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WHO'S THE BOSS? THE "JOINT EMPLOYER" STANDARD AND BUSINESS OWNERSHIP

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE "JOINT EMPLOYER" STANDARD AND BUSINESS OWNERSHIP

FEBRUARY 5, 2015

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WHO'S THE BOSS? THE "JOINT EMPLOYER" STANDARD AND BUSINESS OWNERSHIP

THURSDAY, FEBRUARY 5, 2015

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:01 a.m., in room 430, Dirksen Senate Office Building, Hon. Lamar Alexander, chairman of the committee, presiding.

Present: Senators Alexander, Burr, Isakson, Scott, Cassidy, Murray, Franken, Baldwin, Murphy, and Warren.

OPENING STATEMENT OF SENATOR ALEXANDER

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will come to order.

This morning we're having a hearing about who qualifies as a joint employer in the National Labor Relations Board's view. Senator Murray and I will each have an opening statement, and then we will introduce our panel of witnesses.

We welcome you and thank you for coming.

After our witness testimony, Senators will have up to 5 minutes each for questions. We will finish by about 11:30 because we have votes at that time.

The hearing this morning is about a pending National Labor Relations Board decision that could destroy a small business opportunity for more than 700,000 Americans. These men and women are franchisees. They operate health clubs, barber shops, auto parts shops, child care centers, neighborhood restaurants, music stores, cleaning services, and much more. They use the brand name of companies like Planet Fitness, Merry Maids, and Panera Bread. They may work 12 hours a day serving customers, meeting a payroll, dealing with government regulators, paying taxes, and trying to make a profit.

We live in a time when Democrats and Republicans bemoan the fact that it's getting harder to climb the economic ladder of success in our country. Today, successfully operating a franchise business is one of the most important ways to do that.

Why would the pending decision by the National Labor Relations Board threaten this very American way of life, knocking the ladder out from under hundreds of thousands of Americans?

The Board and its General Counsel are pursuing a change to what is called the joint employer standard. This standard, or test, has since 1984 required that for a business to be considered a joint

employer, it must hold direct control over the terms and conditions of a worker's employment. To decide that, the NLRB looks at who hires and fires, sets work hours, picks uniforms, issues directions to employees, determines compensation, handles day-to-day supervision, and conducts recordkeeping.

Under the changes the NLRB is now considering, it would take just indirect control over the employees' terms and conditions of employment, or even unexercised potential to control working conditions, or where industrial realities otherwise make it essential to meaningful collective bargaining.

What could this mean for more than 700,000 franchisees and employers? These franchise companies will find it much more practical to own all their stores and their restaurants and their day care centers themselves. There will be many more company-owned outposts rather than franchisee-owned small businesses. There will be more big guys, and there will be fewer little guys.

Franchisees tell me they expect franchisors would be compelled to try to establish control over staffing decisions and daily operations. Franchisees would lose their independence and become *de facto* employees of the franchisor. This case doesn't just affect franchisees. It will affect every business that uses a subcontractor or contracts out for any service. That includes most of the 5.7 million businesses under NLRB jurisdiction, because most businesses contract for some service.

Consider a local bicycle shop that contracts out its cleaning service under a cost-plus provision in which the cleaner is paid for all of its expenses to a certain limit, plus a profit. If this arrangement is interpreted to create indirect control or have unexercised potential over working conditions, they could trigger joint employer obligations. Same thing for a local restaurant that outsources all of its baked goods.

What does it mean to be a joint employer? First you're required to engage in collective bargaining. You're on the hook for all the agreements made in collective bargaining such as salaries, health care coverage, and pension obligations. Being considered a joint employer also eliminates protection from what are called secondary boycotts. Imagine being an employer and having these legal, financial, and time burdens placed on you by unions representing employees you have no real control over.

Let me give you another example. We have several large auto plants in Tennessee. Let's say one of these has a few thousand employees but thousands of other workers come in and out of the plant's gate every day to provide goods and services. These workers are employed and directly controlled by subcontractors that provide security, supply auto parts, and staff the company lunch room. If the NLRB goes down this road, the plant owner could be forced to sit at dozens of different bargaining tables, be responsible for another employer's obligations.

What would the manufacturer do? It would probably take in as much in-house as it can. If that move comes at the cost of efficiency and innovation, the plant could be relocated elsewhere.

This example is especially concerning to me because more than 100,000 Tennesseans are employed in the auto manufacturing industry.

As for the subcontractors, they would be losing huge clients, which would in turn jeopardize more jobs and threaten these businesses' futures.

Most business owners are people who wanted to run their own business, be their own boss, and live their dream of providing a much-needed service in their community. This pending decision may ruin that dream for many.

Senator Murray.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Thank you very much, Chairman Alexander. I want to thank all of our colleagues who are joining us today, and all of our witnesses who are taking time out to be with us as well.

We are a few weeks into this new Congress, and I truly do hope that this committee can find some ways to work together on policies that do create jobs and expand economic security and generate broad-based economic growth for workers and families, not just the wealthiest few but for those who are working hard every day. I do find it really troubling that, once again, my Republican colleagues are putting big corporations and their profits ahead of our hard-working families. That really is what is at the heart of today's hearing.

Across the country today, so many workers clock in 40 hours a week, and they work really hard, and yet they are unable to provide for their families. Last fall, NBC News interviewed a woman from Kansas City named Latoya who worked in a fast-food restaurant, and she was protesting as part of a fast-food workers strike. She said that she is raising four children alone on $7.25 an hour. It should go without saying, it's pretty hard to make ends meet.

For part of last year, she said she was living in a homeless shelter. As she told the reporter last year, "Nobody should work 40 hours a week and find themselves homeless." On top of those rock-bottom wages, Latoya said she and her colleagues experienced unpaid wages, unpredictable scheduling, and have to make do with broken equipment on the job.

Today, we have too many Americans who are in those same shoes, and they are not looking for a handout. They just want to be treated fairly and get basic protections and economic security that previous generations of American workers took for granted at a time when the middle class flourished. But, the labor market has changed dramatically over the past 30 years. Many businesses have begun relying on subcontracting labor to temp agencies, franchises, and other third-party sources to lower their labor costs.

The parent company of a franchise can dictate pricing and store hours. It can prohibit collective bargaining, and it can monitor, in real time, worker hours and staffing levels. Yet, the parent company can put all the liability for poor working conditions and low wages squarely on the shoulders of its franchise owners. Without collective bargaining rights, workers have no recourse, no recourse, for improving those workplace conditions.

By the way, this arrangement can hurt our franchise owners. These small business owners face pressure in bidding for franchise licenses, and they struggle to manage under corporate rules. That's

not good for workers. It's not good for franchise owners. It lets some major corporations have it both ways. They can squeeze both workers and small business owners while they make record profits. They, by the way, get to escape all the liability for low wages and poor working conditions.

When workers make poverty wages, it's Federal taxpayers who end up paying the price. More than half of our fast-food workers in our country today are enrolled in at least one public assistance program. Taxpayers pay nearly $7 billion a year for public assistance that helps fast-food restaurant workers make ends meet.

Too many big corporations are rigging the system and leaving taxpayers holding the bag. These employment arrangements, including temp agencies and franchises, are the new reality of today's labor market, but they shouldn't be the end of basic worker protections or earning a living wage.

Last year, the National Labor Review Board decided to reexamine its joint employer standard to make sure it responds to the realities of today's workplace. The NLRB is currently deliberating the *Browning-Ferris* case, and the complaint involving McDonald's is in the very early stages of the process.

Our hearing today isn't the place to debate ongoing litigation. Let's remember, by law, the NLRB is entrusted to examine and adapt the National Labor Relations Act to changing patterns in the labor market so workers can collectively bargain.

While my Republican colleagues claim that revisiting the joint employer standard is somehow an overreach, the NLRB is actually simply carrying out its duties under the law. By law, it is supposed to adapt as the labor market changes.

Still, many of our Republican colleagues are defending a precedent that allows too many major corporations to turn a blind eye to poor labor conditions, even as their workers scrape by on stagnant wages and watch as their rights are routinely denied. Instead of allowing some of the biggest corporations to rig the system against small businesses and workers, I hope that we can have a discussion about how to best expand economic security for more Americans. That's good for workers, it's good for businesses, it's good for the economy and something we should be striving for in our work here in Congress.

I truly hope that in the future we can work together on policies that create jobs and help our workers and families benefit from broad-based economic growth. Again, I do want to thank all of our witnesses for being here today, and I look forward to this discussion.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murray.

Senator Baldwin, do you have a witness to introduce?

STATEMENT OF SENATOR BALDWIN

Senator BALDWIN. I do indeed. Thank you, Mr. Chairman and Ranking Member Murray.

Paul Secunda joins us today from Marquette University in my home State of Wisconsin. He is a distinguished law professor and the director of the Labor and Employment Law Program at Marquette. Mr. Secunda has written extensively on labor and employ-

ment issues, and his research has focused on collective bargaining rights for private-sector employees, among many other topics.

Labor Secretary Perez named him as the chair of the Advisory Council on Employee Welfare and Pension Benefit Plans for 2015.

Professor Secunda, we appreciate your making the trip, and I look forward to hearing your testimony today. Welcome.

The CHAIRMAN. Thank you, Senator Baldwin.

I'll introduce the other witnesses.

Mr. Marshall Babson was appointed by President Reagan to serve as one of two Democrats on the National Labor Relations Board from 1985 to 1988.

Mr. Gerald Moore owns and operates five locations of The Little Gym, two of which are in Tennessee.

Mr. John Sims owns a single franchise location of the Rainbow Station in Richmond, VA.

We welcome all of you.

We have your testimony and we've read it. If you could summarize your remarks in about 5 minutes, that would leave more time for Senators to have a chance to have a discussion with you afterwards.

Mr. Babson, why don't we start with you and go down the line? Then Senator Murray and I will begin the questioning.

STATEMENT OF MARSHALL B. BABSON, COUNSEL, SEYFARTH SHAW LLP, NEW YORK, NY

Mr. BABSON. Thank you, Mr. Chairman and Ranking Member Murray, members of the committee. I appreciate very much the invitation to be with you today.

My name is Marshall Babson. I'm a management labor lawyer. I am counsel at the law firm of Seyfarth Shaw. I am in the New York office, although I do spend a good deal of time here in Washington.

I served on the National Labor Relations Board from 1985 to 1988. I was one of two Democrats appointed by President Reagan. During that time I had the opportunity to participate in hundreds of NLRB cases involving both unfair labor practices and representation cases in which employees sought representation by labor unions.

I'm very proud of my association with the National Labor Relations Board. I'm very proud of my work at the National Labor Relations Board, and I have been a strong and continue to be a strong supporter of the agency and of the purposes of the statute.

The reason that I'm here today is because I do believe that this is not a question of policy preferences when we're talking about changing the rule for joint employer status. I am somebody who has continued to participate in NLRB activities since my service at the Board. I have never made it a practice or a business to second-guess my colleagues at the NLRB with regard to their policy preferences.

I have, however, spoken up and participated in litigation on a regular basis when I believed that the agency has exercised authority outside the boundaries of the statute, and that is the cause for my concern here today.

There is no question that this administrative agency has the authority to change the rule based on changing circumstances, but there are limitations on what those changes may be, and those are the limitations that were established by Congress. This statute in 1935, again in 1947, and again in 1957 made clear that the definitions of "employer," "employee" are to be the common-law definitions, and that for someone to be held liable or responsible under the National Labor Relations Act for a remedy, he first, before he may be called a joint employer, must in fact be an employer.

We have many, many relationships in this country. The Chairman has pointed out a few. I've worked with many franchisees over the years as a representative. In my experience, these are independent businessmen who have invested large sums of money that they've saved for a long time to build their business. These are local businesses. Of course, they have support with regard to the brand and the quality and the product from the franchisor. They are individuals, and I worked with these individuals when I was in Connecticut and since, when I was in Washington and New York, in establishing their own terms and conditions of employment.

When the NLRB operates outside of its bounds—when the NLRB, for example, as in the New Process Steel case, when two Board members were deciding cases where the statute had indicated that three Board members, a minimum of three Board members were required—when the Board is operating outside of its bounds, it is not in a position to help some of these issues that were referred to by the Ranking Member. It is operating outside of the boundaries of the statute.

Efficient, flexible business operations are important to the success of this country. It is not in the interests of the NLRB, it's not in the interests of employers, employees, or unions to affix liability when there is no relationship between the company that's being sought to be held liable as a joint employer and the employees. There must be some direct relationship. The notion that there are economic realities, are industrial realities that have changed, that require change at the Board, there is no support, I submit, in NLRA jurisprudence for such a broad, sweeping change, and it is up to this committee and ultimately to the Congress to adjust the statute if they believe that there have been sufficient economic changes in the business model to warrant such changes.

Thank you, sir.

[The prepared statement of Mr. Babson follows:]

PREPARED STATEMENT OF MARSHALL B. BABSON

Chairman Alexander, Ranking Member Murray, and distinguished members of the committee, thank you for giving me the opportunity to testify before you today.

My name is Marshall Bruce Babson. I have been practicing labor law since 1975. In 1985, President Reagan appointed me to serve as one of two Democrats on the National Labor Relations Board ("NLRB" or "Board"). I was confirmed by the U.S. Senate and served on the NLRB until August 1988. While on the NLRB, I participated in a number of significant decisions, including, *e.g., John Deklewa & Sons*, which set forth new rules for pre-hire agreements in the construction industry, *Indiana and Michigan Electric Co.*, which established guidelines regarding an employer's duty to arbitrate post-contract expiration grievances, and *Fairmont Hotel*, a union access case which involved clarifying the balance between private property rights and section 7 rights under the National Labor Relations Act. I have devoted

the majority of my career to traditional labor relations and to issues under the National Labor Relations Act ("NLRA" or the "Act").

Since serving on the Board, I have been engaged in private practice with a focus on traditional labor law and specializing in NLRB proceedings, negotiating collective bargaining agreements, participating in arbitration proceedings and various other personnel matters. Throughout my career, I have authored numerous articles and commentaries regarding labor law and the NLRA as well as the 1984 book, *Developments Under the 1974 Health Care Amendments to the National Labor Relations Act*. I have previously testified before Congress regarding proposed labor and employment legislation, testified before President Clinton's Dunlop Commission regarding the status of U.S. labor laws. I am a member of the Board of Directors of the U.S. Chamber Litigation Center, the U.S. Chamber of Commerce's public policy law firm, serve on the Litigation Center's Labor Law Advisory Committee. I am also on the Board of Advisors of the Institute for Law and Economics at the University of Pennsylvania. Currently, I hold the position of Counsel at Seyfarth Shaw LLP, a global law firm of over 800 attorneys, over 350 of whom specialize in providing labor and employment counsel to companies of all sizes. I serve as an Adjunct Professor of Law at George Washington University Law School where I teach labor law. I appear before you today as an individual practitioner and not on behalf of any particular organization or company.

INTRODUCTION

Issues surrounding who is an "employee" and who is an "employer" are fundamental to the administration of the National Labor Relations Act ("NLRA" or "Act"). The common law of agency provides the legal framework that underpins the Act's entire structure, both creating bargaining obligations for an "employer" and boundary conditions that bar secondary activity directed against entities not properly deemed a primary "employer." Congress directed in 1935 and again in 1947, via the Taft-Hartley Amendments, that "employee" and "employer" status under the NLRA *must be* determined in accordance with the common law of agency. Accordingly, before a separate entity may be deemed a "joint-employer," there is a clear and unambiguous congressional mandate in the statute that requires that the entity first be an "employer" under common law agency principles.

The joint-employer concept recognizes that "two or more business entities are in fact separate, but that they share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation*, 269 NLRB 324, 325 (1984) ("*Laerco*"); *TLI*, 271 NLRB 798, 803 (1984) (same); *see also, e.g., Boire* v. *Greyhound Corp.*, 376 U.S. 473, 475 (1964) (noting joint-employer status turns on whether the entities "exercised common control over the employees" at issue). Applying the familiar framework derived from the common law, for more than 30 years the Board has recognized that joint-employer status turns on the extent to which the purported employer determines matters governing the essential terms and conditions of employment, including right to hire and fire, set work hours, determine start and end times of shift, uniforms, directions, compensation, day-to-day supervision, record keeping, approve drivers and devise rules under which drivers were to operate. *NLRB* v. *Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1122–25 (3d Cir. 1982). The "essential element in [each such] analysis is whether a putative joint employer's control over employment matters is *direct and immediate*." *Airborne*, 338 NLRB 597, 597 n.1 (2002) (the "indirect control" test was "abandoned" two decades earlier) (emphasis added).

No one factor in the analysis is dispositive; consistent with the common law, the question is fact specific that must be determined "on the totality of the facts of the particular case." *Southern Cal. Gas Co.*, 302 NLRB 456, 461 (1991); *Laerco*, 269 NLRB at 325; *Boire*, 376 U.S. at 475; *NLRB* v. *United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) ("there is no shorthand formula or magic phrase that can be applied to find the answer, [] all of the incidents of the relationship must be assessed and weighted with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles"); *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 324 (1992) (same).

The NLRB's General Counsel now advocates a new joint-employer standard that includes employers who are "essential for meaningful collective bargaining," a test implicitly, if not explicitly, rejected outright by Congress in 1947 and by decades of Board precedent as wholly untethered to the common law of agency. Under the General Counsel's proposed standard, adapted perhaps from former Member Liebman's concurrence in *Airborne Freight Co.*, an entity would be deemed an "employer" or a "joint-employer" if it "exercised direct *or* indirect control over working conditions, had the *unexercised* potential to control working conditions, or where 'industrial re-

alities' otherwise made it essential to meaningful bargaining." *See, e.g., Amicus Brief of the General Counsel*, Case 32-RC–109684 (June 26, 2014) at 2, 4–5, 16–17 (emphasis added) ("GC *Amicus*"); *Airborne*, 338 NLRB at 597–99. This is not, and should not be construed as mere "policy choice," and cannot be squared with an Act that is rooted in, and bounded by, the common law definitions of employer and employee.[1] Congress and the U.S. Supreme Court have repeatedly instructed that determinations of employee, employer and, by extension, joint-employer status under the Act must be bound by the common law of agency. *See, e.g., Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (citing *United Ins. Co.*, 390 U.S. at 256) (NLRB may not "depart[] from the common law of agency" in determining employee status). It is through this analytical lens that this issue must be viewed.

I. THE NLRB IS CONSTRAINED TO ADHERE TO THE CURRENT STANDARD WHICH COMPORTS WITH THE COMMON LAW OF AGENCY

Congress and the Supreme Court explicitly have directed the Board to rely upon common law agency principles in determining who is an employee and who is an employer under the Act. Congressional intention is clear both in the plain text of the Act as well as in the 1947 Taft-Hartley amendments, and accompanying congressional record.

First, as to the Act itself, where, as here Congress uses the terms "employee" and "employer" in a statute but does not explain the terms' origins or bases, Congress "means to incorporate the established meaning of th[at] ter[m]," and as the Supreme Court has concluded, "'Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" *Town & Country Elec., Inc.*, 516 U.S. at 94 (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322–23 (1992), in turn quoting *Cmty. for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739–40 (1989)). The NLRB may not unreasonably "depart[] from the common law of agency." *Town & Country Elec., Inc.*, 516 U.S. at 94 (citing *United Ins. Co.*, 390 U.S. at 256).

Second, in 1947 the Congress unambiguously directed in the Taft-Hartley Amendments to the NLRA that the Board is constrained by common law principles of agency when determining who is an employee and, consequently, who is an employer.[2] *See, e.g.*, H.R. Rep. No. 510, at 36, 80th Cong., 1st Sess. (1947); *United Ins. Co. of Am.*, 390 U.S. at 256 (the "obvious purpose of [the 1947] amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act"). The House Committee Report accompanying the 1947 amendments harshly criticized the Board's then recent determination that independent contractors were "employees" within the meaning of the Act, noting the term "employee":

> according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire . . . [and who] work for wages or salaries under *direct* supervision.
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> * * *
>
> It must be presumed that when Congress passed the Labor Act, it intended words it used [such as "employee"] to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . It is inconceivable that Congress, when it passed the act, authorized the board to give to every word in the act whatever meaning it wished.

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[1] The Board itself has repeatedly rejected efforts to deviate from the long-standing joint-employer doctrine rooted in the text of the Act and in the common law of agency. For example, in *Roadway Package Sys., Inc. & Teamsters Local 63*, 326 NLRB 842 (1998), the Board declined to deviate from its well-established joint-employer test rooted in the common law of agency, finding, the "common law of agency is the standard to measure employee status [and] . . . the Board has] no authority to change it." *Id.* at 849. A decade later in 2002, the Board again declined to deviate from the current legal framework for joint-employers. *See, e.g., Airborne Freight Co.*, 338 NLRB at 597 n.1 (noting, "indirect control" test was "abandoned" two decades earlier, and refusing to "disturb settled law" by reverting back to such a test).

[2] Among other changes, the 1947 revisions narrowed the definition of "employee" to exclude independent contractors. This amendment was designed to overrule the Supreme Court's earlier decision in *NLRB* v. *Hearst Publications, Inc.* ("*Hearst*"), 322 U.S. 111 (1944), which disregarded common law principles of agency in favor of an analysis of "economic facts" to find that "independent contractors" could be treated as "employees" under the Act. *See, e.g.*, 61 Stat. 137–38 (1947), 29 U.S.C. § 152(3).

H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis added); *Allied Chem. & Alkali Workers, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167 (1971) (quoting the same report).

The 1947 amendments also narrowed the definition of "employer" to encompass only those persons who are "acting as an *agent* of an employer," 29 U.S.C. § 152(2) (emphasis added), rather than any individual "acting in the *interest* of any employer" as the statute previously read. This change was similarly intended to reinforce the applicability of agency law to the determination of who is an employer under the Act. *See, e.g.*, H.R. Rep. No. 245, at 11, 80th Congress, 1st Sess. (1947) (observing the modified definition "makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions"); H.R. Rep. No. 245, at 68; 93 Cong. Rec. 6654, at 6672 (1947) ("[n]ow[,] before the employer can be held responsible for a wrong to labor[,] the man who does the wrong must be specifically an agent or come within the technical definition of an agent").

Consistent with the Taft-Hartley Amendments, the Supreme Court has repeatedly instructed that common law principles of agency determine who is an employee, and consequently, who is an employer under the Act. *See, e.g., Town & Country, Elec., Inc.*, 516 U.S. at 90 (applying common law of agency to determine who is an "employee" within the meaning of Act); *Allied Chem.*, 404 U.S. at 168 ("1947 Taft-Hartley revision made clear that general agency principles could not be ignored in distinguishing 'employees' from independent contractors"); *United Ins. Co. of Am.*, 390 U.S. at 256–57 (utilizing common-law agency principles to distinguish between employee and independent contractor). *See also, e.g., Carbon Fuel Co.* v. *United Mine Workers of Am.*, 444 U.S. 212, 216–18 (1979) (applying "the common law of agency" to determine "whether any person is acting as an 'agent' of another person" under Labor Management Relations Act to determine liability of international union for "wildcat" strikes).

Simply put, Congress has unequivocally directed that the NLRB must rely upon common law agency principles in determining who is an employee and who is an employer, and the NLRB has no authority to deviate from this standard. *See, e.g., Chevron USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (an "agency[] must give effect to the unambiguously expressed intent of Congress"). The proposed departure from the long standing joint-employer framework would burden companies that are not employers with bargaining obligations, enmesh them in ever-widening industrial disputes and deprive them of the protections against secondary activity afforded under Section 8(b)(4) of the Act. Such an unwarranted change would also force non-employer entities to participate in collective bargaining where they have no control to set or negotiate terms and conditions of employment and would have no authority to remedy unfair labor practices, bringing multiple parties with widely disparate interests to the bargaining table, frustrating the purposes of the Act.

II. THE NEW, EXPANDED "INDIRECT CONTROL" TEST URGED BY THE BOARD'S GENERAL COUNSEL IMPERMISSIBLY DEVIATES FROM TRADITIONAL AGENCY PRINCIPLES AND EXCEEDS BOARD AUTHORITY

Under the General Counsel's proposed standard, an entity would be deemed an "employer" or "joint-employer" if it "exercised direct *or* indirect control over the working conditions, had the unexercised potential to control working conditions, or where "industrial realities" otherwise made it essential to meaningful collective bargaining." *See* GC *Amicus* at 2, 4–5, 16–17 (advocating what misleadingly is described as a return to the Board's "traditional" standard, making no distinction "between direct, indirect, and potential control over working conditions" and finding "joint employee status where 'industrial realities' make an entity essential for meaningful bargaining"). As a consequence of this broad, unbounded standard, a business could be deemed a joint-employer even though it freely contracts at arm's length only for the *ends* to be achieved at a given cost, not the *means* by which the ends are achieved, and notwithstanding that the business eschews any role in hiring, firing, directing employees, or determining the terms and conditions of their employment.

Such a drastic shift in the current law is manifestly unwarranted, ignores common law agency principles prescribed by Congress, and would stifle innovation in the marketplace. Without question, cost, efficiency, and quality are at the heart of every owner-contractor or contractor-subcontractor arrangement. The owner will seek out low-cost, highly efficient providers, and the subcontractor will seek to maximize economic gains under their contract. Similarly, franchisors will seek out effi-

cient high quality franchisees who can grow the business to maximize gains. Either party may refuse to enter into an agreement on the terms offered by the other. This is true in *every* owner-subcontractor agreement and may not be used as a basis to render one such entity as an employer absent other indicia of a traditional master-servant employment relationship unquestionably required under the NLRA. Even the imposition of a limit on costs related to a contract, such as the maximum amount of wages which the owner will reimburse under a cost-plus agreement, is "no different from the right of any commercial client to continue to accept, or to reject, a supplier of goods or services based on the consideration of price," which is not a sufficient basis to impute an employer relationship. *See, e.g., Hychem Constructors, Inc.*, 169 NLRB 274, 276 n.4 (1968) (rejecting argument that Texas Eastman's ability to approve any wage increase gives it a veto power over any collecting bargaining negotiations between contractor and its employees). As the Board held:

> "[w]hile a determination by the client to continue the business arrangement, because the price is favorable to him, might remotely benefit the supplier's workforce, the exercise of this right by the client would not establish an employment relationship between the client and the supplier's employees." *Id.*

Board precedent has rejected the contention that any time a subcontractor

> "has the ability to convince the contractor to renegotiate the terms of their contract, particularly if the subcontractor's cost are affected by collective bargaining, this means that the general contractor is the one having the *de facto* control over the subcontractor's labor relations,"

and has observed that,

> "if extended to its logical conclusion, [this] would mean that in virtually all contractor-subcontractor relationships, the two companies involved should necessarily be construed as joint employers whenever the employees of the subcontractor are unionized."

Airborne Freight Co., 338 NLRB at 606 (decision of the ALJ); *see also, e.g., TLI*, 271 NLRB at 799.

The very nature of free competition means that there is always some market force or entity making a demand on the price and terms of services. What the General Counsel seeks through adoption of a grossly expanded "joint-employer" standard is the right to negotiate how an owner runs its business, *not* how the subcontractor pays or manages its employees. However, by mandating that bargaining obligations attach *only* where employer status exists under common law agency principles, Congress has structured the Act to limit the expansion of industrial disputes in ever widening circles.

The "industrial realities" test articulated by Member Liebman[3] and reformulated by the General Counsel, implies an assessment of the degree of "economic dependence" in the owner-subcontractor relationship based on the Board's evaluation of the owner's relative economic power to set price and terms in its negotiations with the subcontractor, thereby exerting—in varying degrees—an "indirect" influence on wages, terms and conditions of employment which the subcontractor negotiates for its employees. Adoption of such a test will require a lengthy, fact-intensive, and often subjective inquiry into not only the relationship between the nominal joint-employers and the putative employees, but also the market relationship between the two purported employers. This would result in Board decisions turning, not on the common law of agency, but rather on an investigation of industry economics and the market for a subcontractor's services.

This new analytical framework would quickly devolve into an expensive and time-consuming war of economic experts involving a scrutiny of market forces, pricing structures, price elasticity, barriers to entry and alternatives to the subcontractor's services, all under the vague umbrella of "industrial realities." In the end, a putative employer's bargaining obligations under the Act would depend on an assessment of industry and market forces, rather than on the direct, immediate control required to establish an employer-employee relationship under the common law. Congress already has rejected such an approach *both* by demanding a common law agency analysis in determining employment status and by *specifically prohibiting* the NLRB from employing any individuals for economic analysis or from resur-

[3] There is an uncomfortable irony in Member Liebman's and the Board's new found advocacy for "meaningful collective bargaining" in *Airborne Freight Co.*, whereas such "meaningful collective bargaining" apparently was of little or no concern to the NLRB in *Management Training Corp.*, 317 NLRB 1355 (1995) which overturned a requirement of "meaningful collective bargaining" in *Res-Care, Inc.*, 280 NLRB 670 (1986). The only consistency between these polar positions is that in each instance the Board compelled collective bargaining without regard to who is in fact the employer.

recting the now, long defunct, Division of Economic Research. *See, e.g.*, 29 U.S.C. § 154(a); 93 Cong. Rec. 4136, at 4158 (1947). The Board's early penchant for regulation based on economic analysis from 1935 to 1940 by the soon-to-be discredited Division of Economic Research resulted in vigorous and outspoken opposition in Congress regularly from 1940 to 1947 when Congress once and for all capped its opposition to "regulation by economic analysis" by specifically prohibiting it in the Taft-Hartley Amendments.

The myriad and complexity of business relationships further underscores the impracticality and unwieldy character of such an inquiry. Manufacturers contract with a shipping company for distribution. Automakers strictly control prices and costs for their tier two and three suppliers. Companies utilize vendors to supply non-core services such as catering, janitorial and maintenance. General contractors routinely subcontract with a dozen or more subcontractors on a single building site. The opportunity to create multiple, unworkable bargaining obligations where the contracting party has no direct relationship with the terms and conditions of the subcontractor's employees is unbounded and inconsistent with the congressional purposes of the NLRA which were to remove the burdens and obstructions that were "impairing the efficiency, safety or operation of the instrumentalities of commerce." Such an untoward regime should be avoided at all costs.

CONCLUSION

Time and again Congress and the Supreme Court have directed that the Board must rely upon the common law of agency in making determinations with respect to who is an employee and who is an employer under the Act. The current joint-employer standard promotes stability and predictability in business relationships and collective bargaining which allows for corporate efficiency and innovation. Any modification to the longstanding principles which are grounded in the Act's text are unwarranted and will have deleterious consequences which are both extensive and far reaching.

The CHAIRMAN. Thank you very much, Mr. Babson. You were right on time, and I thank you for that.

Mr. Moore.

STATEMENT OF GERALD F. MOORE, FRANCHISE OWNER, THE LITTLE GYM, KNOXVILLE, TN

Mr. MOORE. Chairman Alexander, Ranking Senator Murray, and distinguished members of the committee, good morning. My name is Gerald Moore. I am the owner and operator of five The Little Gym franchise locations. I am appearing before you today on behalf of my business and the International Franchise Association, and I thank you for the opportunity to share our views on the joint employer issue.

I am a former school teacher and a Vietnam veteran. I volunteered for the U.S. Army in 1970 and I received the Meritorious Service Medal for my service, for which I'm very proud. I later worked for Ryder Systems, Inc. for nearly 30 years. When my family opened our first The Little Gym franchise location in Raleigh, NC in 1996, we took a huge financial risk. At the same time, we felt confident that if we executed our franchise successfully, we would be better off and create something we could pass along to our children. We later opened locations in Greensboro, NC; Mount Pleasant, Sc; Knoxville, TN; and Farragut, TN, and we are proud of the success we have enjoyed for the past 19 years.

The Little Gym is an experimental learning center focused on learning though physical and educational programs for young children. My business is truly a family business as I own my franchise locations with my wife and our two children. That is why franchising appealed to us in the first place; we were wanting something to do as a family. Quite honestly, I do not believe my family

could have successfully opened and operated a children's business on our own. The Little Gym International's guidance and support has made all the difference. We would not be where we are today without their business model.

That said, the franchisor does not run our business. The franchisor provides us with the brand name and the recognition that comes with it, as well as product standards to make sure that we provide the high-quality services and programs that our customers have come to expect from The Little Gym operations. We pay for these benefits in the form of a monthly royalty payment which is set by the contractual relationship we have agreed to in our franchise agreement with The Little Gym International, our franchisor.

The Little Gym International is not involved in the daily management of our gyms. For example, we are free to determine the staffing levels. We decide who to hire, we decide what to pay, and we decide what benefits to offer our employees. The examples like this could go on and on. Suffice it to say that The Little Gym International does not play any role in these types of business decisions.

The day-to-day operations and management of our business is ours and ours alone. I fear that this would change drastically if the National Labor Relations Board expands the current employer standard. If the NLRB deems franchisors liable for franchisee labor practices, franchisors will need to have increased control and more day-to-day involvement in small businesses like mine. Increased control could mean only one thing for me—less freedom and less autonomy to run my business as I see fit, a business that I purchased with my savings in order to provide an opportunity and security for my family. Our family business may no longer be our family's business.

We currently own the rights to a sixth location where we were planning to open another The Little Gym franchise. The uncertainty on this very issue has forced us to put our plans on hold. We are not at all comfortable with the idea of more franchisor involvement in our business, and we are not willing to put in the hard work to expand our business if it soon may no longer truly be ours.

This is an example of how the National Labor Relations Board's recent actions have already affected my business and resulted in fewer jobs in our community, and I think that's a shame.

While the new possibility of a broader definition of a joint employer has already impacted my family, I fear that the real impact will be felt down the road when other families are looking for their first franchising opportunity, as we did in the mid-1990s. Simply put, small business owners will be less attractive business partners for franchisors, and there can be no doubt that this will drastically reduce the opportunities for business ownership across the country.

Mr. Chairman, my family and I have worked incredibly hard to build our business for the last 19 years, giving up nights, weekends, and holidays. We ask that you take whatever steps possible to ensure that the current joint employer standard is maintained. Thank you.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF GERALD F. MOORE

Chairman Alexander, Ranking Member Murray, and distinguished members of the committee, my name is Gerald Moore. I am the owner and operator of five The Little Gym franchise locations. I am appearing before you today on behalf of my business and the International Franchise Association. Thank you for the opportunity to share our views on the joint employer issue.

I am a former school teacher. I volunteered for the U.S. Army in 1970 and I received the Meritorious Service Medal for my service. I later worked for Ryder Systems, Inc. for nearly 30 years. When my family opened our first The Little Gym franchise location in Raleigh, NC in 1996, we took a huge financial risk. At the same time, we felt confident if we executed our franchise successfully, we would be better off, and create something we could pass along to our kids. We later opened locations in Greensboro, NC; Mount Pleasant, SC; Knoxville, TN; and Farragut, TN, and are proud of the success we have had the past 19 years.

The Little Gym is an experimental learning center focused on learning though physical and educational programs for young children. Our mission is to help develop healthy, smart and socially adept children who can explore their own potential through our 3 Dimensional Learning Process and better understand and enjoy the world around them. We offer parent/child classes for children from 4 months to age 3, as well as a variety of sports, dance, music, gymnastics and other programs for children up to the age of 12.

My business is truly a family business. I co-own my franchise locations with my wife and our two children. That is why franchising appealed to us in the first place—it was something that we could do as a family. The Little Gym brand was a perfect fit for my family. I had management and operational experience, my son was in sales, and my wife and daughter were both educators. We knew that the combination of our skills and experiences with the proven The Little Gym brand would allow us to be successful. Quite honestly, I do not believe my family could have successfully opened and operated a children's business on our own. The Little Gym International's guidance and support has made all the difference to my family. We would not be where we are today without The Little Gym International's business model.

That said, The Little Gym International does not run our business. The Little Gym International as the franchisor provides us with the brand name and the recognition that comes with it. The Little Gym International provides us with product standards to make sure that we provide the high-quality services and programs that customers have come to expect from The Little Gym operation. We pay for these benefits in the form a monthly royalty payment, which is set by the contractual relationship we have agreed to in our franchise agreement with The Little Gym International, our franchisor.

We have an annual audit site visit with The Little Gym International to review brand and service standards and to help us grow our business. We also have monthly calls with a franchisor representative to update us on new programs or marketing strategies. The Little Gym International is not involved in the daily management of our gyms. For example, we are free to determine staffing levels for our gyms. We decide who to hire and what to pay. We decide who to discipline and who to discharge, as well as who to develop to take on additional responsibility. We decide what benefits to offer our employees. The examples could go on and on. The Little Gym International does not play any role in these types of business decisions.

The day-to-day operation and management of our business is ours and ours alone. I fear that this would drastically change if the National Labor Relations Board expands the current joint employer standard. I am here today to share my concerns and the concerns of franchisees across the country on this issue. In a recent survey of IFA members, 97 percent of franchise business respondents believe the expanded joint-employer standard would have a negative impact on their business, with 82 percent saying the impact would be "significant."

I am an independent business owner. Certainly, I reap the successes of my business but I am also responsible for its failures—and the liabilities that may come from such failures. As a small business owner, I work hard to manage risk and reduce liabilities where I can. For example, if (God forbid) one of my employees mistreated a child at one of my gyms, I would be responsible. I understood that was my responsibility when I purchased my business and, as a result, I make sure that my gyms are staffed with high-quality employees and that we maintain proper supervision over those employees at all times. I think we can all agree that to do otherwise—to turn a blind eye to this risk—would be foolish and bad for business.

An expanded joint employer standard, however, would mean that my franchisor would be jointly responsible for all of my employment-related liabilities. Just as I

try to manage risk and reduce liabilities for my business, The Little Gym International will need to do the same. If The Little Gym International is now also liable in the event an employee mistreats a child, won't The Little Gym International want to have a say in whom we hire and how we supervise them? If it would be foolish for me to turn a blind eye to this risk, it will be equally foolish for The Little Gym International to do the same. This will mean increased control and more day-to-day involvement by The Little Gym International. That can only mean one thing for me: less freedom and less autonomy to run my business as I see fit—a business that I purchased with my savings in order to provide opportunity and security for my family. Our family business will no longer be ours.

My family currently owns the rights to a sixth location where we were planning to open another The Little Gym franchise. The uncertainty on this very issue has forced us to put our plans on hold. We are not at all comfortable with the idea of more franchisor involvement in our business and we are not willing to put in the hard work to expand our business if it soon may no longer truly be ours. The National Labor Relations Board's recent actions have directly resulted in lost opportunity and income for my family and lost development and fewer jobs in our community. I think that is a terrible shame.

What's perhaps most disappointing about the NLRB's actions is the General Counsel's assertion in his *amicus brief* to the pending *Browning-Ferris* case that the Board should return to its pre-1984 "traditional" approach. The Board has never treated franchisees and franchisors as joint employers. In its 1968 *Southland* case, the Board carefully analyzed whether a 7-Eleven franchisee's use of the trade name and operational system made the franchisor a joint employer. In declining to find joint employment, the Board noted that the critical factor in determining whether joint employment exists is the control the franchisor exercises over the labor relations policy of the franchisee.

While the mere possibility of a broader definition of joint employer has already impacted my family, I fear that the real impact will be felt down the road when other families are looking for their first franchising opportunity, just as my family was in the mid-1990s. If franchisors are now on the hook for the liabilities of their franchisees, upstart entrepreneurs with limited assets will be passed over for well-established franchisees that can better protect the "deep pockets" of the franchisors. Simply put, small business owners will be less attractive business partners for franchisors and there can be no doubt that this will drastically reduce the opportunities for business ownership all across the country. Franchise businesses are expected to grow and create more jobs at a faster pace than the rest of the economy in 2015 for the fifth consecutive year. The expanded joint employer standard could put the brakes on what looks like a banner year of accelerated growth and job creation in the franchise sector.

I hope my testimony today has helped the committee understand how this issue impacts franchisees and those desiring to become franchisees. My family and I have worked incredibly hard to build our business over the past 19 years. I had hoped that this would continue to be my family's business long after I was gone. Instead, I am now contemplating the possibility that it could all disappear. I speak for myself and my family when I say please do not allow the National Labor Relations Board to take this all away. We urge the committee to take whatever steps possible to ensure that the current joint employer standard is maintained.

The CHAIRMAN. Thank you, Mr. Moore.

Mr. Sims.

STATEMENT OF JOHN SIMS IV, FRANCHISE OWNER, RAINBOW STATION, RICHMOND, VA

Mr. SIMS. Chairman Alexander, Ranking Member Murray, and distinguished members of the committee, thank you for inviting me to testify before you today.

My name is John Sims. I am an owner and operator of Rainbow Station at the Boulders, an early education center located in Richmond, VA. I am a small business owner, an entrepreneur and a franchisee. I appear today on behalf of franchise businesses to discuss my concerns regarding an expanded definition of joint employer and the very real threat to my business that a new joint employer standard brings.

My family and I moved to Richmond from northern Virginia nearly 2 years ago. My wife and I quit our secure jobs and poured our life savings into this business. We made this move so that our three young daughters—Ellie, age 8; Mary, who is 5; and Kirby, who is 3—could grow up close to their grandparents and the rest of our extended family. Prior to this move, my wife and I spent a great deal of time thinking about what type of job or business opportunity would be the best fit for our family in Richmond. We decided to explore the idea of purchasing an existing business. We considered both independent businesses and franchises.

We ultimately decided that a franchise opportunity would be the best fit for our family because it would allow me to be an independent business owner but still be able to work with a proven brand and business model.

In the summer of 2013, I purchased my Rainbow Station franchise. Rainbow Station is a child care and early education center committed to quality education and recreation programs designed to foster social, emotional, physical and cognitive development in children. Rainbow Station was the right fit for me given my education degree and prior work experience. We currently have 35 employees and have almost 200 children enrolled in our programs.

The franchising arrangement with the Rainbow Station Corporation is pretty simple. The franchisor provides the brand materials, including the trademarks and logos, curriculum, and some marketing materials. In all other aspects, I operate as an independent, stand-alone business, just like a non-franchise small business owner.

I have the autonomy to run my business as I see fit, including on matters such as staffing, labor costs, enrollment fees, vendor relationships, and other things. For example, I determine the staffing level for my business, I make all hiring decisions, and I determine what wage rates to offer. The franchisor has no role in this aspect of my business whatsoever. I am also solely responsible for determining what to charge for the various programs we offer.

My decisionmaking on all of these issues must take into account market forces in the local economy such as availability of qualified employees or the typical level of discretionary spending by local families with children.

Mr. Chairman, small businesses like mine play a valuable role in our economy. They provide entrepreneurial opportunities for people looking to better themselves and their families, create jobs, and grow local economies. Many small business opportunities exist because these local businesses can provide valuable services and other benefits to large corporations.

However, if large businesses are now liable for the employment decisions of their service providers, franchisees or other contractors, then the opportunities for small businesses are surely going to disappear. The small business community is bracing for the NLRB's decision in the forthcoming *Browning-Ferris* case. I'm not a lawyer, but it's no mystery where the NLRB is likely headed. In his *amicus brief* in the *Browning-Ferris* case, the NLRB General Counsel asserted that, "The Board should abandon its existing joint employer standard." If the General Counsel's new standard is adopted by the Board, franchisors would be joint employers over

franchisees whenever the franchisor exercises even indirect control. Thus, the NLRB would find joint employment even though franchisors such as mine play no role in employment practices.

This issue is not theoretical to me because my Rainbow Station location was previously owned by the franchisor and was not a franchisee-owned location. I believe that if a broader joint employer standard such as the one the NLRB is contemplating had been in place 2 years ago, there's a very good chance that Rainbow Station would have opted to maintain corporate ownership and they would not have franchised this location.

Quite frankly, if the franchisor is going to be responsible for the liabilities arising out of the operations of the business and oversight of the workforce, why would they hand over control to someone else? I think many businesses will feel this way, and opportunities for local business ownership will decline dramatically.

I know how fortunate I am to own my own business and be able to provide for my family. While the franchisor provides advice and support when I need it, I am the decisionmaker when it comes to my business. The success or failure of my business is essentially all on me, and that's why I love it. It would be a real shame to take these types of opportunities away from people like me.

Mr. Chairman, I strongly urge this committee to consider the devastating impact on all small business owners if the NLRB invents a new definition of joint employer. I ask you to take steps to preserve the current joint employer standard long into the future. Thank you.

[The prepared statement of Mr. Sims follows:]

PREPARED STATEMENT OF JOHN SIMS IV

Chairman Alexander, Ranking Member Murray, and distinguished members of the committee, thank you for the opportunity to testify before you today.

My name is John Sims. I am an owner and operator of Rainbow Station at the Boulders, an early education center located in Richmond, VA. I am a small business owner, an entrepreneur and a franchisee. I come before you today to discuss my concerns regarding an expanded definition of joint employer and the very real threat to my business that a new joint employer standard brings.

I am here today on behalf of my business because I am extremely troubled by recent events at the National Labor Relations Board related to the joint employer standard. I believe that unelected government officials are inventing a new definition of "joint employer" that may threaten the livelihoods of local business owners like me.

My family and I moved to Richmond from northern Virginia nearly 2 years ago. My wife and I made this move so that our three young daughters—Ellie (8), Mary (5) and Kirby (3)—could grow up close to their grandparents and the rest of our extended family. Prior to the move, I worked for a non-profit organization in northern Virginia managing parks and recreational facilities. I enjoyed my job and was hoping to find an opportunity in Richmond that would allow me to capitalize on my experience operating recreational facilities and also allow me to continue working with children. My wife and I spent a great deal of time thinking about what type of job or business opportunity would be the best fit for our family.

We decided to explore the idea of purchasing an existing business. We considered both independent businesses and franchises. We ultimately decided that a franchise opportunity would be the best fit for our family because it would allow me to be an independent business owner but still be able to work with a proven brand and business model.

In the summer of 2013, I purchased my Rainbow Station franchise. Rainbow Station is a child care and early education center committed to quality education and recreation programs designed to foster social, emotional, physical and cognitive development in children. We offer nursery school, pre-school and kindergarten programs as well as a before & after-school program for school-age children and a sum-

mer camp. I knew Rainbow Station was the right fit for me given my education degree and prior work experience. We currently have 35 employees and have almost 200 children enrolled in our programs.

The franchising arrangement with Rainbow Station is pretty simple. They provide the brand materials, including the trademarks and logos, curriculum, and some marketing materials. In all other respects, I operate as an independent stand-alone business, just like a non-franchise small business owner. I have the autonomy to run my business as I see fit, including on matters such as staffing, labor costs, enrollment fees, and vendor relationships, among others. For example, I determine the staffing level for my business, I make all the hiring decisions, and I determine what wage rates to offer. Rainbow Station does not have a role in this aspect of my business whatsoever. Similarly, I am solely responsible for determining what to charge for the various programs we offer. My decisionmaking on all of these issues must take into account market forces in the local economy such as availability of qualified employees or the typical level of discretionary spending by local families with children.

Small businesses like mine play a valuable role in our economy. They provide entrepreneurial opportunities for people looking to better themselves, create jobs and grow local economies. Many small business opportunities exist because these local businesses can provide valuable services and other benefits to larger corporations. However, if large businesses are now liable for the employment decisions of their service providers, franchisees, or other contractors, then the opportunities for small businesses are surely going to disappear.

The small business community is bracing for the NLRB's decision in the forthcoming *Browning-Ferris* case. I'm not a lawyer but it's no mystery where the NLRB is likely headed; The NLRB General Counsel asserts that "the Board should abandon its existing joint-employer standard." The General Counsel also asserts that companies may effectively control wages by controlling every other variable in the business. The General Counsel's new standard shifts the analysis away from the day-to-day control over employment conditions to operational control at the systemwide level. Under the new standard, franchisors would be joint employers whenever the franchisor exercises "indirect control" over the franchisee. The focus would be on "industrial realities" that make the franchisor a necessary party to meaningful collective bargaining. The NLRB would find joint employment even though the franchisor plays no role in hiring, firing, or directing the franchisee's employees.

My Rainbow Station location was previously owned by the franchisor and was not a franchisee-owned location. I believe that if a broader joint employer standard, such as the one NLRB is contemplating, had been in place 2 years ago there is a very good chance that Rainbow Station would have opted to maintain corporate ownership and they would not have franchised the location. Quite frankly, if Rainbow Station is going to be responsible for the liabilities arising out of the operation of the business and oversight of the workforce, why would they hand over control to someone else? I think many businesses will feel this way and opportunities for local business ownership will decline dramatically. I know how fortunate I am to own my own business and be able to provide for my family. While Rainbow Station provides advice and support when I need it, I am the decisionmaker when it comes to my business. The success or failure of my business is, essentially, all on me—and that is what I love about it. It would be a real shame to take these types of opportunities away from people like me.

Fortunately, 2 years ago the opportunity for small business ownership did exist and I am privileged to be a proud Rainbow Station owner. However, if the Labor Board radically changes the joint employer standard, I fear that my days as an autonomous business owner will be numbered. If my liabilities extend back to Rainbow Station as the franchisor, I have to assume that they are going to want a role in managing risks and protecting against those liabilities. Instead of occasionally providing me with guidance and support, Rainbow Station will be an active participant in the day-to-day operation of my business. They will, presumably, want a say in how many employees we use to run our business, who we hire, and what we pay. This level of franchisor involvement will be a complete reversal of the way the franchise relationship is intended to work. My freedom and autonomy—the entire reason I wanted to own my own business—will vanish. I am very worried about this possibility.

My wife and I have often talked about opening a second Rainbow Station location. However, the uncertainty as to what the future holds for franchisees and other small businesses has forced us to put that plan on hold. It simply does not make sense to try and grow our business at a time when we do not know what the future of our business will be. The uncertainty on this issue is hurting my family and many other families like mine who own and operate small businesses.

Mr. Chairman, I strongly urge this committee to consider the devastating impact on all small business owners if the NLRB invents a new definition of joint employer to the potential detriment of local businesses like mine. I ask you to take steps to ensure that the National Labor Relations Board cannot take away my livelihood now or in the future.

The CHAIRMAN. Thanks, Mr. Sims.

Mr. Secunda.

STATEMENT OF PAUL M. SECUNDA, J.D., PROFESSOR OF LAW AND DIRECTOR, LABOR AND EMPLOYMENT LAW PROGRAM, MARQUETTE UNIVERSITY LAW SCHOOL, MILWAUKEE, WI

Mr. SECUNDA. I would like to start by thanking the Chairman of the committee, Senator Alexander, Ranking Member Senator Murray, and distinguished members of the committee for this opportunity to testify on this important workplace law issue.

Employment relationships are dynamic, and the mix of jobs and relationships in our economy shifts over time. The Board is simply reexamining its joint employer standard to ensure that it properly effectuates the purposes of the Act. As the agency charged with administering the NLRA, the NLRB must ensure that it is fulfilling its statutory mandate by protecting employees' rights to engage in concerted activity and to bargain collectively with their employers.

The Board has not yet decided what actions to take, and there is nothing extraordinary or unusual about the adjudicatory process that the Board is following in reexamining its joint employer test.

The Board has continuously reconsidered and adjusted its joint employer standard based on experience, and that's consistent with the express purpose of the Act, to ensure industrial peace through the process of collective bargaining over terms and conditions of employment. Industrial peace can only be fostered if employees have an opportunity to collectively bargain with all parties that meaningfully control workplace terms and conditions. The Board is simply fulfilling the responsibility that the U.S. Supreme Court gave it in the case of *NLRB* v. *Weingarten* in 1975, that it adapt the National Labor Relations Act to changing patterns of industrial life.

These evolving realities include the rapid expansion of precarious low-wage work and subcontracting that have fractured the 21st century workplace. Between 1990 and 2008, employment in temp services doubled, from 1.1 million to 2.3 million. Some of the largest staffing agencies and many of the fast-food industries are some of the most profitable in the country. The 10 largest franchisees in 2012 employed over 2.25 million workers and earned more than $7.4 billion in profits.

There are now more than 3.5 million fast-food workers, and more than 75 percent of them work in franchised outlets. Numerous studies indicate that under-employment and poverty-inducing earnings are the norm. The social costs of these conditions are borne by U.S. taxpayers who shell out about $3.8 billion a year to cover the costs of public benefits received by fast-food workers employed at the top 10 fast-food franchisees. These trends are playing out in a number of joint employer cases, including the one that was recently covered in the media concerning McDonald's. The case is at the beginning of the adjudicatory process. It is too early to specu-

late on what the administrative law judges and the Board may decide in these cases.

Importantly, the decision will be specific to the facts of that case and will not be binding on all franchisor-franchisee relationships. To be clear and so there is no misunderstanding here, no party has ever proposed a universal rule that all franchisors and temp agencies from now on will be considered joint employers. Cases will turn on their particular facts.

Several parties have also pointed out in their *amicus briefs* in *Browning-Ferris* that the current Board approach is unduly restrictive and is inconsistent with other Federal labor and employment laws, and this is true. The Fair Labor Standards Act, Title 7 of the Civil Rights Act of 1964, ERISA, the Family Medical Leave Act, all these statutes, in determining whether more than one employer should be treated as a joint employer of the employee, look at the actual relationship between the employer and the employees rather than the reasons for the relationship, and they all consider the relevant terms and conditions of employment and ask whether the two employers share meaningful aspects of the employment relationship. The fact-specific nature of the joint employer inquiry is well illustrated by the Board's *Browning-Ferris* case, which I hope to receive some questions on.

In conclusion, the Board's decision to take a hard look at its joint employer standard is reasonable and practical as a means of considering whether the current test is effectuating the National Labor Relations Act purpose of enabling workers to organize and collectively bargain with their employers to improve their lot in the workplace. Thank you very much.

[The prepared statement of Mr. Secunda follows:]

PREPARED STATEMENT OF PAUL M. SECUNDA, J.D.

I would like to start by thanking the Chairman of the committee, Senator Alexander, Ranking Member, Senator Murray, and the other members of the committee for this opportunity to testify on this important workplace law issue. My testimony will focus on: the process by which the joint employer doctrine is currently being re-examined by the National Labor Relations Board; the importance of this question given the underlying purposes of the National Labor Relations Act; the similarity of the joint employer test under the NLRA to how this same issue has been treated under related Federal labor and employment law statutes; and finally to stress to the committee that nothing has been decided yet in the underlying case, *Browning-Ferris Industries*, Case 32–RC–109684 (or for that matter in the pending complaint against McDonalds). The Board is following its usual and ordinary adjudicatory process to ascertain whether employees in certain economic structures are able to properly exercise their organizational, collective bargaining, and concerted activity rights under the Act. The fact-intensive, complex nature of the joint employer question in *Browning-Ferris* will help me underscore for the committee the need for a case-by-case approach which considers a number of relevant factors concerning who controls important terms and condition of employment.

Employment relationships are dynamic, and the mix of jobs and relationships in our economy shifts over time. The Board is simply re-examining its joint employer standard to ensure that it properly effectuates the purposes of the Act. As the agency charged with administering the NLRA, the NLRB must ensure that it is fulfilling its statutory mandate by protecting employees' rights to engage in concerted activity and to bargain collectively with their employers. To be clear, and to re-state what I have already said once: the Board has not yet decided what actions to take. In the *Browning-Ferris* case, the Board has done what it has done many times before—it has asked for *amicus briefs* from all interested parties based on the facts of the case. The Board has expressed a desire to hear from as many voices as possible as it deliberates over this significant workplace issue. There is nothing extraordinary or unusual about the adjudicatory process that the Board is following in re-exam-

ining its joint employer test. The Board, unlike other Federal agencies, generally does not engage in rulemaking and instead develops the "common law of the shop" through fact-intensive investigations of complex, individual cases.

As the Board makes its decision in *Browning-Ferris*, it will not be writing on a blank slate. The joint employer test under the National Labor Relations Act was set forth by the U.S. Supreme Court over 50 years ago in *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). There, the question, broadly stated, was whether one employer "possesses sufficient control over the work of the employees to qualify as a "joint employer" with [the actual employer]." In other words, joint employment occurs when "one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." *NLRB* v. *Browning-Ferris of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982).

The Board has continuously reconsidered and adjusted its joint employer standard based on experience. Starting in 1984, for example, the Board provided an additional gloss on this joint employer test in the cases of *Laerco Transportation*, 269 NLRB 324 (1984) and *TLI, Inc.*, 271 NLRB 798 (1984). In these cases, the Board stated that it would find joint employment, "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment." In particular, an employer must "meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Laerco*, 269 NLRB at 325. In 2002, the Board restricted the joint employer test by stating: "The essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate." *Airborne Freight Co.*, 338 NLRB 597, 597 n.1 (2002). Several parties in the *Browning-Ferris* case have urged the Board to reconsider these recent tightening of the joint employer test and return to the Board's traditional approach consistent with Supreme Court case law.

The express purpose of the Act is to ensure industrial peace through the process of collective bargaining over terms and conditions of employment. Industrial peace can only be fostered if employees have an opportunity to collective bargain with all parties that have meaningful control workplace terms and conditions. Therefore, by re-examining its joint employer test, the Board is simply fulfilling the responsibility that the U.S. Supreme Court has entrusted to it: "adapt[ing] the [National Labor Relations Act] to changing patterns of industrial life." *NLRB* v. *Weingarten*, 420 U.S. 251, 266 (1975). *Browning-Ferris* does not represent the Board acting in an unusual or activist way in asking whether it should revise its joint employer test in any manner in light of evolving economic realities.

These evolving realities include the rapid expansion of precarious low-wage work and subcontracting that have fractured the 21st century workplace. Temporary staffing and franchising account for a disproportionate share of the economic growth following the recession of 2008. Between 1990 and 2008, employment in the temp services industry doubled, from 1.1 million to 2.3 million and temporary employees now represent a record share of the workforce at 2 percent. By 2013, staffing services generated $109 billion in sales and 2.8 million temp positions. In the first quarter of 2014, True Blue (formerly Labor Ready), the largest U.S. staffing agency, had a profit of $120 million on gross revenues of $453 million. Franchising is equally profitable as evidenced by the fast-food sector of the restaurant industry where in 2012 the 10 largest franchises employed over 2.25 million workers and earned more than $7.4 billion in profits.

There are more than 3.5 million fast-food workers and more than 75 per cent of them work in franchised outlets. Numerous studies indicate that under-employment and poverty-inducing earnings are the norms. Households that include an employed, fast-food worker are four times as likely to live below the Federal poverty level. The social costs of these conditions are born by U.S. taxpayers who shell out about $3.8 billion per year to cover the cost of public benefits received by fast-food workers employed at the top 10 fast-food franchises.

These trends are playing out in the other joint employer case receiving much recent media coverage, the McDonald's case. There, the NLRB's General Counsel, after an investigation, has issued several unfair labor practice complaints against McDonald's on grounds that McDonald's is a joint employer with its franchisees under the particular facts and circumstances presented in the case. Complaints have only recently been issued, and the cases are now before administrative law judges for hearings on the complaints. The cases are at the beginning of the adjudicatory process. It is too early to speculate on what the administrative law judges, and what the Board, may decide in the cases. Importantly, the decision will be specific to the facts of that case, and will not be binding on all franchisor-franchisee relationships. To be clear, and so there is no misunderstanding on this point: no

party has even proposed a universal rule that all franchisors and temp agencies from now on will be considered joint employers. Cases will turn on their particular facts.

Consistent with the standards set by the U.S. Supreme Court initially in 1964 and reiterated by the Board in 1984, joint employer doctrine under the NLRA turns on whether two separate employers "share or codetermine" terms and conditions of employment that "meaningfully affect" the employment relationship. A less restrictive definition might, for example, not define the "essential" terms and conditions of employment, might not limit such terms to only hiring, firing, and discipline," and would not require "direct and immediate control" over the employee, as the Board first adopted in 2002.

Several parties have also pointed out to the Board that its current, unduly restrictive approach definition is inconsistent with the joint employer test under other Federal labor and employment law statues including: the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Employee Retirement Income Security Act/Internal Revenue Code, and the Family and Medical Leave Act. All these statutes, in determining whether more than one employer should be treated as joint employers of the employee look at the "actual relationship between the employer and [the employees], rather than the reasons for the relationship." *Redichs Interstate, Inc.*, 255 NLRB 1073, 1077 (1980). None attempts to define "essential terms of employment," "direct and immediate control over employees," or limit the analysis to ultimate employment decisions like hiring and firing. They consider *all* relevant terms and conditions of employment and ask whether the two employers control the meaningful aspects of the employment relationship.

The fact-specific nature of the joint-employer inquiry is well illustrated by the *Browning-Ferris* case itself. The record in that case reflects that Browning-Ferris operates a recycling facility in Milpitas, CA, where it directly employs approximately 60 workers at the facility, including loader operators, equipment operators, forklift operators, sort line equipment operators, spotters, and one sorter. These employees are all represented by Sanitary Truck Drivers and Helpers Local 350. Browning-Ferris also contracts with Leadpoint to supply mostly sorters for the facility and maintains that Leadpoint is these employees' sole employer. Leadpoint employs approximately 240 full-time, part-time, and on-call employees who work within the plant and are not part of any union.

Browning-Ferris maintains the entire physical plant, including the conveyors, screens, and motors that are used for the sorting operation. Browning-Ferris possesses and exercises significant authority over work hours, work days, and headcount. It sets the facility's hours of operation, including the start and end times of each of its three shifts, and controls the speed of the line and thus the speed at which the sorters must work.

Under the restrictive test the Board currently uses for determining joint employer status, Browning Ferris will have to establish that it has direct and immediate control over the Leadpoint workers' terms and conditions of employment. Frankly, it seems to me that this is a situation where Browning Ferris could and should be found a joint employer under the Board's current test because it exercises such substantial control over the Leadpoint workers' employment. The economic realities are such that Browning-Ferris is in charge, and if the Leadpoint workers are to unionize and bargain over their terms and conditions of employment, Browning-Ferris really needs to be at the table in order for meaningful bargaining to take place. The fact that an NLRB regional director applied the Board's current test and found Browning Ferris not to be a joint employer demonstrates why the General Counsel is right to argue that the Board should re-examine and adjust its test to better reflect economic realities.

Again, the point I want to emphasize to the committee is that under any joint employer test, the actual decision is incredibly fact-intensive. Many employers working together, in franchise and temp agency arrangements and other relationships, will not be considered joint employers. Where the facts show that both employers meaningfully affect the terms of workers' employment, they may be found to be joint employers with joint responsibilities to bargain with the workers and their representative over terms of employment.

In conclusion, the Board's decision to take a hard look at its joint employer standard is reasonable and practical as a means of considering whether the current test is effectuating the National Labor Relations Act's purpose of enabling workers to organize and collectively bargain with their employers to improve their lot in the workplace. By considering whether its existing joint employer standard is consistent with Congress' intent in light of changing employment practices, the Board is acting responsibly and well within its statutory authority. I ask that the committee allow

the administrative process to run its normal course before any conclusions about the impact of such a decision are reached.

I look forward to your questions. Thank you.

The CHAIRMAN. Thank you, Mr. Secunda.

We will begin a 5-minute round of questioning, and I'll go first. Then Senator Murray, Senator Burr and Senator Franken.

Mr. Moore, you indicated you were thinking about a sixth site, and you slowed down on that. Mr. Sims, you indicated the franchisor used to own your site before.

That's really the nub of it, isn't it, with franchisees and franchisors? Seven-hundred-thousand franchisees in the country. You're two of them. You and your families risked your savings. You are independent business people. You're making your way up the ladder.

There's another alternative to that, and that is Ruby Tuesday can either have a franchisee or it can own the store. The same with your company. The same with any of these companies. Mr. Moore, what do you think would be the danger of an expanded joint employer standard? What do you think would happen? Do you think it's likely that your franchisor or other franchisors might decide in the future to own more of their own stores and there would be fewer opportunities for people like the Moore family and the Sims family?

Mr. MOORE. Yes, I agree with that premise. I have actually worked for other large corporations, and I understand the positions that they take. The fact is that a lot of corporations have to report to their stockholders and their stakeholders. As an independent business owner, we don't have to do that. What we have in our hands is ours to determine how we're going to handle it, how we're going to run the business.

If this decision were to go forward, having the franchisor be responsible and getting involved in our business would be no different than working for someone. I may as well go back to work for the large corporations because it's taken all the controls, all the reasons that I wanted to be an owner to begin with, it takes all that away from us. Those people who go into the business and take the risks want that independence. We've been to the corporate level, and that's not what we like.

The CHAIRMAN. A suggestion was made that an expanded joint employer standard might help the little guy. It sounds to me like an expanded standard might make the franchisee—the little guy compared to the big corporation—less independent, less autonomous, less able to determine your own life.

Mr. MOORE. Yes, sir. I would agree with that.

The CHAIRMAN. Mr. Babson, we've talked a lot about franchisees and franchisors, but the possibility of an expanded joint employer standard applies to lots of other people, including contractors and subcontractors. Mr. Secunda seems to say, well, they shouldn't worry very much about it, this is just a single case. If you were a subcontractor of, say, an auto manufacturer in Tennessee, would you worry at all about the NLRB proceedings going on today?

Mr. BABSON. I would. I do agree with you, Senator. I think there would be something to worry about, not only in the auto industry where we have Tier 2 and Tier 3 suppliers that the auto industry

has relied upon to be efficient, effective, to provide product in the necessary time, and to be competitive in a very competitive world market, but we see that also in the construction industry. If we had a building that was being built down here on Pennsylvania Avenue, there's going to be a general contractor. There will be 10, 11, or 12 subcontractors. I've worked and advised many clients who are contractors at the Kennedy Space Center and at the Johnson Space Center.

We work very, very hard, and with all due respect, these are not necessarily lower paid workers. We work very, very hard to keep the relationships separate, and the subcontractors with whom I've worked, whether it's in the construction industry, auto suppliers, at the Space Center, they all take very, very seriously their own responsibility for recruiting their own employees, training them, setting their terms and conditions, and overseeing them. That is their calling card. That's how they succeed.

The CHAIRMAN. It seems to me, based on what I've heard, that an expanded joint employer standard is likely to mean more company-owned stores, more company-owned services, or more company interference in a business like Mr. Moore's or Mr. Sims', where you become an effective manager of a big corporation's outlet, which is something that is not what you really wanted to do to begin with when you left a big corporation to go start your own company.

Thank you all very much for being here. My time is up.

Senator Murray.

Senator MURRAY. Thank you, Mr. Chairman.

Mr. Secunda, in your testimony you touched on the changes in the labor market. Can you talk a little bit about what those trends have meant for workers, in particular our fast-food franchise workers?

Mr. SECUNDA. Absolutely, Senator Murray. When the standards that exist today were adopted for the joint employer definition in 1984, we were looking at a very different economy than we have today in 2015. As I mentioned, the number of temp workers has skyrocketed. The number of fast-food workers has skyrocketed. Although we have seen rebound in our economy, many people have noted that the lower-income workers are not sharing in that prosperity, and it's not surprising because with more franchisees and more workers being employed by fast-food companies and temping agencies, they're making very low wages. I read in the paper today that the average wage of the McDonald's worker is about $8.34. If you do the calculations, almost no one in any part of the country can live on those types of wages.

Senator MURRAY. Thank you. We've heard a lot of predictions that if, in fact, the NLRB through this process does decide to alter its joint employer standard, it will result in the end of franchising models as we know it. Can you comment on that?

Mr. SECUNDA. Absolutely, Senator. I want to emphasize what I emphasized in my remarks, which is that the actual decision of whether any franchisor-franchisee relationship amounts to a joint employer test is incredibly fact-intensive. Many employers working together in franchise, in temp agency arrangements and other relationships will not be considered joint employers. Where the facts

show that both employers meaningfully affect the terms of workers' employment, they may be found to be joint employers with joint responsibilities to bargain with the workers and the representatives over terms of employment.

Senator MURRAY. From what you have heard about Rainbow Station and Little Gym today, are these the kinds of business arrangements where the NLRB is likely to find joint employer status?

Mr. SECUNDA. Absolutely not, Senator. These gentlemen have spoken eloquently about the independent control that they maintain over their businesses. Those are the facts of the situation, and if the joint employer test were applied, they would not be found to be joint employers with their franchisor.

Senator MURRAY. As you talked about in your testimony, the NLRB looks at these cases individually. They wouldn't just broadly say we made this decision and it covers every franchise. They would look at the facts of the case. Can you describe that?

Mr. SECUNDA. Absolutely. The NLRB is unusual when it comes to Federal agencies because it doesn't generally engage in what's called rulemaking; that is, regulations. It actually develops the law through adjudication of individual cases, and they do it that way because of the changing circumstances all the time of the workplace. By going case by case, they can move more incrementally and decide what's appropriate at that point in time for that particular doctrine.

Senator MURRAY. OK. One other question here. I've heard some of our colleagues who oppose raising the minimum wage. They argue that low-wage workers should take responsibility for their own earning power. How does this current narrow joint-employer standard prevent employees from doing just that?

Mr. SECUNDA. Many of these employees who work for fast-food companies and temp agencies are operating under a service agreement between the franchisor and the franchisee. In fact, if the local franchisee wants to raise the wages, many times they're not able to. They are told they can't because if they do it at one franchisee, then all franchisees will start raising wages and that will cut into the profits of the corporate franchisor.

It's a big impediment. I think the reason that we have more under-employed people today than we've ever had in our history is because of the growth of many of these types of models.

Senator MURRAY. OK. Thank you very much.

Thank you, Mr. Chairman.

Mr. BABSON. Senator Murray, may I respond just very briefly to what Mr. Secunda said?

Senator MURRAY. Absolutely. I have 20 seconds left. Go for it.

Mr. BABSON. Just very quickly, two points, it seems to me, need to be made. The General Counsel of the NLRB in the brief to which Mr. Secunda referred in *Browning-Ferris*, and in the *McDonald's* case, alleges, among other things, that this should be the test: unexercised potential to control working conditions, unexercised potential to control working conditions.

Senator MURRAY. In those two specific cases.

Mr. BABSON. That's correct. That is the suggestion—that, that be the test, and I would suggest that everybody present in this room satisfies that test, unexercised potential to control working condi-

tions. This has not been supported in the jurisprudence of the NLRA.

Senator MURRAY. Isn't that what the NLRB has to look at and make that determination that hasn't been made?

Mr. BABSON. This is the second point, Senator Murray, if I may, and with all due respect to Mr. Secunda, he understands that it is true that the Board members—and I agree—in an appropriate case, have the obligation to mold the statute, within the bounds of the statute. I contend that this proposed definition is outside the bounds of the statute. Apart from the Board members' decision one way or the other, this represents the standard—that I mentioned that the General Counsel is arguing for—that represents the enforcement policy of the NLRB today. There are going to be many small businesses who are going to be ensnared in this allegation before the Board makes its final decision.

Senator MURRAY. I appreciate that, but I really would like to hear from Mr. Secunda, and I'm out of time. If you could at least give it to us in writing why you believe that that doesn't apply broadly and that they do have the power to make these decisions within the law.

The CHAIRMAN. Thank you, Senator Murray.

Senator Burr.

STATEMENT OF SENATOR BURR

Senator BURR. Mr. Moore, Mr. Sims, I know neither one of you are fast food or temp employers, but Mr. Secunda said you can't raise or lower wages. Can you make that decision, Mr. Moore, in your operation and for your employees?

Mr. MOORE. Yes, sir.

Senator BURR. Mr. Sims, can you do it?

Mr. SIMS. Yes, sir.

Senator BURR. OK. Mr. Babson, if I understood you—and I'm going to make it simple, but you correct me if I'm wrong—you said that the statute of the law is very clear, that the NLRB does not have this authority to change the definition. Is that accurate?

Mr. BABSON. This Congress and the Supreme Court have made clear on numerous occasions that the terms "employer" and "employee" as used in the National Labor Relations Act are bounded by the common-law definitions. Before you can become a joint employer, you have to be an employer and you have to have exercised some control over those terms and conditions of employment. Most of the franchisors that I've represented understand this demarcation and they abide by it.

I'll just say in 1947, when the Taft-Hartley Congress amended this statute, they said in the House report, in frustration over the NLRB's continuing to expand the definitions beyond the common law, they have a phrase that has stuck in my mind, and I certainly remembered it when I was at the NLRB. The report says that apparently everybody in the United States knows who is an employer and who is an employee except the members of the National Labor Relations Board.

Senator BURR. Mr. Secunda, are you saying he's wrong?

Mr. SECUNDA. I would never say that about a former Board member.

[Laughter.]

I would say it's incomplete. I would say in the 1940s, the definition of who was an employee and who was an employer was pretty straightforward indeed. Unfortunately, in 2015 in our current economy, it's anything but clear.

Senator BURR. Are you saying that—and you've made the phrase that things change over time. Does the statute of law change over time without congressional involvement?

Mr. SECUNDA. The statute itself, Senator Burr, does not change. However, the Congress has——

Senator BURR. The interpretation of what that statute means?

Mr. SECUNDA. Right. The Congress has delegated to the National Labor Relations Board the authority to interpret and to administer the National Labor Relations Act. What has happened is that both the Congress, as Mr. Babson has said, and the Supreme Court of the United States have told us what to consider when looking at who is an employer, and there is a multi-factor test——

Senator BURR. Do you think there's a gray area in what we've told them to look at?

Mr. SECUNDA. With all due respect, yes. I think the National Labor Relations Act has not been meaningfully amended in 65 years, and so it's pretty much, as we like to say, ossified. It doesn't necessarily speak to the current realities.

Senator BURR. One of the things we look at for the need to change statute or law is whether it's applicable.

Mr. SECUNDA. Yes.

Senator BURR. Clearly Congress has felt that it was clear, it was applicable to today. Congress has reemphasized, as the Supreme Court has, clarifications of what the NLRB should look at. Is the only reason that you're suggesting that they do this is because it makes it easier to organize workers if, in fact, they carry this out? Is that what you're after?

Mr. SECUNDA. First of all, the National Labor Relations Act, in its purpose—it says its purpose is to promote collective bargaining. That's not a bad thing, right? Collective bargaining brings power to workers.

Senator BURR. Aren't you saying that this change is so that that happens easier?

Mr. SECUNDA. Not that it happens easier but that it can happen at all, because if you can't bring the members who are in charge of the workplace to the bargaining table, you can't change anything. If people have meaningful control of——

Senator BURR. You'd re-interpret the statute of the law. You'd re-interpret what congressional intent, specific intent was to say, yes, but we're going to do this anyway. Is that the way it works?

Mr. SECUNDA. It doesn't work that way.

Senator BURR. That's what you're suggesting.

Mr. SECUNDA. I am not, with all due respect. The Supreme Court has said that the intent of Congress in defining employers can be looked at by considering a number of factors, most recently in the 1989 case of *CCNV* v. *Reid*, which was concerning who is an employer under the Copyright Act, but it applies here as the common-law test. We look at a number of things. We look at staffing. We look at who decides how many people should work on a given day,

who brings their tools and implements, how do they get paid, do they get a W–2, do they get a 1099. There are about 12 or 13 different factors, and all I'm suggesting is those factors might apply differently in today's economic reality.

Senator BURR. I thank all of you.

Mr. BABSON. Senator, could I respond to that?

Senator BURR. Certainly.

Mr. BABSON. With regard to the purposes, very briefly, I do not disagree that a purpose of this statute is to promote collective bargaining. It's very clear, if you go back and read the purposes in the preamble, this is not a zero-sum game. Senator Wagner and that Congress were clear that the reason that workers and the way that workers succeed is if business succeeds, and the reason for this statute is because we had work stoppages that were interfering with commerce, and the references to "efficient and successful business enterprise" is made no less than five times in the preamble to this statute. When business succeeds, workers will succeed and share in that. You can read this morning in the newspaper about what General Motors has done with its union workers. When business succeeds, workers will succeed. That's what collective bargaining is about.

The CHAIRMAN. We're over by about a minute. Mr. Secunda, I'll give you a little time to comment on that, if you'd like, and then we'll go to Senator Franken.

Mr. SECUNDA. I completely agree with Mr. Babson. Workers do well when employers do well, and employers do well when workers do well. General Motors is giving a big bonus to its workers in today's paper because they have recovered as a company. Those are unionized workers. To the point that on construction sites those workers make good money, it's because they're unionized.

The CHAIRMAN. Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman.

Professor Secunda, in your testimony you say that the current standard under the NLRA is "inconsistent with the joint employer test under other Federal labor and employment statutes," including the Fair Labor Standards Act and civil rights statutes.

If I'm understanding that correctly, that means that if a worker at McDonald's doesn't get paid minimum wage, then McDonald's, the corporation, would be responsible as a joint employer because it exerts enough control over that worker.

Mr. SECUNDA. That is correct, Senator.

Senator FRANKEN. OK. But, if a worker at a McDonald's is fired for trying to organize to bargain for better wages or hours because McDonald's corporate wants to discourage organizing, is McDonald's corporate off the hook?

Mr. SECUNDA. Currently, yes.

Senator FRANKEN. OK. Well, that doesn't make a lot of sense to me and, frankly, it just doesn't seem fair.

Again, Professor Secunda, some are concerned that the National Labor Relations Board's consideration of changes to the joint employer standard is unusual or would be a violation of the common-law definition of what an employer is. Yet, as you point out in your

testimony, the Supreme Court has entrusted the Board "the responsibility to adapt the National Labor Relations Act, or the Act, to changing patterns of industrial life." Based on your expertise, the Board is following its usual procedures to fulfill its responsibilities under the NLRA.

Can you address these concerns and explain how the Board's process in a review of the joint employer standard is not only within their right but is required, given the changes that we have seen in the workplace where the result is often to deprive workers of their rights and push more of the risks of dangerous low-wage work onto workers?

Mr. SECUNDA. Sure. In the 1960s, the U.S. Supreme Court decided a case called *Boire* v. *Greyhound*. That was the case that basically set up the joint employer standard under the NLRA, and it talked about you can be a joint employer if, like the other employer, you have meaningful control over the workplace. That was the standard until about 1984. Two cases were decided that year, the *TLI* case and the *Laerco* case. They added some additional glosses, but the test was still pretty much the same, who co-determines what happens in the workplace, who has control. The emphasis has always been on control.

They changed it a little bit, to be frank, because over 20 years the workplace had changed from 1964 to 1984. I might point out, that was a Republican board.

The next time it was changed, it was changed in 2002 in a case called *Airborne Express*. Again, a Republican board added an additional gloss, this time requiring direct and immediate control over the workplace. It was at that point in 2002 that the National Labor Relations Act no longer mirrored its sister and brother statutes such as the FLSA, OSHA, ERISA, the Family Medical Leave Act.

What we see now occurring from 2002 to 2015 is another attempt to try to adapt the Act, using the common-law definition, as we always have in this area of the law, to the current realities in the workplace which, as I mentioned to Senator Murray, include a vast expansion of precarious workers working for fast-food companies, temporary agencies, and other forms of subcontractors.

Senator FRANKEN. Mr. Sims, first of all, you said that you went into your business so your children could be close to their grandparents. Is that right?

Mr. SIMS. Yes, sir.

Senator FRANKEN. As a grandfather, I so commend that and think that should be actually written into law.

[Laughter.]

In your testimony you say that you have pretty significant autonomy to run your business as you see fit, and that your franchisor provides just mainly branding, marketing and curriculum materials, and advice. Does your franchisor track your sales or your labor costs, and do they continually monitor your compliance with their standards?

Mr. SIMS. They do, sir. They do monitor our revenues. The royalties that I pay to them are based on a percentage of our gross revenues. As far as the standards, they do visit our location twice a year, unannounced basically, to check on the standards. Other than

that, they have no control over the hiring or pay or anything like that of the workers themselves.

Senator FRANKEN. Because they have no control over the hiring—and I'm out of time, so I'll just try to draw a conclusion from that. It seems to me that since this would be determined on a case-by-case basis, that in many ways this might cause the franchisor, so that it doesn't get caught under this joint employer status, to give you even more autonomy, and that would be a good outcome for a small business owner like you. That's just an observation.

I'm over my time.

Mr. BABSON. Senator Franken.

The CHAIRMAN. Mr. Babson, we'll give every witness the chance at the end, if we have time, to say anything that's left unsaid. We've got several Senators who are here, and I'd like for them to have a full chance to use their 5 minutes.

Senator Cassidy.

STATEMENT OF SENATOR CASSIDY

Senator CASSIDY. Mr. Secunda, building off what Senator Franken just said, I am struck that some people are just born entrepreneurs. I mean, my gosh, they roll out of bed, they start a business. There are others who are not quite so gifted. I'm struck that the genius of the franchisee-franchisor relationship is that you can take someone who doesn't necessarily have the intuitions of an entrepreneur, but by wrapping around the services of the franchisor—I feel a little bit like Flip Wilson—that they are able to become entrepreneurs.

They don't have the ability to come up with the software that would track employees' hours, and they probably don't have the legal status to define compliance with all the kind of myriad of laws required. Because it's wrap-around, that person who otherwise is not born with the intuition develops it.

By what you're describing, the more wrap-around it becomes, the more likely the franchisor would be ruled a dual employer. Is that a fair statement?

Mr. SECUNDA. It's a fair statement, and if you don't mind me saying, the *Browning-Ferris* case, the case that is actually in front of the Board right now, provides kind of the facts that you would tend to see that would lead——

Senator CASSIDY. I know. As I read your testimony, it seemed self-evident.

Mr. SECUNDA. Yes.

Senator CASSIDY. It almost seems prejudicial against the person who needs to be more dependent upon the franchisor. If a company, if a franchisor is going to be more proactive, how do I bring in people who traditionally have not been small business people? Really, you're opening yourself up to this sort of ruling against you. Would you accept that as fair?

Mr. SECUNDA. I would say that most of the small business franchisors that I know or have met are more like the two gentlemen to the right of me, which is to say they're very successful, they're independent——

Senator CASSIDY. I accept that. When I look at a Subway owner who moved to Louisiana, who moved here from Africa, and he

might be quite entrepreneurial but he's not like these gentlemen, who kind of come from a tradition, I suspect, of "'This is how you do it, son," and he's an incredibly successful fast-food franchisee. I do have a sense that there is a wrap-around—this is how you do it, this is how you limit labor costs because if you don't, you will go out of business. Again, his franchisor now seems to be opening himself up to that involvement in your case because he is providing these wrap-around services. Again, I think that's an intuitive and fair statement, correct?

Mr. SECUNDA. I think when you're talking about fast-food companies like Subway, you're absolutely correct.

Senator CASSIDY. In that case, it almost seems like you're encouraging that company not to provide those wrap-around services, that you're saying to that company, listen, if you're trying to cultivate this set of entrepreneurs, boom, the NLRB is going to hammer you. It almost seems discouraging for them to provide the support they need to provide for folks who never dreamed of having a business to become a successful business owner. Would you dispute that?

Mr. SECUNDA. I would disagree with that, Senator.

Senator CASSIDY. Why?

Mr. SECUNDA. Because when we're talking about a franchisee like someone who owns a Subway store, we're talking about someone who has to run their business in a way to be profitable, but it doesn't give them the right, if they treat their workers unfairly, to——

Senator CASSIDY. You define treating them unfairly as just paying them about minimum wage and limiting the number of hours they work.

Mr. SECUNDA. I think they should have a right to have a voice in the workplace if they and their fellow employees would like to organize, and the only way they can organize is by——

Senator CASSIDY. You have two systems. You have, one, a set of franchisees who are able to run it on their own, and therefore are going to be immune to this, and another set who really need a lot more support from the franchisor, otherwise they will not be successful. If you've got the kind of native ability or the father and mother who told you how to do so, then, by golly, you'll be immune from this. If you need that wrap-around support, again, NLRB is going to insert themselves in your business. That seems inherently unfair to those who are a little less advantaged and more dependent upon a franchisor providing that wrap-around service.

Mr. SECUNDA. The NLRB would actually apply equally to an independent franchisor——

Senator CASSIDY. No, because these gentlemen are able to disassociate themselves more from the franchisor, can make themselves immune to this—you just told me it wouldn't be a——

Mr. SECUNDA. They wouldn't be a joint employer, but they would be an employer.

Senator CASSIDY. Yes, but they would not be a joint employer. Therefore, they would be, again, exempt from what you're telling me is going to come down from NLRB.

Mr. SECUNDA. Under other NLRB doctrine they would still be subject to organizing campaigns and other forms of collective bargaining.

Senator CASSIDY. They would be less vulnerable, if you will, if you consider this a vulnerability.

Mr. SECUNDA. I don't think so.

Senator CASSIDY. You just told me that these two fellows—I'm sorry, I don't mean to be rude—that these two fellows probably wouldn't be covered by the decision that's coming down now.

Mr. SECUNDA. Not this decision, but there are other decisions that they would be covered by.

Senator CASSIDY. Just to finish up this point. The Subway owner who now is vulnerable because Subway can be considered a joint employer, these two fellows are as equally vulnerable, if you will, to be unionized as the one who is a joint employer relationship?

Mr. SECUNDA. It's not just unionization. It's any kind of concerted activity.

Senator CASSIDY. Just answer my question. They're equally likely to be unionized under NLRB doctrine, if you will, or rulings"

Mr. SECUNDA. If employees so choose that's what they want.

Senator CASSIDY. It seems the whole point of this is that it's easier to get collective bargaining if you go with the mother ship, if you will, McDonald's or Subway, than if you go with the individual. That's the whole point of this, correct?

Mr. SECUNDA. No. It's about making sure that the people are at the table who control the terms and conditions of employment so if you're unhappy with them, you can bargain with the person who can change them.

The CHAIRMAN. We're running out of——

Senator CASSIDY. I'm out of time. I'm not sure I came to a conclusion, but I yield back.

The CHAIRMAN. Thank you, Senator Cassidy.

Senator Warren.

STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you, Mr. Chairman.

Historically, if an employer violated the legal rights of its workers through, say, an illegal firing, the employer was on the hook for damages. Today, though, some big companies have figured out they can hide behind a complex arrangement like subcontracts and franchises to dodge their legal responsibilities toward their workers.

Here's how it works. The big parent company may functionally control every tiny detail of what the workers do, including how much they get paid, how they're trained, and when they get bathroom breaks. When, for example, an employee doesn't get paid legally required overtime, the big company steps back and dumps all the responsibility and the costs on the franchise owner even if the franchise owner was just doing what the big company forced him to do.

For decades, going back to the 1960s and affirmed by both the Supreme Court and the NLRB, the law has been clear that there is some sort of joint employer test to determine when, for example, a parent company is really in charge of franchise employees. No

one disputes that such an obligation exists. Instead, this dispute today is really about how much control is enough to hold a parent company responsible for what happens to employees in its franchises.

Is that right, Mr. Babson?

Mr. BABSON. I think not.

Senator WARREN. You don't think this is a fact question that we're disputing here and that the underlying law has been clear for decades?

Mr. BABSON. With respect, Senator, I think your premise is misplaced. I have been representing, with the exception of my service at the NLRB, for most of my career I've been representing employers in these matters, and I will tell you during my service at the NLRB I found that in the overwhelming majority of cases, both employers and unions were trying to do the right thing.

Senator WARREN. I'm sorry, that was not my question, Mr. Babson. My question was——

Mr. BABSON. Your premise was—I'm sorry, Senator. I apologize. Sorry.

Senator WARREN. My question was are we all clear on the law? There is an obligation, when the employer has sufficient control, when the franchisor has sufficient control, then we have employees to whom they will be responsible and can be held legally responsible, and that the dispute we're having today is solely over the question of what the facts are that trigger that.

Mr. BABSON. That's correct.

Senator WARREN. Thank you.

Mr. BABSON. One of the things that troubled me about what Mr. Secunda said earlier about McDonald's, I don't know how he can say so blithely in response to Senator Franken that McDonald's is responsible——

Senator WARREN. Thank you, Mr. Babson.

Mr. BABSON. I don't know what the facts are, and I don't think he does either.

Senator WARREN. I just wanted to establish what I thought was a pretty straightforward rule of law that I think everyone agrees with, and I'm glad to hear that you agree. Then let's look at the facts. You raised the question of the facts.

McDonald's requires franchise owners to install software on their computers that collects data on a daily basis on when each employee, each and every one of them, clocks in, when each employee clocks out, and how long it takes each employee to fill a customer's order.

Domino's Pizza literally tracks the delivery times of each and every employee and decides which ones, employee by employee, meet Domino's test.

Mr. Babson, in your view, is it clear that none of this is enough to raise even a factual question about whether the company is in control, and that the NLRB can't even ask that question based on those facts?

Mr. BABSON. Of course not. I've been practicing law too long, Senator, to tell you that there's not a question. That's why the complaint is issued. It's my understanding that the General Counsel not only has been arguing for a new test of this unexercised poten-

tial, but it is my understanding, and I believe the record will show, that the General Counsel was arguing even under the present test that McDonald's satisfies the employer——

Senator WARREN. Thank you, Mr. Babson. The question I am simply trying to drive at is whether or not there are enough facts here that the NLRB should be called on to rule about whether or not there is joint responsibility.

Mr. Secunda, how do you see that?

Mr. SECUNDA. Senator Warren, clearly there is enough here under the existing test, the common-law test, to look at that fact question. Unlike Mr. Babson, of course, with all due respect, this is not outside the statutory authority in any way of the NLRB.

Senator WARREN. OK, and let me just ask—I think you raised this point earlier—is the current NLRB test consistent with how joint employment relationships are determined under other major labor and employment statutes?

Mr. SECUNDA. The current test is not. The one that was developed in 2002 under the Airborne case requires direct and immediate control. There is no such language in any other labor and employment statute when talking about common-law control over employees.

Senator WARREN. The NLRB has been unduly restrictive in this area.

Thank you very much, Mr. Chairman. I appreciate it, and I appreciate the extra time.

The CHAIRMAN. Thank you, Senator Warren.

Senator Isakson.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Mr. Chairman, I'd like to ask unanimous consent that a letter dated February 4, 2015 from the Asian American Hotel Owners Association be admitted for the record.

The CHAIRMAN. It will be.

[The information referred to may be found in Additional Material.]

Senator ISAKSON. Thank you, Mr. Chairman.

I have deep respect for the Senator from Massachusetts, but I want to take issue with the premise of her last question, which was for years American businesses found ways to avoid responsibility; i.e., franchising was one of the things that she mentioned. I'm not a franchisee and never was one. I ran a business, a sub-S corporation business, but we had independent contractors.

I think franchising started out as an opportunity for a business to expand and grow a brand and a product and a service, and an opportunity for the middle class to own a piece of it that they never could own if they had to do it as a big business. In fact, there are a lot of people today in Congress talking about the middle class and how we've got to look out for the middle class. If you take away the ability or the incentives for corporations to franchise or in other ways to offer their opportunity to middle America, you're going to make the big guys bigger, and the small guys are going to be out of business.

Mr. Moore, I would assume that would be true. Do you think so?

Mr. MOORE. I would, yes.

Senator ISAKSON. Your business is a sub-S or a C corp?

Mr. MOORE. I'm sorry?

Senator ISAKSON. You're a sub-S or a C corp?

Mr. MOORE. We're sub-S.

Senator ISAKSON. Most businesses or franchises are sub-S. Am I correct?

Mr. MOORE. I think so.

Senator ISAKSON. If you took the thinking behind this rule potential and plot it to the IRS, why wouldn't the IRS say, well, since McDonald's is a C corp, and they pay withholding, and they pay Social Security taxes on a quarterly basis, unlike what you do as an independent contractor, everybody who's got a franchise is a franchisee and McDonald's now has to do the same thing McDonald's does in terms of tax filings and withholding? Wouldn't that be an actual extrapolation of the same rule, just a different application?

Mr. MOORE. I could see that happening, yes.

Senator ISAKSON. If you did that, it would make franchising almost impossible because it would take away the benefits of a small entrepreneur from being able to start a small business and grow it using a brand name that was established by a major corporation. Am I correct?

Mr. MOORE. Yes, sir.

Senator ISAKSON. Mr. Babson, the definition of "employer" and "employee" under Taft-Hartley was passed by the Congress of the United States, correct?

Mr. BABSON. Yes, sir.

Senator ISAKSON. It was not written by an unelected employee of the National Labor Relations Board. Is that correct?

Mr. BABSON. Yes, sir.

Senator ISAKSON. I think that's the important thing. If this is a legitimate debate for Ms. Warren and I to have, and the other members of the Senate, it ought to be on the floor of the U.S. Senate in a piece of legislation. It ought not be defending ourselves against a ruling by an attorney working in a department of the Federal Government, and I think that's my main point on this issue. I don't argue with there may be points we ought to look at, but I don't think it should be dictated by the NLRB attorneys. I think we should decide as the Congress of the United States, just like we did in Taft-Hartley, what the definitions are.

Senator Warren, you wanted to say something. Since I mentioned your name, I should at least let you respond.

Senator WARREN. That's very kind. The only thing I'd say, then, is should we go back to the standard as it was before 1984, the standard as it was described in the Supreme Court in 1968, which was an "all the relevant facts" standard? It's the NLRB that actually changed the standard, tightened it, and put us where we are today. If we hadn't had interpretations from the NLRB that shifted it over time, I think we'd be fine with the original interpretation of congressional intent by the NLRB. Let's go there. That's all we're asking for.

Senator ISAKSON. You may be correct. My only point is that congressional intent ought to be determined on the floor of the U.S.

Senate or the U.S. House, not in some office building down the street on Connecticut Avenue.

Mr. Chairman, I appreciate the time. Thank you.

The CHAIRMAN. Thank you, Senator Isakson, Senator Warren.

Senator Scott.

STATEMENT OF SENATOR SCOTT

Senator SCOTT. Thank you, sir.

I'd ask a question, just going back to Senator Warren's point, of Mr. Babson, because I actually have owned a franchise. The conversation that we're having seems to be inconsistent with the experience that I had.

When we talk about the desire of McDonald's or Domino's to track the progress of the activities of a franchisee, what they're tracking is a system that creates a higher and more profitable corporation. They're not hiring the employees. They're not responsible for the employees' activities. They're not responsible for which employees are chosen. Is that accurate?

Mr. BABSON. I'm not familiar with the—all I really wanted to say, and again very respectfully to Senator Warren, in response to the question is, unlike Mr. Secunda, I'm not willing here today, based on bits and pieces of information, to make a conclusion that McDonald's is a joint employer with its franchisees. I can tell you during the time that I've worked for McDonald's franchisees, McDonald's scrupulously avoided becoming a joint employer by not getting involved in these very items.

All I really wanted to say is that I'm not willing to make the same judgment.

The second thing, Senator, that I think needs to be said is that the issue isn't whether or not the Board's test was correct or not in 1984 when the Board arguably tightened a rule, or whether it even applied the rule correctly. The test, and I think the concern of this committee, rightly so, is whether a standard as open and untethered as unexercised potential control of working conditions, or looking at economic relationships, again as Senator Isakson pointed out—in 1947 the Congress was very clear. They were so upset in 1947 that the NLRB had embarked on economic analysis, on looking at the economic relationships between parties and determining unfair labor practices, that they put a specific provision in the statute, section 4(a), that prohibits the NLRB from engaging in the very kind of economic analysis that the General Counsel is now urging.

Senator SCOTT. Thank you, sir.

Mr. Moore, you're a franchisee, I understand.

Mr. MOORE. That's correct. Yes, sir.

Senator SCOTT. There's a part of your franchisee experience that really confuses me, even as a franchisee, I understand that you have a location in Mt. Pleasant, SC?

Mr. MOORE. That's correct, yes.

Senator SCOTT. Yet you live in another State.

Mr. MOORE. That's correct.

Senator SCOTT. Have you ever been to Mt. Pleasant, SC? Because you would want to live in Mt. Pleasant.

Mr. MOORE. Actually, you should know that I lived in South Carolina in the early 1970s and enjoyed it very much.

Senator SCOTT. Yes, sir. So you were once wise. This is good, this is good.

[Laughter.]

Mr. MOORE. Thank you.

Senator SCOTT. I would recommend that you come back home.

Just let me ask you a question. Your relationship with your franchisor, do they hire your employees?

Mr. MOORE. No, sir.

Senator SCOTT. When I owned my insurance agency, AllState Insurance Agency—God bless the "Good Hands" people—the fact of the matter is Allstate—I think we're on the same page finally here. This is good news for me.

[Laughter.]

Or maybe not good for me, actually.

They never came into my office and interviewed a single employee. They never told me that I had to hire anyone. Those decisions were mine. We had processes in place for profitability that were important to the business system and the continuation of the brand that I worked under. The responsibility for employees was totally and specifically mine. Has that been your experience?

Mr. MOORE. Yes, sir. That's been the experience in all States that I've worked.

Senator SCOTT. Two questions for you, one on labor and the other one on what you do as a franchisor. Mr. Moore, how can we expect businesses to grow and innovation to flourish if the Board is simultaneously shortening the timeframe for union elections down to as few as 10 days, allowing micro-unions in the workplace, and altering the definition of "joint employer"?

Mr. MOORE. I'm really not prepared to address anything relative to the union. We've never experienced that in any of our operations, so I don't know that I could speak to that. I've heard some interesting conversations today about the unions and so forth, but our interest primarily has been the control of our business. That's what we're here for today, and that's what I'm concerned about.

Senator SCOTT. A question for you, though, with the few seconds I have left, before you get into this question. In addition to your relationship with the franchisor, do you contract out for any additional services, such as janitorial, landscaping, or others where you could potentially find yourself in the position as a joint employer?

Mr. MOORE. No, sir.

Senator SCOTT. Good. OK.

Mr. Babson, I only have a few seconds left.

Mr. BABSON. I was just going to say very briefly in response to your question, I do think, Senator, that this is a cause for concern, the shortening of the time and eliminating the opportunity for campaigning, when we have the Supreme Court, liberal justices in the Supreme Court saying as recently as the *Brown* case that in this area, full and open debate on this issue of representation is important and essential; when we have a recent decision like the Purple Communications case in which the NLRB has essentially said that an employer's email systems must be turned over for organizing, I

think that raises constitutional concerns; and now with the joint employer issue, it seems to me this is a triple-headed attack.

It is true the statute is intended to encourage collective bargaining. It's not intended to guarantee it.

Senator SCOTT. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Scott.

We have a vote at 11:30. What I'd like to do is ask the witnesses if you have one last word, and by that I'm suggesting a sentence or two, that you'd like us to remember. Mr. Secunda, that will give you the last word. Then we'll see what Senator Murray has to say in closing remarks, and then we'll conclude the hearing. I thank Senator Warren and Senator Franken and Senator Scott for being here.

Mr. Babson, any last word for us?

Mr. BABSON. Just very briefly, Mr. Chairman, I believe that this is not a zero-sum game. I've been involved in collective bargaining for a long time. I believe that collective bargaining works, but it works best when we have successful, efficient, effective business, and organizers and employees who are free to choose to organize or not.

The CHAIRMAN. Mr. Moore.

Mr. MOORE. First of all, I'd like to thank you for the opportunity to be here and listen to the debate. I guess the only thing that I would be interested in, I heard the comment earlier, it would really be nice, I think something that's so critical to our business and the independence we enjoy is that it would really be nice to see that this would be settled in Congress and not by a Board that's been appointed.

The CHAIRMAN. Thank you.

Mr. Sims.

Mr. SIMS. I'd like to thank you for the opportunity first to testify today. My final point that I would like to make is that giving the franchisor less control would give no brand protection to the brand, which I believe would hurt consumers and would hurt me as a small franchisee. If the franchise can't protect its own brand, I think it's bad for business altogether. That's my comment.

The CHAIRMAN. Mr. Secunda.

Mr. SECUNDA. The economy is changing. The Board needs to re-evaluate the economy based on those changes. It's the responsible thing to do. Nothing has been done yet. It's a fact-intensive process, and let the NLRB, which has been charged with this process, do what it's supposed to do.

The CHAIRMAN. Thank you, sir.

Senator Murray.

Senator MURRAY. Thank you very much, Mr. Chairman. Thank you to all of our witnesses today. I really appreciate it.

As Mr. Babson said, collective bargaining works, and I think that's the question before the NLRB today, which is whether or not it works under today's working conditions where if you are a McDonald's employee, there is no one to bargain with. That's the question that they're looking at.

Clearly, with the two witnesses today, the facts of those cases would be extremely different looking at the NLRB. But that's not me. I'm not an attorney, and they would make those decisions.

I think it is important to think about what Mr. Secunda just said. The workplace has changed, so there is nowhere for McDonald's employees to be able to go to say we need better working conditions, or is there a way for us to work together to get better working conditions. I think that is a relevant question for them, and we will see, through a very long process, where they come out at the end of this.

I appreciate the hearing today and look forward to future discussions.

The CHAIRMAN. Thank you, Senator Murray.

I think it's correct that if the employees of a franchisee wanted to organize, they have every right to organize under the National Labor Relations Act. They have that right today under current law.

We thank you for coming. This has been very helpful and it's been a good mix of views and well stated and good participation by the Senators.

I used to be on the board of a large restaurant company, Ruby Tuesdays. It wasn't very big when I was on the board. They had six restaurants. It wasn't making any money at all. Now I think it has about 800. I've watched it over the years, and I've watched the difference between a company-owned store and a franchise store, and I see that difference. If the result of decisions that expand the joint employer standard is to make the franchisees mere managers of their store, that's going to be depriving people like Mr. Moore and Mr. Sims of a great American opportunity. If the result is to cause Ruby Tuesdays and auto plants in our State to bring in-house more services, the big guys will get bigger and the medium and small size guys will have less opportunities.

I'll be watching this very carefully. I think we all will as the Senate, and we have different points of view. That's why we're all here.

The hearing record will remain open for 10 days. Members may submit additional information and questions for the record within that time if they would like.

Our next hearing on labor matters will be next Wednesday on the NLRB's new ambush rule.

Thank you for being here.

The committee will stand adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF THE AMERICAN HOTEL & LODGING ASSOCIATION (AH&LA)

On behalf of the American Hotel & Lodging Association (AH&LA), the sole national association representing all sectors and stakeholders in the U.S. lodging industry, including owners, REITs, chains, franchisees, management companies, independent properties, suppliers, and State associations, we thank Chairman Lamar Alexander and Ranking Member Patty Murray for the opportunity to submit a statement for the record for the U.S. Senate Committee on Health, Education, Labor, and Pensions hearing entitled, "Who's the boss? The Joint Employer Standard and Business Ownership." We appreciate the committee's attention to this critical issue facing the hospitality industry.

The lodging industry is one of the Nation's largest employers. With nearly 2 million employees in cities and towns across the country, it generates $155.5 billion in annual sales from 4.9 million guestrooms at 52,529 properties nationally. It's particularly important to note that this industry is comprised largely of small businesses with more than 55 percent of hotels having 75 rooms or less.

Our industry's strong growth, sales, and employment base are key reasons that lodging has helped lead our Nation's economic recovery with 52 steady months of growth. The lodging industry is a valuable contributor to the local and national economy, creating well-paying jobs and career opportunities for millions of people. Hoteliers strive each day to make sure those opportunities continue to grow. We are concerned, however, that recent and pending decisions from the National Labor Relations Board (NLRB) could jeopardize growth within the lodging sector, particularly in relation to the franchised segment of the industry which makes upwards of 80 percent of the more than 52,000 lodging properties across the country.

We appreciate the committee's interest in expected changes to the NLRB's joint employer standard. Recent actions by the government indicate changes to the standard are both likely and imminent, including the NLRB's May 12, 2014, announcement (the Notice and Invitation to file Briefs in *Browning-Ferris Industries*) that it is considering adopting a new joint employer standard, the NLRB's General Counsel Richard Griffin's June 26, 2014, brief in *Browning-Ferris Industries* recommending changes to the joint employer standard, and Griffin's announcement in December 2014 that he issued complaints against McDonald's USA for the actions of its franchisees. For over 30 years, the franchisor/franchisee relationship has been based on the fundamental understanding that franchisors and franchisees are not joint employers, because they do not exercise direct control over the same employee's responsibilities and conditions of employment. Overturning this long understood standard will put the over 4 million employees within the hospitality industry at risk.

The NLRB's General Counsel advocates for a change to the standard that simply fails to recognize that independent owners of franchised hotel properties are small business entrepreneurs. These local small business owners and leaders of their communities are the epitome of the American dream—pouring their life savings into building a business from the ground up. While these local business owners and entrepreneurs may pay a hefty "brand" fee to own a franchised property, they are the ones doing the hiring and firing, handling all personnel matters, setting the schedule, and conducting employee reviews; all the while trying to turn a profit and hopefully create more jobs. Independently owned, franchised hotels have a contractual licensing agreement with their franchisors, but they are neither an agent of the franchisor nor an employee of the franchisor. They are independent businessmen and women and carry the authority and responsibility that comes with that role. The franchisor exercises no direct control over personnel issues at any of their franchised properties.

Moreover, changes to the joint-employer standard could drastically alter thousands of contractual agreements already in effect between franchisors and franchisees. If a franchisor were to be held liable for the actions taken by one of their franchisees, then the business relationship and the contracts that govern that relationship would have to be wholly revisited. In its most basic terms, the franchisor licenses and protects its brand, while the franchisee owns and operates a location of that brand as a licensee. The contractual relationship between the franchisor and franchisee does not extend to the H.R. and personnel policies implemented at each individual location.

The General Counsel's recommended changes to the joint employer will serve only to destroy the franchisor/franchisee relationship as it currently exists and, thus, deprive thousands of small business entrepreneurs from starting locally owned and operated businesses and creating new jobs. At the same time, it would negate thou-

sands of contractual relationships putting many more thousands of existing jobs at risk. This will serve only to erode the American dream of starting and growing a small business and create a disincentive for future job creators to create locally owned and operated businesses. AH&LA strongly urges the committee to protect the current joint employer standard and reject efforts by the NLRB and its General Counsel to drastically alter the franchisor/franchisee relationship as currently constituted.

ASIAN AMERICAN HOTEL OWNERS ASSOCIATION,
FEBRUARY 4, 2015.

Hon. JOHNNY ISAKSON,
U.S. Senate,
131 Russell Senate Office Building,
Washington, DC 20510.

Dear Senator Isakson: We are writing on behalf of the Asian American Hotel Owners Association (AAHOA). As you may know, AAHOA is based in Atlanta, GA, and represents more than 14,000 small business owners nationwide. Our members own more than 40 percent of all hotels in the United States and employ nearly 600,000 workers, accounting for over $9.4 billion in annual payroll. As small business owners, our members consistently contribute to the economy through tourism, real estate development, job creation and community investment.

We understand that the Senate Committee on Health, Education, Labor, and Pensions will hold a hearing entitled, "Who's the Boss? The 'Joint Employer' Standard and Business Ownership," this week. We strongly urge you and your colleagues to work to preserve the current definition of joint employer status, as any alteration in the current regime would adversely impact small businesses across the country.

Nearly 70 percent of the over two million guest rooms owned by AAHOA members are located in franchised properties. The franchise business model has been essential in creating entrepreneurship opportunities for our members, who are nearly all first and second generation Americans. We fear the prospects for business ownership would be significantly limited if franchising were no longer available to AAHOA members.

The franchising model in the lodging industry can provide considerable benefits to franchisees and in many markets, affiliating with a nationally recognized brand can be the difference in determining whether or not a hotel can succeed. Moreover, the franchising model succeeds for hoteliers because of the distinct responsibilities of franchisees and franchisors.

Hotelier-franchisees are responsible for identifying a suitable market, applying for a franchise license, securing financing, purchasing land, acquiring insurance, establishing agreements with contractors, passing health and safety inspections, setting prices, determining staffing needs, understanding local laws and regulations, undertaking all of the financial risk, and running the daily operations of the business.

Conversely, hotel franchisors' responsibilities include granting franchise licenses, providing guidelines for construction, interior and exterior design, conducting national marketing campaigns, developing training for management, furnishing software and services such as point of sales systems and reservation portals, and generally offering guidance to ensure consistency of brand quality.

Typically, franchisors also charge a fee upwards of $50,000 for use of a brand name, or "flag," as it is known in the industry, and monthly royalties of around 15 percent of the gross revenues of the business. The net profits earned by the business belong to the hotel owner.

As hoteliers, we have come to depend on the franchise model as the most advantageous means to small business ownership. Consequently, we are deeply concerned that the NLRB's efforts to expand the definition of joint employer status will transfer control of small businesses from independent hotel owners and operators to large corporations. This loss of control will have devastating effects on employers, employees and the lodging industry. This expanded definition intimated by the NLRB would compel franchisors to take an active role in staffing decisions due to the potential for liability. Franchisees, including the majority of AAHOA members, would lose independence in decisionmaking and may effectively become employees of the franchisor.

Currently, it is the hotel owner and operator who controls the day-to-day operations of the property, including staffing decisions. Hoteliers exclusively establish working conditions, staffing needs, wages, promotions, benefits, schedules, evaluation metrics, raises and disciplinary procedures. Further, once the license agreement is signed, interactions with franchisors are fairly limited. Discussions usually in-

volve the status of maintenance and renovations, compliance with laws and regulations, and availability of technology that can improve efficiency—generally, the topics focus on how to ensure a hotel property can continue to maintain the standards of quality that customers come to expect from a specific brand. Franchisors do not provide input on staffing decisions and certainly do not comment on specific employees.

The new direction for joint employer status suggested by the NLRB, attributing liability for franchisees' employment decisions onto franchisors, will cause franchisors to exert control over the operations of the respective hotel properties in an effort to prevent legal action. Franchisors would begin to dictate policies on staffing decisions and hoteliers would be compelled to comply. Once this occurs, hoteliers would become the *de facto* employee of the franchisor, because they would be forced to follow someone else's directives.

A new, essentially coerced partnership arrangement between franchisees and franchisors that would arise based on a new joint employer standard would devastate the industry, because the interests of both parties are particularly distinct. As franchisees, our interests are to ensure our individual properties are as successful as possible. That means growing, maintaining and developing a dedicated workforce. As hotel operators, intimately involved in the daily functions of the hotel, we know our staff members personally and understand their unique importance to the business. It is important to remember, most franchisors are public companies with different goals and motives than small business owners. As a result, franchisors value expenditures and investments differently than we do and our employees and staffs may suffer if new standards impose a new management structure.

For example, under a new joint employer regime, there are easily conceivable circumstances where a disagreement on employment decisions exist between the franchisee and franchisor. At such an impasse, the franchisee may have to capitulate to the franchisor's judgment. Franchisors may also insist on reviewing or approving promotion criteria, wage increases, benefits, schedules and other staffing decisions. It would be extremely harmful to the business for a third party with a limited understanding of the culture of the specific property to encroach on the employer-employee relationship. The franchisor and franchisee relationship is certainly not without its frictions as a result of some conflicting interests, and oversight of this nature would only add strain to the relationship.

A result of a more intrusive relationship caused by a new joint employer standard, hoteliers would lose the equity they have built in their businesses and for no other reason than the extreme decision of an unelected bureaucrat in Washington, DC.

Further, an added role for franchisors may also cause them to raise franchising fees and royalties, or demand to participate in the net profits of the hotel. These outcomes are unsustainable for the lodging industry and frankly threaten to undo the entrepreneurial success of AAHOA members. Ultimately, if a new joint employer standard is adopted, AAHOA members would be discouraged to grow their businesses, create new employees or invest in their local communities.

Expanding joint employer status would collapse the franchising model and extinguish aspirations of business ownership. Consequently, many good American jobs would be lost, or never created, because entrepreneurs do not want to simply manage some else's hotel.

We strongly urge you to consider the tremendously adverse impacts on franchisees and workers when deliberating policy proposals associated with the definition of a "joint employer."

Respectfully,

PRATIK PATEL,
Chairman.

JIMMY PATEL,
Vice Chairman.

BRUCE PATEL,
Treasurer.

BHAVESH PATEL,
Secretary

CHIP ROGERS,
Interim President.

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
WASHINGTON, DC 20001,
February 4, 2015.

Hon. LAMAR ALEXANDER, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20515.

Hon. PATTY MURRAY, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20515.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I am writing in regards to Thursday's full committee hearing, *Who's the Boss? The "Joint Employer" Standard and Business Ownership*. We applaud the committee for exploring this issue, which is of great concern to ABC members.

On May 12, 2014, the National Labor Relations Board (NLRB or Board) issued an invitation to the public to file *amicus* briefs in the *Browning Ferris Industries* case, on whether the Board should revisit its 30-year-old joint employer standard. The unprecedented changes the Board is considering would redefine who qualifies as a "joint employer" under the National Labor Relations Act, potentially imposing unnecessary barriers to and burdens on the contractor and subcontractor relationships throughout the construction industry. Contractors may find themselves vulnerable to increased liability making them less likely to hire subcontractors, most of whom are small businesses, to work on projects.

The NLRB under the Obama administration has continually issued radical decisions and rules threatening small business. The possibility of overturning decades of standards that have worked for both the contractor and the subcontractor is yet another example.

Again, we thank you for exploring this important issue and look forward to working with Congress to protect hard working ABC members and the businesses they have built.

Sincerely,

GEOFFREY BURR,
Vice President, Government Affairs.

CHAMBER OF COMMERCE,
WASHINGTON, DC 20062,
February 12, 2015.

Hon. LAMAR ALEXANDER, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20515.

DEAR CHAIRMAN ALEXANDER: The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates this opportunity to provide a statement for the record as part of the committee's February 5, 2015 hearing entitled "Who's the Boss? The 'Joint Employer' Standard and Business Ownership." The purpose of this letter is to provide you with a summary of our members' concerns regarding the National Labor Relations Board's efforts to overturn its long-standing "joint employer" standard.

The National Labor Relations Act is a vital law which is designed to strike a balance between the rights of workers, employers and unions. Unfortunately, over the last few years, the Board has upset this delicate balance by overturning decades of precedent and pursuing one-sided regulatory initiatives. As detailed below, the Board's recent efforts to overturn its joint employer standard is simply the latest example of this radical policy shift. Consequently, we wish to thank you for holding a hearing on this important subject in particular and making NLRB oversight a priority. We look forward to working with you and other members of the committee on these issues in the coming months.

I. SUMMARY

The National Labor Relations Board ("NLRB" or "Board") is attempting to redefine what it means to be an employer. Through two separate vehicles, the Board

and its General Counsel are attempting to upend the Board's longstanding "joint employer" standard. This is a complicated but important issue that will have a significant impact on Chamber members and the business community in general.[1]

While the Board's recent joint employer allegations involving McDonald's have received much of the attention, a change in the joint employer standard would have the potential to extend far beyond the circumstances of those cases, and threatens to impact any business which uses non-traditional workplace arrangements (e.g., franchise arrangements, temporary workers, subcontractors, etc.). Countless industries would be impacted by the Board's actions. They include, but are not limited to, restaurants and other franchises, construction, healthcare, hospitality, employment services companies and logistics companies.

As explained more thoroughly below, if the Board is successful in changing the joint employer standard, businesses that franchise or use subcontractors or temporary workers will be susceptible to increased liability and litigation. Worse, a bad ruling by the Board could permeate other areas of employment law such as wage, hour and workplace discrimination law.

II. THE BOARD'S CURRENT "JOINT EMPLOYER" STANDARD

Under the National Labor Relations Act, two separate and independent business entities are considered "joint employers" when they "share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation*, 269 NLRB 324, 325 (1984). For example, a factory owner may be considered the "joint employer" of janitorial workers who perform services in the factory but who are directly employed by a separate outside vendor if the factory owner participates in the hiring, firing and discipline of the workers, sets their work schedules, and directs and supervises the work to be performed.[2]

For over 30 years, the Board has maintained a clear test for determining whether two separate companies are joint employers.[3] The test is whether the putative joint employer[4] exercises direct and immediate control over the employees at issue. This direct control is generally understood to include the ability to hire, fire, discipline, supervise and direct.[5] The test is very fact-intensive and no one factor is particularly more compelling or persuasive than another.

Over the years, employers, employees and unions have come to rely upon the predictable application of the standard, and the Board has rejected several efforts to upend this consistent standard. The result is 30 years of unbroken NLRB jurisprudence which holds that *two entities are "joint employers" only when they share direct and immediate control over the same employees*. For example, even where there is evidence of integration of certain operations between a putative joint employer and a direct employer, the Board and Federal courts have found that two entities were *not* joint employers in the following situations:

- Where the putative joint employer owned the facility used by the direct employer, placed its logo on the uniforms and trucks of the workers, and provided equipment necessary for the work. *Airborne Express*, 338 NLRB 597 (2002).
- Where the putative joint employer engaged in "limited and routine" supervision of work and retained the contractual right to approve hires by the direct employer. *AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007).

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[1] In light of this concern, on March 5, 2015, the Chamber will be hosting a conference entitled, *The NLRB and the Joint-Employer Standard: New Interpretations, New Liabilities and the Impact On Other Statutes*.

[2] In this way, the phrase "joint employer" should not be confused with "single employer"—a similar but different labor law term of art—which addresses the question of whether two supposedly separate employers are actually one employer. The test for determining whether two entities are actually the same, "single employer" involves an analysis of the following factors: (1) inter-relation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *See, e.g., NLRB* v. *Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982).

[3] "Prior to 1982 when the United States Court of Appeals for the Third Circuit decided *NLRB* v. *Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), the Board's analysis of what constituted a joint employer relationship was somewhat more amorphous." *The Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993).

[4] For purposes of this document, the phrase "putative joint employer" shall refer to the employer which is alleged to meet the legal standards of constituting a joint employer.

[5] The test adheres to the agency principles that Congress instilled in the Taft-Hartley Act in 1947, which changed the definition of "employer" from "any person acting in the *interest* of the employer," to "any person acting as an *agent* of the employer." 29 U.S.C. § 152(2)(emphasis added).

• Where the putative joint employer engaged in "limited supervision" of the direct employer's employees and also participated in collective bargaining. *AT&T* v. *NLRB*, 67 F.3d 446, 451–52 (2d Cir. 1995).

In each of these cases, *there was no finding of joint employer status because the two companies did not share direct and immediate control over the terms and conditions of employment*. On the other hand, where two entities share a sufficient degree of control and direction over the employees at issue, the Board has found that the joint employer standard was met in the following cases:

• Where the putative joint employer disciplined, terminated, and set work assignments of the direct employer's employees and also participated in decisions involving employee incentive awards. *Aldworth Co.*, 338 NLRB 137, 140 (2002).

• Where the putative joint employer hired the direct employer's employees, authorized their overtime and "conducted an informal grievance meeting concerning one of the employees." *Computer Assoc. Int'l, Inc.*, 332 NLRB 1166, 1167 (2000).

• Where the putative joint employer, in addition to other indicia of control, "through the constant presence of the site superintendents and a high degree of detailed awareness and control of unit employees' daily activities, exercise[d] substantial supervisory authority over unit employees." *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991).

There are good policy reasons why the current standard has been in place for over 30 years. The current standard ensures that the putative joint employer is actually involved in matters that fall within the Board's purview, to wit, the employment relationship. Accordingly, the putative joint employer is required to come to the bargaining table only when it actually controls terms and conditions of employment—the very issues that will be the subject of bargaining.

As explained more fully below, depending on the circumstances, a large company may have contractual relationships with hundreds or thousands of franchisees, vendors and contractors. The current direct control test ensures that such companies will not be embroiled in labor negotiations or disputes involving employees and workplaces over which they have little or no control. Indeed, it makes sense to impute liability—as the current standard does—only in those cases in which an employer is in a position to investigate and remedy unlawful actions.

III. CURRENT BOARD EFFORTS TO UPEND THE JOINT EMPLOYER TEST

A. The McDonald's and Browning-Ferris Cases

Since the establishment of the current well-defined standard, labor unions and their allies on the Board have advocated a return to a looser, ambiguous joint employer test which would make it easier to enmesh multiple employers in labor disputes and organizing campaigns. See *Airborne Express*, 338 NLRB at 597 n. 1 (rejecting then-Member Liebman's suggestion to revisit joint employer standard). Now, however, with the rise of worker centers[6] and a locked-in Democrat majority at the Board, there is a new concerted effort by the NLRB to topple the existing standard. The Board is trying to change the current standard through two different cases:

• *McDonald's*. On July 29, 2014, the Board's Division of Advice recommended that the General Counsel issue complaints against McDonald's USA LLC for the employment decisions of individually owned-and-operated franchised restaurants. The pending complaints stem from charges filed by employees who claim that their rights were violated when they were disciplined for walking off the job to support minimum wage protests orchestrated by the Service Employees International Union (SEIU). In filing the charges against the individually owned McDonald's franchisees, these charges also named McDonald's USA LLC as a joint employer. The recommendation upends decades of established Board law governing joint employers and has applications beyond both the franchise model and the NLRA. Following this recommendation, on December 19, 2014, the NLRB's Office of General Counsel announced that it issued complaints against McDonald's franchisees and their franchisor, McDonald's USA, LLC, as joint employers. The complaints allege various violations of the NLRA and were issued from 13 different NLRB Regional Offices.

[6] *See*, THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS, *http://www.workforcefreedom.com/sites/default/files/WFI%20Worker%20Center%20Study%20-%20New%20Model%20of%20Representation.%20Final%20version%20downloaded%202.20.14.pdf;* THE EMERGING ROLE OF WORKER CENTERS IN UNION ORGANIZING, *http://www.workforcefreedom.com/sites/default/files/WFI%20Manheim%20Study%2011–21–2013.pdf;* LABOR ORGANIZATIONS BY ANOTHER NAME, *http://www.fed-soc.org/publications/detail/labor-organizations-by-another-name-the-worker-center-movement-and-its-evolution-into-coverage-under-the-nlra-and-lmrda.*

According to the NLRB, absent settlement, hearings in these cases will begin on March 30, 2015.

• *Browning-Ferris*. At the same time that the decision to issue complaints against McDonald's USA LLC was likely being formulated in the General Counsel's office, the Board took its own steps to reconsider the current joint employer standard. In *Browning-Ferris*, Leadpoint Business Services provided workers to perform recycling and cleaning duties at a facility operated by Browning-Ferris. The Teamsters filed a representation petition, asking the Board to hold an election of employees of *both* Leadpoint and BFI, claiming that the two entities were joint employers. The NLRB Acting Regional Director applied the existing joint employer test and determined that Leadpoint was the sole employer of the employees at issue. The union appealed the Acting Regional Director's ruling to the Board, claiming that BFI and Leadpoint were joint employers under the current standard, and that if they were not, the Board should reconsider the standard. The Board has invited stakeholders to submit comments on whether a change in the standard is appropriate.[7]

Both the *McDonald's* and *Browning Ferris* cases indicate the Board's clear intention to overturn its current joint employer test in favor of a looser test that will have a negative impact on employers. Such a standard will result in instability and uncertainty.

B. The Board's Likely New Standard

As noted above, the Board has not actually decided anything yet or articulated a new standard. However, the *amicus* brief submitted by the Board's General Counsel in the *Browning-Ferris* case likely foreshadows what the new joint employer standard may be. In the brief, the General Counsel proposes the following test for establishing joint employer status:

> "[W]here, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entitity's employees such that meaningful bargaining could not occur in its absence"

See General Counsel brief at page 17.

The brief advocates "a return to the Board's traditional approach" which, in the past, the Board itself has described as "amorphous."[8] Rather than the existing standard which focuses on the direct and immediate control of the employees, the General Counsel proposes finding joint employers even when there is only *indirect* control of employees.

This "indirect control" standard means that joint employer status could be found simply through the existence of a contractual agreement between a company and its contractor or vendor. For example, the structure of certain contracts may result in the putative joint employer influencing the direct employers' operations by setting certain production or safety standards or wage reimbursement rates. In such a situation, the General Counsel's argument goes, "meaningful" collective bargaining cannot occur absent the participation of the putative joint employer.[9] Essentially, almost any economic or contractual relationship could trigger a finding of joint employer status under the proposed new standard.

IV. IMPACT OF A CHANGE IN THE JOINT EMPLOYER STANDARD ON EMPLOYERS

The NLRB's actions in both *McDonald's* and *Browning-Ferris* will have direct impacts in the labor law context. Some potential direct negative impacts of a joint employer standard which focuses on "indirect control" include the following:

1. *Corporate Campaigns*. Being able to characterize large, well-known businesses as the "employer" of a targeted group of workers who are employed by smaller, lesser-known businesses, will encourage unions to launch very public organizing cam-

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[7] The Chamber submitted an *amicus* brief here: *http://www.chamberlitigation.com/sites/default/files/cases/files/2014/U.S.%20Chamber%20Amicus%20Brief%20-%20Browning%20Ferris%20Industries%20of%20California%20%28NLRB%29.pdf*. Additionally, the Chamber signed on to the brief submitted by the Coalition for a Democratic Workplace here: *http://myprivateballot.com/wp-content/uploads/2012/10/Brown-Ferris-Brief-Amici-Curiae.pdf*.

[8] *See* Footnote 2, supra.

[9] Proponents of the indirect control standard continue to advance this line of reasoning despite the fact that the Board has ruled that vendors, suppliers and contractors are free to pay wage rates that are higher than the reimbursement rates provided for in their agreements with the putative joint employer. *See Management Training Corp.*, 317 NLRB 1355, 1356 (1995). In fact, the Regional Director in *Browning-Ferris* noted that the direct employer was not prohibited from paying its employees over and above the reimbursement levels in its contract with Browning-Ferris. *See* Decision and Direction of Election, 32–RC–109684, pg. 15.

paigns in hopes that the larger employer will bend to public pressure and recognize the union. A national card check/neutrality agreement extracted from a nationally recognized brand could be used to quickly organize smaller local affiliates or franchisees.

2. *Liability under the National Labor Relations Act*. The putative joint employer would be liable for labor violations committed by the direct employer, even though the putative joint employer exerts no control over the employees of the direct employer or how the direct employer manages its labor relations.

3. *Collective Bargaining*. If the direct employer is organized, the putative joint employer would have to participate in collective bargaining. Depending on the circumstances, the putative joint employer could be dragged into bargaining relationships with hundreds of entities over whose day-to-day operations they have no control. The union could require the putative joint employer to supply information relevant to bargaining, including wage and benefit data for its employees.

4. *Secondary boycotts*. The NLRA's prohibition on secondary boycotts means that if a union has a dispute with one employer (e.g., a janitorial services company), it cannot entangle other employers in the dispute (e.g., the factory owner that contracts with the janitorial services company). This distinction would likely be eviscerated under the potential new standard, and unions could picket and demonstrate against both entities.

5. *Effects Bargaining*. Under the NLRA, unionized employers retain the inherent managerial right to unilaterally determine whether to downsize or shutdown its business. However, the law requires the employer to bargain about the decision's effects on unit employees. Accordingly, an employer must provide the union with notice of such a decision, as well as an opportunity to bargain about issues such as severance pay, or health coverage for displaced workers. *See First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). Under a new joint employer standard, should an entity wish to terminate an existing services contract for whatever reason—such as poor performance or to reduce costs—it could be required to engage in effects bargaining with the union who represents the workers who are employed by that particular service provider. *See W.W. Grainger*, 286 NLRB 94, 97 (1987). This will erode both economic competition and employers' flexibility.

V. POTENTIAL RAMIFICATIONS UNDER OTHER EMPLOYMENT STATUES

Furthermore, although a new test established by the NLRB would not be binding on other agencies, it will likely be persuasive, and the new expansive standard could be applied by the Department of Labor, the Equal Employment Opportunity Commission and other agencies' enforcement efforts. Plaintiffs' attorneys will also be eager to explore how they may exploit a new standard. If the current joint employer standard is relaxed, some negative effects beyond the NLRA include the following:

1. *Threshold employer coverage*. Many statutes, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act have small business exceptions and only apply if an employer has a certain number of employees. By loosening the joint employer standard, employer coverage under such statutes will explode.[10] This would essentially eliminate carefully negotiated small business exceptions in these Federal statutes.

2. *Discrimination law*. In its *amicus* brief submitted in the *Browning-Ferris* case, the EEOC notes that "the Board's joint employer standard influences judicial interpretation of Title VII." If the Board adopts a new, looser joint employer standard, this might encourage both the EEOC and the plaintiffs' bar to stretch the bounds of the law in an effort to entangle more employers in discrimination lawsuits.[11] Perhaps already trying to take advantage of pending *McDonald's* cases at the NLRB, on January 22, 2015, 10 employees at three different McDonald's locations in Virginia filed a lawsuit alleging race discrimination and sexual harassment under title VII, and named as defendants not just the individual local restaurants, but also McDonald's corporate. *See Betts* v. *McDonald's Corp., et al.*, Case No. 4:15-cv-00002

[10] *See* EEOC COMPLIANCE MANUAL, SECTION 2: THRESHOLD ISSUES ("To determine whether a respondent is covered, count the number of individuals employed by the respondent alone and the employees jointly employed by the respondent and other entities. If an individual is jointly employed by two or more employers, then s/he is counted for coverage purposes for each employer with which s/he has an employment relationship.")

[11] By now, it has been well-documented that the EEOC is more than willing to pursue questionable litigation theories. *See "Part II: EEOC's Unsuccessful 2013 Amicus Program"* in U.S. Chamber, "*A Review of EEOC Enforcement and Litigation Strategy During the Obama administration—A Misuse of Authority*." June 2014, *https://www.uschamber.com/sites/default/files/documents/files/021449_LABR%20EEOC%20Enforcement%20Paper.pdf*.

(W.D. Va. Jan. 22, 2015). Lawsuits like this one are likely to become more frequent should the Board adopt the General Counsel's proposed "indirect control" test.

Importantly, compensatory damages are capped under title VII, and the caps generally increase as the number of employees increases. Thus, the plaintiff's bar will be encouraged to establish joint employer status because doing so could increase the number of employees, thereby increasing the amount of available damages.

3. *Wage and Hour issues*. Employers who use subcontractors may be liable for the subcontractor's wage-and-hour violations if it is determined they are a joint employer of the employee. Because of the broad definitions in both the Fair Labor Standards Act and its implementing regulations, most Federal courts already use a more expansive "economic realities" test in wage and hour cases.[12] However, some circuits' tests are more restrictive than others and all tests focus on the element of control. Accordingly, both the Wage & Hour Division and the plaintiffs' bar will likely look to see how they may exploit any new joint employer standard adopted by the Board. It is no secret that the current Wage and Hour Administrator, David Weil, has a strong distaste for alternative workplace arrangements.[13]

4. *Occupational Safety and Health Administration (OSHA) issues*. An expansion of the joint employer standard may also provide an opportunity for OSHA to ratchet up fines against a parent company for repeated violations. For example, the same safety violation occurring at several different franchisees could be considered repeat violations if the franchisor is considered to be a joint employer with each of the franchisees. Also, OSHA has recently launched an effort to target workplaces that use outside sources for their workers such as temporary staffing agencies or services. If the new joint employer model advances, OSHA's ability to cite the host employer would be enhanced which could be used by unions as leverage against employers who have been targeted for organizing.

5. *Affordable Care Act Issues*. Under the health care law's employer mandate, any employer with 50 or more "full-time equivalent employees" (FTEs) must provide a certain mandated level of health care coverage to all full-time employees and their dependents, or potentially face a penalty. The employer mandate takes effect in 2015 for businesses with 100 or more FTEs, and in 2016 for businesses with 50 to 99 FTEs. If the current joint employer standard is changed, individual franchises falling well below the employer mandate threshold and small businesses that depend on independent contractors or temporary workers could soon have to comply with the employer mandate's requirements. They would not only be on the hook for providing coverage to all of their full-time employees (and dependents), but would also have to ensure that the coverage meets the new affordability and minimum value standards of the ACA. Since the formula for determining FTEs includes full-time employees and hours worked by part-time employees, figuring out if these new "joint employer" entities are subject to the employer mandate will be an extreme burden because the requisite record keeping by each organization involved may not be complete. The franchise and temporary worker/subcontractor communities will be particularly hit hard since they use high numbers of part-time workers that might now be considered "full-time" under the new definition of full-time work in the ACA as 30 hours per week.

6. *Blacklisting in Federal Contracting*. On July 31, 2014, President Obama signed Executive Order 13673, "Fair Pay and Safe Workplaces," which seeks to use the Federal procurement process as a vehicle to create additional remedies for labor and employment law violations.[14] The Order would require Federal contractors and subcontractors seeking to obtain Federal contracts or subcontracts worth $500,000 or more to disclose violations that occurred within the last 3 years. The reportable violations include "administrative merits determinations," "arbitral awards or deci-

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[12] A similar test is used with regard to Family and Medical Leave Act cases. *See Moreau* v. *Air France*, 356 F.3d 942 (9th Cir. 2004)(applying FLSA joint employer factors in an FMLA case to conclude that Air France was not a joint employer with various ground handling service companies and therefore exempt from scope of FMLA). However, "only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits." 29 CFR 825.106(c).

[13] *See* David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 THE ECON. & L. REL. REV. 33, 44 (2011)("Strategic enforcement should therefore focus on higher-level, seemingly more removed business entities that affect the compliance behaviour 'on the ground' where vulnerable workers are actually found").

[14] The Chamber has been steadfast in its opposition to Federal contracting blacklisting proposals. *See, e.g.*, Randel K. Johnson, U.S. Chamber of Commerce, *Comments on U.S. Department of Agriculture Direct Final Rule (DFR)(76Fed. Reg. 74,722) and Notice of Proposed Rulemaking (NPRM)(76 Fed. Reg. 74,755) covering "Labor Law Violations" (RIN 0599–AA19)* (January 24, 2012). Available at: *https://www.uschamber.com/sites/default/files/documents/files/120124 usdablistcommentsDFR.pdf*.

sions," and "civil judgments" issued under the following 14 Federal labor employment laws and their State equivalents:

a. Fair Labor Standards Act
b. Occupational Safety and Health Act of 1970
c. Migrant and Seasonal Agricultural Worker Protection Act
d. National Labor Relations Act
e. Davis-Bacon Act
f. Service Contract Act
g. Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity)
h. Section 503 of the Rehabilitation Act of 1973
i. Vietnam Era Veterans' Readjustment Assistance Act of 1974
j. Family and Medical Leave Act
k. Title VII of the Civil Rights Act of 1964
l. Americans with Disabilities Act of 1990
m. Age Discrimination in Employment Act of 1967
n. The President's February 12, 2014 Federal contractor minimum wage Executive Order (No. 13658)

During the bidding process, the contracting officer will then take these violations more closely into account when evaluating whether the company satisfies the requirement for having a satisfactory record of integrity and business ethics. The phrase "administrative merits determinations" could include NLRB General Counsel complaints, EEOC cause determinations and other non-final agency actions. This nebulous reporting requirement is bad enough on its own, but becomes worse when contemplating the Board's current actions. For example, an expansion of the joint employer concept could require a contractor to report, as part of the Federal contract bidding process, on labor or wage and hour violations committed by the vendors with whom it contracts to supply cleaning or security services. Considering that Federal contractors likely have hundreds or thousands of relationships with subcontractors and vendors, a change in the joint employer standard will exacerbate the bad policy results of the Executive order.

VI. ECONOMIC IMPACTS

In an increasingly competitive economy, companies make decisions on a daily basis to adapt, change and find unique advantages over their competitors. As part of this decisionmaking, companies often find that certain functions of the workplace—such as logistics, information technology, human resources, etc.—can be more efficiently performed by an outside vendor. The Board's current joint employer test strikes the right balance in these situations by allowing the putative joint employer the ability to monitor and oversee the performance of its subcontractors and vendors, while ensuring that employees have a right to bargain with the employer that actually controls the terms and conditions of employment.

Unfortunately, these contractual relationships would become less attractive under a new joint employer standard, as a company could be considered a joint employer simply for setting operational or performance standards in an agreement with a vendor or supplier. Because myriad liabilities and obligations—including the duty to bargain—attach to a finding of joint employer liability, employers could respond in very different ways.

First, some employers may determine that, as long as they are going to be held liable for the actions of their subcontractor or vendor, they must exert more control over the day-to-day operations of the vendor. The *McDonald's* case illustrates how this could be particularly devastating to both franchisors and franchisees. Franchisors would have to exert themselves into the decisionmaking process regarding issues such as hiring/firing, compensation, training, and labor costs. Even if this were possible for certain franchisors, the costs of exerting this control would be astronomical. For the franchisees, they would be relegated to partners or employees of a business over which they worked so hard to build.[15] Ultimately, this would discourage both existing companies and entrepreneurs from participating in the franchise business model.

Conversely, employers could try to avoid a finding of joint employer liability altogether by further distancing themselves from their subcontractors. This could have unintended negative consequences as employers might choose to remove certain labor, safety or environmental standards from the agreements with subcontractors in order to avoid a joint employer finding.

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[15] *See* testimony Mr. Gerald F. Moore, Franchise Owner, The Little Gym. "*Who's the Boss? The 'Joint Employer' Standard and Business Ownership*." SENATE COMMITTEE ON HEALTH, EDUCATION LABOR & PENSIONS, February 5, 2015.

Finally, employers could choose to cancel or eliminate these relationships which will most directly impact small businesses and independently owned operations. Ultimately, the "indirect control" test as advanced by the General Counsel and union in the *Browning-Ferris* case would limit employer flexibility and competition at a time when the economy continues to experience anemic economic growth.

VII. CHANGING THE JOINT EMPLOYER STANDARD IS THE LATEST EXAMPLE OF THE BOARD'S OVERREACH

Of course, the Board's efforts to upend its joint employer standard do not occur in a vacuum. Rather, this is just the latest attempt by the Board and the Administration to dramatically overhaul labor law in favor of their union allies. Set forth below are several examples of such actions taken by the Board and the Administration.

• *Unconstitutional Appointments to the Board*. In June 2014, the Supreme Court in *Noel Canning* unanimously ruled that President Obama exceeded his constitutional authority when he appointed Sharon Block and Dick Griffin to the NLRB while the Senate was in session.[16] During their time as unconstitutionally appointed members of the Board, Griffin and Block participated in numerous decisions which departed radically from Board precedent and which were harmful to the employer community. Making matters worse, Griffin in now the Board's General Counsel and Block was re-nominated to serve as a member of the Board, though her re-nomination was eventually withdrawn.

• *Ambush Elections*. The Board issued its final "ambush" election regulation on December 12, 2014, just prior to the December 16 expiration of Democrat Board Member Nancy Schiffer's term. The changes to the Board's election procedures will dramatically shorten the time period between the filing of a representation petition and the actual election. It will also require employers to hand over to union officials and the NLRB personal contact information about employees, even if the employees wish to keep such information private. Like the Employee Free Choice Act, the goal of the proposal is to limit an employer's ability to communicate with its employees about the pros and cons of unionization. Given that the Board's own statistics demonstrate that 94% of elections are held within 56 days, this endeavor is nothing more than a sop to the labor unions whose membership numbers continue to crater.[17] The committee's hearing on February 11, 2015, entitled "Ambushed: How the NLRB's New Election Rule Harms Employers & Employees," detailed the serious negative consequences that the Board's rule will have on both employers and employees.[18]

• *Fractured Workplaces*. The Board has overturned it's long-standing criteria for determining an appropriate bargaining unit under the NLRA. Under *Specialty Healthcare* and its progeny, unions can now gerrymander bargaining units into very small micro-units of known union adherents. This has already lead to a Balkanizaton of the workforce,[19] and will potentially saddle an employer with multiple unions, multiple bargaining agreements (with potentially different pay scales, benefits, work rules, bargaining schedules, and grievance processes for similarly situated employees) and increased chances of work stoppages.[20]

• *Mandatory, Biased Posters*. In an ill-advised rulemaking, the Board attempted to promulgate a regulation which would have required employers to post a biased notice of labor rights in their workplaces. The regulation created a new unfair labor practice out of whole cloth for an employer's failure to post the notice. Fortunately, the Federal courts prevented the Board's power grab, as one Federal court of appeals—in a case filed by the Chamber—ruled that the Board had no statutory au-

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[16] The U.S. Chamber Litigation Center represented Noel Canning, a member of the Chamber, in the Supreme Court, and served as co-counsel to Noel Canning alongside the law firm Jones Day.

[17] The Chamber's comments to the Board's ambush election proposal are here: *https://www.uschamber.com/sites/default/files/documents/files/NLRB%202011%200002%20US%20Chamber%20of%20Commerce.pdf*.

[18] The Chamber's testimony at the hearing is here: *https://www.uschamber.com/sites/default/files/chamber__testimony__on__ambush__elections__mark__carter__-__final__2-11-2015.pdf*.

[19] *See Macy's*, 361 NLRB No. 4 (2014)(finding appropriate the union's petitioned-for unit of only the cosmetics and fragrance employees at a Macy's department store).

[20] The Chamber's amicus brief which urged the U.S. Circuit Court of Appeals for the 6th Circuit to overturn *Specialty Healthcare* is here: *http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Kindred%20Nursing%20Centers%20East%2C%20LLC%2C%20fka%20Specialty%20Healthcare%20v.%20NLRB%2C%20et%20al.%20%28NCLC%20Amicus%20Brief%29.pdf*.

thority to issue the regulation,[21] and another court of appeals ruled that the regulation violated the First Amendment.

• *Union Access to Employer Email*. In a case called *Purple Communications*, issued in December 2014, the NLRB ruled that once an employee is given access to company email, he or she may generally use that email for union organizing during non-working time. This ruling infringes on employers' property interests to prohibit personal use of its email system in order to maintain production, ensure protection from computer viruses, and limit its exposure to legal liability.

• *Expansive Application of Section 7*. The Board has undertaken a specific agenda which is intended to severely limit employers' abilities to effectuate rules and policies in their workplaces. The Board has accomplished this by expanding its interpretation of "protected activity" under Section 7 of the National Labor Relations Act (NLRA or Act). In this way, the Board has dramatically expanded its role beyond being a neutral arbiter of labor disputes to become an agency which now concerns itself with second-guessing employers' H.R. policies. For example, in *Karl Knauz Motors, Inc.*,[22] the Board invalidated an employer's common sense rule which encouraged courteous behavior on the sales floor of a car dealership. Additionally, in *Plaza Auto*,[23] an employee berated the owner of the car company for which he worked, calling him a "f*****g crook", an "a***hole" and telling him he would regret it if he was fired. The Board determined that the termination was unlawful and violated the employee's section 7 rights because it occurred during a discussion over working conditions.

VIII. CONCLUSION

While a new joint employer standard will have significant implications in the labor-management realm, a new standard has the potential to extend beyond just the *Browning-Ferris* and *McDonald's* cases and the NLRB. Clever agency enforcement officials and plaintiffs' attorneys will undoubtedly explore any avenue to expand and apply a relaxed joint employer standard to their own particular circumstances, resulting in devastating consequences for both employers and employees. Unfortunately, discarding a doctrine that has worked consistently well for over 30 years in order to increase union organizing opportunities and plaintiffs' attorneys' prospects has become *de rigueur* for an agency that is supposed to be a neutral arbiter of labor disputes.

We wish to thank you for taking the time to hold this important hearing on NLRB oversight. These comments only begin to summarize the very great concern that we have with the NLRB's policy agenda. We look forward to working with you as you continue to examine these important issues. Please do not hesitate to contact us if we may be of assistance in this matter.

Sincerely,

RANDEL K. JOHNSON,
Senior Vice President,
Labor, Immigration and Employee Benefits.

JAMES PLUNKETT,
Director, Labor Law Policy.

NATIONAL ASSOCIATION OF MANUFACTURERS,
NATIONAL RESTAURANT ASSOCIATION,
FEBRUARY 5, 2015.

Hon. LAMAR ALEXANDER, *Chairman,*
U.S. Senate,
Committee on Health, Education, Labor & Pensions,
Washington, DC 20510.

Hon. PATTY MURRAY, *Ranking Member,*
U.S. Senate,
Committee on Health, Education, Labor & Pensions,
Washington, DC 20510.

Re: Hearing on "Who's the Boss? The 'Joint-Employer' Standard and Business Ownership"

[21] The opinion of the U.S. Circuit Court of Appeals for the 4th Circuit is here: *http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Opinion%20--%20Chamber%20of%20Commerce%20et%20al%20%20v%20%20NLRB%20%28Posting%20Rule%29%20%28Fourth%20Circuit%29.pdf.*

[22] 358 NLRB No. 164 (Sept. 28, 2012).

[23] 360 NLRB No. 117 (May 28, 2014).

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: On behalf of the National Association of Manufacturers and the National Restaurant Association, we want to thank you for the oversight your committee is providing through today's hearing on "Who's the Boss? The 'Joint-Employer' Standard and Business Ownership." We would also like to ask you to introduce our comments for the record.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs nearly 12 million men and women, contributing more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Restaurant Association is the leading business association for the restaurant and food service industry. The Association's mission is to help members build customer loyalty, rewarding careers and financial success. Nationally, the industry is made up of one million restaurant and food service outlets employing 14 million people—about 10 percent of the American workforce. Despite being an industry of mostly small businesses, the restaurant industry is the Nation's second-largest private-sector employer.

Together members of our two industries employ nearly a fifth of the entire U.S. workforce. We appreciate the attention this committee is placing on the potential impact that the changes the National Labor Relations Board ("NLRB") is considering to make to the "joint-employer" standard would have on the franchise business model. Nevertheless, we are submitting this statement for the record to emphasize that the negative consequences of those potential changes go much deeper than that.

The ongoing attempts by the NLRB to change the joint-employer standard would be bad for workers, employers, franchises, and the economy. The joint-employer standard has not been legally changed yet. However, the NLRB's General Counsel's recent opinions provide further proof that the NLRB is getting ready to assail the joint-employer standard that has been the bedrock of American business relationships for the last three decades.

In May of last year, in the *Browning-Ferris* case (32–-RC–109684), the NLRB issued a notice calling for briefs from interested parties to address whether the NLRB should obey the legally established joint-employer standard or create a new one. Our organizations filed joint comments arguing that the current standard must be maintained because any deviation from the existing standard would seriously and adversely affect the Nation's manufacturing, restaurant, and food service industries. In addition, no new circumstances have arisen since the standard was clarified 30 years ago to justify modifying or overturning prior decisions.

Besides the franchisees testifying today, any change to the current joint-employer standard would have profound negative effects on a company's ability to use temporary employees, staffing agencies, leased employees or other contingent workers. This is particularly so for companies in our industries, which rely on these contingent workers to supplement their own workforces. If the standard is changed, our companies may find themselves responsible for conduct beyond their control. For example, a company may be held liable for work duties and conditions that they had no part in establishing or bargaining over, such as violations of sections 7 (an employee's right to form a union) and 8(a)(3) (unlawful discipline or discharge of a temporary employee) of the National Labor Relations Act ("NLRA").

Additionally, if the staffing agency's employees are represented by a union, these companies may be unwittingly subjected to the staffing agency's collective bargaining obligations under Section 8(a)(5) of the NLRA. As a result, companies may be compelled to change their business models and terminate their contracts with staffing agencies because of their potential harmful and/or unpredictable ramifications.

For the last 30 years, companies have comported themselves and organized their businesses on the basis of a clear joint-employer standard. Any change will hinder these companies and the current, stable environment in which contingent employees, unions and companies currently operate.

Finally, we would like to offer our help to protect the current joint-employer standard. As stated, the changes envisioned by the NLRB and its General Counsel

would be detrimental not only to the franchise model, but to the economy as a whole.

Sincerely,

JOE TRAUGER,
Vice President, Human Resources Policy,
National Association of Manufacturers.

ANGELO I. AMADOR, ESQ.,
Senior Vice President, Labor & Workforce Policy,
National Restaurant Association.

[Whereupon, at 11:26 a.m., the hearing was adjourned.]

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