barbeque Rest.*, 245 NLRB 78, 118 (1979) (nothing that the "need for uniformity of operation will not, of itself, suffice to establish a joint employer relationship"); *Thriftown, Inc.,* 166 NLRB 603, 607 (1966) ("[O]our decision…is not based upon mere 'appearances' or upon whether the agreement of the parties 'as between themselves' establishes a particular type of business entity, 'in law'"); *Disco Fair Stores, Inc.,* 189 NLRB 456, 459 (1971) ("The existence of such control, however, has not in and of itself been sufficient for finding that the [franchisor] is a joint employer of employees of its [franchisees]"); *Tilden, S.G., Inc.,* 172 NLRB 752, 753 (1968) (various terms of franchise agreements did not support a joint-employer finding). Specifically, the Board should clarify that franchisors can exert control over the "elements of the business relationship" with franchisees "to keep the quality and goodwill of [the franchise] name from being eroded" without being a joint employer. *Tilden, S.G. Inc.,* 172 NLRB at 753.[23]

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[23] Several courts in recent years have recognized that the test for joint employer should account for the special considerations inherent in the franchising relationship. *Patterson v. Domino's Pizza,* 60 Cal. 4th 474 (2014) ("The imposition of and enforcement of a uniform marketing and operational plan cannot *automatically* saddle the franchisor with responsibility for employees of the franchisee…The contract-based operational division that otherwise exists between the franchisor and the franchisee would be violated by holding the franchisor accountable for misdeeds committed by employees who are under the direct supervision of the franchisee, and over whom the franchisor has no contractual or operational control"); *Salazar v. McDonald's Corp.,* 944 F.3d 1024 (9th Cir. 2019) (control over "means and manner of work

Fifth, the new rule should also clarify that actions taken by a company to comply with laws and regulations are not probative of joint-employer status. *See, e.g., Aldworth Co.*, 338 NLRB 137, 139 (2002) ("[A]ctions taken pursuant to government statutes and regulations are not indicative of joint employer status"). To the extent government regulations require an entity to take actions vis-à-vis another entity, that should not be evidence of a joint-employer relationship. "The Board should clarify that contract terms to abide by federal requirements should be considered routine components of a company-to-company contract, and not essential terms and conditions subject to joint employer liability."[24] This is particularly important in light of laws like California's AB 257, which will permit union representatives to have a hand in regulating quick-service restaurant employers in California, including on issues related to wages, hours, and health and safety matters.[25] Moreover, as explained above, franchisors—as owners of a trademark—are required to take certain actions to preserve and protect their marks under the Lanham Act. Interpreting such required actions as evidence of joint employment punishes the trademark holder and creates an untenable conflict between federal statutes.

Sixth, the new rule should be clear that social responsibility provisions between contracting parties are not evidence of a joint-employer relationship. *See, e.g., Doe I v. Walmart Stores, Inc.*, 572 F.3d 677, 680-83 (9th Cir. 2009) (contracts containing a code of conduct requiring Walmart's foreign suppliers to comply with foreign labor laws and permitting Walmart to monitor compliance were not evidence that Walmart was a common-law employer of its suppliers' employees). The Board previously—and correctly—recognized that corporate social responsibility contract terms (*e.g.*, safety and quality standards, harassment guidance, etc.) are routine contracting practices and not indicative of a joint-employer relationship. *See* 85 Fed. Reg. at 11222. The Board should reaffirm this principle here, insofar as doing otherwise would have the perverse effect of disincentivizing parties from agreeing to socially beneficial agreements.

Seventh, if the Board adopts the proposed rule, it should make explicitly clear that the final rule applies to local unions viz. their national and international parent unions. Under the proposed rule, it would appear in virtually all instances that a parent union

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performed at franchises" that is "geared specifically toward quality control and maintenance of brand standards" cannot create a joint-employer relationship").

[24] SBA, *supra* note 4, at 4.

[25] Under AB257, the so-called "Fast Food Accountability and Standards Recovery Act" or "FAST Act," a 10-person council of workers, corporate representatives, franchisees, and state officials will have the authority to raise California's minimum wage to $22 per hour by January 1, 2023, a 41 percent increase in wages. *See* Isabella Hindley, "Considering California's $22 Minimum Wage at the Federal Level" (American Action Forum September 2022), available at httpw://www.americanactionforum.org/insight/considering-californias-22-minimum-wage-at-the-federal-level/. This is anticipated to cause price increases or employment decreases of up to 35 percent. *Id.* This despite the fact that rate of wage claims in the limited-service restaurant industry is up to **five times lowe**r than in other industries. *See* Employment Policies Institute, "Not So FAST: Analyzing Labor Law Compliance at California Fast Food Restaurants" (August 2022), available at https://epionline.org/studies/not-so-fast-analyzing-labor-law-compliance-at-california-fast-food-restaurants/.

would be the joint employer of its locals' employees, based on the broad control the parent both exercises and reserves with respect to the local. Parent union constitutions routinely include provisions exerting or reserving control over a range of local operations, including strike notice requirements, membership requirements, dues structures, the examination of books and records, and the approval of local constitutions and bylaws. Under the broad standard set forth in the proposed, it would appear to be a foregone conclusion that the employees of a local union would be joint employees of the parent national or international, and a final rule, if it is promulgated, should plainly say so.

Finally, if the Board adopts the proposed rule, the Board should delay its effective date to ensure employers have sufficient time to implement changes to their current arrangements. A lengthy implementation period is needed in light of reliance interests, compliance costs, and other regulatory burdens associated with shifting to a new legal regime.

IV. The Proposed Rule Is Unlawful.

As set forth below, the proposed rule is legally flawed. IFA urges the Board to reject its premise and submits that no final rule that adopts the same or a substantially similar approach to joint-employer analysis can withstand legal challenge.

First, Congress has not authorized the Board to issue the proposed joint employer rule. The proposed rule would greatly expand the class of entities that qualify as "employers" within the meaning of the NLRA, with a correspondingly significant effect on the economy. Had Congress intended the Board to be able to, in its discretion, so expand its regulatory authority, Congress would have said so clearly. It did not.

Second, the proposed rule's definition of "joint employer" is an impermissible interpretation of the NLRA. The term "employer" in the NLRA must be given its common-law meaning. At common law, "joint-employer" status was reserved for those entities that exercise direct and immediate control over the essential terms and conditions of employment of another entity's employees. *See, e.g.,* 27 AM. JUR. 2D *Employment Relationship* § 5 ("While dual employment does not necessarily exist whenever two entities affect the actions of a single employee, it may exist if two employers exercise substantial control over the employees by participating in the selection, hiring, and paying of the employee, by having the power to discharge the employee, and by controlling the employee in the performance of his or her duties.") The proposed rule rejects those limits, thereby transgressing the common law and the NLRA.

Third, the proposed rule ignores the D.C. Circuit's express direction in *BFI* to "erect some legal scaffolding that keeps the [joint employer] inquiry within traditional common-law bounds." *BFI*, 911 F.3d at 1220. The D.C. Circuit criticized the Board for not distinguishing between "essential terms and conditions of employment" and "routine components of a company-to-company contract." *Id.* at 1221. The proposed rule continues to provide "no blueprint for what counts as 'indirect' control," and remains

ambiguous as to what is considered an "essential term[] and condition[] of employment." *Id*. at 1220-21.

Fourth, the proposed rule frustrates Congress's purpose in enacting the Lanham Act. Under the Lanham Act, franchisors must maintain control over the use of their trademarks. Under the proposed rule, mere compliance with the Lanham Act could transform such trademark owners into employers. Congress surely did not intend such a penalty to accompany its trademark law.

Fifth, even if the proposed rule's definition of "joint employer" were a permissible interpretation of the NLRA, it would be arbitrary and capricious under the Administrative Procedure Act (APA). The proposed rule fails to acknowledge its departure from "longstanding" agency practice, even as it purports to be "consistent" with it. It significantly alters the standard set out in the agency's *BFI* decision, even as it claims to "incorporate" that decision. The proposed rule's harmful disruptive effects on existing franchise agreements render the rule impermissibly retroactive. And the proposed rule fails to provide fair notice to employers of what conduct will trigger a joint employer finding. The proposed rule offers virtually no guidance as to what would constitute adequate control over "essential terms and conditions" to render an entity a joint employer. Instead, the proposed rule vaguely incorporates by reference "common-law agency principles," even as it expressly contradicts those principles in the same rule. Finally, the Board failed adequately to consider the alternatives to the proposed rule.

Sixth, an interpretation of the NLRA that would permit the Board to promulgate the proposed rule would violate the Constitution. The NLRA contains no useful definition of the term "employer" and never uses the term "joint employer." Neither does the Act give guidance as to how to define either term. Accordingly, if the NLRA were to be read in the way the proposed rule suggests—to authorize the Board to aggressively expand the definition of "joint employer"—the NLRA would violate the nondelegation doctrine.

A. *The Proposed Rule Exceeds the Board's Authority Because Congress Has Not Clearly Authorized The Board To Issue The Proposed Joint Employer Rule.*

The NLRA was designed to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. The statute also provides that the Board has the "authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." *Id*. § 156. However, the NLRA nowhere gives the Board *carte blanche* authority to define what a joint employer is in derogation of the common law. This is especially true in light of the fact that the proposed expansion of the concept of joint employment is an extremely important and consequential one.

1. The proposed rule addresses a major question.

"When the statute at issue is one that confers authority upon an administrative agency," the interpretation of its words "must be shaped, at least in some measure, by the nature of the question presented—whether Congress in fact meant to confer the power the agency has asserted." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–08 (2022). Accordingly, under the major questions doctrine, statutes are not read to confer authority on agencies to answer "question[s] of deep 'economic and political significance' that [are] central to th[e] statutory scheme" unless Congress delegated that authority "expressly." *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *Util. Air Regulatory Group v. EPA,* 573 U.S. 302, 324 (2014)). Put another way, in such situations, courts will find that, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Accordingly, where an agency asserts an "[e]xtraordinary grant of regulatory authority," a mere "colorable textual basis" in the statute is insufficient; Congress must be "clear." *West Virginia*, 142 S. Ct. at 2609.

The major questions doctrine has been repeatedly invoked to strike down agency overreach, including in this past Supreme Court term. In *Alabama Association of Realtors v. HHS,* the Supreme Court held that the Centers for Disease Control and Prevention lacked the authority to impose an eviction moratorium under 42 U.S.C. § 264(a), which provides that "[t]he Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." 141 S. Ct. 2485, 2487 (2021) (quoting 42 U.S.C. § 264). The Court so held because the eviction moratorium was a "claim of expansive authority" affecting millions of tenants, and § 264 "is a wafer-thin reed on which to rest such sweeping power." *Id*. Likewise, in *NFIB v. OSHA*, the Supreme Court held that the agency's statutory authority to create an "emergency temporary standard" did not include the power to impose a vaccine mandate. 142 S. Ct. 661, 665 (2022).[26] Because the power to impose such a mandate would be a "power[] of vast economic and political significance," the statute had to "plainly authorize" the mandate, and it did not. *Id*. Most recently, in *West Virginia v. EPA*, the Supreme Court held that the EPA's authority to determine the "best system of emission reduction" under 42 U.S.C. § 7411(a)(1) did not provide "clear congressional authorization" to "devise carbon emissions caps based on a generation shifting approach." 142 S. Ct. at 2614.

Likewise here, the proposed rule is unauthorized under the major questions doctrine. Whether the definition of "employer" under the NLRA should extend so far is a

[26] That authority could be exercised only if the Secretary "determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1).

"question of deep economic and political significance that is central to this statutory scheme." *King*, 576 U.S. at 486 (internal quotation marks omitted). The definition of "employer" is undoubtedly "central" to the NLRA's statutory scheme. In *King*, because tax credits were "among the [Affordable Care Act's] key reforms," "[w]hether those credits are available on Federal Exchanges [was] … central to this statutory scheme." *Id*. Here, the NLRA was enacted to "encourag[e] the practice and procedure of collective bargaining" between employers and employees. 29 U.S.C. § 151. Under the NLRA, employers are prohibited from engaging in "unfair labor practice[s]," which include "discrimination in regard to hire or tenure of employment … to encourage or discourage membership in any labor organization" and "[r]efus[ing] to bargain collectively with the representatives of his employees." *Id*. § 158(a). Surely whether an entity is an employer *at all* qualifies as a "key" part of the statutory scheme.

Moreover, the question whether entities who possess merely the right to exercise indirect control and who do not actually exercise such control fall within the NLRA's scope is a question of "deep economic and political significance." *King*, 576 U.S. at 486. Since the mid-twentieth century, nontraditional business relationships such as the franchisor-franchisee model have been a significant part of the U.S. economy. In 1955, there "were about 50,000 total franchisees in the country, grossing $2.5 billion annually."[27] From there, the model only grew. "By 1970, there were more than 900 different franchisors and over 670,000 franchisees, grossing approximately $90 billion a year, or 10 percent of gross domestic product."[28] In 2013, gross franchisee sales were "in excess of $2 trillion."[29] The proposed rule will potentially impose compliance costs on a vast majority of franchisors that do not actually exercise substantial control over their franchisees' employees and accordingly have never been found to be joint employers under any legal standard. Whether such employers should be subject to the NLRA's requirements—for the first time since the NLRA's enactment in 1935—is a major question. Other elements of the proposed rule—such as its refusal to articulate a complete list of essential terms and conditions of employment—further expand the rule's potential reach and confirm that it addresses a major question. *See* Part I, *supra*.

2. Congress has not clearly authorized the Board to expand the definition of "employer" under this proposed rule.

Even if a colorable interpretation of the NLRA could lead to the proposed rule's definition of a joint employer, Congress has not clearly authorized such an expansion, and the Board is therefore not empowered to promulgate the rule. In the NLRA, the term "employer" is defined, with some exceptions, to include "any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. § 152(2). The proposed rule would permit the Board to find an entity to be a joint employer on the basis

[27] John T. Bender, *Barking Up the Wrong Tree: The NLRB's Joint-Employer Standard and the Case for Preserving the Formalities of Business Forman Franchising*, 35 Franchise L.J. 209, 224 (2015).
[28] *Id.*
[29] *Id.* at 225.

of "possess[ing] the authority to control (whether directly, indirectly, or both)" or "exercis[ing] the power to control (whether directly, indirectly, or both)[] one or more of the employees' essential terms and conditions of employment." 87 Fed. Reg. at 54663. In its notice of proposed rulemaking, the Board concedes that the NLRA is "silent as to the definition of 'joint employers.'" 87 Fed. Reg. at 54642. As the D.C. Circuit pointed out, the NLRA "gives no direct guidance" on that question because it "provides no relevant definition of 'employer,' let alone of 'joint employer.'" *BFI*, 911 F.3d at 1200. That is because the statutory definition of "employer" is circular in that it defines the term with reference to the term itself. 29 U.S.C. § 152(2).

The Supreme Court has used the major questions doctrine to invalidate agency assertions of authority even when the case turned on the plain meaning of a statutory definition which seemed to encompass the agency's interpretation. In *Brown & Williamson*, the Supreme Court rejected the argument that tobacco falls within the Federal Food, Drug, and Cosmetic Act (FDCA) definition of "drug," which in relevant part was "articles (other than food) intended to affect the structure or any function of the body." 529 U.S. at 159–61. The Court reached that conclusion because it was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." Id. at 160. If the FDCA is cryptic, the NLRA's circular definition of "employer" is sphinxlike. If Congress intended the Board to have the authority to read into "employer" the scope of its proposed rule, Congress would have said so clearly.

The NLRA's general rulemaking provision, 29 U.S.C. § 156, similarly fails clearly to authorize the Board to promulgate the proposed rule. That provision grants the Board the authority to promulgate "such rules and regulations as may be necessary to carry out the provisions of this Act." Accordingly, the Board has acted under § 156 to issue regulations on, for example, "[a]ppropriate bargaining units in the health care industry" for "petitions filed pursuant to [29 U.S.C. § 159]." 29 C.F.R. § 103.30(a). The generic rulemaking provision does not at all address whether the Board may radically expand its authority by re-defining what an 'employer' is. That silence is dispositive. Given the vast implications of allowing the Board to act in this way, Congress must speak clearly, and it has not done so here.

3. <u>The Board's past practice confirms that it lacks the authority to extend the definition of "employer" to entities possessing only reserved, indirect, and unexercised control.</u>

Past practice confirms that the NLRA was never meant to confer such authority on the Board. "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941). Accordingly, "[W]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically

greet its announcement with a measure of skepticism." *Util. Air*, 573 U.S. at 324 (internal quotation marks and citation omitted); *see also OSHA*, 142 S. Ct. at 666 ("[L]ack of historical precedent, coupled with the breadth of authority that the Secretary now claims, is a telling indication that the mandate extends beyond the agency's legitimate reach." (internal quotation marks omitted)).

Until 2015, the Board had never before sought to regulate as joint employers entities who possessed only reserved, indirect, and unexercised control. The proposed rule seeks expressly to do just that. In the process, it potentially covers business format franchisors, another unprecedented expansion of the Board's authority despite the franchise business model's prominent place in the American economy the last sixty years. That the Board had never attempted to expand the employer umbrella to include entities with only reserved and indirect control is evidence that Congress never gave the Board the power to do so in the first instance. It is, at the very least, evidence that Congress did not *clearly* give the Board the power to regulate these entities—and for an issue of this magnitude, clarity is required.

The Board's proposed joint employer definition is unprecedented not just in scope, but also in form. As the Board notes, "[F]or nearly the entirety of the Act's history, [it] has developed its joint-employer jurisprudence through case-by-case adjudication." 87 Fed. Reg. at 54644. This reflects the Board's more general approach. As late as 1998 (62 years after the Board was established), the Supreme Court noted that, "[T]o our knowledge, only one regulation has ever been adopted by the Board, dealing with the appropriate size of bargaining units in the health care industry." *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 374 (1998). Just as Congress did not clearly authorize the scope of the Board's proposed definition, it also did not clearly authorize the form that definition took. Even if the Board could use the proposed definition in its adjudications, Congress has not clearly authorized the Board to promulgate this newly expansive definition as a generally applicable rule changeable only through notice-and-comment.

4. <u>The 2020 rule does not implicate these concerns</u>.

The 2020 rule, by contrast, was clearly within the Board's statutory authority. The 2020 rule did nothing more than restate the common-law principles the Board had developed in decades of adjudications. The Board made clear that it "intend[ed] in [the final 2020 rule] to return, with clarifying guidance, to the carefully balanced law as it existed before the Board's departure in *Browning-Ferris*." *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184, 11224 (Feb. 26, 2020). Thus, the 2020 rule did not expand the Board's regulatory authority; it simply clarified that the Board's approach was consistent with the common law. The 2020 rule did not answer a "question of deep economic and political significance," because the only question it addressed was one which had been answered—repeatedly—for decades in the agency adjudication process and in the common law. In contrast, the proposed rule is an expansion of the Board's regulatory authority to entities which had never before been classified as joint employers. The proposed rule therefore *does* answer a major

question and answers it in a way that no rule had ever done before. If Congress intended the Board to do so, it would have spoken clearly.

In sum, the proposed rule sets forth an unprecedentedly broad definition of joint employers, and potentially reaches categories of entities and business relationships which the Board, in its nearly century-long history, has never attempted to regulate. For the Board to assert that sort of authority, Congress must speak clearly, and certainly more clearly than it did through the NLRA's circular definition of "employer."

B. *The Proposed Rule Exceeds the Board's Authority Because the Board's Definition Of "Joint Employer" Is An Impermissible Interpretation Of The NLRA*.

The proposed rule is also invalid because its definition of "joint employer" reflects an impermissible interpretation of the NLRA. As noted above, the NLRA makes no mention of joint employers and provides no useful definition of "employer." Accordingly, the term "employer" must be given its meaning at common law. By requiring no more than reserved and indirect control to find an entity to be a joint employer, the proposed rule transgresses the common law and therefore the NLRA as well.

1. <u>The definition of "employer" under the NLRA must be consistent with common law principles</u>.

"It is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, 527 U.S. 1, 21 (1999) (internal quotation marks and alteration omitted). For that reason, "When Congress has used the term 'employee' without defining it,' the Supreme Court has "concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (using a "common-law test for determining who qualifies as an 'employee' under ERISA" because "ERISA's nominal definition of 'employee' … is completely circular").

The NLRA does not meaningfully define "employer," and therefore that term must be given its common-law definition. *See* 29 U.S.C. 152(2); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968). "In past cases of statutory interpretation, when [courts] have concluded that Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law, [courts] have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Cmty. for Creative Non-Violence*, 490 U.S. at 740. For that reason, restatements provide "useful starting point[s]" for construing the NLRA. *See Kolstad v. ADA*, 527 U.S. 526, 542 (1999).

2. The proposed rule conflicts with the common law and the NLRA.

According to the proposed rule, to be a joint employer "means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment." 87 Fed. Reg. at 54663. In other words, an entity can be a joint employer if it merely possesses—without exercising—the authority to indirectly control an employee.

The proposed rule's joint employer definition contradicts the common law. Under common-law agency principles, joint-employer status is limited to entities that exercise direct, immediate, and substantial control over one or more essential terms and conditions of employment of another entity's employees. It is a narrow test. "While dual employment does not necessarily exist whenever two entities affect the actions of a single employee, it may exist if two employers exercise substantial control over the employees by participating in the selection, hiring, and paying of the employee, by having the power to discharge the employee, and by controlling the employee in the performance of his or her duties." 27 AM. JUR. 2D *Employment Relationship* § 5. That is, "[T]he test for determining whether dual employment exists is whether there is evidence to support an inference that more than one individual or company controls or directs a person in the performance of a given function." 30 C.J.S. *Employer-Employee* § 10.

The Restatement of Employment Law is instructive. *See Aguilo v. Cognizant Tech. Sols. U.S. Corp.*, No. 8:21-CV-2054, 2022 WL 2106077, at *5 (M.D. Fla. June 10, 2022) (describing the Restatement of Employment Law as "simply [a] summation[] of generic common law"); *see also Atterbury v. U.S. Marshals Serv.*, 805 F.3d 398, 408 n.6 (2d Cir. 2015) (using the Restatement of Employment Law to describe the "common-law rule"). That Restatement says that "[a]n individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each control or supervise such rendering of services as provided in § 1.01(a)(3)." RESTATEMENT OF EMPLOYMENT LAW § 1.04(b) (AM. L. INST. 2015). In turn, § 1.01(a)(3) provides that an employer must "control[] the manner and means by which the individual renders services, or the employer [must] otherwise effectively prevent[] the individual from rendering those services as an independent businessperson." To illustrate, the Restatement provides an example:

> 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 accordance 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 cmt. c., illustration 5. In other words, it is not enough for R to have indirect control over A, or even for R to give A certain simple instructions. R still is not an employer of A.

The Board's jurisprudence has, until recently, reflected the Restatement's view. In *Laerco Transportation & Warehouse*, the Board held that "[t]o establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." 269 N.L.R.B. 324, 325 (1984). Applying that rule, the Board found that Laerco was not a joint employer; even though "there [was] some minimal day-to-day supervision of the petitioned-for employees by Laerco," it was "of an extremely routine nature" and Laerco did "not possess sufficient indicia of control … to support a joint employer finding." *Id*. at 325–26. Similarly, the Board in *TLI, Inc.* held that an entity was not a joint employer because "the supervision and direction exercised by [the entity] on a day-to-day basis [was] both limited and routine," and the entity also lacked "hiring, firing, and disciplinary authority." 271 N.L.R.B. 798, 799 (1984). The principle, from these and other cases, was that "[t]he essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate." *Airborne Freight Co.*, 338 N.L.R.B. 597, 597 n.1 (2002).

Courts applying the NLRA agreed with the foregoing analysis. The Supreme Court addressed this issue only once, holding that, to qualify as a joint employer, an entity must "possess[] sufficient control over the work of the employees." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). Later courts have fleshed out that standard. In *Doe v. Walmart Stores, Inc.*, the Ninth Circuit held that Walmart was not a joint employer of the plaintiffs, who were employees of Walmart's foreign suppliers. 572 F.3d 677, 679 (9th Cir. 2009). According to the court, "[t]he key factor to consider in analyzing whether an entity is an employer is the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed." *Id*. at 682 (internal quotation marks omitted). In turn, "[a] finding of the right to control employment requires a comprehensive and immediate level of 'day-to-day' authority over employment decisions." *Id*. (alteration omitted) (quoting *Vernon v. State*, 116 Cal. App. 4th 114, 127–28 (2004)). Even more to the point, the Second Circuit endorsed *Laerco* by observing that "[a]n essential element of any joint employer determination is sufficient evidence of immediate control over the employees." *SEIU Loc. 32BJ v. NLRB*, 647 F.3d 435, 442–43 (2d Cir. 2011) (internal quotation marks omitted). In *Adams & Associates v. NLRB*, the Fifth Circuit applied the *Laerco* standard and noted that "reservation" of the "right to discipline" is "insufficient to establish a joint-employer finding, absent evidence that the right was ever exercised." 871 F.3d 358, 378 (5th Cir. 2017).

The proposed rule is wrong to bring entities within the jurisdiction of the NLRB on the basis of mere reserved control. Finding a joint employer relationship on the basis of

mere boilerplate contractual language would elevate form over substance in a manner the Board has previously (correctly) rejected. *See, e.g., AM Prop. Holding Corp.*, 350 N.L.R.B. 998, 1000 (2007) ("In assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."); *The Goodyear Tire & Rubber Co.*, 312 N.L.R.B. 674, 677 (1993) (noting prior cases in which "the presence of the operational control clause, in and of itself, was not evidence of joint employer status" and in which "the Board determined it was more appropriate to look to the actual handling of day-to-day business"). The proposed rule also errs by not requiring a putative joint employer to exercise "substantial" control, and in permitting "limited and routine" control to establish joint employment. That too is incorrect. As noted above, finding a joint employer relationship based on so little flies in the face of decades of Board and judicial precedent. The 2020 rule adhered to these longstanding principles. 85 Fed. Reg. at 11204. The proposed rule would chart its own path, in derogation of the common law.

3. The proposed rule's defenses of its expansion of the joint-employer standard are unpersuasive.

The proposed rule offers certain defenses of its interpretation of the common law. Those defenses fail.

First, the proposed rule wrongly suggests that joint employer status turns on the putative joint employer's "authority to control." 87 Fed. Reg. at 54663. It relies for this point on the D.C. Circuit's analysis of the common law. 87 Fed. Reg. at 54645–46. The D.C. Circuit, for its part, relied on the Second Restatement of Agency in suggesting that the "right to control" is significant to joint-employer status. See *BFI*, 911 F.3d at 1211 ("[T]he 'right to control' runs like a *leitmotif* through the Restatement (Second) of Agency."); see also RESTATEMENT (SECOND) OF AGENCY § 2(2) (AM. L. INST. 1958) (stating that "[a] servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."). This approach is mistaken, as the Second Restatement of Agency's treatment of master-servant relationships cannot be exported to the joint-employment context.

The Supreme Court's use of the Second Restatement of Agency is illustrative. In *Kelley v. Southern Pacific Co.*, the Court relied on that Restatement to construe the FELA provision under which a railroad "is liable for negligently causing the injury or death of any person 'while he is employed' by the railroad." 419 U.S. 318, 324 (1974) (quoting 45 U.S.C. § 51). In *Kolstad v. ADA*, the Court used the Second Restatement of Agency as a "starting point for defining th[e] general common law" of "vicarious liability for punitive damages." 527 U.S. at 542; *see also Burlington Indus. v. Ellerth*, 524 U.S. 742, 755 (1998) (using the Second Restatement of Agency to determine "whether an employer has vicarious liability" in the Title VII context). Those cases do not support applying the same Restatement principles out of context—however illuminating they are as to vicarious liability. It is the common law that controls, not the Restatement, and its application to

the NLRA—which concerns not vicarious liability but such matters as whether an entity must "bargain collectively with the representatives of his employees," 29 U.S.C. § 158(a)—must therefore be scrutinized in its particulars.

To begin, the Second Restatement of Agency simply does not speak to the concerns of employment law. This was recognized in the Restatement of Employment Law, which observes in its introductory note that it "generally uses the terms 'employer' and 'employee,' rather than the terms 'master' and 'servant' used in the Restatement Second, Agency." RESTATEMENT OF EMPLOYMENT LAW Introductory Note. And this choice "reflects the purposes of employment law, which are to set out the rights and duties of the parties to the employment relationship rather than to delimit the bounds of enterprise liability in tort to third parties." *Id*. Read properly, the restatements cannot justify importing master-servant concepts wholesale into the employer-employee context.

Accordingly, it is incorrect to suggest that, if a consideration bears on the master-servant relationship as described in the Second Restatement of Agency, it also would logically bear on the joint-employer inquiry. *See BFI*, 911 F.3d at 1211 ("[I]f unexercised control is relevant to identifying two distinct employers, that consideration logically applies to identifying simultaneous joint employers as well."). Indeed, that Restatement made clear that it was not talking about joint employers. In § 226, it says "[a] person may be the servant of two masters, *not joint employers*, at one time as to one act, if the service to one does not involve abandonment of the service to the other." RESTATEMENT (SECOND) OF AGENCY § 226 (emphasis added). And, in fact, that restatement questioned the very concept of having two masters. It observed that "[t]he conception of two masters to whom the servant must be obedient is perhaps even more difficult than that of an agent with two principals," and only begrudgingly accepted "the existence of subservants" as an exception. *Id*. § 5 Reporter's Notes. If this approach were to be exported mechanically to the joint-employment context, it would suggest, if anything, that there is no such thing as joint employment at all.

And it makes sense to separate out the two inquiries. The NPRM cites to § 220 of the Second Restatement for its definition of "servant." But that section is within the part of the restatement discussing the liability of masters for their servants' torts. When seeking to impose vicarious liability on a master, the important question is whether there is a master at all. In that context, it makes sense to look for the "right to control" even if that control was not exercised.

The joint-employer inquiry is different. As noted above, employment law is generally not focused on vicarious tort liability; it is more concerned with the "rights and duties of the parties to the employment relationship" than with whether there is someone who can be sued for the employee's torts. That is especially true in the joint-employer context, in which the existence of at least one employer—the direct employer—is a given. *See NLRB v. Condenser Corp. of Am.*, 128 F.2d 67, 72 (3d Cir. 1942) (noting that, to determine whether an entity is an employer under the NLRA, "the problem is not to be approached from the standpoint of vicarious liability" but "is rather a matter of

determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers"). The question, instead, is whether another entity "share[s] or codetermine[s] those matters governing the essential terms and conditions of employment." *NLRB v. Browning-Ferris Indus., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982) (emphasis omitted). It makes no sense to say that an entity "shares" or "codetermines" such matters if in fact the entity never exercised its right to do so.

Second, the proposed rule offers a mistaken interpretation of 29 U.S.C. § 152(2), which provides that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly." The NPRM adopts the D.C. Circuit's analysis of this provision, which took the statutory definition to indicate "that the statute looks at all probative indicia of employer status, whether exercised 'directly or indirectly.'" *BFI*, 911 F.3d at 1216; see also *id.* (reading that definition to mean that the NLRA "itself expressly recognizes that agents acting 'indirectly' on behalf of an employer could also count as employers").

That is a misunderstanding of § 152(2). The key point for understanding that statutory definition is that it extends to direct or indirect agents of an employer—in other words, it is still necessary to determine what entities count as employers in the first place. The provision does not answer that question at all, let alone in a manner that abrogates the common law.

In any event, even the D.C. Circuit recognized that "[t]he National Labor Relations Act's test for joint-employer status is determined by the common law of agency." *BFI*, 911 F.3d at 1206. The Supreme Court was clear that courts "should apply the common-law agency test … in distinguishing an employee from an independent contractor" under the NLRA. *United Ins. Co.*, 390 U.S. at 256. Accordingly, it is already settled that the NLRA requires giving "employer" its common-law meaning. And as noted above, unexercised, indirect, and insubstantial control is not enough to make an entity an employer under the common law. The Board's reliance on Section 152(2) is therefore a red herring.

C. *The Proposed Rule Fails to Adhere to the BFI Court's Direction to Differentiate True Indicia of Joint Employment from Common Elements of Typical Business-to-Business Contracts.*

In its 2018 *BFI* decision, the D.C. Circuit held that the *Browning-Ferris* standard applied by the Board exceeded the scope of the common law insofar as it failed to distinguish between evidence of indirect control that "bears on workers' essential terms and conditions of employment from evidence that simply documents the routine parameters of company-to-company contracting." *BFI*, 911 F.3d at 1216. The Court of Appeals remanded the case to the Board, with the direction that it "erect some legal scaffolding" to ensure that its joint-employment standard recognized that global oversight or commonplace elements of business-to-business contracts does not trigger joint-employment status.

The proposed rule wholly disregards the D.C. Circuit's admonition that its failure to distinguish between these elements "overshot the common-law mark," and, indeed, appears to compound the problem exponentially by offering almost no guidance as to how these very different forms of control are to be distinguished or weighted in a joint-employer analysis. This is especially true in the case of the franchise business model.

As discussed in Part I above, franchisors are required, under federal law, to exert certain measures of control over their franchisee operations. "To comply with trademark standards, a franchisor must achieve uniformity among its company-owned and franchised units; to achieve that goal, elaborate and voluminous standards are developed, imposed, and policed."[30] As one examination of the franchisor/franchisee model explained:

> Typically, a franchisor imposes systemwide standards by means of the franchise agreement between the parties that establishes uniform specifications with regard to: advertising and promotion; site selection; construction and design; furniture and fixtures; products and services; cash control; bookkeeping and reporting procedures; general operations; personnel; revenue reports; customer lists; accounting; display of signs and notices; authorized or required equipment, appliances, and appurtenances; required uses of trademark; insurance requirements; license requirements; standards for management and personnel; hours of operation; required uniforms; local advertising; required manner of offering or selling products or services; standards of maintenance and appearance; and training requirements. Other procedures, specifications, and standards may also be imposed. This list is not exhaustive, but it touches upon many of the characteristics of the franchise relationship that courts have erroneously cited as examples of the franchisor's "control" over its franchisees in order to justify imposing direct or vicarious liability upon a franchisor.[31]

Indeed, most franchisee agreements will routinely include contractual provisions governing many aspects of business operation, some in great detail, but which have little to no bearing on a franchisor's "control" of its franchisees' employees, including:

- Language expressly characterizing the relationship of both businesses, and setting forth which responsibilities each party assumes or retains;
- Brand standards manuals and guidance, which give franchisees the benefit of the franchisor's experience and expertise to assist them in running a successful franchise, while giving the franchisor an assurance that its brand standards are

[30] David J. Kaufman, Felicia N. Soler, Breton H. Permesly, Dale A. Cohen, *A Franchisor is Not the Employer of Its Franchisees or Their Employees*, 34 Franchise L.J. 439, 461 (2015).
[31] Shelley & Morton, *supra* note 8, at 121.

used consistently, and in a manner consonant with its policies and procedures for business operations;

- Training requirements for franchisees and their franchises' executive management on business operations;
- The rights and responsibilities of the parties with respect to ongoing business guidance, recommendations, or advice for franchisees to use at their discretion, and obligations relating to periodic advice and communication;
- Broad contours for the conduct of business administration, including required hours of operation, trade dress provisions ensuring the visual consistency of brand décor, design, color, and signage;
- Staffing guidance, offering suggestions or sample documents for, *e.g.*, HR policies, employee discipline, training, and scheduling, to use (or not use) as the franchisee sees fit;
- The use of proprietary software for business operation or payroll processing;
- Safety and security requirements that franchisees must meet; and
- Language requiring the franchisee to operate the franchise in compliance with all applicable laws and regulations.[32]

Some or all of these are almost always likely to be found in common franchisor/franchisee agreements, and on their face can suggest a far greater involvement of the franchisor in day-to-day operations than is actually the case, or which in no way bear on the relationship of the franchisor to the franchisee's employees. While, as one commentator noted, these "[t]ypical franchisor controls can look pervasive to judges, lawyers, and jurors who are not schooled in modern franchising,"[33] they are nevertheless the very types of standards that many courts have found to be: (1) consistent with a franchisor's right to control its trademarks and the quality of products and services distributed under those Marks; and (2) insufficient to justify the imposition of vicarious liability.

In this regard, the Board's *Browning-Ferris* standard, expanded in the proposed rule, ignores these fundamental realities of franchising. Establishing and monitoring brand standards performance merely constitutes the global oversight necessitated by the Lanham Act to ensure that franchisors protect and preserve their Marks and brands. As

[32] Susan A. Grueneberg, Joshua Schneiderman, Lulu Y. Chiu, *Drafting Franchise Agreements After Patterson v. Domino's: Avoiding the Minefield of Vicarious Liability and Joint Employment*, 36 Franchise L. J. No. 2 189, 195-213 (Fall 2016).
[33] William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 Franchise L. J. 162, 165 (2005).

recognized by the *BFI* Court, there must be "some legal scaffolding" within the joint-employment analysis which ensures that global oversight of a business-to-business relationship does not trigger joint employment. *BFI*, 911 F.3d at 1220. Indeed, global oversight, unlike the exercise of control over the essential terms and conditions of employees' work lives, is a "routine feature of independent contracts." *Id.* Likewise, it is essential to all brand licenses, whether in franchising or not.

The failure of the Board's *Browning-Ferris* standard to recognize that franchisor-established brand standards and necessary controls (such as those discussed above) are integral to the franchise model had dramatic consequences for franchisors.[34] In light of this fact, if the Board chooses to move forward with the proposed rule—which for all the reasons above IFA submits is ill-advised—we strongly urge the Board to retain the 2020 rule's acknowledgment that "A franchisor's maintenance of brand-recognition standards (*e.g.*, a requirement that the employees of its franchisees wear a particular uniform) will not evidence direct control over employees' 'essential' working conditions." It should likewise make clear in any final rule that a franchisor's protection of its trade or service mark is *not* evidence of joint employment.

D. *The Proposed Rule Frustrates the Requirements of Federal Trademark Law.*

The proposed rule will, as *Browning-Ferris* did, deter franchisors from providing guidance, advice, or recommendations to their franchisees that are essential to the franchisors' protection of their brands. In doing so, the proposed joint-employer standard directly undermines the Lanham Act's requirements, which mandate that franchisors maintain control over the use of their Marks as a matter of federal trademark law.

Absent statutory authorization, the Board may not override Congressional mandates contained in other statutes. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield"); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 634-35 (1975) (rejecting claim that federal antitrust policy should defer to the NLRA); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902-04 (1984) (Board's remedial authority was limited by equally important Congressional objective adopted in

[34] Indeed, under the Board's prior *Browning-Ferris* standard, courts improperly looked to routine brand standards unrelated to the terms and conditions of franchise employees' employment as indicia of joint employment. *See*, *e.g.*, *Parrott v. Marriott International*, 2017 U.S. Dist. LEXIS 144277, Case No. 17-10359 (E.D. Mich. Sep. 6, 2017) (allegations that franchisor gave franchise employees discounts at other franchise hotels worldwide, "controlled" operations through corporate managers and audits; audited franchisee's financial records and discussed controlling labor costs; and had "workplace rules" by which the business was to be operated sufficient to defeat motion to dismiss in an FLSA exemption/misclassification case); *Harris v. Midas*, 2017 U.S. Dist. LEXIS 184765 (W.D. Pa. 2017) (denying franchisor's motion to dismiss Title VII harassment, discrimination, and retaliation claim because franchisor's franchise agreement was "so nebulously and generally phrased as to suggest that [the franchisor] retained a broad discretionary power to impose upon the franchisee virtually any control, restriction, or regulation it deemed appropriate or warranted").

the Immigration Reform and Control Act, even if that led to unavailability of more effective remedies under the NLRA).

Under federal trademark law, and the FTC's Franchise Rule, a franchise must be identified or associated with the franchisor's trademark, and federal trademark law mandates that trademark licensors maintain control over the use of their trademarks. *See* 15 U.S.C. §1127 (2000). Indeed, the Board itself has recognized that "If a franchisor fails to maintain sufficient control over its marks, it is considered to have engaged in 'naked licensing' and thereby to have abandoned [its] mark." *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156, at 28 (Dec. 14, 2017), *vacated on other grounds*, 366 NLRB 26 (Feb. 26, 2018). *See also Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 338 (Wis. 2004) (explaining that detailed operational standards in franchise agreement are necessary and required to protection of the franchisor's marks under the Lanham Act); *Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 598 (9th Cir. 2002) (use of trademarks is designed to ensure that "all licensed outlets will be consistent and predictable").

Under the proposed rule, franchisors "will likely be labeled as joint employers because of the brand-specific rules and procedures they impose on franchises. Franchisors' oversight of the brands' franchises will be seen as possession of authority to control terms and conditions of employment, therefore subjecting them to the responsibilities of a joint employer."[35] This means, as a practical matter, that franchisors would more readily be implicated in collective bargaining negotiations and unfair labor practice claims, at a phenomenal cost of time and money.[36]

Put more simply, the proposed rule would act to penalize franchisors *who are simply doing what federal laws governing franchising require them to do.* Proverbially, it robs Peter to pay Paul, placing franchisors in the position of either: (a) ceding almost any operational control over their franchisees' operations (even reserved rights, and routine business-to-business contractual provisions) and risking the abandonment of their protected Marks under the Lanham Act; or (b) retaining these federally-required brand standards to protect their Marks at the cost of joint-employer status under the NLRA, subjecting themselves to potential ULP liability, bargaining requirements, and otherwise prohibited secondary activity. In the absence of an express direction from Congress, the Board's authority under the NLRA simply does not extend that far.

E. *The Proposed Rule Is Arbitrary and Capricious Under the Administrative Procedure Act.*

Even if Congress intended to give the NLRB authority to interpret "employer" as in the proposed rule (and it did not), the proposed rule would be arbitrary and capricious

[35] Isabella Hindley, "Recent Labor Regulations Will Disincentivize the Franchise Model" (American Action Forum November 2022), available at: https://www.americanactionforum.org/insight/recent-labor-regulations-will-disincentivize-the-franchise-model/.
[36] *See id.*

under the APA. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* The proposed rule fails to meet this standard in several respects.

1. The Board fails to acknowledge its departure from the longstanding standard for determining joint-employer status.

Most fundamentally, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009). The proposed rule fails to acknowledge, let alone justify, its departure from the Board's decades-old approach to determining joint employer status.

The Board's failure to address this shift is not mere silence; in the NPRM's telling, "[t]he proposed rule would codify the board's longstanding joint-employer standard, approved by the Third Circuit and the District of Columbia Circuit Court of Appeals." 87 Fed. Reg. at 54645. According to the Board, prior to 1982 its approach to the joint-employer inquiry tracked the current proposed rule, and the Third Circuit's opinion in *NLRB v. Browning-Ferris Industries, Inc.* was in keeping with that pre-1982 Board precedent. It was only after that Third Circuit opinion, according to the Board, that the joint-employer inquiry took a sharp wrong turn in *TLI* and *Laerco*. 87 Fed. Reg. at 54643. For those reasons, the Board says, its proposed rule is not a departure from a longstanding position, but rather a return to it.

That account is wrong at every turn. To start, the Board is wrong to suggest that, prior to *TLI* and *Laerco*, entities with only reserved, indirect, and unsubstantial control were regularly found to be joint employers. In reality, the Board's approach in joint employer cases (at best for the Board's position) was much more ambiguous. For every case in which the Board said "[i]t is immaterial whether this control be actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate," *The Southland Corp.*, 170 N.L.R.B. 1332, 1334 (1968),[37] there is another

[37] In fact, in *Southland Corp.*, the entity "neither exercise[d] actual, nor possesse[d] potential, control over the store's labor relations under the franchise agreement." 170 N.L.R.B. at 1334.

case in which the lack of exercised control is all but determinative, *see Esgro Anaheim, Inc.*, 150 N.L.R.B. 401, 405 (1964).[38]

The Board is also incorrect when it says that the Third Circuit's *Browning-Ferris* decision is somehow at odds with the NLRB decisions that followed it. In the seminal paragraph in which the Third Circuit formally upheld the Board's joint employer standard, it cited to many cases—both before the NLRB and before federal courts—which emphasize actual control. *See Browning-Ferris*, 961 F.2d at 1124.[39] It therefore makes little sense for the Board to claim that "the Third Circuit endorsed the Board's 'share or codetermine' formulation of the joint-employer standard" yet criticize *TLI* and *Laerco* for emphasizing actual, direct, and substantial control. 87 Fed. Reg. at 54643. In fact, the Third Circuit's *Browning-Ferris* decision relied on cases that treated such characteristics as hallmarks of a joint employer. *Walter B. Cooke, Inc.*, 262 N.L.R.B. at 642; *O'Sullivan, Muckle, Kron Mortuary*, 246 N.L.R.B. at 167–68. Try as it might, the Board cannot depict the proposed rule as a return to the Third Circuit's 1982 decision.

Post-1982 NLRB decisions are consistent with the Board's longstanding approach. The Board therefore must justify the reversal of its policy for the last three decades. Under the APA, the Board "must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v.*

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[38] *See also Hychem Constructors, Inc.*, 169 N.L.R.B. 274, 276 (1968) (noting that the retention of the right to control regarding plant safety and removal of employees "is a natural concomitant of the right of any property owner or occupant to protect his premises" and therefore the entity "does not exercise joint control … and is therefore not a joint employer of the employees here involved" (footnote omitted)); *H.E. Stoudt & Son, Inc.*, 114 N.L.R.B. 838, 862 (1955) ("[A]lthough Stoudt had no specific contractual right directly to hire or discharge employees of Weisker, it in fact specified, and thus exercised control over, the source and manner of their hiring through the provisions of the subcontract and letter described above.").

[39] Those cases include *N. Am. Soccer League v. NLRB*, 613 F.2d 1379, 1382–83 (5th Cir. 1980) (upholding Board's "finding of a joint employer relationship among the League and its constituent clubs" after observing that "[t]he League also exercises considerable control over the contractual relationships between the clubs and their players"); *Lutheran Welfare Servs. v. NLRB*, 607 F.2d 777, 778 (7th Cir. 1979) (noting that "[t]he NLRB has long held that if two or more employers exert significant control over the same employees, they constitute 'joint employers' under the NLRA."); *NLRB v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1271–72 (4th Cir. 1970) (upholding joint employer determination because "Jewell exercised de facto control over the ten employees at the Horn & Keene mine"); *Ace-Alkire Freight Lines, Inc. v. NLRB*, 431 F.2d 280, 282 (8th Cir. 1970) (upholding joint employer determination because "[b]oth [employers] shared in the hiring process and both exercised control over the manner in which the men performed their duties"); *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969) (upholding joint employer determination after observing that "[i]n practice [the employer] exercised its control, though in varying degrees"); *Walter B. Cooke, Inc.*, 262 N.L.R.B. 626, 642 (1982) ("The minimal amount of control exercised by Respondent in the context of the entire relationship between Respondent and Pyramid and Ruggiero, I regard as insufficient to warrant the conclusion that Respondent was a joint employer of any of the employees of these trade houses."); *O'Sullivan, Muckle, Kron Mortuary*, 246 N.L.R.B. 164, 167–68 (1979) ("[T]reating Respondent as a joint employer … is warranted inasmuch as Respondent clearly exercises direct and total authority and control over significant aspects of the unit drivers' employment relationship and on-the-job duties and performance."); *Atwood Leasing Corp.*, 227 N.L.R.B. 1668, 1669 (1977) ("[S]ince Drs. Siegel and Sekuler exercise no control over the labor relations policies of the Employer, the partnership and the Employer are not joint employers of the employees sought herein.").

Navarro, 579 U.S. 211, 221 (2016). The Board does not even do the former (so it certainly never attempts the latter). In addition, [w]hen an agency changes course, … it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (internal quotation marks omitted). In that scenario, agencies are "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915. Here, there can be no doubt that the Board's consistent approach to the joint-employer inquiry has "engendered serious reliance interests." *Id.* at 1913 (quoting *Encino Motorcars*, 579 U.S. at 221–22). For decades, business relationships have been structured based on the Board's longstanding position on what counts as a joint employer. But the proposed rule makes no effort to account for these reliance interests.

In short, the Board justifies its proposed rule as a return to a "longstanding" approach, when in fact the proposed rule's conception of joint employers is novel. A rule resting on such a flawed premise must be rejected. *See, e.g.*, *AstraZeneca Pharms. LP v. Becerra*, No. CV 21-27-LPS, 2022 WL 484587, at *9 (D. Del. Feb. 16, 2022) (holding that HHS's "failure to acknowledge that the agency's position has shifted over time provides an independent basis for the Court to award AstraZeneca relief").

2. The Board provides no explanation for its departure from the *BFI* standard.

For similar reasons, the proposed rule's departure from the Board's 2015 *BFI* standard—even as it claims to reinstate that standard—make it arbitrary and capricious. The Board "proposes to rescind [the 2020 rule] and replace it with a new rule that incorporates the *BFI* standard and responds to the District of Columbia Circuit's invitation for the Board to refine that standard in its 2018 decision on review." 87 Fed. Reg. at 54642. As the dissenting opinion points out, however, the proposed rule departs from the *BFI* standard in two significant ways. *Id.* at 54658 (Board Members Kaplan and Ring, dissenting).

First, the proposed rule is clear that nothing more than indirect, reserved control can suffice to establish joint employer status. *See* 87 Fed. Reg. at 54663. The *BFI* standard, on the other hand, was not so bold. That standard said merely that "[t]he right to control, in the common-law sense, is *probative* of joint-employer status, as is the actual exercise of control, whether direct or indirect." *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 1614 (2015) (emphasis added). That is also how the Board in *BFI* characterized its pre-1982 precedent. *Id.* at 1607 ("[Before 1982,] the Board typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status.").

Second, the proposed rule wholly omits the second step of the *BFI* test. In *BFI*, the Board said that "the *initial* inquiry is whether there is a common-law employment relationship with the employees in question." 362 N.L.R.B. at 1600 (emphasis added).

Then, at the second step, "The inquiry … turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." *Id.* In contrast, the proposed rule rests the inquiry entirely upon its (incorrect) view of "common-law agency principles." *See* 87 Fed. Reg. at 54663.

The Board never addresses the first departure from the *BFI* standard, and its pithy acknowledgement of the second departure is inadequate. The only justification given by the Board for omitting the second *BFI* inquiry is that "by focusing on whether a putative joint employer possesses the authority to control or exercises the power to control employees' essential terms and conditions of employment, any required bargaining under the new standard will necessarily be meaningful." 87 Fed. Reg. at 54645 n.26. But that assertion is arbitrary, unsupported, and baseless. According to the proposed rule, a joint employer might merely possess (without exercising) the authority to indirectly control in a limited or routine manner one "essential term[] [or] condition[] of employment" (selected from an open-ended list). *See id.* at 54663. As such, there is no basis to suggest that any required bargaining under the new standard will necessarily be meaningful. The Board has therefore fallen far short of demonstrating that there are "good reasons" for its new approach. *Encino Motorcars,* 579 U.S. at 221. And once again, it has made no effort to account for the significant reliance interests that are implicated here.

Instead, the Board centers its proposed rule around reinstating the *BFI* standard. *Id.* at 54642 (asserting that "the 2020 final rule … repeats the errors that the Board corrected in *BFI*" and announcing intention to "replace it with a new rule that incorporates the *BFI* standard"). But the proposed rule is crucially different from the *BFI* standard, in ways which the Board hardly acknowledges and fails to justify. Reinstating the *BFI* standard cannot be the justification for the proposed rule.

3. The proposed rule's disruptive effect on existing franchise agreements renders the rule impermissibly retroactive.

"A rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule—may for that reason be 'arbitrary' or 'capricious' and thus be invalid." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring) (citation omitted).[40] "The legal effect of such secondary retroactivity is to add a nuance to ordinary review for whether the agency has been arbitrary or capricious: [courts] review to see whether disputed rules are 'reasonable, both in substance and in being made retroactive.'" *Indep. Petroleum Ass'n of Am. v. DeWitt*, 279 F.3d 1036, 1039 (D.C. Cir. 2002).

[40] In a similar vein, a change in agency position "that does not take account of legitimate reliance on prior interpretation may be 'arbitrary, capricious [or] an abuse of discretion.'" *Smiley v. Citibank (s.D.), N.A.*, 517 U.S. 735, 742 (1996) (quoting 5 U.S.C. § 706(2)(A)).

Agencies in the past have been able to survive such review by "expressly consider[ing] the relative benefits and burdens of applying [their] rule[s] to existing contracts and, after extensive analysis, conclud[ing] that [such application] was essential." *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 671 (D.C. Cir. 2009). The Board has not yet engaged in the balancing required. Though the Board "believes that it is unlikely that the proposed rule will have a significant economic impact on a substantial number of small entities," it admits that this is still a "hypothesis" and "seeks public input." 87 Fed. Reg. at 54659. (And of course, it is it not merely small entities that the Board would need to consider to survive the secondary retroactivity inquiry.)

In reality, there is no plausible path for the Board to conclude that the proposed rule's benefits outweigh its secondary retroactive effects. For its small entity analysis, the Board "assume[d] … that all of the 6,081,544 small business firms could be impacted by the proposed rule and will incur the one-time compliance cost of reading and familiarizing themselves with the text of the new rule." *Id.* at 54660. But, as explained below, the proposed rule imposes a totality-of-the-circumstances test, untethered from the common law and with no obvious limit as to what circumstances may be considered. So, it is nothing short of absurd to suggest that the cost of complying with the rule is limited to referring the "one-time compliance cost of reading [it]."

For at least thirty years, entities have structured their business relationships in reliance on a clear and consistent line of Board precedent. And indeed, at no prior point did franchisors that did not exert substantial direct and immediate control over their franchisees' employees have reason to be concerned that they might be labeled "employers" within the meaning of the NLRA. The proposed rule purports to discard all of those reliance interests in one fell swoop. Before it promulgates that rule, the Board must weigh the burdens and benefits of unsettling all of those business relationships. When it does so, the only defensible conclusion will be that the proposed rule should be abandoned.

4. <u>The proposed rule fails to provide fair notice to business entities of what conduct will trigger a joint employer finding.</u>

"Administrative action is arbitrary and capricious if it fails to articulate a comprehensible standard for assessing the applicability of a statutory category." *ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) (internal quotation marks and alteration omitted). In other words, "[i]f a purported standard is indiscriminate and offers no meaningful guidance to affected parties, it will fail the requirement of reasoned decisionmaking." *Id.* (internal quotation marks omitted); *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (observing that the fair notice requirement "has now been thoroughly 'incorporated into administrative law'" (quoting *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987))).

The proposed rule fails to provide adequate notice to business entities of whether they will be classified as joint employers and is for that reason arbitrary and capricious.

To start, the proposed rule provides no meaningful guidance because it relies on wholesale incorporation of common-law principles. In subsection (a), the proposed rule says that an employer "is an employer of particular employees … if the employer has an employment relationship with those employees under common-law agency principles." No rule is needed to establish that principle. Congress has already told the Board and the courts to "apply general agency principles" under the NLRA. *United Ins. Co.*, 390 U.S. at 256. Subsection (e) similarly provides that "[w]hether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment"—that is, whether an entity is a joint employer—"is determined under common-law agency principles."

If the proposed rule consisted solely of those provisions, it would be pointless (and arbitrary and capricious for that reason). But what makes the proposed rule not just useless but vague is that, even as it gestures towards common law principles, it expressly abandons them by insisting that indirect unexercised authority is enough to establish joint employer status. As noted above, that is not what the common law says. *See, e.g.*, *Walmart Stores*, 572 F.3d at 682. And the Board injects further confusion in its half-hearted attempt to define what constitutes the relevant set of common law authorities. The proposed rule refers to "primary articulations … by common-law judges as well [as] compendiums, reports, and restatements of common law decisions such as the *Restatement (Second) of Agency* (1958), and early court decisions addressing 'master-servant relations.'" 87 Fed. Reg. at 54645. But as mentioned earlier, those authorities are at odds both with each other and with the proposed rule; for example, as noted above, the Second Restatement of Agency would suggest that there is no such thing as joint employment at all. Restatement (Second) of Agency § 5 Reporter's Notes. In short, the Board has issued a vague and self-contradictory set of instructions, which cannot provide fair notice. *See ACA Int'l*, 885 F.3d at 702–03 (noting that, even if it is "permissible for the Commission to adopt either interpretation," "the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order").

Other aspects of the rule only deepen the confusion. Subsection (d) defines "[e]ssential terms and conditions of employment," and provides examples: "wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance." But the proposed rule also makes clear that the list is not exclusive, emphasizing that essential terms and conditions of employment "will generally include, but are not limited to" those examples.

Moreover, the rule says virtually nothing about what evidence *could not* establish joint-employer status. The only evidence which the proposed rule excludes from its totality-of-the-circumstances standard is "[e]vidence of an employer's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles or control over matters that do not bear on the employees' essential terms and conditions of employment." Proposed 29 C.F.R. § 103.40(f). That

formulation is in part circular (because it turns on what constitutes the essential terms and conditions of employment) and in part vague (because it once again imports wholesale an ill-defined and internally inconsistent body of authorities interpreting the common law).

Such an open-ended rule would leave businesses at a loss. Importantly, the proposed rule imposes merely a preponderance of the evidence standard on the party asserting that an employer is a joint employer of particular employees. Proposed 29 C.F.R. § 103.40(g). Accordingly, businesses must be prepared to be labeled a joint employer—with all the legal obligations that entails—unless they are confident that an opposing party cannot meet the lowest burden of proof in demonstrating that the business has the unexercised right to indirectly control in a limited or routine manner one or more of a potentially infinite list of "essential terms and conditions of employment." And they must make that calculation without the benefit of thirty years of NLRB precedent, under a mandate to follow the common law yet ignore it, and with little guidance as to what is or is not an "essential term and condition of employment." This is hardly fair notice; it is barely notice at all.

Notably, the 2020 rule is free of these weaknesses. *See* 29 C.F.R. § 103.40. It provides specific guidance instead of incorporating the common law wholesale. It is free of internal contradictions. And it provides a comprehensive list of essential terms and conditions of employment, along with detailed explanations of what it means to exercise direct and immediate control with respect to each of them.

Indeed, the 2020 rule achieves the goals of the proposed rule better than the proposed rule itself. The Board claims that the proposed rule "establish[es] a definite, readily available standard [that] will assist employers and labor organizations in complying with the Act." 87 Fed. Reg. at 54645. For that reason, the Board says that it hopes "that the proposed rule, codifying what [it] view[s] as the essential elements of a joint employer relationship, will reduce uncertainty and litigation over the basic parameters of joint-employer status." *Id.* As noted above, the proposed rule fails on these dimensions because it provides no meaningful guidance to business entities. Accordingly, it will, if anything, *promote* litigation over joint-employment issues. The 2020 rule, on the other hand, clearly indicates to business entities whether they are considered joint employers. It fully describes the conditions necessary for a joint-employer finding, and keeps decades of Board precedent intact. If the Board seeks to foster predictability and reduce litigation, it should keep the 2020 rule.

As the dissent notes, all these are reasons that the proposed rule is arbitrary and capricious. *Id.* at 54656 (Board Members Kaplan and Ring, dissenting). Because the proposed rule would be a change in policy, the Board is obligated to provide "good reasons" for the change. *Fox TV Stations*, 556 U.S. at 515. And here, the Board has not offered any good reasons for adopting a rule that achieves its goals *less* effectively than the rule it would replace. But in any event, quite apart from the advantages of the 2020

rule, the proposed rule is too vague to provide notice to regulated entities and is therefore invalid.

5. The Board failed to consider alternatives to the proposed rule.

Particularly in a case such as this, where a proposed rule purports to rescind prior policy, the agency's "reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___ U.S. ___, 140 S. Ct. 1891, 1913 (2020) (citation omitted). By failing to contemplate alternatives within the ambit of the existing policy, the agency fails to "consider important aspects of the problem before [it]." *See id*.

The proposed rule cannot credibly purport to have examined alternatives to existing Board policy. Indeed, it identifies the sum total of two options the Board considered—allowing the current rule to remain in effect or creating a limited exemption for certain small employers. But it is not enough for the Board to simply identify alternatives. "[R]ely[ing] on generalized and conclusory policy considerations as grounds for rejecting" alternatives is "inadequate." *Int'l Ladies' Garment Workers' Union v. Donovan,* 772 F.2d 795, 818 (D.C. Cir. 1983). Instead, "the APA demands an adequate explanation when these alternatives are rejected." *Id.* at 817.

First, the Board fails to identify any deficiency in the current rule's application (and indeed, could not do so if it wanted to, insofar as it has yet to apply the 2020 standard in any case or proceeding). Nor has any intervening case law materially changed the joint-employer analysis in the short time that the current rule has been in effect. Rather, the majority of the Board appears to have simply decided it does not like the current rule, and wishes to discard it—an odd choice, given then-Member McFerran's exhortation in 2018 that, given the relatively short period of time that *Browning-Ferris* had been the operative standard, "The Board's best course of action may be to define the contours of the correct standard…through the usual process of adjudication." 87 Fed. Reg. 46692 (Member McFerran dissenting).

As to the second alternative, the proposed rule rejects a small business exemption largely because of speculative fear that the "exception would swallow the rule" and that "the very small quantifiable cost of compliance" might be outweighed by the burden of a small business determining whether it fell within the exception. *See* 87 Fed. Reg. 54622. As set forth in great detail above, prior experience under the *Browning-Ferris* standard demonstrates that the cost of compliance with the proposed rule is anything but "very small."

F. *The Board Would Violate the Constitution by Promulgating the Proposed Rule.*

Congress "may not transfer to another branch powers which are strictly and exclusively legislative." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (internal

quotation marks omitted). Accordingly, "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Id.*

Here, the Board would, by this proposed rule, contradict thirty years' of settled precedent, even though every one of its decisions to date has interpreted the same statutory term. Such a wild swing in policy can only be explained by the fact that, as the D.C. Circuit observed, "The National Labor Relations Act gives no direct guidance" on how the concept of "joint employer" ought to be defined." *BFI*, 911 F.3d at 1200. Indeed, the NLRA "provides no relevant definition of 'employer,' let alone of 'joint employer.'" *Id.* This lack of statutory guidance has led to the whiplash-inducing reversals of policy that have recently characterized this area of law. But if the term "employer" imposes such minimal constraint on administrative decisionmaking, it also fails to provide the constitutionally mandatory intelligible principle.

To be sure, in recent decades the Court has applied only a lax nondelegation doctrine test. "[S]ince 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring in the judgment). As noted above, however, a reading of the statute that provides authority to promulgate the proposed rule fails even that test. A standard that allows the NLRB to extend its jurisdiction farther than it ever has since 1935 and to unsettle decades of reliance for a vast sector of the economy—and all on the basis of a term which does not even appear in the statute—cannot be based on an intelligible principle.

Furthermore, the Court has recently given indications that a stricter test might apply in the future. *See Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *id.* at 2139–42 (Gorsuch, J., dissenting) (criticizing the "intelligible principle" test). Under a stricter test—such as one that asked whether "Congress had made all the relevant policy decisions." *Id.* at 2139 (Gorsuch, J., dissenting). Given that the term does not even appear in the statute, Congress did not make the policy decision of stretching the joint-employer definition this far.

In sum, what the proposed rule seeks to accomplish should be done not by rule, but by statute. If the NLRA is now to apply so broadly, the Constitution demands that it is Congress which says so.

For all of the foregoing reasons, the proposed rule is unlawful. It should be abandoned.

* * *

The proposed rule would upend the highly successful franchise model of business, in contravention of both law and good public policy. We thank the Board for the opportunity to present these concerns on behalf of IFA's members.

Sincerely,

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