COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

December 7, 2022

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

Re: Comment on Notice of Proposed Rulemaking, RIN 3142-AA21, Standard for Determining Joint Employer Status

Dear Ms. Rothschild:

We write in support of the National Labor Relations Board's ("NLRB" or "the Board") proposed rule that would return to the traditional standard for determining when employees have joint employers under the National Labor Relations Act ("NLRA").[1] Congress has closely tracked the dramatic oscillation of this standard and its effects on workers,[2] and we applaud the proposed

[1] Standard for Determining Joint Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022) (to be codified at 29 C.F.R. § 103.40).

[2] *See, e.g., The Future of Work: Preserving Worker Protections in the Modern Economy*, Hearing Before the Subcomm. on Workforce Protections and the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. On Education and Labor, 116th Cong. (Oct. 23, 2019); *Protecting the Right to Organize Act: Modernizing America's Labor Laws*, Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. On Education and Labor, 116th Cong. (July 25, 2019); *H.R. 3441, Save Local Business Act*, Hearing 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); *H.R. 3459, Protecting Local Business Opportunity Act*, Hearing Before the H. Comm. on Education and the Workforce, 114th Cong. (Oct.

rule for advancing the purposes of the NLRA by preventing employers from contracting out work to evade their bargaining obligations.[3]

The question of whether a company is a joint employer significantly impacts workers' rights under the NLRA, especially those workers employed by a temporary staffing agency, subcontractor, or other employment intermediary. Approximately three million Americans are employed by a temporary staffing agency on any given day, performing work on behalf of a client company that directs or reserves control over the employees' work but does not write the employees' paychecks.[4] When workers organize 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 whenever workers are unable to bargain with all entities that control those wages and working conditions. The proposed rule is therefore necessary for holding entities accountable even if they reserve control, or exercise control indirectly, over employees' working conditions.

I. The proposed rule would restore the joint employment standard required by the National Labor Relations Act and affirmed by the U.S. Court of Appeals for the D.C. Circuit.

The NLRB has traditionally held that an entity may be a joint employer even if its control over the terms and conditions of employment are indirectly exercised, such as through an intermediary, or reserved but not yet exercised.[5] This traditional standard is consistent with Supreme Court's requirement that the NLRB interpret the NLRA's definition of employer as consistent with the common law,[6] as well as with the legislative history of the NLRA's 1947 amendments.[7] Without providing any explanation, the NLRB departed from this traditional standard in 1984, discounting indirect and reserved control from the joint employer analysis in two decisions.[8] In another decision in 2002, the NLRB explicitly limited the joint employer

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28, 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).

[3] 29 U.S.C. § 151 ("It is declared to be the policy of the United States to…encourag[e] the practice and procedure of collective bargaining…").

[4] Bureau of Labor Statistics, *Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Data*, Econ. News Release https://www.bls.gov/news.release/empsit.t17.htm (last visited Oct. 5, 2022).

[5] *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); *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).

[6] *See 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").

[7] *See* 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 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).

[8] *TLI, Inc*., 271 NLRB 798, 803 (1984); *Laerco Transportation*, 269 NLRB 324, 325-26 (1984).

standard to only "direct and immediate" control.[9] In recent decades, temporary and contingent employment arrangements proliferated rapidly, and the NLRB's departure from the common law enabled corporations to use intermediaries to evade any obligation to bargain collectively with workers.[10]

In the 2015 *Browning-Ferris* decision, the NLRB restored earlier precedent considering the entity's reserved and indirect control over working conditions.[11] The NLRB's previous Republican majority attempted to overturn *Browning-Ferris* in 2017, but then initiated the rulemaking to invalidate *Browning-Ferris* when the adjudication was unsuccessful.[12] While that rulemaking was pending, the D.C. Circuit upheld *Browning-Ferris* "as fully consistent with the common law [because] both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis."[13] 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."[14] The D.C. Circuit also warned, "[t]he Board's rulemaking…must color within the common-law lines identified by the judiciary."[15]

The NLRB did not color within those lines, and in 2020 it issued a final rule to narrow the joint employer standard ("2020 Rule"). In doing so, it narrowed the joint employer standard to only cover entities that "possess and actually exercise substantial direct and immediate control over employees' essential terms and conditions of employment."[16] To justify sidelining consideration of indirect and reserved control, which the D.C. Circuit emphasized, the 2020 Rule stated that indirect and reserved control may still be considered, but they could not, "without more…establish a joint-employer relationship."[17] The D.C. Circuit has since described this claim as "dubious" in a decision earlier this year, emphasizing that it "took great pains to inform the Board that the failure to consider reserved or indirect control is inconsistent with the common law of agency."[18] The proposed rule heeds the D.C. Circuit's repeated finding that indirect or reserved control can establish joint employer status, and we support the NLRB's effort to restore this common law precedent.

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[9] *Airborne Freight Co.*, 338 NLRB 597 (2002) (finding the "essential element" to be "whether a putative joint employer's control over employment matters is direct and immediate").
[10] *Redefining Joint Employer Standards*, Hearing Before the H. Comm. on Education and the Workforce, 115th Cong. (Jul. 12, 2017) (written testimony of Catherine K. Ruckelshaus, General Counsel, National Employment Law Project, at 4) ("Between 2005 and 2015, the number of contract workers grew by more than half, while the overall workforce grew by only five percent.") (hereinafter "Ruckelshaus Testimony").
[11] 362 NLRB 1599, 1600 (2015).
[12] *See infra* Section IV.
[13] *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1222 (D.C. Cir. 2018).
[14] *Id.* at 1209.
[15] *Id.*
[16] *The Standard for Determining Joint Employer Status*, 85 Fed. Reg. 11184, 11185 (Feb. 26, 2020) (codified at 29 C.F.R. pt. 103).
[17] *Id.* at 11220.
[18] *Sanitary Truck Drivers & Helpers Local 350 v. NLRB*, 45 F.4th 38, 47 (D.C. Cir. 2022) (considering issues in *Browning-Ferris* that the Board considered after the D.C. Circuit remanded in 2018).

II. The proposed rule would advance the policies of the National Labor Relations Act by preventing employers from evading their obligations under labor law.

The proposed rule far better advances the NLRA's statutory purposes of "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association" than the 2020 Rule.[19] As the NLRB noted in *Browning-Ferris*, "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."[20]

The proposed rule's return to the Board's traditional standard is therefore necessary to mitigate the fissuring of the workplace, which exacerbated in the decades after the NLRB departed from considering indirect and reserved control.[21] If a lead business controls any of its subsidiary's workers' terms and conditions of employment, but is not deemed a joint employer, then those workers cannot engage in collective bargaining with the lead business to improve terms and conditions that are within the lead business's control.[22] This opens workers to retaliation even when they attempt to organize a union with the subsidiary alone. For example, if a lead business is not recognized as a joint employer under the 2020 rule, it is likely that it can terminate a subcontractor whose employees organize a union without the workers having any recourse to the NLRB.[23] As a result, large companies can evade their bargaining obligations and liability for unfair labor practices, leaving smaller employers on the hook and leaving workers without any meaningful recourse.[24]

III. The proposed rule would improve compliance with the United States' obligation under international law to respect, promote, and realize the principles concerning the fundamental rights of freedom of association and collective bargaining.

Because the proposed rule's traditional joint employer standard is consistent with the policies of the NLRA, unlike the 2020 Rule, the proposed rule would better comport with the United States' obligations under international law. The United States is a founding member of the International

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[19] 29 U.S.C. § 151.
[20] 362 NLRB at 1609.
[21] *The Future of Work: How Congress Can Support Workers in the Modern Economy*, House of Representatives Committee on Education and Labor (Dec. 2020) at 4-5, https://edlabor.house.gov/imo/media/doc/Future%20of%20Work%20Report%20(FINAL).pdf (hereinafter "*The Future of Work*"); *see also* Ruckelshaus Testimony at 4.
[22] *The Future of Work* at 6.
[23] *The Future of Work* at 6 (citing *The Future of Work: Preserving Worker Protections in the Modern Economy*, Hearing Before the Subcomm. on Workforce Protections and the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. On Education and Labor, 116th Cong. (2019) (written testimony of Brishen Rogers, Professor at Temple School of Law, at 9)).
[24] *Protecting the Right to Organize Act: Modernizing America's Labor Laws, Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Education and Labor*, 116th Cong. (2019) (written testimony of Richard Griffin, Of Counsel at Bredhoff & Kaiser, P.L.L.C., at 11-12).

Labor Organization ("ILO") and a signatory to the Declaration on the Fundamental Rights of Principles at Work, and therefore has an obligation to "respect, to promote, and to realize…the effective recognition of the right to collective bargaining."[25]

In applying the principles of freedom of association and the right to bargain collectively, the ILO's Committee on Freedom of Association has found that if "an employer can resort to subcontracting as a means of evading in practice the rights of freedom of association and collective bargaining" then a nation's labor standards are insufficient to protect against "acts of anti-union discrimination."[26] Moreover, the Committee on Freedom of Association has held that "collective bargaining between the relevant trade union and the party who determines the terms and conditions of employment of the subcontracted/agency workers should always be possible."[27] By requiring consideration of indirect and reserved control, the proposed rule ensures a thorough examination of which entities actually "determine"[28] working conditions, thus guaranteeing that "trade unions representing subcontracted workers may effectively seek to improve the…working conditions of those whom they represent."[29]

IV. The 2020 joint employer rule was tainted by a defective process, and the proposed rule marks a return to good governance.

The 2020 Rule suffered from legitimate public concerns as to whether the Board initiated it in order to circumvent then-Member William Emanuel's ethical obligations. The Board in 2017 attempted to overturn *Browning-Ferris* through adjudication 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.[30] However, the Board was forced to vacate *Hy-Brand* after the 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*

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[25] Int'l Lab. Org., Declaration on Fundamental Principles and Rights at Work, Section 2 (June 18, 1998), https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm. The United States has not formally ratified ILO Convention No. 87 Concerning the Application of the Principles of the Right to Organize and Bargain Collectively, 68 U.N.T.S. 17 (1948), or Convention No. 98 Concerning the Right to Organize and Collective Bargaining, 96 U.N.T.S. 257 (1949). However, the Declaration states "that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization" to "respect, to promote, and to realize" the principles concerning the conventions. ILO Declaration, Section 2.

[26] Int'l Lab. Off., Compilation of Decisions of the Comm. on Freedom of Assoc., P 1082 (last accessed Oct. 4, 2022); *id.* at 1413 (encouraging member nations to prevent subcontracting to evade bargaining obligations); *see also id.* at P 328 ("the status under which workers are engaged with the employer should not have any effect on their right to join workers organizations and participate in their activities").

[27] *Id.* at P 1283 (citing Case No. 363 (Republic of Korea), Report in which the Committee Requests to be Kept Informed of Developments, ILO Committee on Freedom of Association, Mar. 2012, https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057164).

[28] *Id.*

[29] *Id.* at P 1413.

[30] 365 NLRB No. 156 (2017).

and because the two cases constituted the same deliberative process.[31] Less than three months later, the Board announced it would engage in rulemaking on the joint employer standard, and the proposed rule was virtually identical to the standard in the tainted *Hy-Brand* decision.[32]

The previous Republican majority of the NLRB failed to assuage concerns that it engaged in rulemaking to reach a result it was foreclosed from obtaining in adjudication due to a conflict of interest.[33] Board Members participating in a rulemaking "must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments."[34] The NLRB noted that the DAEO determined that Member Emanuel could participate in the rulemaking, but the DAEO's memorandum did not apply the recusal standard by considering the basic facts of Member Emanuel's participation, such as the speed with which the Board initiated the rulemaking after invalidating *Hy-Brand*.[35] Even though Members of Congress raised this concern in the previous rulemaking, the Board brushed the objection aside without any explanation when it issued the 2020 Rule.[36]

The current rulemaking is welcomed for its ability to restore confidence in the Board's deliberative process, as it is not tainted by any ethical conflict of interest. After Member Emanuel's term expired,[37] no Member of the NLRB had represented, or was employed by a law firm that represented, any of the parties in *Browning-Ferris* or *Hy-Brand*. The proposed rule therefore lacks even the appearance of a conflict of interest, as there are no recusal obligations from adjudication that the rulemaking could be said to circumvent. Accordingly, the current effort would appear to "restore confidence in the Board's deliberative process," which the Inspector General tasked the Board with doing after the *Hy-Brand* scandal.[38]

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[31] *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.

[32] NLRB 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-to-address-joint-employer-standard.

[33] *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.").

[34] *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)).

[35] Congressman Robert C. "Bobby" Scott, Chairman of the H. of Reps. Comm. on Educ. and Labor, and Senator Patty Murray, Chairwoman of the S. Comm. on Health, Emp., Labor and Pensions, Comment Letter on the Standard for Determining Joint Employer Status (Jan. 28, 2019) at 13-15.

[36] *The Standard for Determining Joint Employer Status*, 85 Fed. Reg. at 11190 (noting that concern regarding the lack of analysis in the DAEO memoranda "does not undermine the DAEO's determination").

[37] Ben Penn and Ian Kullgren, *NLRB Member Emanuel Hounded by Ethics Allegations on Way Out*, Bloomberg Law (Aug. 26, 2021) https://news.bloomberglaw.com/daily-labor-report/trump-nlrb-pick-emanuel-probed-by-doj-over-ethics-allegations (noting that Member Emanuel's term expired in August 2021).

[38] Letter from David Berry, NLRB Inspector General, to Marvin Kaplan, NLRB Chairman, et al. (Feb. 9, 2018) https://www.nlrb.gov/sites/default/files/attachments/pages/node-290/oig-report-regarding-hybrand-deliberations.pdf.

Conclusion

For the reasons set forth above, we urge the Board to restore the traditional joint employer standard as set forth in the proposed rule. Thank you for consideration of this comment.

Sincerely,

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

MARK DeSAULNIER
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

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