Congress of the United States
Washington, DC 20515

January 28, 2019

Ms. Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

RE: Comment on Notice of Proposed Rulemaking, RIN 3142-AA13, The Standard for Determining Joint Employer Status

Dear Ms. Rothschild:

We write to oppose the National Labor Relations Board's ("NLRB" or "the Board") proposal to narrow the standard for determining joint employment under the *National Labor Relations Act* ("NLRA").[1]

The proposed rule would obstruct workers from exercising their rights under the NLRA by permitting employers that codetermine terms and conditions of employment to escape their legal responsibilities to bargain in good faith and remedy unfair labor practices. The question of whether a company is a joint employer significantly impacts workers' rights under the NLRA, especially those of workers employed by a temporary staffing agency, subcontractor, or other employment intermediary. For many workers, the name on the door of the building where they work is not the name of the company that signs their paycheck. When workers organize into unions, the NLRA guarantees them the right to collectively bargain for better wages and working conditions without fear of retaliation. Where multiple entities control workers' terms and conditions of employment, this right is rendered futile if workers cannot bargain with all companies that control those wages and working conditions.

In the Board's 2015 *Browning-Ferris* decision, the Board returned to the traditional standard for determining when a company's control over terms and conditions of employment is sufficient to render it a joint employer.[2] Consistent with both common law principles and the text of the NLRA, the Board stated in *Browning-Ferris* that it would find an entity to be a joint employer if "there is a common-law employment relationship with the employees in question," and if "the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."[3] *Browning-Ferris* was pending review at the time the Board proposed this rule to overturn it, but during the comment period the D.C. Circuit upheld the *Browning-Ferris* standard and rejected assumptions upon

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[1] The Standard for Determining Joint Employer Status, 83 Fed. Reg. 46681 (Sept. 14, 2018) (to be codified at 29 C.F.R. § 103.40).
[2] *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).
[3] *Id.*, slip op. at 2.

which the Notice of Proposed Rulemaking ("NPRM") depended.[4] This decision further supports the legal foundations of the *Browning-Ferris* standard.

Accordingly, we request that the Board withdraw the proposed rule because:

- the NPRM is based on legally invalid assumptions regarding the scope of the common law, and thus the Board lacks authority to enact the proposed rule;
- the NPRM relied upon unverified anecdotes regarding impacts to employers without objective evidence, and failed to fully consider the damage this proposed rule would impose on workers' rights; and
- the Board has not adequately rebutted the appearance that it pursued this rulemaking to circumvent ethics rules that prevented the Board from obtaining its desired result through adjudication.

The Proposed Rule Would Depart from the Common Law, and the D.C. Circuit Invalidated Critical Assumptions in the NPRM

The Board proposes in the NPRM to return to a standard almost identical to the one immediately preceding *Browning-Ferris*. The proposed standard would hold that an entity is a joint employer only if it "posses[es] and actually exercise[s] substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine."[5] The NPRM questions whether the common law, which delimits the scope of the employment relationship under the NLRA, permits the *Browning-Ferris* standard, and it also contends that the proposed rule is consistent with the common law by narrowing this standard.[6] The NPRM also seeks public comments to answer questions on the common law, such as whether "the common law dictate[s] the approach of the proposed rule or of *Browning-Ferris*," and whether "the common law leave[s] room for either approach."[7]

These questions were pending before the D.C. Circuit at the time the Board issued the NPRM, and the court answered them unambiguously. It upheld "as fully consistent with the common law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis."[8] Specifically, it found that consideration of a company's right to control "is an established aspect of the common law of agency," and that *Browning-Ferris* was also correct that "an employer's indirect control over employees can be a relevant consideration."[9]

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[4] *Browning-Ferris Indus. v. NLRB*, Case Nos. 16-1063, 16-1064, 2018 U.S. App. LEXIS 36706 (D.C. Cir. Dec. 28, 2018).
[5] 83 Fed. Reg. at 46696-97.
[6] *Id.* at 46686.
[7] *Id.* at 46687.
[8] *Browning-Ferris Indus.*, 2018 U.S. App. LEXIS 36706 at *56.
[9] *Id.* at *27.

Moreover, the court issued its decision on *Browning-Ferris* at the Board's request to "resolve this case notwithstanding the pending rulemaking."[10] In doing so, the court observed, "[t]he Board's rulemaking...must color within the common-law lines identified by the judiciary."[11]

The *Browning-Ferris* decision's reliance on the common law is consistent with the NLRA's text, binding Supreme Court precedent,[12] and the legislative history of Congress's 1947 amendments to the NLRA.[13] For the majority of the NLRA's lifetime, the Board repeatedly found evidence of control to be probative even if the control was indirect or held but not yet exercised,[14] and has done so with court approval.[15]

The Board began to jettison its traditional standard in 1984. In *TLI, Inc.* and *Laerco Transportation*, the Board unmoored its joint employer standard from common law principles and began discounting companies' reserved and indirect power over workers.[16] In 2002, the

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[10] *Id.* at *25-26.
[11] *Id.* at *26.
[12] *See id.* at *23 (citing *NLRB v. United Insurance Co. of America*, 390 U.S 254, 256 (1968) (requiring the Board to "apply general agency principles in distinguishing between employees and independent contractors under the Act")); *see also Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 103 (2011) ("Where Congress uses terms that have accumulated settled meaning under the common law, we must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms.") (internal citations omitted).
[13] Congressional Record, Senate, at 1575-76 (1947) (statement of Sen. Taft), *reprinted in* 2 Legislative History of the Labor Management Relations Act, 1947, 1537 (1948) (detailing how the amendment's exclusion of independent contractors from the definition of employee is designed "to make it clear that the question of whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency"), and House Conf. Rep. No. 510 on H.R. 3020 at 32-33 (1947) *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947, at 536-37 (1948) (explaining the law's exclusion of independent contractors from the definition of employee in order to overturn a Supreme Court decision that "held that ordinary tests of the law of agency could be ignored by the Board" in determining the existence of employment relationships).
[14] *See, e.g., Franklin Stores Corp.*, 199 NLRB 52, 53 (1972) (upholding ALJ finding of joint employment where one employer, "by virtue of the lease arrangement with" the other employer, "has the right to veto the employment of employees by" the other "and to insist on the discharge of employees by" the other); *Jewel Tea Co.*, 162 NLRB 508, 510 (1966) ("That the licensor has not exercised such power is not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control..."); *Frostco Super Save Stores*, 138 NLRB 125, 128 (1962) (finding joint employer status turned on "right of control over the employment relationship"); *Manhattan Shirt Co.*, 84 NLRB 100, 100-01 (1949) (finding joint employment where supplier employer agreed to "employ labor" for client employer, while client supervised entire operation, retained power to discharge or reject employees, and "*has* complete control over all aspects of employer-employee relations of the plant") (emphasis added).
[15] *See, e.g., Floyd Epperson*, 202 NLRB 23, 23 (1973) (finding proof of joint employment where client employer had "some indirect control over [employees'] wages" and "some control, albeit indirect, over [employee] discipline"), *enforced* 491 F.2d 1390 (6th Cir. 1974); *S. S. Kresge Co.*, 169 NLRB 442, 444 (1968) (concluding licensor is a joint employer because it "retains the power substantially to affect the employment conditions of employees in licensed departments"), *enforced* 416 F.2d 1225 (6th Cir. 1969); *Dayton Coal & Iron Corp.*, 101 NLRB 672, 689 (1952) (upholding ALJ finding that quarry lessor and lessee were joint employers where lessor "persuaded" lessee to discharge workers, rely on lessor's help in securing return of some workers, and cancel one meeting with the union), *enforced* 208 F.2d 394 (6th Cir. 1953).
[16] *TLI, Inc.*, 271 NLRB 798, 803 (1984); *Laerco Transportation*, 269 NLRB 324, 325-26 (1984).

Board further strayed from the common law in *Airborne Freight Co.*[17] That decision stated that the "essential element" in joint employer determinations is "whether a putative joint employer's control over employment matters is direct and immediate."[18] The *Airborne* Board cited *TLI* for this claim, even though *TLI* did not state this requirement.[19] Although *TLI* and *Laerco* did not acknowledge their departure from precedent, the *Airborne* Board credited these two cases with "abandon[ing] [the Board's] previous test in this area, which had focused on a putative joint employer's indirect control over matters relating to the employment relationship."[20] None of these decisions explained why the Board departed from its earlier common law approach.

Last month, the D.C. Circuit recognized that the Board in *Browning-Ferris* appropriately realigned its joint employer standard with common law principles. In finding that *Browning-Ferris*'s consideration of reserved control is supported by common law, the court examined both precedent and the Restatement (Second) of Agency, which the Supreme Court routinely consults to determine whether a common law employment relationship exists.[21] As the court noted, "the Restatement (Second) specifically notes that the 'right of the [putative] master[s] to control the conduct of the servant' is determinative of whether the servant has two masters at the same time."[22] Similarly, the court affirmed that *Browning-Ferris* was correct in finding indirect control relevant in joint employer determinations.[23] "[T]he common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship."[24]

The D.C. Circuit's decision forecloses the standard proposed in the NPRM because, when it affirmed the *Browning-Ferris* standard, it found that "the common-law inquiry is not woodenly confined to indicia of direct and immediate control."[25] In the NPRM, the Board runs afoul of this finding by proposing to not find an entity a joint employer "absent a requirement of proof of some 'direct and immediate control,'" without considering reserved or indirect control.[26] Accordingly, the Board's foundational assumption that its proposed rule is consistent with the common law is incorrect.[27]

In the aftermath of the D.C. Circuit's decision, the Board's Chairman has incorrectly asserted that "the joint-employer standard articulated by the Board in *Browning-Ferris* was neither a clear

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[17] *See Airborne Freight Co.*, 338 NLRB 597 (2002); *see also Wiers International Trucks*, 353 NLRB 475, 487 (2008) (rejecting joint employer status relying on client employer's lack of day-to-day involvement at facility); *AM Property Holding Corp.*, 350 NLRB 998, 1037 (2007) (rejecting joint employer status despite company's influence over wages and benefits because such influence was insufficiently "direct and immediate").
[18] *Airborne*, 338 NLRB at 597 n.1.
[19] *See generally TLI*, 271 NLRB 798 (1984).
[20] *Airborne*, 338 NLRB at 597 n.1.
[21] *Browning-Ferris Indus.*, 2018 U.S. App. LEXIS 36706 at *28-35.
[22] *Id.* at *31 (citing Restatement (Second) of Agency § 226 cmt. a, at 498).
[23] *Id.* at *42-49.
[24] *Id.* at *44 (citations omitted).
[25] *Id.* at *27.
[26] 83 Fed. Reg. at 46686.
[27] *Id.*

standard nor was it affirmed by the D.C. Circuit."[28] Both assertions rely on a faulty reading of the case. First, the D.C. Circuit explicitly stated it "affirm[ed] the Board's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control."[29] Second, to support the Chairman's claim that the *Browning-Ferris* standard is unclear and "leaves much unresolved," he cites a portion of the Board's *Browning-Ferris* decision stating that applying the common law depends on the specific facts of the case.[30] This is consistent with Supreme Court precedent concluding that whether an employer "possessed sufficient indicia of control to be an employer" under the NLRA "is essentially a factual issue."[31] Although the Chairman views the court's decision as "informing" the rulemaking rather than foreclosing it,[32] the court was explicit that it sought to prevent "the Board [from taking] the first bite of an apple that is outside its orchard."[33]

In order to best effectuate the NLRA and comply with this decision, the Board should withdraw the NPRM, resolve the issues remanded from the court in good faith, and adhere to the *Browning-Ferris* standard in future joint employer deliberations. If the Board's final rule continues to claim that *Browning-Ferris* is inconsistent with the common law and NLRA, then such a final rule would be in error.[34]

Congressional Hearings Have Confirmed that *Browning-Ferris* is the Common Law Standard, and the Board Cannot Depart from the Common Law in this Area Without Congressional Authority

The court's decision is consistent with congressional findings. The two committees with jurisdiction over the NLRA—the House Committee on Education and Labor and the Senate Committee on Health, Education, Labor, and Pensions—have both held multiple hearings on *Browning-Ferris* and the question of joint employment.[35] Witnesses in these hearings and

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[28] Letter from Chairman John Ring to Rep. Robert C. "Bobby" Scott and Rep. Rosa DeLauro (Jan. 17, 2019), https://www.nlrb.gov/news-outreach/news-story/nlrb-chairman-provides-response-members-congress-regarding-joint-employer.

[29] *Browning-Ferris Indus.*, 2018 U.S. App. LEXIS 36706 at *4.

[30] *Id.* (citing *Browning-Ferris*, 362 NLRB No. 186 slip op. at 16).

[31] *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

[32] Letter from Chairman John Ring to Rep. Robert C. "Bobby" Scott and Rep. Rosa DeLauro (Jan. 17, 2019).

[33] *Browning-Ferris Indus.*, 2018 U.S. App. LEXIS 36706 at *26.

[34] 83 Fed. Reg. at 46688 n.19 (Member McFerran dissenting).

[35] *See, e.g., Hearing on H.R. 3441 Before the Subcomm. on Workforce Protections and the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and the Workforce*, 115th Cong. (Sept. 13, 2017); *Redefining Joint Employer Standards, Hearing Before the H. Comm. on Education and the Workforce*, 115th Cong. (Jul. 12, 2017); *Restoring Balance and Fairness to the National Labor Relations Board, Hearing Before the Subcomm. on Heath, Employment, Labor and Pensions of the H. Comm. on Education and the Workforce*, 115th Cong. (Feb. 14, 2017); *Hearing on H.R. 3459 Before the H. Comm. on Education and the Workforce*, 114th Cong. (Oct. 28, 2015); *The NLRB's Joint Employer Decision, Hearing Before the S. Comm. on Health, Education, Labor & Pensions,* 114th Cong. (Oct. 6, 2015); *The "Joint Employer" Standard and Business Ownership, Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 114th Cong. (Feb. 5, 2015); *Expanding Joint Employer Status, Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and the Workforce*, 113th Cong. (Sept. 9, 2014).

committee members did not disagree that *Browning-Ferris* articulates the common law standard, even though they disagreed sharply over the effects of that decision.

For example, at a hearing before the Senate Committee on Health, Education, Labor, and Pensions on October 6, 2015, witnesses included attorneys representing both management and labor, and both agreed that *Browning-Ferris* was rooted in the common law. Arguing against *Browning-Ferris* before the committee on other grounds, Mark G. Kisicki of the law firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. acknowledged that the *Browning-Ferris* standard was "the common law employment test."[36] Michael Rubin, an attorney who represents low-wage workers, testified on why *Browning-Ferris* returned to the common law standard and how that affected the facts of that case.[37]

More recently, on July 12, 2017, the House Committee on Education and Labor held another hearing that reached the same conclusion. One of the witnesses was Michael Harper, a Reporter for the American Law Institute's Restatement of Employment Law and Professor at Boston University School of Law, who assured members of the committee that *Browning-Ferris* "was narrowly framed and based on the common law."[38] In doing so, he expressed concerns that "[s]elective congressional intervention" to narrow the joint employer standard "would engender greater legal uncertainty…and the erosion of protections for the American worker."[39]

Speaking on the same panel, G. Roger King, Senior Labor and Employment Counsel at the HR Policy Association, which represents employer interests, argued against relying on the common law standard, contending that "the common law doesn't help us here at all" and that the committee should introduce legislation that departs from the common law.[40]

Advocating for legislation that would reverse *Browning-Ferris* in favor of a standard similar to the NPRM, one Republican member of the committee argued at the same hearing that "this idea that we should defer to the Supreme Court and common law is ridiculous."[41] Shortly after the hearing, he introduced a bill on July 27, 2017 that purported to codify the pre-*Browning-Ferris*

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[36] *The NLRB's Joint Employer Decision, Hearing Before the S. Comm. on Health, Education, Labor & Pensions,* 114th Cong. (Oct. 6, 2015) (written statement of Mark G. Kisicki, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), https://www.help.senate.gov/imo/media/doc/Kisicki.pdf.

[37] *The NLRB's Joint Employer Decision, Hearing Before the S. Comm. on Health, Education, Labor & Pensions,* 114th Cong. (Oct. 6, 2015) (written statement of Michael Rubin, Partner, Altshuler Berzon LLP), https://www.help.senate.gov/imo/media/doc/Rubin.pdf.

[38] *Redefining Joint Employer Standards, Hearing Before the H. Comm. on Education and the Workforce*, 115th Cong. (Jul. 12, 2017) (statement of Michael Harper, Professor of Law, Boston University), https://www.youtube.com/watch?v=12XX54KJYOw&feature=youtu.be.

[39] *Id.*

[40] *Id.* (statement of G. Roger King, Senior Labor and Employment Counsel, H.R. Policy Association).

[41] *Id.* (statement of Rep. Bradley Byrne).

standard.[42] The Republican majority's Committee report on the bill did not dispute that *Browning-Ferris* was rooted in common law.[43]

The committees of jurisdiction in the House and Senate considered and debated the policy implications of *Browning-Ferris* while considering the testimony of experts in labor law, as well as practitioners representing both workers and management. Over the course of these hearings, a bipartisan, bicameral acknowledgement emerged that *Browning-Ferris* is consistent with the common law of agency. Despite repeated attempts to narrow the joint employer standard by jettisoning the common law, Congress has not successfully enacted legislation to amend the NLRA.[44] The Board is now trying to achieve through rulemaking what Congress did not through legislation.[45] The proposed rule is a case of overreach by the executive branch because it deviates from the judicially-affirmed scope of the common law of agency, and thus exceeds the statutory confines of the NLRA.

The Board's *Browning-Ferris* Decision Furthers the Policies of the NLRA, and the Proposed Rule Would Compromise Those Policies

The Board acknowledges that, under the proposed rule, "fewer employers may be alleged as joint employers."[46] This result is inconsistent with the NLRA's explicit purposes of "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[47] Congress embraced this policy in the NLRA to redress the "inequality of bargaining power" between workers and highly organized corporate employers.[48] *Browning-Ferris* serves the NLRA's purposes by finding that an entity that has a common law employment relationship with employees is a joint employer when "the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."[49]

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[42] H.R. 3441, 115th Cong. (2017); *see also* H.R. Rep. No. 115-379, at 2 ("The bill restores the long-held standard for determining joint employer status under the NLRA that was overturned by a decision of the National Labor Relations Board.").

[43] H.R. Rep. No. 115-379, at 7 (stating that *Browning-Ferris* "held that two or more entities are joint employers if (1) *there is a common-law employment relationship* with the employees in question and (2) the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining") (emphasis added).

[44] H.R. 3441, 115th Cong. (2017) (passed the House of Representatives, received in the Senate); H.R. 3358, 115th Cong. § 408 (2017) (unenacted appropriations rider); H.R. 5926, 114th Cong. § 410 (2016) (unenacted appropriations rider); H.R. 3459, 114th Cong. (2015) (reported out of the House Committee on Education and the Workforce); H.R. 3020, 114th Cong. § 408 (2015) (unenacted appropriations rider).

[45] *Compare* 83 Fed. Reg. at 46686 ("A putative join employer must possess and actually exercise substantial direct and immediate control…in a manner that is not limited and routine.") *with* H.R. 3441, 115th Cong. (2017) ("A person may be considered a joint employer…only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control…").

[46] 83 Fed. Reg. at 46695.

[47] 29 U.S.C. § 151.

[48] *Id.*

[49] 362 NLRB No. 186 slip op. at 2.

As the Board stated when it decided *Browning-Ferris*:

> [T]he primary function and responsibility of the Board…is that of applying the general provisions of the Act to the complexities of industrial life. If the current joint-employer standard is narrower than statutorily necessary, and if joint-employer arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's responsibility to adapt the Act to the changing patterns of industrial life.[50]

The July 12, 2017, hearing before the Committee on Education and Labor confirmed the need for a standard that is consistent with changes in the economy. One witness, Catherine Ruckelshaus of the National Employment Law Project, detailed "examples, in many industries, of companies that deny legal responsibility for the workplace claims of individuals who, from a functional perspective, would traditionally have been considered those companies' employees…"[51] These examples included "companies that use temporary employment services or employee leasing firms to hire and place their workers," although such temporary workers "earn 20%-30% less than non-temp counterparts, depending on the occupation."[52] She further explained that *Browning-Ferris* responds to this economic change because it "will better enable workers to understand and assert their workplace rights and workers will have better opportunities to bargain for improved wages and working conditions."[53]

In contrast, the proposed rule would block the NLRA's application in many workplaces and thus renege on the Board's responsibility to "adapt the Act to the changing patterns of industrial life."[54] Workplaces are increasingly fissured as companies subcontract for labor that was traditionally performed by directly-hired employees.[55] This fissuring especially affects low-wage workers, who are most in need of the practice and procedure of collective bargaining to address the daunting power imbalances they face.[56] As outsourced, subcontracted, temporary, and contingent workers find collective bargaining increasingly out of reach because entities controlling their employment have been released from the duty to bargain, the inequality of

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[50] *Id.*, slip op. at 11.
[51] *Redefining Joint Employer Standards, Hearing Before the H. Comm. on Education and the Workforce*, 115th Cong. (Jul. 12, 2017) (written statement of Catherine K. Ruckelshaus, General Counsel, National Employment Law Project), https://republicans-edlabor.house.gov/uploadedfiles/ruckelshaus_-_testimony.pdf.
[52] *Id.*
[53] *Id.*
[54] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).
[55] David Weil, *Enforcing Labor Standards in Fissured Workplaces: The US Experience*, 22 ECONOMIC AND LABOUR RELATIONS REV. No. 2 pp. 33-54 (2011), http://www.fissuredworkplace.net/assets/Weil.Enforcing-Labour-Standards.ELRR-2011.pdf.
[56] *See generally* Catherine Ruckelshaus et al., *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, NATIONAL EMPLOYMENT LAW PROJECT 19 (May 2014), https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

bargaining power that Congress sought to redress will only worsen.[57] Research suggests that outsourcing is associated with lower wages and fewer benefits for the outsourced workers.[58] The practical effect of the proposed rule is to suppress wages for hundreds of thousands of permatemps by making it easier for putative joint employers to avoid their obligations under the NLRA. Accordingly, the Economic Policy Institute has found that, for workers in contract firms and temporary help agencies, the proposed rule would result in a transfer of $1.3 billion annually from workers to their employers.[59] This contravenes the NLRA's purpose of encouraging collective bargaining to reduce inequality and stabilize "competitive wage rates."[60]

The proposed rule eliminates any determination of whether the putative joint employer's control is sufficient to permit meaningful bargaining. The NPRM dismisses this concern by asserting that "the Act's purposes would not be furthered by drawing into an employer's collective-bargaining relationship, or exposing to joint-and-several liability, a business partner of the employer that does not actively participate in decisions setting unit employees' wages, benefits, and other essential terms and conditions of employment."[61] However, workers cannot meaningfully bargain with a single employer if that employer's ability to bargain is limited by a client entity's reserved ability to alter terms and conditions.

The Board is also without justification for its "preliminary belief…that, absent the requirement of some 'direct and immediate' control…it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers."[62] Businesses concerned with complying with federal labor and employment laws are already subject to statutes with joint employment standards that are at least as broad as *Browning-Ferris*. For example, joint employer determinations under Title VII of the *Civil Rights Act of 1964* turn on a common law standard that is similar to *Browning-Ferris*.[63] Courts have accordingly determined that, under Title VII, "an employee may be considered 'employed' by a third party as

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[57] 29 U.S.C. § 151 (codifying the finding that the "inequality of bargaining power" burdens commerce "by depressing wage rates and the purchasing power of wage earners in an industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries").

[58] *See* H.R. Rep. No. 115-379, at 42-43 (Minority Views) (comparing the wages of workers hired by Leadpoint to work at Browning-Ferris's facility with the wages of union-represented employees working at Browning-Ferris's facility and nearby recycling plants, and finding that the union-represented employees earn $6.50 to $17.50 per hour more than the Leadpoint workers); Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. & LABOR RELATIONS REV. 287, 287 (2010) (finding outsourcing is generally associated with lower wages and fewer benefits for workers, and specifically results in a 4 percent to 7 percent wage penalty for janitors and a 8 percent to 24 percent wage penalty for guards).

[59] Comment from Economic Policy Institute to National Labor Relations Board, The Standard for Determining Joint-Employer Status (RIN 3142-AA13) (Dec. 10, 2018), https://www.regulations.gov/document?D=NLRB-2018-0001-7803.

[60] 29 U.S.C. § 151.

[61] 83 Fed. Reg. at 46686.

[62] *Id.*

[63] *Ma v. Shalala*, EEOC Dec. Nos. 01962389 & 01962390, 1998 EEOPUB LEXIS 3211 (EEOC May 29, 1998).

well as by the nominal employer if the third party has a right to control the employee's conduct, either directly or through the third party's control over the employer."[64]

Moreover, claims that *Browning-Ferris* created uncertainty by broadening the joint employer standard ignore that businesses already must structure their operations to comply with the *Fair Labor Standards Act* ("FLSA"), which defines "employ" as "to suffer or permit to work."[65] Accordingly, the FLSA provides for "the broadest definition that has ever been included in any one act" in determining whether an employment relationship exists.[66] Because businesses are already subject to this much broader standard for joint employer liability, the Board lacks merit in claiming that "it will be extremely difficult" to determine a joint employment relationship "absent a requirement of proof of some 'direct and immediate' control."[67] Further, unlike the NLRA, the FLSA provides workers with a private right of action to sue in court for back wages and grants the Department of Labor independent investigative authority to inspect for violations.[68] The contention that businesses are not hiring new workers because of uncertainty over the NLRA's joint employer standard ignores that businesses are already subject to suits from a robust plaintiffs' bar and independent investigations by the Department of Labor under the FLSA's unquestionably broader standard.

The Proposed Rule Risks Empowering Large Corporations to Dictate Their Intermediaries' and Franchisees' Employee Relations While Simultaneously Avoiding Liability Under the NLRA

The NPRM echoes claims that overturning *Browning-Ferris* would protect small businesses, particularly in the franchise industry, but in fact the proposed rule would undermine their independence. The small businesses that are the object of this purported concern would almost always be statutory employers under either the NPRM or *Browning-Ferris*, because they are the payroll employer with some control over terms and conditions of employment. The effect of the proposed rule would be to shield large corporations from sharing that liability when they codetermine their franchisees or contractors' terms and conditions of employment.

Contrary to arguments that *Browning-Ferris* has harmed the franchise industry, no franchisor has ever been found by the Board to be a joint employer with its franchisees under the NLRA, although specific charges are pending litigation. The *Browning-Ferris* decision explicitly stated that it did not affect the franchise model.[69] The decision has also not had any verifiable effect on

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[64] *Myers v. Garfield & Johnson Enters.*, 679 F. Supp. 2d 598, 611 (E.D. Penn. 2010); *see also Virgo v. Riviera Beach Assocs. Ltd.*, 30 F.3d 1350, 1361 (11th Cir. 1994) (finding "the authority or power to control [to be] highly relevant" in determining whether an entity is a joint employer under Title VII).
[65] 29 U.S.C. § 203(g).
[66] *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).
[67] 83 Fed. Reg. at 46686.
[68] *See* 29 U.S.C. §§ 211, 216.
[69] *Browning-Ferris*, 362 NLRB No. 186, slip op. 20 n.120 (2015) ("The dissent is simply wrong when it insists that today's decision 'fundamentally alters the law' with regard to the employment relationships that may arise under various legal relationships between different entities: 'lessor-lessee, parent-subsidy, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer.' None of those situations

the industry's growth. Indeed, the franchise industry flourished in the decades before the Board narrowed its joint employer standard in 1984. Franchise employment actually grew by 3 percent in 2015, the year *Browning-Ferris* was decided, by 3.5 percent in 2016, and by 3.1 percent in 2017.[70] These rates are faster than the growth of franchising employment in the year prior to *Browning-Ferris*.[71]

Moreover, while *Browning-Ferris* has not negatively affected the franchise industry, hearings before the House Committee on Education and Labor demonstrated that narrowing the joint employer standard could undermine the independence of franchisees and other small employers. As Professor Harper wrote in his testimony to the Committee for its July 12, 2017 hearing:

> [M]odifying the common law standard probably would result in franchisors, and other economically dominant businesses, exerting greater, not lesser, control over franchisees and subcontractors. This is because allowing franchisors and contractors to control their franchisees or subcontractors in ways that would impose vicarious liability under the common law without bearing any potential responsibility for the observance of employment laws would eliminate a disincentive to such control.[72]

Replacing *Browning-Ferris* with a standard that requires "substantial direct and immediate control" over terms and conditions could risk empowering franchisors and other large companies to exercise indirect control while leaving franchisees and smaller businesses exposed to liability. This could lead to situations where a franchisee may be forced to choose between abiding by their franchisor's direction or compliance with the law.

The Board Refuses to Quantify Data Necessary to Determine Whether the Rulemaking is Reasonable

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are before us today…As we have made clear, the common-law test requires us to review, in each case, all of the relevant control factors that are present determining the terms of employment.").

[70] Karla Walter, "The So-Called 'Save Local Business Act' Harms Workers and Small Businesses," *Center for American Progress* (Oct. 3, 2017), https://www.americanprogressaction.org/issues/economy/reports/2017/10/03/168754/called-save-local-business-actharms-workers-small-businesses/ (citing IHS Markit Economics, "Franchise Business Economic Outlook for 2017" (Jan. 2017), https://www.franchise.org/sites/default/files/Franchise_Business_Outlook_Jan_2017.pdf; *see also* IHS Markit Economics, "Franchise Business Economic Outlook for 2018 (Jan. 2018), https://www.franchise.org/sites/default/files/Franchise_Business_Outlook_Jan_2018.pdf.

[71] IHS Markit Economics, "Franchise Business Economic Outlook for 2015" (Sept. 2015), https://www.franchise.org/sites/default/files/Franchise_Business_Outlook_September_2015.pdf (employment growth of 2.9 percent in 2014).

[72] *Redefining Joint Employer Standards, Hearing Before the H. Comm. on Education and the Workforce*, 115th Cong. (Jul. 12, 2017) (written statement of Michael Harper, Professor of Law, Boston University), *available at* https://republicans-edlabor.house.gov/uploadedfiles/harper_-_testimony.pdf.

In the NPRM and in releases to the public, the Board asserted preliminary findings doubting its ability to find a joint employment relationship and the effect of the standard on job growth.[73] However, it has not produced any information to support these claims.

The Board's rulemaking would be arbitrary and capricious under the *Administrative Procedure Act* if it fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[74] "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, to a critical degree is known only to the agency."[75] However, the Board has so far declined opportunities to make available crucial quantitative information that would demonstrate a need for the rulemaking, based on its adjudication of joint employer standards.

In response to the Board's NPRM, we previously wrote to request that the Board produce data regarding its handling of cases involving putative joint employers on October 10, 2018. As our letter dated October 10, 2018, explained:

> The NPRM provides scant research or analysis to justify initiating a rulemaking. The NPRM merely notes the number of filings in the past five years that have asserted a joint employer relationship and offers a rough estimate as to the number of employers implicated in these filings, even though the Board is capable of quantifying the exact number of such employers. In order for commenters to provide meaningful analysis on the rulemaking, including whether rulemaking is appropriate, the Board must make available additional information, including data regarding its case handling involving putative joint employers.[76]

This letter sought data on how often joint employer relationships have been alleged or found before and after the date the Board decided *Browning-Ferris*, in both representation cases and unfair labor practice cases. This letter also requested that same information for each of the specific types of employers the Board identified as "most likely to be impacted by the rule": contractors/subcontractors, temporary help service suppliers and users, and franchises.[77]

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[73] 83 Fed. Reg. 46686 (contending that "it will be extremely difficult for the Board to accurately" determine a joint employment relationship under *Browning-Ferris*, and that the proposed rule will not "leav[e] out parties necessary to meaningful collective bargaining"); Office of Public Affairs, NLRB Considering Rulemaking to Address Joint Employer Standard (May 9, 2018), https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard (claiming that "uncertainty over the standard…undermines employers' willingness to create jobs and expand business opportunities").

[74] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also* 5 U.S.C. § 706(2)(A).

[75] *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

[76] Letter from Rep. Robert C. "Bobby" Scott and Sen. Patty Murray to Chairman John Ring (Oct. 10, 2018), https://www.regulations.gov/document?D=NLRB-2018-0001-9506 (citing 83 Fed. Reg. at 46693).

[77] *Id.* (citing 83 Fed. Reg. 46694).

The Board's responses to this request have been incomplete. On October 23, 2018, it provided six lists of cases that included the phrase "joint-employer" in a keyword search of NxGen, its case management system. On January 9, 2019, the Board partially responded by providing relevant data for significantly narrower time periods than requested.[78] This partial response also failed to specify the requested data with respect to the categories of employers the NPRM purports to impact.

The Board has asserted that it cannot produce relevant data within its possession because it lacks the fields in NxGen.[79] However, "[t]hat a problem is difficult may indicate a need to make some simplifying assumptions, but it does not justify ignoring altogether a variable so clearly relevant and likely to affect" an agency rule.[80]

This information would have provided insight into how *Browning-Ferris* has affected the Board's handling of such cases at all stages of its procedures. For example, although the NPRM speculates that the proposed rule will affect specific types of employers, the Board cannot analyze how significantly it will do so because the Board will not produce the number of cases each type of employer has litigated before the Board involving allegations of a joint employer relationship.[81] Additionally, if the Board provided data examining a broader timeframe before and after *Browning-Ferris*, such data could inform whether the labor-management community is genuinely uncertain over the *Browning-Ferris* standard and its application.[82]

In the meantime, the lists of cases provided by the Board indicate that the NPRM overestimated the effect the joint employer standard has on businesses. According to the lists, in 2016, the first full year *Browning-Ferris* was the governing standard, only 24 out of the 2,029 election petitions (1.2 percent) alleged a joint employment relationship.[83] During that same year, out of 21,326 charges alleging unfair labor practices, 347 (1.6 percent) alleged a joint employment

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[78] The Congressional request sought data "from August 27, 2015, the date the Board decided *Browning-Ferris*, to December 14, 2017, the date the Board first attempted to overturn *Browning-Ferris* in *Hy-Brand*," and "for a period of equal length going back from August 27, 2015." *Id.* The Board's response merely considered representation cases one year before and after the date *Browning-Ferris* was decided, and unfair labor practice cases six months before and after that date.

[79] Letter from Chairman John Ring to Rep. Robert C. "Bobby" Scott and Sen. Patty Murray (Oct. 23, 2018), https://www.regulations.gov/document?D=NLRB-2018-0001-9508.

[80] *Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009) (internal citation omitted). The Board cannot claim that it lacked the resources to develop this necessary data, because the Board retained over $3 million in available, unobligated funds by the end of Fiscal Year 2018. FY 2018 Performance and Accountability Report, National Labor Relations Board (Nov. 2018), at 97 https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/nlrbpar2018508.pdf.

[81] 83 Fed. Reg. at 46693-94.

[82] 83 Fed. Reg. at 46682.

[83] *Compare* Letter from Chairman John Ring to Rep. Robert C. "Bobby" Scott and Sen. Patty Murray, Table 1 (Oct. 23, 2018) *available at* https://www.regulations.gov/document?D=NLRB-2018-0001-9512 *with* NLRB Representation Petitions (last accessed Dec. 21, 2018), https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc.

relationship.[84] The Board has not provided any data or analysis regarding the number of employees possibly affected by the proposed rule. However, the available numbers indicate that the NPRM has exaggerated the anecdotal concerns of companies without fully considering the damage this rule would impose to workers' rights. The available information also suggests that the Board's rare initiation of a rulemaking would privilege a small number of companies against their workers' exercise of rights under the NLRA.[85]

Within this small range of joint employer cases, the Board's data suggests that *Browning-Ferris* had the effect of promoting clarity and reducing unnecessary litigation. According to the Board's January 9, 2019 production of representation cases one year before and after *Browning-Ferris*, parties to cases filed the year after *Browning-Ferris* were 7.6 percent more likely to waive a hearing on whether the employers are joint employers than they were the year prior.[86] In unfair labor practice charges six months before and after *Browning-Ferris*, the number of cases where parties did not contest an allegation of joint employment grew by 16.9 percent in the year after *Browning-Ferris*.[87] As former Chairman William Gould observed, "The number of joint employer decisions indicates that *Browning-Ferris* is not some kind of radical reordering of the status quo. If that were the case, we would see much more litigation and many more findings of joint employment liability."[88] Concerns that *Browning-Ferris* would foster unnecessary litigation therefore lack merit.

The Board Has Not Adequately Rebutted the Appearance that the Rulemaking is Tainted by a Defective Process

There are legitimate public concerns as to whether the Board has initiated this rulemaking in order to circumvent the ethics requirements that protect agency decision-making against both actual conflicts and the appearance thereof. To date, the Board has not alleviated concerns that the conflict arising out of adjudication has followed into the rulemaking. As the Inspector

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[84] *Compare* Letter from Chairman John Ring to Rep. Robert C. "Bobby" Scott and Sen. Patty Murray, Table 3 (Oct. 23, 2018), https://www.regulations.gov/document?D=NLRB-2018-0001-9514 *with* NLRB Charges and Complaints (last accessed Dec. 21, 2018), *available at* https://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints.

[85] 79 Fed. Reg. 46688 (McFerran dissenting) (citing Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FIU L. Rev. 437, 457 (2010)).

[86] Of the 15 petitions filed in the year before *Browning-Ferris* that alleged a joint employer relationship, parties in 6 of those cases (40%) waived a hearing on whether the employers are joint employers. Of the 21 such petitions filed in the year after *Browning-Ferris*, parties in 10 of those cases (47.6%) waived such a hearing. *See* Letter from NLRB to Rep. Robert C. "Bobby" Scott and Sen. Patty Murray (Jan. 9, 2019), https://www.regulations.gov/document?D=NLRB-2018-0001-11824.

[87] Of the 140 charges filed six months before *Browning-Ferris* alleging a joint employer relationship, employers in 25 of those cases (17.9%) declined to contest that allegation. Of the 184 petitions filed in the six months after *Browning-Ferris* alleging a joint employer allegation, parties in 64 of those cases (34.8%) declined to contest that allegation. *See* Letter from NLRB to Rep. Robert C. "Bobby" Scott and Sen. Patty Murray (Jan. 9, 2019), https://www.regulations.gov/document?D=NLRB-2018-0001-11824.

[88] Robert Iafolla, "Joint Employment Test's Bark May Be Worse Than Its Bite," Bloomberg Law (Oct. 2, 2018), https://www.bna.com/joint-employment-tests-n73014482933/.

General noted, when the Board falls short of its standards governing conflicts of interest and the appearance thereof, "the whole of the Board's deliberative process is called into question."[89]

The Board in 2017 attempted to overturn *Browning-Ferris* through adjudication but was not successful due to a conflict of interest. Following that, in December 2018, the Board briefly overturned *Browning-Ferris* in *Hy-Brand Industrial Contractors*, which held that a business must exercise "direct and immediate" control over workers' employment in order to be a joint employer for purposes of the NLRA.[90] However, the Board was forced to vacate *Hy-Brand* after its Inspector General and Designated Agency Ethics Official ("DAEO") both concluded that Member William Emanuel violated ethics rules by participating in the decision, because his former law firm represented a party in *Browning-Ferris* and because the two cases constituted the same deliberative process.[91] The NPRM now proposes a joint employer standard virtually identical to the standard in the tainted *Hy-Brand* decision.

On June 8, 2018, the Board announced it would conduct a comprehensive internal review of its ethics and recusal procedures. In announcing this review, Chairman Ring stated, "Recent events have raised questions about when the Board Members are to be recused from particular cases and the appropriate process for securing such recusals."[92] Our October 10, 2018, letter inquired into whether the Board issued this NPRM prior to completing its ethics and recusal review, and, if so, why. The Board's October 23, 2018, response answered that the review is still pending.

Although we appreciate that Chairman Ring briefed staff of our Committees on this issue, we remain concerned that the Board has not resolved the appearance of a conflict. By initiating a rulemaking to reach a result that the Board was foreclosed from obtaining in an adjudication due to a conflict of interest, this action has raised questions about whether the Board proposed the rule in order to circumvent federal ethical standards.[93] Board Members participating in a rulemaking "must be disqualified when they act with an 'unalterably closed mind' and are

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[89] Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter, National Labor Relations Board Inspector General (Feb. 9, 2018) ("OIG Report Regarding *Hy-Brand* Deliberations"), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf.

[90] 365 NLRB No. 156 (2017).

[91] *See Hy-Brand Industrial Contractors*, 366 NLRB No. 26 (2018); *see also* OIG Report Regarding *Hy-Brand* Deliberations; Report of Investigation – OIG-I-541, National Labor Relations Board Inspector General (Mar. 20, 2018), https://drive.google.com/file/d/1CiNGB3_cvcMOTl3wLUJMLu66OOMiK_i3/view; Recommended Action Plan Respecting the Board's Adjudication of Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017), National Labor Relations Board Designated Agency Ethics Official (Feb. 21, 2018), http://src.bna.com/ykl.

[92] Office of Public Affairs, NLRB to Undertake Comprehensive Internal Ethics and Recusal Review (June 8, 2018), https://www.nlrb.gov/news-outreach/news-story/nlrb-undertake-comprehensive-internal-ethics-and-recusal-review.

[93] *See* 5 C.F.R. § 2635.101(b)(14) (Executive branch "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.").

'unwilling or unable' to rationally consider arguments."[94] Although the Board granted our staff a camera-review of the DAEO's memorandum that cleared Member Emanuel's participation in this rulemaking, we note that the memorandum did not apply the recusal standard for rulemaking in light of the NPRM's particularly suspect procedural history. A more fulsome public examination of that opinion is in order. In any event, this development runs counter to Chairman Ring and Member Marvin Kaplan's own statement in the *Hy-Brand* proceedings that the Board must ensure that "it not only adheres to exacting standards of integrity and impartiality…but that it is perceived by the public as adhering to such standards."[95] Instead, the rulemaking risks undermining the Board's efforts to "restore confidence in the Board's deliberative process," which was called for by the Inspector General.[96]

Conclusion

For the reasons set forth above, we urge the Board to withdraw the proposed rule and preserve the joint employer standard set forth in *Browning-Ferris*. Thank you for your consideration of this comment. For any questions or further communication, please contact Kyle.deCant@mail.house.gov and Joseph_Shantz@help.senate.gov.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman
Committee Education and Labor

PATTY MURRAY
Ranking Member
Committee on Health, Education, Labor, and Pensions

[94] *Air Transp. Ass'n of Am., Inc. v. NMB*, 663 F.3d 476, 487 (D.C. Cir. 2011) (citing *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170, 1174 (D.C. Cir. 1979)).
[95] *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 93 (2018) (Chairman Ring and Member Kaplan concurring).
[96] OIG Report Regarding *Hy-Brand* Deliberations, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf.