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Introduction

Chairman Roe, Ranking Member Polis, and Members of the Subcommittee, I want to thank you for inviting me to testify at this hearing today. As a Professor and scholar of labor law at Boston University since 1978, I care deeply about the integrity of the processes of the National Labor Relations Act and the fulfillment of its purposes. In addition, as a Reporter for the recently completed Restatement of Employment Law, I am particularly concerned that the common law of employment not be misrepresented.

My testimony makes three major points. First, the significance of the decision of the National Labor Relations Board in *Browning-Ferris Industries of California (BFI), 362 N.L.R.B. No. 186 (2015)* has been greatly exaggerated. This exaggeration derived initially from the *BFI* dissenters, whose opinion reads like a speculative law review article written by a professor with unrealistic hypotheticals and a policy agenda, rather than a responsible attempt to contribute to the articulation of workable legal principles. The exaggeration was then compounded in the press, which of course always wants to tell us that revolutionary changes occurred in the prior day that we must read about today, and then by lobbyists, who claim that the sky is falling and that their fees must be paid to help keep it in place above our heads.

In fact, *BFI* is nothing more than a narrowly crafted opinion that reinstates a prior definition of the joint employment relationship for purposes of collective bargaining under the regulatory umbrella of the National Labor Relations Act (NLRA). *BFI* returns to this prior law by overturning some narrowing limitations placed on the definition of joint employment by a few cases in the 1980s. These limitations, while providing some employers a loophole to escape potential collective bargaining obligations imposed by the NLRA, did not eliminate joint employment relationships and associated collective bargaining. Indeed, given the actual facts of the case, the *BFI* decision itself could have been resolved the same way without changing the 1980s test; and the dissenters could have written a more responsible opinion by concurring through application of this test.

Second, despite the *BFI* dissenters' tendentious and misleading reading of case law, the majority's decision in *BFI* drew logically and appropriately from the common law of agency. I say this as someone who played a central role in the most recent effort of the American Law Institute (ALI) to formulate a meaningful expression of the common law of employment. I served as a Reporter for the ALI's newly published Restatement of Employment Law and was primarily responsible for the Chapter of this Restatement that defines the employment relationship, including a section on joint employment.

Third, the proposed legislation currently before your Committee is unnecessary to ensure the continuation of franchising and other efficient segmented business models that are prevalent in our modern economy. The legislation instead only would frustrate the Board's renewed effort to ensure that businesses like BFI not use such models to evade their statutory obligations to bargain over the wages, hours, and conditions of employment that they at least co-determine.

The legislation is not necessary to protect franchisees and other small businesses that provide more efficient supplementary services rather than simply enable controlling business sponsors to evade labor and employment laws. The controlling business sponsors can reap the legitimate advantages of delegating certain supplementary work without retaining the power to control wages, hours, and other conditions of employment of the employees of independent franchisees and other smaller sponsored businesses. The legitimate business justifications for franchising and delegation of supplementary work are not affected by requiring sponsors to meet their legal obligations. For instance, as economists have long understood, franchising exists because it enables franchisors both to raise capital quickly for the rapid expansion of outlets and also to provide greater performance incentives for the owners of these outlets than can be provided for middle managers in a large corporation. These legitimate business reasons for franchising would not be eliminated even if the franchisor decided to claim or assert

authority to control the wages, hours, or other working conditions of its franchisees' employees, rather than only the branded product its franchisees offer to the market. Furthermore, a franchisor that does not assert or claim such authority over working conditions, as franchisors historically seem not to have, is not even affected by the narrowly framed *BFI* decision.

I. A Narrow Opinion

The remainder of my statement elaborates on each of these three points. First, the *BFI* decision is a narrow and limited decision because it is tethered to judicial and Board precedents that existed for several decades prior to the mid-1980s cases[1] that the *BFI* decision expressly overrules. The controlling precedents include the Supreme Court's 1964 approval of the Board's joint-employer doctrine in *Boire v. Greyhound Corp., 376 U.S. 473 (1964)*, as well as the influential Third Circuit Court of Appeals decision in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (3d. Cir. 1982)*. One can debate how to characterize the facts and holdings of all the older controlling precedents, but the Board's acceptance of the precedents and its claim to do no more than over rule the limitations of the 1980s cases, means that the current law of joint-employment is no different than that which existed during a period of great expansion of franchising and other forms of business segmentation, including the traditional subcontracting on construction sites. All legal doctrine is only given full meaning by application to a range of factual contexts, but the existence of old case precedent provides great clarification for the *BFI* decision.

Furthermore, the Board's overruled 1980s qualifications on the prior joint-employer law were marginal in the sense they did not challenge the existence of joint-employment relationships that required joint bargaining obligations. The pre-*BFI* law required employers to be treated as joint-employers when they "share or co-determine" "essential terms and conditions of employment." None of the purported legal issues posed by joint-employer bargaining units, whether fanciful or real, imagined in the *BFI* dissenting opinion were eliminated by the 1980s qualifications. Over the years, the Board has been addressing the real legal issues posed by joint-employer bargaining units in a responsible manner and can be expected to continue to do so.

While the over-turned 1980s qualifications did not eliminate joint-employer bargaining units, they did offer employers like *BFI* a way to avoid bargaining obligations while retaining ultimate authority

[1] See TLI, Inc., 271 N.L.R.B. 798 (1984); Laerco Transportation, 269 N.L.R.B. 324 (1984). The *BFI* decision also overruled two cases elaborating on the 1984 decisions, A&M Property Holding Corp., 350 N.L.R.B. 998 (2007) and Airborne Express, 338 N.L.R.B. 597 (2002).

to control wages, hours, or working conditions, the topics on which § 8(d) of the Act mandates good faith bargaining. They did so by holding that a joint employer's authority over these topics for bargaining must be directly and immediately exercised in more than "limited and routine" instances, rather than only asserted and usually only exercised indirectly through the intermediation of the other employer. In *BFI* the dissenters used these qualifications to assert that BFI was not a joint employer of Leadpoint's employees, even though BFI exerted continuing control over such core mandatory topics of bargaining as the pace of work, productivity standards and overtime requirements, break times, safety standards at its work place, and even maximum pay. As noted above, the dissenters might have concurred in *BFI* without accepting the majority's rejection of the 1980s qualifications. The fact that they did not do so demonstrated how large the loophole created by the qualifications had become for some Board members.

The majority's rejections of the qualifications prevented BFI from avoiding future bargaining obligations while retaining the legal right to control the subordinate's employees of a subordinate employer like Leadpoint and generally only exercising that right by issuing directions through the intermediation of the subordinate employer's supervisors. Indeed, there were instances documented in the record of the *BFI* case, of BFI controlling matters subject to mandatory bargaining, such as termination decisions and processes, indirectly through the Leadpoint supervisors.

All the *BFI* decision does is pronounce doctrine that closes the loophole that was created by the 1980s qualifications. It does so by recognizing that one employer's legal "right–to-control" essential terms and conditions of employment of another employer's employees may be sufficient to determine those terms and conditions, even where control is only exercised indirectly through the second employer's supervisors. Despite the claims of the dissenters and lobbyists, the *BFI* decision does not close this loophole through adoption of some indeterminate and open-ended "economic realities" or "industrial realities" test. The doctrine articulated in *BFI* requires that a joint-employer have at least the "right" to control some essential topics for mandatory bargaining. A"right" to control is a legal, not an economic concept. The *BFI* decision does not impose employer status on one business over another business's employees simply because the first business has an economic relationship with a second business and has more economic resources to satisfy the bargaining demands of the second business's employees. Nor does the *BFI* decision impose on one business employer status over another business's employees simply because the first business has economic leverage over the second business and thus

potentially could require the second business to offer its employees better terms of employment.[2] The *BFI* decision only imposes bargaining obligations where there is an actual, not a potential, employment relationship, as defined by the common law.[3]

II. Common Law Definition of Employment Relationship

My second point about the *BFI* decision is that it appropriately uses the common law as a precondition for finding joint employer status. The Supreme Court has made clear that federal statutes that do not meaningfully define the employment relationship should be presumed to rely on some common law test, such as those presented by ALI Restatements.[4] The legislative history of the Taft-Hartley Act's exclusion of independent contractors from the definition of employee under the Act reflects the same intent that the definition of the employment relationship derive from common law principles.[5] By conditioning joint-employer status on each employer's satisfaction of the common law's definition of employer, the *BFI* decision responds to that intent.

The *BFI* majority based its consideration of a putative employer's legal right to control essential terms and conditions, as well as the employer's exercise of the right, directly on the common law's "right-to-control" test to distinguish employees from independent contractors. This "right-to-control" test was first developed by British and American courts in the nineteenth century to assign responsibility to "masters" for the torts of their "servants." As I discovered during my research for the Restatement of Employment Law, courts have used the "right-to-control" test to cover as employees individuals like chief executives of corporations, highly skilled employees like company computer programmers or pilots or specialized physicians, or mobile employees like ship captains, that the employer has the authority or right to control, but is not practically able to control on a regular basis. Under the various multifactor

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[2] The majority decision also does not embrace any proposals to amend the Act to expand bargaining obligations based on other economic concepts, such as the provision of capital, see Michael C. Harper, Defining the Economic Relationship Appropriate for Collective Bargaining, 39 B.C. L. Rev. 329 (1998). The majority opinion does not endorse or even cite such proposals. Only the dissent does so as part of its mischaracterization of the majority's narrow decision, and its effort to debate broader policy issues not raised by that decision.

[3] The Board does not use the word "potential" in its statement of its holding. It uses the word only once in a footnote, footnote 68 of its opinion, in a statement of agreement with the Board's General Counsel opinion that the "direct, indirect, and potential control over working conditions … are all relevant to the joint employer inquiry." This same footnote, however, clarifies that "control" must be demonstrated, that "influence" over working conditions is not sufficient. Thus, this single use of the word "potential" does not suggest the Board meant to expand in this footnote the carefully stated holding in the text of its opinion.

[4] See, e.g., Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992); Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[5] See H.R. Report No. 245, 80th Cong., 1st Sess, on H.R. 3020, at 18 (1947).

tests encompassed by the traditional "right-to-control" test, courts consistently treat such workers as employees. In § 1.01 of the Restatement of Employment Law, the American Law Institute recognized that such treatment is appropriate because whether or not the employer regularly exercises control over the manner or means of the employee's service, the employer's authority over the employee prevents the employee from choosing to render that service in a manner that serves the employee's own interests independently from those of the employer.

In § 1.04 the Restatement of Employment recognizes that an employee may be employed by two or more joint employers if each qualifies as an employer under the definition provided by § 1.01. The Illustrations in § 1.04, *Comment c.*, make clear that employer status turns on ultimate legal authority or power, not on whether the power is exercised directly or indirectly. Illustration 4, for instance, is based on the facts of *Greyhound v. Boire*:

> "A and B are janitors who work for P, a cleaning and maintenance service. P has assigned A and B to clean a bus terminal owned by R. P pays A and B and has power to discipline, transfer, or promote them. R's supervisors set A's and B's work schedules and direct the details of their work; R also can reject as unsatisfactory any janitor assigned to it by P."
>
> "Both P and R are employers of A and B. P has primary power to set their compensation, while R has primary power to control the details of their work."

III. Unnecessary and Harmful Legislation

The *BFI* decision is thus both narrowly framed and appropriately based on common law principles. Furthermore, and most importantly for consideration of the proposed legislation, the decision does not threaten the franchising model or any other form of efficient segmentation of franchising. The dissenters in *BFI*, in order to claim that there are no new developments in the American economy to justify the Board's re-adoption of the pre-1980s law, accurately point out that franchising and subcontracting have been around for a long time, predating by decades the 1980s' limitations of the joint-employer doctrine that the *BFI* decision removes. But this observation undermines their claim that the *BFI* decision somehow threatens franchising or other efficient forms of business cooperation. The pre-1980s growth of franchising and other forms of business segmentation demonstrates that the law to which the Board returns was not inhibitory of these business forms.

This should not be surprising. The pre-1980s law and the *BFI* decision do not assume a franchisor or other business must bargain over how it offers its products to consumers, including how it maintains the reputation of its brands through product quality control. Such product market decisions have never been within the scope of mandatory bargaining[6] and there is nothing in the *BFI* decision or other recent Board decisions to suggest the Board does not recognize this bargaining limitation. Thus, franchisors, under the pre-1980s law re-adopted in *BFI*, as well as under the 1980s law, have been able to garner the benefits of the franchisor form – including the alternative mode of raising capital for expansion and the provision of extra profit incentives to franchisees, which I mentioned above – without sacrificing quality control over branded products and the manner in which they are sold or served. There is nothing in *BFI* that threatens this advantage of franchising.

Under the doctrine adopted in *BFI*, a franchisor only may have to bargain with a union that secures the support of a majority of the employees of one of its franchisees if the franchisor, in its agreement with the franchisee, has secured authority to control the wages, hours, or other terms and conditions of employment of the franchisee's employees, even if it exercises that authority only by directing the franchisee and its agents as intermediaries. If a franchisor continues to delegate authority over all employment decisions to its franchisees, and retains no right to control scheduling or work pace or other conditions of employment, it cannot be subject to bargaining obligations. Thus, the *BFI* decision should help protect the decentralized franchise model by encouraging franchisors to continue to rely on independent franchisee control of employment decisions.

The distinction between the traditional franchisor's control over the branded products sold by its franchisees and the traditional franchisor's delegation to its franchisees of control over the wages, hours, and working conditions of the franchisees' employees, was the basis for the Board's General Counsel's Advice Memorandum in the Freshii case last April.[7] That Memorandum concluded that Freshii was not a joint employer of a franchisee's employees because it did not have control over the franchisee's employees' wages, hours, and working conditions, even though it closely controlled the franchisees' food production and service. The Memorandum asserted that it would reach the same conclusion even under a broader "industrial realities" standard that would be broader and less determinative than the pre-1980s standard readopted by the Board in *BFI.*

[6] See generally Michael C. Harper, Leveling the Road from *Borg-Warner* to *First National Maintenance*: The Scope of Mandatory Bargaining, 68 Va. L. Rev. 1447 (1982).
[7] Advice Memorandum, Nutritionality, Inc.. d/b/a Freshii, (April 28, 2015).

Similarly, the *BFI* decision does not threaten other common forms of independent business cooperation such as subcontracting on construction sites. It was silly for the BFI dissenters to make the "Chicken-Little" type claim that the majority opinion somehow questions the operation of secondary boycott law at construction sites, as confirmed by the Supreme Court in *Denver Building & Construction Trades Council, 341 U.S. 675 (1951)*, a few years after the passage of the Taft-Hartley Act. The Board cannot adopt doctrine inconsistent with the Supreme Court's interpretation of the provisions of the NLRA and the Board majority certainly did not purport to do so in *BFI*. Under the *BFI* joint employer test, a construction contractor does not become a joint employer of the employees of its specialty subcontractors simply because it specifies to the subcontractor the work it wants done and coordinates the necessary timing of this work with the work of others at the work site. Under the *BFI* test, a construction contractor, like any other business with the potential economic leverage to control the terms and conditions of employment of the employees of a second employer, only may be a joint employer if it has secured the "right" to do so in its agreements with the second employer. There is nothing in the *BFI* majority opinion to make the typical construction contractor a joint employer.

While there is thus no reason to pass the proposed legislation to protect important and common flexible business arrangements in the modern economy, there is good reason not to pass the legislation. While the legislation is not necessary, it also would not be harmless. It would send a clear message to the courts, as well as to future Boards, that Congress wants to permit businesses like BFI to continue to enjoy the loophole that BFI attempted to utilize in this case. That would mean that businesses, without any fear of a bargaining obligation, could continue to control, as did BFI in this case, such essential terms of employment as work pace, overtime, break time, and even maximum wages, as long as much of their control of the work place was exerted through intermediary subordinate employers. Then, if the employees somehow organized a union that asked the subordinate employer to bargain, the BFI-type employer simply could terminate its contract with the subordinate intermediary employer and find another non-union subordinate to use as its intermediary means of control.[8] This manipulation of the system to avoid collective bargaining may not seem harmful to those who do not believe in the NLRA or the collective bargaining it is to protect. But it certainly should be recognized as such by those who understand the contributions of collective bargaining -- including to the existence of

[8] See Plumbers Local 447, 172 N.L.R.B. 128, 129 (1968) ("an employer does not discriminate against employees . . . by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees").

a stronger middle class in the middle of the twentieth century and the threat to our democracy that the erosion of this middle class poses today.

I want to make one final argument against the passage of legislation like this in response to a administrative adjudicatory decision. Individual adjudications, especially in relatively easy cases like *BFI*, even when they announce new doctrine, cannot settle the possible reach of the doctrine or any additional possible implications or problems the doctrine poses. It is unfair to criticize decisions like *BFI* for not answering every such related question. The meaning of certain terms, like "substantial control," necessarily only can be illuminated by application to the rich factual contexts of particular cases. The same was true for terms like "limited and routine" in the 1980s qualified test. The administrative adjudicatory process, like the judicial adjudicatory process, requires time to develop. It should be allowed to continue until its legal product can be fully formed and its practical impact can be evaluated. Presumably that form and evaluation will be influenced by how the judiciary reacts in review of new Board doctrine. Congress should not, based on political ideology, the predictions of lobbyists and the exaggerations of pundits, abort the administrative development of Board doctrine without waiting for both a better understanding of how that doctrine will be applied and the judicial reaction to the application.