EXHIBIT A

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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Ms. Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

Via Electronic Submission: www.regulations.gov

RE: Comments On Behalf Of The United States Chamber Of Commerce To The National Labor Relations Board Proposed Rulemaking, "The Standard For Determining Joint-Employer Status", 83 Fr 46681, RIN 3142-AA13 (September 14, 2018)

Dear Ms. Rothschild:

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. The Chamber has been opposed to the National Labor Relations Board's current joint employer definition since it was first expressed by the Board in the *Browning-Ferris* decision. Accordingly, for the reasons detailed herein, the Chamber supports the proposed rulemaking to reset the definition of joint employer consistent with common law principles, and the goals of the National Labor Relations Act.

I. Introduction

For more than 30 years, the Board followed a joint employer standard that was consistent with the common law and adhered to the legislative intent and fundamental policies of the National Labor Relations Act (the "Act" or "NLRA"). In 2015, the Board turned that standard on its head in the controversial 3-2 ruling in *Browning-Ferris Industries of California Inc. d/b/a Newby Island*

Recyclery, 362 NLRB No. 186 (2015) ("*BFI*"). The *BFI* decision created significant disarray and uncertainty for employers, employees and unions with respect to determining joint employer relationships.[1] Based on a recent survey conducted by Ronald Bird, Ph.D., a senior economist for the U.S. Chamber of Commerce, the uncertainty and instability caused by the *BFI* decision in the business model franchise sector alone costs the economy at least $17.2 billion annually. *See* Dr. Bird's *Statement Regarding the Economic Impact of the Prospective NLRB Public Policy Decision Regarding the Definition of Joint Employer*, dated December 26, 2018, at pp. 35-39, 48-49, a copy of which is attached hereto as Appendix A. Thus, the U.S. Chamber of Commerce and its members support the Board's use of rulemaking to restore certainty and stability to the Board's joint employer standard, consistent with the aims of the Act, and are in favor of the proposed rule.

Prior to the Board's *BFI* decision, Board law consistently held that "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act." *TLI, Inc.*, 271 NLRB 798, 798 (1984). Additionally, for joint employer liability to attach, the putative joint employer had to exercise "direct and immediate" control over the shared employees' terms and conditions of employment. *Airborne Express*, 338 NLRB 597, 597 n. 1 (2002).

In *BFI*, the Board adopted a two-part test to determine joint employer status. The first part of that test is, itself, a multi-factor test that the Board asserts determines whether a "common law employment relationship" exists between a particular group of workers and the putative joint

[1] *See, e.g.*, "NLRB's Joint Employer Attack," THE WALL STREET JOURNAL (August 28, 2015) (describing how the "National Labor Relations Board's Democratic majority handed down a new joint-employer standard that radically rewrites U.S. labor law and upends thousands of business relationships.") available at, https://www.wsj.com/articles/nlrbs-joint-employer-attack-1440805826; *see also*, Stacy Cowley, "Labor Board Ruling on Joint Employer Standard Leaves Some Companies Scratching Their Heads," THE NEW YORK TIMES, (August 28, 2015), available at https://www.nytimes.com/2015/08/29/business/smallbusiness/labor-board-ruling-on-joint-employers-leaves-some-companies-scratching-their-heads.html.

employer. *BFI*, 362 NLRB slip op. at *12. If so, and "the putative joint employer possesses sufficient control over those employees' essential terms and conditions of employment to permit meaningful collective bargaining," then both employers will be deemed to jointly employ the unit of employees. *Id*. As explained below, a major flaw in the *BFI* decision is its complete lack of any guidance as to how the common law test for joint employment is to be applied. Under the *BFI* standard, employees, employers, unions, and even the Board itself are left to wonder, with no guidance, which employers are, will, or should be deemed to be a joint employer.

BFI holds that an entity's *indirect control* over another's workers is sufficient in itself to create a joint employer relationship. *BFI* also dictates that the *theoretical ability* one entity has to control another's workers, even if not exercised, is sufficient to establish a joint employer relationship. Indirect control and the unexercised potential to control another company's workers are inherent aspects of many business relationships where one entity provides goods or services to another.[2] Moreover, the right to control the workers of another company is inherently reserved by operation of law to any business that owns or leases property on which another company's workers perform their jobs. Thus, under the *BFI* formulation, virtually any business-to-business relationship would give rise to a joint employer relationship. *BFI* gives employers, employees, and unions no basis for determining how much indirect control, or reserved but unexercised right to control, will be deemed sufficient by the Board to find that two entities are joint employers, or when they would not be.

Another flaw of the *BFI* joint employer standard is that it is wholly antithetical to the purposes of the Act. The Act was designed to facilitate meaningful and productive collective-

[2] The D.C. Circuit Court specifically recognized in its *BFI* decision that the control required to establish joint employment "must bear on the 'essential terms and conditions of employment,' and not on the routine components of a company-to-company contract." *Browning-Ferris Industries of California, Inc. v. NLRB*, Case No. 16-1028, slip op at *22 (internal citation omitted).

bargaining in those instances where employees have freely chosen an exclusive bargaining representative and to remove burdens and barriers on the free flow of interstate commerce. These aspirational goals are set forth in the statutory text of the Act itself. As more fully explicated below, the *BFI* joint employer formulation unnecessarily renders the process of meaningful and productive collective-bargaining far more difficult and destined to failure. Similarly, this formulation impedes the willingness of employers to contract with one another and impermissibly intrudes upon the fundamental right to contract thereby burdening the free flow of commerce and reducing employment opportunity.

The D. C. Circuit has recently weighed in on the joint employer issue. On December 28, 2018, the United States Circuit Court of Appeals for the District of Columbia issued a decision in the appeal of *BFI*. *See Browning-Ferris Industries of California, Inc. v. NLRB*, Case No. 16-1028 (D.C. Cir. Dec. 28, 2018). The Court opined that under the traditional common law principles *some* indirect control over essential terms and conditions of employment *can* be considered in determining joint employer status. However, it stated that the standard applied in *BFI* appeared to paint with too broad a brush. The Court remanded the case to the Board with instructions to "erect some legal scaffolding" around the appropriate factors to be considered in determining joint employer status under the Act. The Court acknowledged repeatedly that the Board was contemplating engaging in rulemaking to establish a joint employer standard under the Act and simply cautioned that in doing so the Board "must color within the common-law lines identified by the judiciary." The Board's proposed joint employer standard, which was accepted by the Board and courts for over 30 years, evidences its legitimacy and certainly falls within the common-law lines.

The Chamber fully supports the Board's effort to provide all stakeholders with clarity around the joint employer doctrine through the rulemaking process. Without such action, the likely outcome is years of litigation and untold cost to all stakeholders and taxpayers alike to determine the proper application of the *BFI* standard to a vast array of existing and future business relationships. The rulemaking process allows all interested stakeholders to submit feedback and commentary to the Board's proposed rule – creating a transparent and participatory process for crafting an appropriate joint employer standard.

II. Rulemaking Is The Appropriate And Necessary Method of Clarifying The Joint Employer Standard.

The Board has engaged in substantive rulemaking only a few times in its history, despite explicit authority to do so under the Act. Section 6 of the Act expressly gives the Board power to engage in substantive rulemaking: "The Board shall have 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." 29 U.S.C. § 156; *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.")

The Supreme Court has extolled the virtues of the Board's rulemaking powers:

> The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that are forthcoming. It gives an opportunity for persons affected to be heard. . . . Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. . . . This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power makes them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule-making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us. . . . Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action.

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777-79 (1969).

Commentators from all sides seem to agree that the Board should exercise its rulemaking authority more often. *See* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 Emory Law Journal 1469-1494 (2015), citing Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 414 & nn.20-22 (2010) (compiling sources). The advantages typically cited in favor of rulemaking over adjudication are greater stability, certainty, efficiency, participation, and transparency.

As demonstrated by *BFI's* radical revision of the joint employer standard, effectuating significant and broad-based policy only through adjudication allows "new" Boards to easily reverse decisions made by "old" Boards. This recurring phenomenon, particularly with regard to major issues like joint employment, invites regular criticism of the Board and creates uncertainty for stakeholders. This uncertainty makes it difficult or impossible for businesses to effectively assess the potential risks and benefits of long-term business relationships. Rulemaking, on the other hand, provides clarity of expression on significant Board policy and provides legitimacy to the policy through the deliberative process. Policy established through rulemaking also provides stability for stakeholders because the policy cannot be reversed without going through the same deliberative process. The clarity and stability provided through rulemaking allows employers, unions and employees to plan and prepare for the future, without concern that the law will suddenly change in the midst of their relationships.

Another benefit of the rulemaking process is efficiency in setting significant Board policy and standards. Board adjudications are necessarily confined to the issues raised by the parties to the case. Moreover, Board decisions can be lengthy and complex, and often are limited in their application to the specific facts presented, resulting in incremental policymaking over a long period of time through case-by-case consideration. Rulemaking, however, "allows the Board to decide which issues to tackle, when to tackle them, and how broadly or narrowly to address them." Garden, *supra*, 64 Emory Law Journal at 1475.

Finally, the rulemaking process provides for the most inclusive and transparent process for developing Board policy. Policy formulated through adjudication is based solely upon the arguments and evidence presented by the parties to the proceeding. Rulemaking offers the Board an opportunity for a broader scope of action along with public participation and more meaningful notice to affected parties of potential changes in regulatory standards. As the Supreme Court has emphasized, this consideration respects all stakeholders' constitutional due process rights by providing meaningful notice of change to regulatory policy. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 255-57 (2012). Broader participation of interested stakeholders also leads to better decision-making by the Board. It allows the Board to receive empirical data that may not have been available in previous adjudications (see Bird analysis attached as Appendix A) and provides an openness unmatched by traditional Board proceedings. Rulemaking also allows all interested parties to provide their commentary and feedback to the proposed rule and allows the Board to respond to submitted comments (both for and against). This transparent deliberation and justification for the rule should increase deference from courts when called upon to review the Board's actions.

III. The Board's Proposed Joint Employer Rule Is Consistent with the Common Law.

As the Board noted in the Notice of Proposed Rulemaking,

> When distinguishing between an "employee" under Section 2(3) of the Act and an "independent contractor" excluded from the Act's protection, the Supreme Court has explained that the Board is bound by common-law principles, focusing on the control exercised by one employer over a person performing work for it. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); *see also Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322-323 (1992) ("[W]hen Congress has used the term 'employee' without defining it, we have concluded that Congress

> intended to describe the conventional master-servant relationship as understood by common law agency doctrine.") (citations omitted). Similarly, it is clear that the Board's joint-employer standard, which necessarily implicates the same focus on employer control, must be consistent with the common law agency doctrine.

The courts have left no doubt regarding their expectations for the Board, like other legal actors, to adhere to the common law. Most notably, the Supreme Court relied on the Board's "departure from the common law of agency" as a reason to find an interpretation of the Act unreasonable. *See NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995). Likewise, the Court of Appeals for the District of Columbia criticized the Board's "thinly veiled defiance" of common law principles because the agency "has been called upon to apply common law principles that have been established since 1800 and the application of that law under the National Labor Relations Act has been declared by Congress and settled by the courts, including the Supreme Court." *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983).

Even putting aside such judicial admonitions to apply the common law, an important practical consideration also weighs in favor of that approach. Reliance on common law standards allows governmental bodies, to the extent possible, to speak a "universal language." A system in which an entity legally "employs" an individual in one context, but not another, invites chaos. Standardized approaches to common questions, on the other hand, provide private parties with reliable certainty. *See King Soopers*, 364 NLRB No. 93, slip op. at *6 (Aug. 24, 2016) (relying on Internal Revenue Service and Social Security Administration practices to alter the Board's backpay calculation standards).

Consequently, the Board should view consistency with common law standards as not only a desired result, but also a result worthy of the rulemaking process. The traditional *TLI* standard delivers that consistency, while the *BFI* standard departs from well-established common law principles as they have been applied by the Board and approved by reviewing Courts in the context of the NLRA for decades.

A. The Traditional Joint Employer Standard Accords with the Common Law's Subordination of Evidence of Indirect Control to Evidence of Direct Control.

In contrast to the indirect control the Board developed in *BFI* to establish joint employer status, the traditional *TLI* standard adheres closely to common law principles. The *TLI* Board adopted the Third Circuit's joint employment standard, as articulated in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), stating:

> [W]here two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act. Further, we find that to establish such 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. (*emphasis added*)

TLI, 271 NLRB at 798.

As subsequent Board cases explained, the *TLI* standard requires "direct-and-immediate" control by the putative employer over terms and conditions of employment. *Airborne Express*, 338 NLRB 597, 597 n. 1 (2002); *see also Summit Express, Inc.*, 350 NLRB 592, 592 n. 3 (2007). Unexercised, or "reserved," rights do not establish joint employer status under the traditional standard. *See Flagstaff Medical Center*, 357 NLRB 659, 667 (2011) (citing *AM Property Holding Corp.*, 350 NLRB 998, 1001(2007)), enfd. in part 715 F.3d 928 (D.C. Cir. 2013).

This traditional standard closely tracks common law principles of employment status. For example, the Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) largely adopted the Restatement (Second) of Agency § 220's nonexhaustive list of factors to be considered, stating:

> [U]nder the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the

> instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Each of these factors describes a direct relationship and interaction between the putative employer and the workers. Conversely, none of these factors apply to indirect or unexercised authority. These factors closely track the Board's instruction in *TLI* to consider whether the putative "employer meaningfully affects matters relating to the employment relationship." *TLI*, 271 NLRB at 798. *See also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448-49 (2003) (describing direct control as the "touchstone" of the common law test).

TLI and its progeny properly stood for over three decades as the Board's articulation of the common law standard. The Board's decision in *BFI* to deviate from this standard and the common law upset that balance. The proposed Rule would bring the Board back into compliance with the common law.

B. The *BFI* Standard Impermissibly Elevates Evidence of Indirect Control to Dispositive Status.

The difference between the *BFI* standard and common law principles mirrors a 70-year-old debate regarding the common law and the "economic realities" test of employment status. The Board majority in *BFI* conceded that the "economic realities" test applicable to employer status under the Fair Labor Standards Act (FLSA) and Agricultural Workers Protection Act (AWPA) - but rejected by Congress's Taft-Hartley response to *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) - "is significantly more expansive than the common-law test." *BFI*, slip op. at *17. The *BFI* Board failed to acknowledge, however, that its reliance on indirect control directly parallels *Hearst*'s rejection of the common law in favor of "economic realities."

The *Hearst* Court rejected common law agency principles, and instead analyzed the indirect "economic realities" aspects of newsboys' work. Its approach resulted in imputation of "employer" status under the Act to newspaper publishers. The "economic realities" factors included the newsboys' reliance on their earnings for their livelihoods and the publishers' influence over the supply of newspapers. *Hearst*, 322 U.S. at 131. Similarly, the *BFI* Board relied upon indirect factors such as the user employer's rights to discontinue the use of employees and to "make the core staffing and operational decisions that define all employees' work days." *BFI*, slip op. at **18-19.

Also similar to the *BFI* rationale, the Supreme Court stated in *Hearst*:

> Congress [in the Wagner Act] had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment. . . . Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight . . . Unless the common law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.

Hearst, 322 U.S. at 124-47 (footnotes omitted).

As the *BFI* dissent noted, "The only significant difference between the majority's reasoning [in *BFI*] and the Court's reasoning in *Hearst* is that the Court at least candidly recognized the 'intermediate region' into which it extended the Wagner Act's definition of covered employees was beyond the scope of common law[.]" *BFI*, slip op. at *32.

BFI's evisceration of the "intermediate region" between clear employer status and clear non-employer status strikes at the heart of that standard's deficiencies. If evidence of either direct control or indirect control may suffice to establish joint employer status, then parties must ask: "What's left?" In other words, *BFI* would consider an entity to be an employer even when it possesses no control whatsoever over terms and conditions of employment. The common law standard does not set such a preposterous threshold. No conception of the common law has ever elevated evidence of indirect control to dispositive status. Instead, as demonstrated *infra*, common law applications consistently emphasize subordination of such evidence to evidence of direct control.

The *BFI* majority justifies its shift to a "zero control" standard with its policy-driven desire to expand the joint employment threshold, lest the traditional standard grow "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships." *Id.*, slip op. at *1. Such a policy goal cannot justify elimination of the "intermediate region" between clear employer status and clear non-employer status, as preserved by the common law.

The Supreme Court attempted in *Hearst* to push aside common law standards, citing "the evils the statute was designed to eradicate[.]" *Hearst*, 322 U.S. at 127. Congress rejected that attempt in Section 2(3) of the Act. Accordingly, the *BFI* Board cannot try to resurrect the *Hearst* approach when Congress has acted. The proposed Rule thus preserves congressional intent to apply common law standards to "employer" status determinations under the Act.

C. The Common Law Standard Views Evidence of Indirect Control as Probative Only with Regard to Its Relationship to Evidence of Direct Control.

The common law's conception of "employer" status as encompassing direct, but not indirect, control stretches back over a century to "master/servant" distinctions. *See, e.g., Singer*

Mfg. Co. v. Rahn, 132 U.S. 518, 522 (1889) ("[T]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'" (quoting *New Orleans, M&CR Co. v. Hanning*, 82 U.S. 649, 657 (1872)). Accordingly, the Supreme Court has held, "under the common law loaned-servant doctrine[,] immediate control and supervision is critical in determining for whom the servants are performing services." *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963) (emphasis added); *see also Kelley v. Southern Pacific Co.*, 419 U.S. 318, 329-30 (1974) (distinguishing between "authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking") (quoting *Standard Oil Co. v. Anderson*, 212 U.S. 215, 222 (1909)).

Other courts also consistently and historically recognize the distinction between direct control and immediate control on one hand, and indirect control on the other. Those courts refuse to find indirect or unexercised control dispositive. *See, e.g.*, *Spillson v. Smith*, 147 F.2d 727 (7th Cir. 1945) (rejecting evidence of indirect control over the work of musicians); *Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan*, 179 F.2d 882 (8th Cir. 1950) (disregarding evidence of indirect control in finding real estate agents were not employees), cert. denied 340 U.S. 823 (1950); *Glenn v. Standard Oil Co.*, 148 F.2d 51 (6th Cir. 1945) (focusing solely on direct control of plant operators).

A direct analogy exists between this issue and the Board's standards for supervisory status. In that context, secondary indicia of supervisory status are probative, but cannot independently establish Section 2(11) status absent one of the primary statutory functions. *See, e.g., K.G. Knitting Mills*, 320 NLRB 374 (1995) (reversing, where no primary indicia were present, finding of supervisory status based solely on the fact that an individual had a key to factory, opened facility in the morning, "watche[d] everything" before the manager arrived, and dealt with trucks arriving at plant). Likewise, evidence of indirect or unexercised control may be probative of "employer" status, but well-established common law principles preclude such a finding absent evidence of direct-and-immediate control.

The *BFI* majority provided no judicial authority for its apparent contention that the common law permits employment relationships established solely through indirect control because none exists, and the recent D.C. Circuit decision is silent on this question. Conversely, several recent explications of the common law standards by influential courts strongly support the necessity of direct-and-immediate control.

In 2009, the Ninth Circuit addressed a contention that Wal-Mart employed its suppliers' employees. The court ruled against employment status because Wal-Mart did not possess an "immediate level of day-to-day control." *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682–683 (9th Cir. 2009) (quoting *Vernon v. State,* 10 Cal. Rptr. 3d 121 (Cal. Ct. App. 2004)). Under the *BFI* standard, such "immediate" control would not be necessary, and the Board could find that a large retailer employs its suppliers' employees merely as a consequence of its market power. *See also EEOC v. Pacific Maritime Assn.*, 351 F.3d 1270, 1277 (9th Cir. 2003) (applying both economic realities and common law precedent to reject contention that multi-employer bargaining association employed member's employees because, "Logically, before a person or entity can be a joint employer, it must possess the attributes of an employer to some degree. Numerous courts have considered the key to joint employment to be the right to hire, supervise and fire employees.").

Three years prior to *Wal-Mart*, the Second Circuit similarly found the New York State Education Department did not employ a school teacher in *Gulino v. N.Y. State Education Dept.*, 460 F.3d 361 (2d Cir. 2006). The Court noted indirect control over terms and conditions of employment through mechanisms like curriculum and credentialing authority. Nevertheless, the absence of direct-and-immediate control defeated the contention of employer status because, "[The common-law standard] focuses largely on the extent to which the alleged master has 'control' over the day-to-day activities of the alleged 'servant.' The *Reid* [*supra*] factors countenance a relationship where the level of control is direct, obvious, and concrete, not merely indirect or abstract." *Id*. at 379.

At the state level, the California Supreme Court has also approached the common law in a manner consistent with the Board's traditional *TLI* standard. In *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014), the Court stated:

> [T]raditional common law principles . . . supply the proper analytical framework . . . . This standard requires 'a comprehensive and immediate level of 'day-to-day' authority' over matters such as hiring, firing, direction, supervision, and discipline of the employee.

Id., at 740.

Perhaps the most confounding aspect of the *BFI* standard is its failure to recognize the inevitable extent to which some degree of indirect control exists in nearly every contractual relationship. For example, if a homeowner engages a contractor to build a deck, then the homeowner possesses indirect control over the materials, timeframe, and quality of the work provided. Nonetheless, the homeowner is clearly not an employer because the homeowner does not directly control the specific manner in which the contractor performs the work. The same analysis applies to everyday contracts, such as an order placed with an online retailer (the buyer decides what product will be shipped, and within what timeframe, without directly controlling the work of the order selector or truck drivers), or even a hotel reservation (the guest decides when to arrive and leave, when the room can be cleaned, and what room conditions are acceptable, without directly controlling the work of the housekeeper).

Courts have recognized these distinctions between direct and indirect control under the common law for decades. *See, e.g, Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 717-18 (2d Cir. 1943) (comparing relationship between general and subcontractors in construction industry to actors whose production companies only indirectly controlled their work). Even the Supreme Court has noted, in the context of proscribed coercive secondary activities, that the indirect control of one entity over another's work does not destroy their independent identities. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 689-90 (1951).

Consequently, the *BFI* standard's departure from common law principles threatens truly absurd results. Virtually every contractual relationship involves some degree of "indirect control," but the *BFI* standard would find such indirect control sufficient to form an employment relationship. The common law distinctions between direct and indirect control, and between exercised and "reserved" authority, guard against such unmanageable outcomes. Consequently, the Chamber supports the Board's promulgation of its proposed joint employer rule in defense of common law principles, and the well-established underlying distinctions they recognize.

IV. The Proposed Rule Is Consistent With The Legislative Intent And Fundamental Policies Of The Act.

The joint employer standard as delineated in *BFI* is wholly antithetical to the Act's explicit statutory aims of facilitating meaningful and productive collective-bargaining. Thus, as more fully explicated below, the present joint employer formulation unnecessarily renders the process of meaningful and productive collective-bargaining far more difficult and destined to failure. Similarly, and once again without necessity, the *BFI* formulation impedes the willingness of employers to contract with one another thereby burdening the free flow of commerce and reducing employment opportunity. Further still, the *BFI* formulation is internally inconsistent with the statutory text of the Act; at unexplained odds with the Board's own precedent and that of reviewing courts; and, decidedly counterproductive with reference to other overriding federal policies.

The Board's current *BFI* standard, beyond being antithetical to the purposes of the NLRA, further contravenes the fundamental precept regarding the Board's obligation to enforce the Act *in harmony with* other federal statutes. As noted in detail below, the *BFI* standard not only fails to accommodate other statutory commands, it is hostile to, and destructive of, a number of such express federal imperatives.

A. There was no fact-based reason to overturn precedent and settled policy and to adopt the joint employer standard set out in *BFI*.

The Board majority in *BFI* was no doubt acutely attuned to the fact that it needed to provide significant justification in order to overrule and jettison decades of well-settled Board and court precedent and policy and to establish an entirely new analytical construct to determine joint employer status. To do so, in the absence of an overwhelming need, would plainly render the actions of the majority in *BFI* to have been unwarranted[3] and without merit. 29 U.S.C § 156; *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 617-19 (1991). Thus, the Board majority in *BFI* devotes a significant portion of its decision to a disquisition on the fact that there has been a significant increase in the use of subcontracted, contingent and temporary labor over the past several decades. *BFI*, slip op. at *11-12. Indeed, this change in the "procurement of labor" is the

[3] In her dissent to the proposed rule, Member McFerran essentially argues that since the *BFI* standard has only been in place for a relatively short period time that there exists insufficient evidence or experience regarding its negative effect, and therefore it should remain in place and not be altered by rulemaking. 83 FR 46692. With respect, this view is simply without merit. In the absence of evidence justifying the initial change, it is not incumbent on those advocating a return to the settled standard to labor under such a misconceived change in order to accumulate data or evidence of the adverse effects of the change. The failure, and the resulting burden of proof, herein lies with the majority in *BFI* and those that support its view to articulate a reasonable, fact-based, justification for the change in the first place, and not with those advocating a return to the long-settled *status quo ante*.

sole factual justification for the majority's subsequent radical revision of the joint employer standard. The mere increase in the number of such commercial arrangements – which have existed for decades – is, however, a "fact" utterly devoid of any legal significance and, thus, no justification at all for the majority's decision.

An increase in the utilization of subcontracting, franchising, contingency employment, or similar working arrangements does not, in itself, mean that the administration of the Act was adversely affected by such a factual circumstance under the well-settled pre-*BFI* standard. It was not; and there is no evidence otherwise. Indeed, the majority in *BFI* cites not a single fact, instance or piece of data to that effect. Thus, prior to *BFI*, the employees of a subcontractor, a contingent labor supplier, franchisee, a temporary agency, or any similar employer were always able to exercise their right to unionize under the Act. No employee or group of employees was ever denied the Section 7 right to self-organization because a related business, i.e. a contractor, user business, franchisor, or other putative "joint employer" was not also deemed to be their "employer" under the Act. The majority in *BFI* cites no example of any group of employees being unable to unionize because of the pre-*BFI* standard, because no such example exists.[4] Similarly, prior to *BFI* the employees of a subcontractor, labor supplier, franchisee, temporary agency, or similar business were always able to engage in collective-bargaining with their employer. The sole fact upon which the *BFI* majority predicates its radical restructuring of the joint employer analysis is, quite simply,

[4] Those who support the majority view in *BFI* argue that bargaining outcomes *might* be more advantageous to employees if the other entity were deemed a statutory employer since the other entity effectively "controls the purse strings" that, in turn, ultimately dictate what the conceded employer can reasonably agree to in collective-bargaining. There are two glaring problems with this argument. First, there is absolutely no extant evidence that it is true. The Board has never cited any actual instances, or economic analyses, either before or after the issuance of *BFI* that support the argument. It is mere speculative theory untethered to any empirical base. Second, the ability of *every* employer to pay wages, determine hours, retain personnel, etc. is *always* influenced and directly affected by its customers. Economic influence of one business over another in the context of a business to business relationship is an entirely fallacious and unworkable criterion for determining the existence of an *employment relationship.* Were it the criterion, then every business-to-business relationship would result in a joint employer finding with respect to employees employed by one entity that performs work on behalf of another.

an illusion. There was, and is, no change in the economy or in business-to-business relationships that remotely requires or justifies the imposition of the *BFI* standard. The departure from decades of Board and court precedent in *BFI* was wholly unjustified from the outset*;* and, thus, the *status quo ante*, as formulated in the proposed Rule, should be restored on this basis alone.

B. The *BFI* standard does not facilitate collective-bargaining.

The terms "joint employer" or "joint employers" appear nowhere in the text of the Act. In its relevant text, the Act refers *only* to "an employer." Thus, the entirety of the Act's unfair labor practice section (Section 8) prohibits certain practices only by "an employer." For example, Section 8(a)(5) makes it an unfair labor practice for "**an employer"** to "refuse to bargain collectively with the representatives of **his employees** ….." 29 U.S.C. § 158(a)(5) (*emphasis added*).

In the absence of any textual reference it is clear that the notion of "joint employment" is merely a judicial construct. It is a concept that has its roots in tort liability. *Johnson v. City of Boston*, 118 Mass. 114 (1875); *Rourke v. White Moss Colliery Co.*, 2 C.P.D. 205 (1877); *Jones v. Scullard*, 2 Q.B. 565, 569 (1898). Thus, in the tort context two entities could be held *jointly liable* to remedy wrongdoing by one entity, where the other entity had sufficient control over the other to fairly and equitably impose such liability. *Marsh v. Tilley Steel Co*., 26 Cal. 3d 486, 494-95(1980). The two jointly liable entities retain, however, their separate identity. This is manifestly *not* true with respect to the legal fiction of "joint employment" under the NLRA, which applies only to ***an employer.***

Unlike statutory terms, judicial constructs have limited permissible utility. *See United States v. Eurodif S. A.*, 555 U.S. 305, 317-18 (2009). Thus, they must be necessary, practical and harmonious with the aims of the statute or law under which they are applied. *Id* at 318 (explaining, "public law is not constrained by private fiction"). There may, in fact, be narrow or limited circumstances where two employers have become so fundamentally intertwined in the employment of a group of individuals that it may be necessary, practical and in harmony with the aims of the Act to apply the judicial construct of "joint employment." Such instances are, however, and should be, the exception; and they should be limited to those instances in which the two entities both possess and actually exercise a significant range of fundamental employer rights and prerogatives with respect to the group of individuals in question. *BFI* turned this narrow and limited situation on its head by allowing the indirect, potential, or routine impact on the employment conditions of one business, which are the natural result of its relationship with another business, into the touchstone for imposing the judicial construct of joint employment.

In the tort liability context, where the sole issue is what party pays what portion of an injured person's damages, the construct of *joint liability* has a plainly efficacious practical result. But the NLRA is not principally a statute that governs liability in the tort sense.[5] It is a statute that governs on-going labor/management relations most particularly in the context of collective-bargaining. Hence, while common law parameters of joint employer status may permit consideration of indirect control for purposes of assigning "joint liability," extending joint employer status under the Act – where the concern is joint obligations in collective bargaining, the fence should be built much higher. The appropriate standard of joint employment under the Act must be analyzed in terms of its practicality with reference to the process of collective-bargaining.

The construct of a "joint employer" does not erase the reality that such situations always involve two distinct employers each of which brings to their relationship its own distinct

[5] It is true that in certain instances, most notably a discharge violative of Section 8(a)(3), the Act may give rise to monetary liability. It is also conceivable that there are situations where two employers may have been instrumental in causing the unlawful discharge. In such case the purposes of the Act can be fully effectuated by holding the two employers *jointly liable.* There is, however, no need to deem the two entities to be a singular *joint employer* in order to achieve the desired remedial result.

entrepreneurial interests. Thus, contractors, user businesses, franchisors, and other "halves" of any putative joint employer, bring very different goals and expectations to their commercial relationship than do their subcontractor, supplier business, franchisee, or other contracting party. Their economic and practical interests in the work that is the subject of their business-to-business relationship are not the same; indeed, they are often in tension with one another.

Collective-bargaining under the Act is clearly predicated on a *bilateral* model, not a *multilateral* model.[6] Where there exist divergent aims and expectations on one side of the bargaining table, it is axiomatic that achieving agreement with the party on the other side of the table is more difficult, if not impossible. There is no evidence to the contrary, and given the many flaws of *BFI* highlighted in these comments, there is no expectation that such evidence will ever arise. In fact, successful, compelled, multi-employer negotiations have not resulted in a negotiated contract even between the parties involved in *BFI*. It is simply illogical to posit that compelled multi-lateral negotiations are *more* likely to result in agreement than bi-lateral negotiations. Thus, apart from being unnecessary, the joint employer standard embodied in *BFI* is wholly impractical with respect to the Act's aspirational goal of facilitating or fostering meaningful and productive collective-bargaining.[7]

[6] The same Board majority that created the manifold problems associated with the *BFI* standard, compounded them with its subsequent decision in *Miller and Anderson*, 364 NLRB No. 39 (2016). Prior to *Miller,* and with the exception of a brief period under *M.B. Sturgis*, 331 NLRB 1298 (2000), the Board, for decades, adhered to the principle that employers cannot be compelled to bargain on a multi-employer basis, and must consent to such an arrangement. *See Greenhoot, Inc.*, 205 NLRB 250 (1973). The intellectual and practical folly that was *Sturgis* was, wisely, corrected by the Board soon after its issuance. *See Oakwood,* 343 NLRB 659 (2004). In the wake of *BFI* and *Miller*, the scope of relationships which would now effectively compel multi-employer bargaining has not only been resuscitated, and improperly expanded, it now even requires such bargaining in the context of mixed units of solely- and jointly-employed individuals. However, much like *BFI*, there is no evidence that *Miller* has facilitated the practice of collective-bargaining or yielded superior bargaining outcomes. Indeed, *Miller*, itself, resulted in no bargaining at all. Absent compelling empirical proof to the contrary there is no practical, let alone legal or statutory, basis for either *BFI* or *Miller.*

[7] As noted in footnote 5, *supra*, it is not necessary for two employers to be deemed a "joint employer" in order to engage in multi-employer bargaining. Indeed, as the very phrase "multi-employer bargaining" suggests, each employer participant retains its separate legal identity. Given the difficulties of multi-employer bargaining, it is essential that any new standard adopted by the Board does not result in the unintended consequence of rendering two

C. The *BFI* standard is at odds with the Act's express statutory provisions.

The *BFI* standard is further antithetical to the express commands of the Act. For example, assume Employer A contracts with Employer B to provide contingent labor at Employer A's place of business. Under the terms of the contract, in an effort to protect its brand and customer relations and to maintain a safe workplace, Employer A reserves the right to reject certain referred laborers, and to require the contingent laborers to comply with Employer A's plant rules and regulations. Because of the hours that Employer A has determined it will operate, the hours of the contingent laborers are effectively determined by such decision. Employer A has no contractual control over the wages Employer B pays to the contingent laborers. Employer A and Employer B, however, have between themselves negotiated the price that Employer A is willing to pay Employer B. As in every commercial or service contract it is, of course, theoretically true that if Employer A agreed to pay a higher price to Employer B for its services, Employer B would have additional revenue that it might use to pay a higher wage to its employees. As noted, this is true in the instance of every conceivable market relationship.[8]

It seems abundantly clear under the *BFI* structure that Employer A and Employer B would be deemed the "joint employer" of the contingent workforce in the example above. Beyond vastly liberalizing the joint employer analysis, the majority in *BFI* performed no analysis with respect to the ramifications of such a joint employer finding.

Consider, for a moment, if Employers A and B wound up in collective-bargaining negotiations which broke down over an issue over which Employer A had no control, either under

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or more employer/participants a "joint employer" because of their *voluntary* participation in multi-employer bargaining. While the Chamber believes the proposed rule would not yield such a result, it encourages the Board to consider the language of its proposed rule in this light so as not to discourage the practice of *voluntary* multi-employer bargaining.

[8] The D.C. Circuit, in its recent *BFI* decision, explicitly acknowledged that "employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status." *Browning-Ferris Industries of California, Inc. v. NLRB*, Case No. 16-1028, slip op. at *21.

its contract with Employer B or by virtue of its relationship with Employer B. Could the contingent workforce strike and picket Employer A at all of its business locations, or would such activity run afoul of Section 8(b)(4)? Clearly, 8(b)(4) was designed to insulate neutral employers from harmful economic activity where such employer has no control over the resolution of the underlying dispute. Here, clearly Employer A has no such control, and Congress enacted 8(b)(4) to protect such an employer from the economic harms of picketing, strikes and boycotts. Yet, even in the absence of any control over the cause of the breakdown in negotiations, the *BFI* joint employer doctrine would render Employer A "the employer" and thus subject to economic pressure that would otherwise be plainly secondary and prohibited.

Instead, suppose that the strike took place solely over the wages paid to the contingent employees. Employer A clearly has no control contractually over those wages but could theoretically pay more to Employer B for its services. Under such circumstances could the contingent employees picket or boycott Employer A at all its locations, or would such conduct be prohibited by Section 8(b)(4)? The "logic" of *BFI* certainly suggests that such activity would not run afoul of Section 8(b)(4). However, if the activity is not prohibited in those circumstances, then any business that pays another for goods and services can never be a "neutral" in the former's labor dispute since that business consumer of goods and services could always pay more or otherwise alter its relationship with the primary employer.

BFI's broad definition of joint employer is plainly at odds with the statutory purpose of Section 8(b)(4). Congress never intended that entities with no control, or attenuated, indirect, incidental, or theoretical control over particular and disputed subjects of bargaining should be subject to economic pressure in the event of a labor dispute involving a primary employer with which such entities do business.

Finally, with respect to the above example, assume that the cause of the bargaining impasse was either alone, or in conjunction with other issues, the hours that the contingent laborers worked – a matter concededly in the control of Employer A. Would such fact alter the 8(b)(4) analysis? As a practical matter, how, in the event of any bargaining breakdown will the Board reasonably assess what particular issues caused the breakdown, and what changes to which issues would resolve the impasse? Further still, in this instance, if Employer A were to alter its hours of operation in response to the bargaining demands of the contingent laborers, practical operational considerations would likely require it to also do so with respect to all of the other individuals that it clearly employs and who are unrepresented. This would do violence to the fundamental principle of industrial democracy since the terms and conditions of employment for Employer A's permanent workforce would necessarily be altered through bargaining with the representative of the (minority) contingent workforce. This is functionally equivalent to compelled bargaining with a minority union – a practice neither authorized by statute nor ever embraced by the Board.

The failure of the *BFI* Board to deal with the statutory and practical ramifications of its decision do not end with its disjunction from Section 8(b)(4) and the principle of majority representation. For example, Section 2(2) of the Act specifically provides that the term "employer" as used in the Act "shall not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof …." Apart from knowing that the extent of its contracting with private employers is enormous, the federal government itself lacks precise data about its own contracting practices.[9] What is known is that the number of individuals performing services for the federal government pursuant to private

[9] *See, e.g.* Letter from Congressional Budget Office dated March 11, 2015 in response to Rep. Chris Van Hollen noting: "Regrettably, CBO is unaware of any comprehensive information about the size of the federal government's contracted workforce."

sector contracts and grants vastly outstrips the number of federal employees. Thus, in 2015, the federal government employed an estimated 2,042,000 full-time equivalents ("FTEs"), but employed some 4,285,000 private sector FTEs, under private sector grants or contracts. *See*, Light, Paul, C., *The True Size of Government*, NYU School of Public Service, published by The Volker Alliance, New York, 2017. Because of specific reporting requirements more precise data is available from the Department of Defense ("DOD"). According to the Congressional Budget Office, in FY 2015, DOD, alone, entered into contracts with more than 50,000 private U.S. companies. *See*, *Congressional Research Service:* "DOD: Defense Department Primer" published Feb. 10, 2017, available at www.crs.gov. – 7-5700. According to data maintained by DOD it employed some 641,000 private sector employees pursuant only to its non-facility services contracts. *See*, DOD Inventory of Contracted Services ("ICS"), 2014, published pursuant to Section 807, of the National Defense Authorization Act of 2008. This figure does not include the massive number of FTEs employed in service capacities at DOD facilities, or the equally massive number of private sector FTEs employed pursuant to product or "goods" contracts as distinguished from service contracts. Moreover, these are only the relevant numbers involving a single federal department - DOD. Hundreds of thousands more private sector workers are employed pursuant to goods and services contracts with a wide array of other federal departments and agencies. Beyond the federal government, untold numbers of employers hold contracts with states, cities, towns, municipalities and other political subdivisions. The vast majority of these federal and state contracts contain employment provisions at least as proscriptive as any typically found in private business to business commercial contracts, and, in most cases, decidedly more proscriptive. Under the *BFI* standard the US government and state and local governments would invariably be found to be a joint employer with their respective private contractors, potentially depriving the NLRB of jurisdiction. This creates a statutory matter of enormously broad consequence that the *BFI* majority apparently never considered.

When confronted with the statutory issue under Section 2(2), those that support the broader construct of *BFI* invariably respond that the concern is "inconsequential" in light of the Board's jurisprudence under *Management Training, Inc.*, 317 NLRB 1355 (1995).[10] Any reliance on *Management Training* to justify *BFI* is, however, utterly misplaced, and does nothing to address the statutory impediment posed by *BFI's* standard in the government contracting context.

Management Training is inapposite to the present question in several respects, and in no way addresses the statutory problem posed by *BFI* in the context of the tens of thousands of government contracts that populate the US economy. First, *Management Training* was decided two decades before *BFI*, and obviously never contemplated the ramifications of its joint employer construct. Second, and of even greater importance, *Management Training* never addresses the issue of joint employment at all. No party ever apparently raised the statutory infirmity potentially posed and the *Management Training* majority never considered, analyzed or decided that question.

Clearly, the current Board must address this statutory issue. Simply saying that the joint employer construct will not apply where it ousts the Board of jurisdiction is no answer. Such a solution is not only intellectually dishonest, it lacks fidelity to the statute. A better approach is likely that obliquely suggested by *Management Training*, i.e. that there is no "joint employer" relationship where the actual employer can engage in bargaining. In practice, this is the pre-*BFI* standard, and that which is reflected in the proposed Rule. The existence of another employing

[10] *Management Training*, a representation case, involved a petition covering employees at a Job Corps Center that was privately operated under a contract with the United States Department of Labor ("DOL"). The operator argued, under extant Board law at the time, that, because DOL exercised considerable control over the incidences of employment at the Center, it should "share" DOL's governmental exemption from the Board's jurisdiction. A divided Board ruled to the contrary, finding that the private operator had sufficient control over the terms and conditions of employment to engage in bargaining.

entity that possesses only indirect, potential or routine control does not preclude the actual employer from engaging in bargaining. Thus, adoption of the proposed Rule would harmonize with the Board's jurisprudence under *Management Training.* By contrast, application of the *BFI* rubric would either oust the Board of jurisdiction in literally hundreds of thousands of business relationships or would require a tortured, inconsistent and results-oriented interpretation of the statute that is legally untenable. Simply put, the Board is not free to interpret the statutory term "employer" one way when it chooses to, and an entirely different way when it finds it inconvenient to do so.

D. The *BFI* standard is inexplicably at odds with Board and Court precedent.

The *BFI* joint employer formulation unjustifiably restricts the liberty to contract and contravenes decades of Board and Supreme Court precedent without explanation or justification. Anglo-Saxon jurisprudence has long recognized the right of private parties to contract with one another without unjustified governmental interference. *See, e.g.*, *Adkins v. Children's Hospital,* 261 U.S. 525 (1923) (holding that "freedom of contract is … the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances"). While the notion of what constitutes "exceptional circumstances" has been subject to judicial vagary, the notion that the government must articulate a rationale for restraining or regulating the right of private parties to contract has not. By virtue of rendering both entities in a variety of commercial relationships to be *the employer* under the NLRA, the *BFI* joint employer doctrine restrains and regulates the contract between such entities in significant and substantive ways. For example, virtually every business-to-business relationship or contract provides for a bilaterally negotiated means of terminating itself. Thus, where Employer A subcontracts with Employer B, or enters into an agreement with Employer B to provide contingent labor, or grants Employer B a license or franchise, the two invariably provide for the means to terminate their relationship. Thus, they may decide that the relationship is unilaterally terminable at will, after notice, for cause, after a specific amount of time, or any number of other contingencies. The underlying point, however, is that the two contracting entities are free to determine between themselves the circumstances under which they may terminate their relationship. This is the most fundamental right embedded in the freedom to contact.

Consider, however, what transpires if Employer A contracts with Employer B, a unionized entity, and is subsequently determined to be a joint employer with Employer B. Although Employer A and Employer B may well have contracted to make their commercial relationship terminable at will by either party, their freedom to do so has now become constrained and regulated by the federal government. Thus, as *the employer*, Employer A cannot terminate its contract with Employer B unilaterally. As *the employer*, Employer A must bargain with the union representing the employees of Employer B over the *effects* of its termination of the bilateral business agreement; and, may well have to bargain over the *decision* itself. There is hardly a more fundamental restraint on the regulation of a private bilateral contract than a government-imposed obligation to require negotiation with a third party to terminate the contract. Such government intrusion cannot possibly be justified on the basis of the attenuated and theoretical joint employer construct embodied by *BFI.* Indirect, potential, or routine control by one employer with respect to another is simply not a rational basis upon which to either predicate liability or restrain and regulate the freedom of two parties to contract with one another.

These fundamental precepts and the untenable consequences of an overly broad notion of joint employment have been recognized by both the Board and the Supreme Court for more than six decades. For example, in *Plumbers Local No. 447,* 172 NLRB 128 (1968) ("*Malbaff"),* the Board expressly rejected the notion that a contractor's control over a subcontractor's employees would subject the former to unfair labor practice liability under the Act. Thus, in *Malbaff*, a contractor terminated its contract with a subcontractor because of the subcontractor employees' exercise of their Section 7 rights. In such circumstances, the Board in *Malbaff,* expressly noted that "….an employer does *not* discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees." *Malbaff, 172 NLRB* at 129 (emphasis supplied).[11] If a contractor does not violate Section 8(a)(3) under these circumstances, it most certainly has no obligation under Section 8(a)(5) to bargain with the subcontractor employees' representative before terminating its commercial relationship.

In order to reach a contrary result, the Board in *Malbaff* quite correctly observed that it could only be predicated on a finding that the subcontractor's employees were also the statutory employees of the contractor by virtue of the contractor's "real control" over such individuals.[12] Thus, it notes that such a "…finding of *control* in effect [would find] an employer-employee relationship to exist between the general contractor and the subcontractor's employees." *Id.* at 129. The Board expressly rejected the notion that such routine elements of control that attend virtually all contractor/subcontractor relationships would be sufficient to render the subcontractor's employees the statutory employees of the contractor as well. The Board's view is in accord with Supreme Court precedent. *See NLRB v. Denver Building Trades,* 341 U.S. 675, 689-690 (1951) ("We agree … that the fact that the contractor and subcontractor were engaged in the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor **or make**

[11] As a natural consequence of this fact, the Board in *Malbaff* held that a union does not violate Section 8(b)(2) in seeking such a result.

[12] While eschewing the phrase "joint employer" the analytical issue is precisely the same.

the employees of one the employees of the other.") (emphasis supplied). The proposed Rule is in accord with this precedent. By contrast, the *BFI* standard directly contravenes this precedent and does so with no explanation or articulated rationale.

Malbaff, its Board progeny, and its Supreme Court underpinning have never been overruled. Such precedent, however, makes clear that in the absence of "clear language,"[13] or "special circumstances,"[14] the employees of one party to a commercial arrangement cannot be deemed the statutory employees of the other party on the basis of theoretical, potential, indirect or routine control over such individuals, which is the natural incidence of all such commercial arrangements. Put another way, joint employment is a narrow exception to the general proposition that the employees of one party to a commercial transaction are ***not*** the statutory employees of the other party. While such a narrow exception might be justifiably found where both parties directly co-determine the essential and non-routine terms and conditions of employment for the individuals in question, it certainly cannot be predicated on the indirect, potential or routine existence of "control" that attends all business-to-business relationships.

The Board in *BFI* made no serious effort to confront or reconcile its views with decades of countervailing Board and court precedent. Rather, it was content to "justify" its radical departure on nothing more than the fact that there are more commercial relationships now than there were in the past. That may be true, but it is, as earlier noted, a fact without legal relevance.

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[13] *Denver Building,* 675 U.S. at 690 ("The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.").

[14] *Malbaff*, 172 NLRB, at fn. 5 (relying upon *Denver Building* standard and stating, "There are no special circumstances in this case which would warrant any different view.").

E. The Consequences of the *BFI* standard contravene overriding federal policies.

Beyond its statutory problems, the expansive notion of "joint employment" represented by the *BFI* decision conflicts with overriding federal policies on a host of grounds. Franchising, contingent labor arrangements, subcontracting and similar commercial relationships provide enormous economic benefit to the US economy and its citizenry. *See* Appendix A at p. 51 (*citing* PWC, "The Economic Impact of Franchised Businesses," volume IV, 2016 at https://www.franchise.org/sites/default/files/Economic%20Impact%20of%20Franchised%20Businesses_Vol%20IV_20160915.pdf (finding $678.3 billion national total output of the business model franchise sector in 2016)). Franchising and subcontracting, for example, have provided unparalleled entrepreneurial opportunity while simultaneously permitting separate businesses to focus on their core competencies. Subcontracting and contingent work arrangements also provide contractor and user employers with access to individuals with supplemental skill sets and afford them the necessary workforce agility to be competitive in an expanding world market. Individuals employed by entities on both sides of such commercial relationships directly benefit as well. Employers with fluctuating manpower and skill-based needs often exhibit unstable employment patterns. The use of supplemental, temporary, or differentiated, skill-based labor mitigates against such employment instability for the employees of both the user employer and the provider employer. Further still, in the instance of temporary or contingent employees, their employment is not only more stable, it is oftentimes a gateway to both career advancement and "permanent" employment. These economic benefits are palpable and self-evident and reflect the federal government's economic policy priorities.

Equally self-evident is the fact that an overly expansive definition of the legal "employment" relationship has a markedly depressive effect on the creation and utilization of such economically beneficial commercial relationships. *See* Appendix A, at p. 8 (finding that, in the franchising industry alone, "distancing" behavior resulted in between $17.2 billion and $33.3 billion per year lost output equivalent to the franchise sector and between 194,000 and 376,000 lost job opportunities in 2016). What then is the purported benefit of an expansive notion of "employment" that, as a matter of federal policy, should outweigh its negative impact? There is none. As earlier noted, neither the right to self-organization, nor the right to collective-bargaining, which lie at the core of the NLRA, are precluded by the pre-*BFI* notion of joint employment. Moreover, the pre-*BFI* standard which reflects and tracks the common law notion of *joint liability* does not preclude a justifiable apportionment of liability. The *BFI* notion imposes liability without regard to whether or not the subject party created the liability or is capable of resolving it. Such a policy is unwarranted and unwise on its face and is doubly so when it produces a host of unintended and negative economic consequences.

The breadth of negative economic consequence wrought by *BFI's* expansive notion of joint employment is dealt with extensively in Appendix A at pp. 48-55, which is attached and incorporated herein by reference. One policy matter, however, is deserving of particular mention here. Because the *BFI* standard has a depressive effect on the formation of certain forms of business association, it has an equally depressive effect on minority ownership, entrepreneurship, and economic participation. For example, in the franchise area alone, minority ownership is at a significantly **higher** and **faster growing** rate than non-franchise business ownership. *See Franchised Business Ownership by Minority and Gender Groups: An Update for the IFA Foundation*, prepared by Price, Waterhouse, Coopers, March 2018. Thus, in the franchise model alone, discouraging the formation of such business arrangements disproportionately and negatively affects minority business ownership and entrepreneurship. This is diametrically opposed to federal policy as reflected in a host of federal statutes enacted for the express purpose of *fostering* minority business ownership. *See, e.g.,* Small Business Act, 15 U.S.C. § 631(f)(1)(A) (encouraging "opportunity for full participation in our free enterprise system" for minority business owners); 49 U.SC. § 47113 (same, aimed at the transportation industry). What is true with respect to the franchise model is likewise true with respect to subcontracting and other types of commercial relationships. *See, e.g.*, 15 U.S.C. § 637 (encouraging subcontracting to minority-owned businesses).

Thus, beyond being antithetical to the policies that underpin the Act itself, the current *BFI* standard is at odds with other overriding federal policies. In adopting its unnecessary and overbroad standard, the *BFI* majority contravened a fundamental precept regarding the Board's administration of the Act. Thus, as reviewing courts often remind the Board, and as the Board itself has often acknowledged, the Board must enforce the Act *in harmony with* other federal statutes. *See, e.g., Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013); *Springfield Transit Management*, 281 NLRB 72, 77 (1986) (observing the Board "is not free to pick and choose which acts of Congress it will observe and which acts of Congress it will ignore"); *American News Co.*, 55 NLRB 1302, 1309 (1944). The *BFI* formulation not only fails to accommodate other statutory commands, it is hostile to, and destructive of, a number of express federal imperatives.

V. Conclusion

For the foregoing reasons, and based on the extensive, appended economic analysis, the U.S. Chamber of Commerce respectfully urges the Board to adopt its proposed joint employer rulemaking as set forth in 83 FR 46681, September 14, 2018.

Sincerely,

Vice President, Workplace Policy
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Appendix A

Statement Regarding the Economic Impact of the Prospective NLRB Public Policy Decision Regarding the Definition of Joint Employer

By Ronald Bird, Ph. D. December 26, 2018

Summary

This report describes the economic impact on employers, employees, and consumers of a contemplated decision by the National Labor Relations Board regarding the definition of circumstances where two or more employers may be found to have joint employer obligations and liabilities with respect to one or more employees. This report examines the costs and benefits of the proposed policy decision on consumers, workers and businesses, and it presents quantitative estimates of the economic impact through the franchise business sector on output and employment.

The decision before the Board is whether to maintain the status quo definition of joint employment enunciated in its 2015 *Browning-Ferris* decision or to adopt a proposed rule (83 Fed. Reg. 46681 (September 14, 2018)) that would return the definition to its previous form. This report focuses on the economic impact of the status quo, which the Board should consider when it decides whether to continue the *status quo* or to replace it. Relief from cost burdens of the *status quo* may constitute benefits of adopting the replacement standard that the Board has proposed.

The analysis presented here is based on survey data compiled from 77 in-depth interviews with franchise business entrepreneurs and knowledgeable observers who have direct experience of business conditions in the franchise industry before and after the 2015 decision.[15] This interview data shows that the *Browning-Ferris* expansion of the joint employer definition has had

[15] The data collection method applied for this research is commonly described in economic literature as a "contingent valuation" survey. This method has been widely applied in economic cost benefit analyses by government agencies to inform environmental, safety, transportation and land use, regulation decisions. The detailed design and implementation protocols are described in the body of this report, below.

a chilling effect on the assistance and leadership that franchisors previously provided to their franchisees. Fear of joint employer liability under the *Browning-Ferris* doctrine has caused franchisors to "distance" themselves from franchisees by curtailing guidance regarding compliance with labor and employment laws, limiting training programs, withdrawing assistance with marketing and cost control practices and eliminating other services that previously were provided. This economic impact of the decision is NOT the cost of complying with the current joint employer test by assuming joint employer status. Rather, it is the economic impact of franchisors' defensive response to avoid joint employer status under the *Browning-Ferris* standard. It reflects the loss of productivity that has resulted from the fear and uncertainty that has ensued from the *Browning-Ferris* decision. The fact that franchisors are willing to sacrifice the measure of efficiency and output identified here to avoid joint employer designation implies that they perceive the cost of being designated as a joint employer to be even greater than the economic impacts found in this study.

The data presented here indicate that the "distancing" behavior by franchisors from franchisees has resulted in franchisees experiencing lost sales or increased costs equivalent to 4.9% average yearly lost potential output for the franchised businesses represented in the sample. Statistical analysis of the sample data indicates with 99.9% confidence the economic impact on the business model franchise sector's total output is *at least* 2.55% lost yearly potential output.[16] Based on the $674.3 billion national total output of the business model franchise sector reported in 2016 U.S. Economic Census data,[17] the output loss is $33.3 billion per year and 376,000 lost

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[16] "Business model" franchise refers to arrangements whereby a company licenses to others the right to operate under its brand name to supply a good or service produced and delivered in a specified manner. Alternatively, "distribution" franchises involve dealer networks for retail sales of a manufactured product such as automobiles or appliances. The analysis presented here is based on experiences of business model franchisors and franchisees.

[17] Quoted in PWC "The Economic Impact of Franchised Businesses, volume IV, 2016 at https://www.franchise.org/sites/default/files/Economic%20Impact%20of%20Franchised%20Businesses_Vol%20IV

job opportunities at the sample mean of 4.9% lost output.[18] This lost potential output associated with the *Browning-Ferris* joint employment definition could be regained by adoption of the proposed rule to return the definition to its pre-2015 form. Furthermore, if the current *Browning-Ferris* joint employer standard is allowed to remain in place, the annual adverse economic impact may increase.

The robustness of the data reported here is indicated by the statistical lower bound of the sample result. The statistical lower bound of 2.55% lost output implies *at least* $17.2 billion annual lost economic output and 194,000 lost job opportunities for workers. This means that there is less than one chance in one thousand that another survey would find any smaller impact.

For the 233,000 small business franchisees nationwide,[19] at the sample mean the average franchisee experiences an annual revenue loss of $142,000 and $21,000 lost profit per year. These amounts are 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. Regulatory decision makers are required to consider these impacts under the terms of the Regulatory Flexibility Act.

The quantified economic impacts on the business model franchise sector are only a part of the total adverse impacts of the *Browning-Ferris* joint employment standard. Other impacts on the franchise sector in qualitative terms are discussed in the body of this report. The adverse

_20160915.pdf. The PWC report listed employment in the business model franchise sector as 7.6 million in 2016.the lost job opportunities calculation is 4.5% of that number.

[18] Lost job opportunities is an indicator of reduced labor demand. While competitive general economic equilibrium may result in full employment, reduced labor demand results in lower wages and gross domestic product less than the potential that would be achieved if the subject government regulation did not discourage efficient resource allocation.

[19]The 233,000 number of franchisee business firms includes many franchisees who operate multiple establishments. The total number of franchisee establishment units is over 700,000. Data regarding the number of franchisees and franchisors was provided by FRANData (Franchise Information Systems, Inc.). See https://www.frandata.com/

economic impacts of the *Browning-Ferris* standard associated with the franchise business sector are only one component of the total economic impact of the *Browning-Ferris* standard across all sectors of the economy. Other adverse impacts are transmitted through the franchised distributor sector, managed manufacturing and service industry supply chains, and performance-specified support services contract arrangements. These additional channels of impact multiply the quantified impacts presented here.

To justify continuation of the *Browning-Ferris* joint employment standard, the Board must show that there are benefits to the economy and society that outweigh the likely costs and that these net benefits are greater than the net benefits of the alternative standard proposed in the September 14, 2018, *Federal Register* notice.[20] The quantified monetary costs of $17.2 billion to $33.30 billion per year represent a lower bound on the total economic costs that any benefit analysis must surpass. There is no quantitative evidence available to suggest that benefits to workers of expanded joint employer status (supposedly through increased union representation, improved collective bargaining, or increased labor law compliance) would remotely approach the $17.2 billion lowest bound of annual cost shown here and even less likelihood of benefits approaching the mean estimate of $33.3 billion.

Private sector union membership continues its long downward trend despite the *Browning-Ferris* decision: Only 6.5 % of private sector workers were union members in 2017, compared to 6.7 % in 2015, before the impact of the Board's decision took effect, and significantly below the 7.5 % of 2007. This suggests a total lack of the primary expected benefit from the decision.

[20] The Regulatory Flexibility Act (USC 5.604 (a) (6)) mandates that regulatory agencies, which term includes the National Labor Relations Board, demonstrate consideration of impacts of their decisions on small entities by describing the steps that they have taken to minimize these economic impacts. This mandated consideration implies weighing of costs and benefits and selecting a regulatory approach among available alternatives that is reasonably expected to yield positive net benefits unless explicit statutory requirements dictate otherwise.

Because the quantified amount is only a fraction of the comprehensive cost, the full bar that any benefit estimate must surpass is much higher. While quantified impacts are not the exclusive criteria for regulatory decisions, the existence of quantified impacts provides a benchmark against which qualitative impacts must be considered. This report presents overwhelming evidence that the broad *Browning-Ferris* definition of joint employment is a policy that imposes significant net costs on society without commensurate benefits.

A critical factor in the failure of expected benefits from the *Browning-Ferris* decision to materialize is the distancing behavior documented in the interview data presented here: The *Browning-Ferris* decision created an incentive for franchisors and other core businesses to back away from earlier business arrangements and interactions with franchisees, suppliers and support contractors. This reaction may have sacrificed opportunities for better efficiency, quality, brand reputation protection, and output growth that would have benefited themselves, their business partners, workers and consumers, but it avoided the greater perceived risks and costs of embracing joint employer status. The result of this reaction to the *Browning-Ferris* decision is that the benefits that may have been anticipated for workers by the Board and others never materialized. Instead, large economic losses have been imposed on the entire economy, including workers and consumers, because of the fear and uncertainty that the *Browning-Ferris* decision created. The result has been a policy that imposes significant losses on society without yielding noticeable commensurate benefits. This mistake can be rectified by a decision to adopt the Board's proposed rule of September 14, 2018.

Background and NLRB Decision in *Browning-Ferris*

The joint employment doctrine makes other (usually larger) employers responsible for alleged labor law violation claims filed against their (usually smaller) business partners – suppliers, contractors or franchisees. Prior to 2015, the NLRB had for many years followed a relatively narrow definition that a joint employment relationship existed under the National Labor Relations Act (NLRA) when two employers "share or codetermine those matters governing the employees' essential terms and conditions of employment."[21] Under this definition a second company's indirect influence over the terms and conditions of employment for employees of another firm was not alone sufficient to establish joint employer status for the secondary company absent a showing that the secondary employer's putative control was actually exercised and was direct and immediate. Findings of joint employer liability in labor law cases were rare prior to 2015. "Even direct and immediate supervision of another's employees was insufficient to establish joint-employer status where such supervision was limited or routine."[22]

In 2015, the NLRB issued an opinion in the case of *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), that significantly broadened its interpretation of circumstances giving rise to joint employment status under the NLRA. The new ruling included circumstances in which the influence of the secondary company over the other's employees was not exercised or was only indirect, limited or routine. Specifically, the Board determined that:

1. "Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry."
2. A finding of control exercised directly and immediately was not required for a finding of joint employment; and

[21] 83 Federal Register, 179, p. 46683.
[22] Ibid.

3. "control exercised indirectly – such as through an intermediary – may establish joint-employer status." [23]

This decision significantly broadened the joint employment liability risk that franchisors, manufacturing supply chain managers, and support services contract managers faced in their relationships with franchisees, suppliers and support services contractors.

In the face of uncertainty, prudent businesses may reasonably plan for the worst outcome and often react by adopting defensive strategies. As it was written and as it was perceived, *Browning-Ferris* marked a departure from the Board's historic policy trend and suggested a risky, costly and uncharted course for the future. Defensive reactions by those subject to the new risk were predictable and reasonable.

The Board's analysis in the *Browning-Ferris* decision conflates under the term "contingent employment" a variety of business arrangements that have been central to innovation and economic growth in recent years:

1. Business model franchising, which has grown to include over 233,000 small business franchisee companies associated with approximately 3,000 franchisor brands, producing $674.3 billion in direct output and directly generating 7.6 million jobs and 269.9 billion per year in direct wages;[24]

2. Manufacturers' supply chain management, which has been responsible for increased productivity, timely delivery of critical components, efficiency of inventory cost

[23] 362 NLRB No. 186, p. 2.
[24] FRANdata provided estimates of numbers of franchisees; PWC, op. cit.., is the source for the output, jobs and wages data reported. The PWC report also includes estimates of indirect economic impact through suppliers and through consumption spending multipliers from direct wages.

control, and increased competitiveness of American manufacturers in the globally competitive economy; and

3. Outsourcing of specialized business services, such as information technology, facilities maintenance, housekeeping, logistics, security and administrative services to third party vendors or contractors, which has allowed businesses to focus management effort on improvement of productivity and efficiency in core business areas and to save costs by reliance on specialists who bring specific skills and scale efficiencies.

Critics discount the economic benefits to businesses, workers and consumers that have resulted from these innovations in economic organization. They blame these innovations for declining private sector union membership and slower wage growth among lesser skilled workers, while ignoring the growth in employment opportunities (instead of welfare dependence) that these innovations have helped to bring about.

The NLRB is now contemplating whether to maintain the current definition of joint employment based on its 2015 *Browning-Ferris* decision or to replace it with the alternative definition proposed at 83 Fed. Reg. 46681 that an employer "must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine" in order to be considered a joint employer.[25]

Data Sources and Findings

To answer critical questions about the economic impact of the *Browning-Ferris* decision, and to inform the Board's decision of whether to maintain the broad definition *status quo* or to

[25] 83 Fed. Reg. 46696.

adopt the proposed rule to return the definition to its pre-2015 form, the International Franchise Association, with the assistance of U.S. Chamber of Commerce, undertook an interview survey of franchise business entrepreneurs and knowledgeable observers who had direct experience of business conditions in the franchise sector before and after the 2015 decision. To date, 77 interviews have been conducted. The interview data collection process is on-going, and further updates to this report may be published after the immediate rule-making comment period has ended. In addition, the Chamber is in the process of conducting a separate interview survey of non-franchise businesses involved in the supply chain management and support contract management aspects of the markets affected by the joint-employer standard. Preliminary findings of this effort are not yet at the stage to provide quantitative economic impact estimation data, but some qualitative initial observations will be discussed later in this report.

The interviews conducted for this research are an example of the data collection method that is known in the economic cost-benefit analysis literature as a contingent valuation survey. Contingent valuation surveys have been widely used for estimation of data to calculate benefits and costs for regulatory decisions in environmental, safety, health, land use, transportation, recreation, and other public policy decision contexts. "Courts have held that surveys of citizens' valuations enjoy 'rebuttable presumption' status in cases involving the assessment of damage to natural resources." [26]

Interviews conducted for this study included a series of both qualitative and quantitative questions. Interviewees were asked questions designed to elicit their assessments of how curtailment of guidance, support services and interactions with franchisees by franchisors had

[26] Anthony E. Boardman, et al., Cost-Benefit Analysis: Concepts and Practice, 5th edition (Cambridge, UK: Cambridge University Press, 2018) p.422.

impacted sales, efficiency, costs or other operational parameters of franchisees. Franchisors have direct information regarding franchisees' sales because they typically receive a royalty payment from franchisees based on gross revenue receipts. Some franchisors also operate their own units within the franchise brand network, providing them with a benchmark for comparison of both sales and costs. Franchisees obviously are well acquainted with their own financial performance records, reflecting experience before and after the *Browning-Ferris* decision. The group of attorneys, consultants and others interviewed have experience with multiple franchisors and franchisees and detailed knowledge of their clients' financial, management, and litigation experiences.

Most interviews were up to an hour in length and covered a variety of both quantitative and qualitative assessments of how joint employer definition concerns have impacted business decisions and operations. For this study an interview guide was developed around a series of questions designed to elicit information from each respondent based on his or her experience. The interview structure asked questions that gradually moved from elicitation of general and qualitative perceptions to more specific and quantified perceptions. To ensure consistency and as a check on bias, key questions were posed in several alternative forms. For example, the key issue of quantitative impact was approached through three different questions posed to franchisees who had qualitatively identified curtailment of franchisor guidance and assistance as a significant concern:

1. "Comparing experience before and since the *Browning-Ferris* decision in 2015, by how much has the curtailment of guidance or assistance from your franchisor caused a perceptible loss of expected revenue or increase in costs for your business?"

2. "How much additional annual royalty percent of gross revenue would you be willing to pay to obtain the valuable services from your franchisor that you say you no longer receive in the post-*Browning-Ferris* environment?"
3. "To mitigate your complaints about receiving less help from your franchisor, how much of a reduction in the current gross revenue royalty payment that you now make to the franchisor would be sufficient?"

Similar questions were adapted for franchisors and other observers who were interviewed.

Questions 2 and 3 go beyond the simple approach used in many contingent valuation surveys and probe for both the "willingness to pay" and the "willingness to accept" values of the respondent, effectively bracketing the estimated damage incurred because of the policy in question and providing a check on the consistency of the respondent's perceptions. In some cases respondents were able to respond to all three questions; in other cases only one or two responses were obtained in an interview. Where more than one response was obtained, the analysis applied the average of the responses given

The 77 completed franchise sector interviews reveal clearly that fear of liability under the broadened *Browning-Ferris* joint employer standard has had a chilling effect on franchisors' support for and interactions with their franchisee partners. Seventy-one respondents (92%) reported that franchisors have implemented defensive distancing behaviors in the wake of the *Browning-Ferris* decision. Fear of joint employer liability under the *Browning-Ferris* doctrine has caused franchisors to "distance" themselves from franchisees by curtailing guidance regarding compliance with labor and employment laws, limiting training programs, withdrawing assistance with marketing and cost control practices and eliminating other services that previously were provided and critically impacted.

This view is shared by both franchisors and franchisees and by other observers interviewed. All 28 franchisor executives interviewed reported that they had constrained guidance, support services and interactions with franchisees that had previously been routine. Thirty (83%) of the 36 franchisee business owners interviewed reported significant curtailment of guidance, support services, and interactions that had been routine before the *Browning-Ferris* decision. Of the six franchisees who reported no notable curtailment (their output loss estimates were recorded as zero percent), three were long-experienced business owners who stated that they had never relied on franchisor assistance either before or since the decision. Two of these, however, stated that less experienced new franchisees would benefit from franchisor guidance that has been curtailed since the *Browning-Ferris* decision. Among the 13 attorneys, consultants and other observers with experience representing franchisors and franchisees, all reported observing franchisors curtailing guidance, support services and interactions with franchisees, ranging qualitatively from moderate to large.[27] Interviewees across the board reported that the impact of defensive distancing and withdrawal of interaction was most significant for new and struggling franchisees. The adverse impact on women and minority group members in the franchisee ranks was especially noted.

Franchisors reactions to the NLRB decision reflect their concern about liabilities under the National Labor Relations Act, and their reactions also reflect concerns about liabilities under other federal and state laws for which they perceive that judicial and administrative interpretations have been influenced by the NLRB precedent. Their concerns about the risk of joint employer liability reflect both concrete experience from claims filed against themselves or from claims of which they are aware having been filed against others and concerns reflecting uncertainty about the boundaries

[27] The inclusion of attorneys and consultants who represent franchise businesses in the interview process improved the reliability of the survey data because many of these respondents reflected the collective experiences of multiple clients.

of the *Browning-Ferris* doctrine and how it may evolve and broaden as further cases are decided in various jurisdictions.

Franchisors, franchisees and attorney/consultant observers reported in 69 of 77 interviews that franchisees (themselves or others from whom they had heard) are complaining about the curtailments of guidance, support services and other interactions from franchisors in the wake of the *Browning-Ferris* decision. Franchisees' complaints focused predominantly on their perception of receiving reduced value for the constant (or even increased) royalty fees that they pay to the franchisor, compared to the value received prior to the *Browning-Ferris* decision.

Altogether, 54 useable quantitative responses for *Browning-Ferris* related output losses were obtained. These 54 responses ranged from losses of 25% to zero, with a mean value of 4.93% lost output, a sample standard deviation of 0.0539, and standard error of the mean of 0.0073. The median observation was 4.0 % lost output. The calculated t-statistic value of 6.729 indicates a very high probability that the *Browning-Ferris* decision has had an adverse economic impact that is significantly greater than zero.

The t-value for a one-tail lower bound at p = 0.001 (or 99.9% confidence level) is 3.251, resulting in a lower bound estimate of 2.55% lost potential output associated with *Browning-Ferris*-induced curtailments of franchisors guidance, support services and interactions with franchisees.[28]

The lower bound (99.9 % confidence) value is shown to reflect potential sensitivity of the sample mean to sample size, sample frame selection, the valuation survey method and non-response biases that may be present. The lower bound estimate of 2.55% output loss, indicates a

[28] The lower bound is calculated as 0.093 - 3.251 x 0.0073 = - 0.0255 or 2.55% output loss.

statistically significant impact even under extreme statistical error assumptions regarding the representativeness of the sample with respect to the subject population. There is less than a one in one thousand chance that another survey or a census of the entire population of franchisors and franchisees would yield a smaller impact estimate than the indicated lower bound amount for this sample.[29]

Analysis and Implications

The data presented here indicate that the "distancing" behavior by franchisors from franchisees has resulted in franchisees experiencing lost sales or increased costs equivalent to yearly lost potential output between 4.93% and 2.55%.[30] Based on the $678.3 billion national total output of the business model franchise sector reported in 2016 U.S. Economic Census data,[31] the sample mean (4.93% lost output) implies $33.3 billion per year lost output equivalent to the franchise sector and 376,000 lost job opportunities.[32] This lost potential output associated with the *Browning-Ferris* joint employment definition could be regained by adoption of the proposed rule to return the definition to its pre-2015 form. The statistical lower bound (2.55 % lost output)

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[29] Because of the relatively wide range of sample observations, a trimmed mean calculation was also considered. This approach discards the two greatest (25% each) and two least (0% each) output loss responses and calculates the average of the remaining 50 observations. The trimmed mean approach resulted in a mean estimate of 3.68% output loss ($29,2 billion). The smaller resulting mean sample error (.0052), yielded a higher value for the lower bound, 2.63% output loss ($17.3 billion).

[30] These estimates apply to the "business model" franchise market -- arrangements whereby a company licenses to others the right to operate under its brand name to supply a good or service produced and delivered in a specified manner. Alternatively, "distribution" franchise market involves dealer networks for retail sales of a manufactured product such as automobiles or appliances. The analysis presented here is based on experiences of business model franchisors and franchisees.

[31] Quoted in PWC "The Economic Impact of Franchised Businesses, volume IV, 2016 at https://www.franchise.org/sites/default/files/Economic%20Impact%20of%20Franchised%20Businesses_Vol%20IV_20160915.pdf.

[32] Lost job opportunities is an indicator of reduced labor demand. While competitive general economic equilibrium may result in full employment, reduced labor demand results in lower wages and gross domestic product less than the potential that would be achieved if the subject government regulation did not discourage efficient resource allocation.

implies that the economic impact of the *Browning-Ferris* joint employment definition is at least $17.2 billion annual lost economic output and 142,000 lost job opportunities for workers.

For the 233,000 small business franchisees nationwide,[33] at the sample mean value of 4.93% lost output, the average franchisee experiences a revenue loss of $142,000 and a profit loss of $21,000 per year. These amounts are 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. Regulatory decision makers are required to consider these impacts under the terms of the Regulatory Flexibility Act and to choose a regulatory approach that reduces of eliminates these burdens if allowed by controlling statutes.

The quantified economic impacts on the business model franchise sector is only a part of the total adverse impacts of the *Browning-Ferris* joint employment standard on the franchise sector, and the adverse economic impacts of the *Browning-Ferris* standard on the franchise business sector is only one component of the total economic impact of the *Browning-Ferris* standard on the economy. Other adverse impacts are transmitted through the franchised distributor sector, managed manufacturing and service industry supply chains, and performance-specified support services contract arrangements. These additional channels of impact likely multiply the quantified impacts presented here. Examples of non-quantified additional economic impacts include:

- Additional litigation and legal costs incurred by franchisors and franchisees. In the most recent four years joint employer claims under NLRB jurisdiction involving

[33] Data regarding the number of franchisees and franchisors was provided by FRANData (Franchise Information Systems, Inc.). See https://www.frandata.com/

franchise businesses have increased five-fold.[34] In addition, respondents to the interview survey reported increases in joint employer claims filed in non-NLRB matters alleging joint employer status based on the *Browning-Ferris* precedent. Outside the context of litigation filed, franchisors interviewed 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. Franchisees have incurred addition legal counsel costs to replace services and guidance that franchisors previously provided to them.

- Franchisees and franchisors have incurred costs to revise or outsource training materials to minimize potential joint employment liability claims.
- Franchisors have reduced inspections and on-site enforcement of brand quality and performance standards to avoid being designated as a joint employer. The subsequent erosion of brand quality may have decreased the market value of the franchise brand.
- In 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.
- Several franchisors mentioned during interviews that an effect of the *Browning-Ferris* decision has been to discourage them from recruiting and accepting less experienced and less financially secure franchisee applicants. They explained this as the result of the post-*Browning-Ferris* reality that new franchisees must be more self-sustaining because franchisors cannot risk joint-employment entanglement by providing them the needed guidance that was previously feasible. These respondents noted that this has

[34] This count excludes cases related to McDonalds, which has been the subject of a concerted campaign by the Service Employees International Union that began before the *Browning-Ferris* decision was rendered.

resulted in reduced opportunities for women, minority race/ethnic group members, disabled veterans, and displaced workers – all groups that found opportunities for entering the economic mainstream through franchised businesses before the *Browning-Ferris* decision changed the dynamics of franchisee recruiting and selection. These initial interview responses were self-prompted. During the last 10 franchisor interviews a question about such effects was added and six of the 10 franchisor executives questioned confirmed that their companies had become more cautious in the selection of new franchisees – favoring candidates with more prior business management experience. These responses raise concern that the *Browning-Ferris* joint employer standard may be having an adverse effect on business opportunities for women and minority group members who typically have relatively less business management experience.

- Prior to the *Browning-Ferris* decision the franchise sector had enjoyed a notable record of providing business ownership opportunities to minority group members. The 2012 U.S. Census Survey of Business Owners found that 30.8 % of franchised businesses were owned by members of racial or ethnic minority groups, compared to 18.8 % of non-franchised businesses. In the five years between the 2007 and 2012 surveys the proportion of franchise businesses owned by minority group members increased by half, from 20.5 % to 30.8 %.[35] Results of the 2017 Survey of Business Owners have not yet been published by the Census Bureau, but when the results become available they will be examined to ascertain the possible impact of the joint employer standard change on the growth of minority group members in the franchise sector. The

[35] Quoted in PwC, Franchised Business Ownership by Minority and Gender Groups, p. 1, at https://www.franchisefoundation.org/franchise-business-ownership-minority-and-gender-groups-2018

potentially adverse impact of the *Browning-Ferris* decision on minority group members and on women as business owners was noted in a recent study published by the Progressive Policy Institute:

> "One problem is the likely response from franchisors to the expanded NLRB standard—in particular, we may see reduced business dynamism. Franchising is an engine of entrepreneurship in the United States, with independent operators who, despite the assistance of national brands, assume plenty of financial risk themselves. At the same time, we have seen the rise of large franchising operations that own hundreds of franchises across the country. Not surprisingly, large franchising operations are better able to comply with employment laws than small, single-operator franchisees. Faced with the new incentive structure of the expanded joint employer doctrine, franchisors will have a clear preference against smaller franchisees in favor of the larger organizations. This will make it much harder for new entrepreneurs to enter business through franchising, further raising barriers of entry for business creation."[36]

- Looking beyond the franchise business context, there is evidence that the *Browning-Ferris* definition of joint employment has had similar adverse impacts on non-franchise businesses that use supply chain management contracts and support services contracts. Fear of joint employer designation in relation to their suppliers or support services contractors has led businesses to reduce or eliminate their specifications of performance standards, schedules and worker qualifications in these contracts. The result has been

[36] Dane Stangler, "Experience of the Joint Employer Doctrine Fails to Strike the Right Balance," October 5, 2017, at https://www.progressivepolicy.org/blog/expansion-joint-employer-doctrine-fails-strike-right-balance/

a loss of the efficiency, quality and cost savings that were previously obtainable. The U.S. Chamber of Commerce is in the process of conducting interviews similar to those conducted with the franchise sector to obtain quantified estimates of the economic impacts of risk averting reactions to the *Browning-Ferris* decision among companies in the supply chain management and support services contracting markets.

- The *Browning-Ferris* decision has a high potential to create conflict between the joint-employer standard and other federal laws and regulations. For example, banking regulations require covered financial institutions to monitor and supervise the selection by their contractors of employees who are assigned to work in their facilities under support services contracts. These include information technology systems workers, housekeepers, security guards and maintenance workers. Executives in affected companies express concern that the Board's broad joint employer definition exposes them to unanticipated costs for their compliance with federal banking regulations.

To justify continuation of the *Browning-Ferris* joint employment standard, the Board must show that there are benefits to the economy and society that outweigh the likely costs and that these net benefits are greater than the net benefits of the alternative standard proposed in the September 14, 2018, *Federal Register* notice.[37] The quantified monetary costs presented here represent a lower bound on the total economic costs that any benefit analysis must surpass. There is no quantitative evidence available to suggest that benefits to workers (supposedly through increased union representation or improved collective bargaining) would remotely approach the

[37] The Regulatory Flexibility Act (USC 5.604 (a) (6)) mandates that regulatory agencies, which term includes the National Labor Relations Board, demonstrate consideration of impacts of their decisions on small entities by describing the steps that they have taken to minimize these economic impacts. This mandated consideration implies weighing of costs and benefits and selecting a regulatory approach among available alternatives that is reasonably expected to yield positive net benefits unless explicit statutory requirements dictate otherwise.

$17.2 billion to $33.3 billion annual cost shown here, and because the quantified amount is only a fraction of the full cost, the full bar that any benefit estimate must surpass is much higher. While quantified impacts are not the exclusive criteria for regulatory decisions, the existence of quantified impacts provides a benchmark against which qualitative impacts must be considered. The interview data shows that the *Browning-Ferris* expansion of the joint employer definition has had a chilling effect on the assistance and leadership that franchisors previously provided to their franchisees and that, in turn, has resulted in lost economic output to society.

The critical factor in the failure of expected benefits to materialize is the distancing behavior documented in the interview data presented here: The *Browning-Ferris* decision created an incentive for core businesses to back away from earlier business arrangements with franchisees, suppliers and support contractors. This reaction may not have been anticipated by the proponents of broadening the definition of joint employment. By reacting in this way franchisors and other affected businesses may have sacrificed opportunities for increased efficiency, quality, brand reputation protection, and output growth that would have benefited themselves, their business partners, workers and consumers, but they were driven toward this reaction by greater perceived risks associated with a joint employer designation. The result of this reaction to the *Browning-Ferris* decision is that the benefits anticipated for workers never materialized because the strategies adopted by targeted businesses have effectively avoided the joint employer designation. Instead, large economic losses have been imposed on the entire economy, including workers and consumers, because of the fear and uncertainty that the *Browning-Ferris* decision created and the disengagement of franchisors and larger companies at the centers of supply chain and support contractor networks that the decision has motivated. The broader joint employer standard created by the *Browning-Ferris* decision widened the supposed fissures in the workplace, of which some have complained, instead of closing them.

Conclusion

If the Board does nothing, the current definition reflecting the *Browning-Ferris* decision will remain in effect by default. Inaction by the board, allowing the current "broad" definition to remain in effect, 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. The adverse impacts that have already been observed since the 2015 NLRB decision 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.[38]

The current broad joint employer concept based on the *Browning-Ferris* decision is a policy that was motivated by the expectation of salutary effect based on an untested theory. Practical experience has now proven that theory to be in error. In promulgating the 2015 *Browning-Ferris* decision, the Board failed to anticipate the incentives for defensive reaction by affected business that they were creating. The survey findings reported here show that the result has been a policy that imposes significant losses on society without yielding any commensurate benefits. This mistake can be rectified by a decision to adopt the Board's proposed rule of September 14, 2018.

[38] In the realm of the joint employer concept, the NLRB provides a pattern and leadership that is followed by other agencies and jurisdictions, giving its decision an economic impact that ranges far beyond the relatively narrow scope of unfair labor standards charges arising under the Board's statutory authority. The "contagion" effect of the 2015 *Browning-Ferris* decision by the NLRB has already been observed in regulations issued by other government agencies and in the growth of single party and class action litigation in which a joint employment relationship is alleged under the "broad" definition.