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STEALING THE AMERICAN DREAM OF BUSINESS OWNERSHIP: THE NLRB'S JOINT EMPLOYER DECISION

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE NATIONAL LABOR RELATIONS BOARD'S JOINT EMPLOYER DECISION

OCTOBER 6, 2015

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C O N T E N T S

STATEMENTS

TUESDAY, OCTOBER 6, 2015

STEALING THE AMERICAN DREAM OF BUSINESS OWNERSHIP: THE NLRB'S JOINT EMPLOYER DECISION

TUESDAY, OCTOBER 6, 2015

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

The committee met, pursuant to notice, at 10:02 a.m., in room SD–430, Dirksen Senate Office Building, Hon. Lamar Alexander, chairman of the committee, presiding.

Present: Senators Alexander, Isakson, Collins, Hatch, Roberts, Murray, Casey, Franken, Bennet, Baldwin, Murphy, and Warren.

OPENING STATEMENT OF SENATOR ALEXANDER

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

This morning, we have a hearing about the recent National Labor Relations Board decision that threatens to steal the American Dream from owners of 780,000 franchise businesses and millions of contractors. We'll also discuss the legislation I've introduced to undo this decision and restore the law the way it was before the NLRB decision.

Senator Murray and I will each have an opening statement. We'll introduce our panel of witnesses. We thank each of you for coming. After the witness testimony, each Senator will have 5 minutes of questions.

Last week, I met a man named Aslam Khan. He is an immigrant from Pakistan who started out as a dishwasher at Church's Chicken and who today has become a very successful owner of Church's Chicken franchises. He talked about achieving the American Dream. He said it was possible because of our Nation's, "free enterprise, entrepreneurial spirit."

On August 27, the NLRB released a decision that threatens to steal that American Dream from owners of the Nation's 780,000 franchise businesses and millions of contractors. It threatens to destroy that free enterprise, entrepreneurial spirit.

The labor board's new joint employer standard will make big businesses bigger and make the middle class smaller by discouraging larger companies from franchising and contracting work to small businesses. It is the biggest attack on the opportunity for small businessmen and women in this country to make their way up the economic ladder that we've seen in a long, long time, and I am committed to fighting it with legislation that already has 45

cosponsors in the Senate and a total of 60 cosponsors in the House, including three Democrats.

For three decades, Federal labor policies have held that two separate employers are joint employers if both have direct and immediate control over employment terms and working conditions. That means two employers who are both responsible for tasks like hiring and firing, work hours, issuing directions, determining compensation, and handling day-to-day recordkeeping.

Under the new joint employer standard adopted in August in *Browning-Ferris Industries*, a 3 to 2 NLRB majority said that merely indirect control or even unexercised potential to control working conditions could make two employers joint employers. This means all these franchisees and contractors who have worked so hard to build businesses in their communities, hire the right people, and sometimes spend 12 hours or more a day serving customers, meeting a payroll, dealing with government regulations, paying taxes, and trying to make a profit—they will no longer be considered their workers' sole employer.

For the businesses that have franchised their brand or used subcontractors to haul their waste or clean their offices and are now considered one of the employers of those companies' workers, there will be a huge incentive to retake control of those franchises and retake control of those contracted tasks, because if you're going to have all the liability of being the boss, you might be much better off being the boss.

That means costs go up—less ability to invest capital. As joint employers, business owners will be forced to engage in collective bargaining and share liability for labor law violations.

This change also harms employees. Millions of employees will lose the ability to negotiate things like pay, hours, and leave time with their direct supervisor, because those decisions will now be made between the larger employer and the union. As one employee put it in an interview with a Denver news channel, "I would be just another number to a corporation. I'm a person to my employer now."

Franchising will be particularly impacted by this decision. There are 780,000 franchise establishments across this country, and they create nearly 9 million jobs.

Last week, I met with a Chattanooga, TN couple who started their own franchisee location of Two Men and a Truck, a moving company. With hard work and commitment, they have been able to grow that first franchise into six locations. They would like to continue to grow, but this new NLRB decision is causing them to put their plans on hold.

Two Men and a Truck is a good example of how franchising allows entry into business ownership and the middle class. It was started in Michigan by a mom with two sons she was ready to put to work. Her first franchisee was her daughter. It has now grown to 220 franchisees, who have created 8,000 jobs. Thirty-eight percent of their franchisees began by working on a truck.

Successfully operating a franchise business is one of the most important ways to climb the ladder of success.

Women own or co-own nearly half of all franchise businesses. Minorities own about 20 percent. Why would we want to cutoff this business model?

The Protecting Local Business Opportunity Act that I have introduced would roll back the NLRB ruling and reaffirm that an employer must exercise actual, direct, and immediate control over essential terms and conditions of employment. This is the commonsense standard that has been applied for decades. We have 45 cosponsors of our bill, and I hope we will add more. I hope that will include some Democratic members of the Senate.

This is an issue that is important. I believe it's time for Congress to act as soon as possible to stop a destructive policy that damages the middle class growth that has made this Nation what it is today. I hope my colleagues on both sides of the aisle will agree.

Senator Murray.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Thank you very much, Mr. Chairman.

Our economy and our workplaces and our country should work for all of our families, not just the wealthiest few. I assume everyone agrees we can't make that happen without considering the massive changes in the labor market over the past 30 years.

Many big corporations increasingly rely on temp agencies, franchises, and other third-party sources to stay competitive and lower labor costs. Sometimes corporations still maintain significant control over the workers performing their day-to-day operations of franchises and subcontractors.

Some of these corporations work very hard to ensure workers are treated fairly and have access to the protections they deserve. Unfortunately, when some other parent companies maintain this control, it can often come at a huge cost to workers and to small business owners alike.

For example, some of the biggest corporations can dictate a franchise's pricing and store hours, they decide how many people are on a franchisee's staff, and they sometimes even have a say in how much employees can earn. Yet, these parent companies can escape all liability for poor working conditions and rock-bottom wages.

In some cases, workers have tried to exercise their basic rights to join together and improve wages and workplace conditions. When those workers sit down to negotiate, they find out that not all of the people who have control over the terms and conditions of their jobs have to show up at the bargaining table.

Take for example a worker named Arold, who worked for a temp agency that supplied workers for a warehouse in California. In a report from the National Employment Law Project, he said he and his coworkers barely made more than the minimum wage. They never knew when their shift would end, and they never had a set day off of work. That made it impossible for them to plan their lives.

When they joined together to form a union, instead of meeting them at the bargaining table, the company that owned the warehouse threatened to close the temp agency and fire all the workers. These employment arrangements can be bad for small business owners as well.

Take for instance a man named Syed. In a story from NPR, he said he came to the United States from India, and he's been a franchise owner for nearly a quarter of a century. Over time, the parent company had enacted tighter and tighter controls over Syed's business, and that has really limited his ability to free up resources to treat his workers better. He said, "When I lived in Bombay, this is not what I thought they meant by the American Dream."

While there are many responsible corporations, other parent companies put all liability for low wages and poor working conditions squarely on the shoulders of the small business owners. I believe we need to help our workers and grow our economy from the middle out, not from the top down. That means that we as a nation should not turn our backs on empowering workers, especially because that's the very thing that has helped so many workers climb into the middle class.

There has been an overwhelming amount of disinformation out there about the NLRB's *Browning-Ferris*'s decision. Before hearing testimony, I want to make a couple of things clear.

When workers want to join together with their coworkers, they are not looking for special treatment. They are simply exercising their basic rights that are guaranteed by law. Second, one of the Board's responsibilities is adapting to the realities of today's workplaces to make sure workers can exercise their right to collectively bargain.

Some of my Republican colleagues have claimed that this decision is somehow an over-reach. Given the changes in the workplace, the Board is simply carrying out its duties under the law.

This might be the most important point. I've heard some opponents of this decision use sweeping language about the scope of this decision. Let's be clear. This decision does not change the relationship between a local business owner and her employees. If she was deciding who to hire and who on her staff deserved a raise before this decision, she will continue doing that going forward.

The *Browning-Ferris*'s decision only clarifies that if another company also has substantial control in the critical terms of employment, like who to hire and fire or how much to pay franchise owners' employees, the NLRB is going to take it at its word and treat it as an employer as well. Workers can only exercise their basic rights, rights that are guaranteed under the Constitution and the National Labor Relations Act, when all of the employers who have a say in their working conditions are at the table.

Again, the labor market looks a lot different today than it did 30 years ago. Rather than using these trends to end basic worker protections and undermine the fundamental fairness of due process, this committee should study these trends and discuss what we can do for workers and small business owners to keep the American Dream in reach for all families.

I hope this committee can find ways to look at these trends and work together on policies that expand economic security, grow the economy from the middle out, and ensure our country and workplaces work for all families, not just the wealthiest few and the biggest corporations.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murray.

I'm pleased to welcome our four witnesses today. Ms. Ciara Stockeland is the founder of MODE designer fashion discount stores headquartered in Fargo, ND. Founded in 2007, MODE now has nine franchises operating boutique stores across six States.

Ed Martin is the president of Tilson Home Corporation in Austin, TX. Tilson Homes is a family-owned, build-on-your-lot custom home builder that's been in business for 80 years.

Mark Kisicki is a shareholder of the Ogletree Deakins law firm in Phoenix, AZ. He has represented clients in some of the most significant cases before the National Labor Relations Board. He is a member of the American Bar Association section of Labor and Employment Law Committee on Practice and Procedure under the NLRA.

Mr. Michael Rubin is a partner at Altshuler Berzon LLP in San Francisco, CA. Mr. Rubin specializes in class action and appellate litigation, representing workers.

We thank the four of you for coming, some of you long distances today. We ask that you keep your testimony to about 5 minutes. That will leave more time for the Senators to have a conversation with you and ask questions.

Why don't we start with you, Ms. Stockeland.

STATEMENT OF CIARA STOCKELAND, OWNER, FOUNDER, MODE STORES, FARGO, ND

Ms. STOCKELAND. Good morning Chairman Alexander, Ranking Member Murray, and members of the committee. My name is Ciara Stockeland, the owner and operator of MODE, a designer outlet concept, which I founded in Fargo, ND. I currently live in Grand Forks, ND, with my husband and our two children, Harrison and Isabella, who are actually watching today's events at their schools, fifth and sixth grades.

Thank you very much for the invitation to appear before this committee today to share my story of small business ownership and discuss the concerns of local business owners everywhere regarding the NLRB decision to change the joint employer standard. It is an honor to be in Washington before you today. Likewise, it will be an honor to join employees, employers, and many others as I attend the White House Summit on Worker Voice tomorrow.

Today's joint employer issue is a critical threat to our livelihoods, and it is very important that small business perspectives are heard by our Nation's leaders. I am here to speak on behalf of the hundreds of small business owners like myself who are members of the Coalition to Save Local Business, which I joined because I believe saving local business is what's at stake in this so-called joint employer issue.

Today, I will share why it's so critical for the future viability of millions of small businesses and the 780,000 franchise businesses in America that this committee and Congress reinstate the very successful joint employer standard by passing S. 2015. This simple, one sentence legislation will restore certainty to small business, and I urge every committee member to support the bill.

Mr. Chairman, I am a small business owner and a third generation entrepreneur. I employ 10 people in my North Dakota-based

company, and our franchisees have about 40 employees across 11 stores. I love creating jobs in America.

Nine years ago, I opened my first store in Fargo, ND. Four years ago, we began franchising and have successfully expanded to 12 locations across the Midwest and South Carolina. Why did I franchise rather than own a company-based operation? I knew it would be difficult to operate company-owned stores and support employees from a remote location in North Dakota.

By franchising, my brand could grow through the operations of local entrepreneurs. I hope to continue to grow, and I plan to have 75 stores by 2024.

I am a franchisor. My company, MODE, is one of more than 3,000 franchisors in the United States. While some people may hear the terms, franchise or franchisor, and think only of major corporations, they should also think of my story and the story of hundreds of thousands of both franchisors and franchisees who are small business owners. My company is precisely the kind of small business that Members of Congress can support.

Like many small business owners, I have known the stress of working to ensure I can cover payroll and rent. While my employees have been paid first, I did not take a consistent paycheck until 2014. That's 8 years of working virtually for free.

Every day I work, knowing that if my business fails, my family will lose everything. We do not need another insecurity to add to the already extreme risk of business ownership.

You might think we would have government that supports us. Instead, the NLRB has created extreme uncertainty by introducing the *BFI* decision. I have two points to share.

First, the joint employer ruling affects every small business. The majority of NLRB members made clear that the *BFI*'s decision was an isolated one. The Board wrote,

> "We have decided to restate the Board's legal standard for joint employer determinations and make clear how that standard is to be applied going forward."

All businesses covered by the NLR Act and their business partners may face liability under the Board's new joint employer doctrine.

Second, there can be no question that the joint employer standard makes small business unsafe. No one here can assure me that my business will not run afoul of a nebulous indirect control standard. The expansion of joint employer liability from direct control to both direct and indirect leaves small businesses facing serious uncertainty.

Mr. Chairman, I plead for the use of common sense. The joint employer standard that has existed for decades works and protects small business. Why change it? If S. 2015 is not enacted, why would I continue to grow, knowing that I have the risk and that I am liable for other employers' workers.

Senator Alexander has put forth a proposal today to protect entrepreneurs and small business. I urge all members of this committee to support locally owned businesses in your States by working to enact and protect, using the Protecting Local Business Opportunity Act, S. 2015.

Thank you very much.

[The prepared statement of Ms. Stockeland follows:]

PREPARED STATEMENT OF CIARA STOCKELAND

Good morning Chairman Alexander, Ranking Member Murray, and members of the committee. My name is Ciara Stockeland, the owner and operator of MODE designer outlet stores, which I founded in Fargo, ND. I currently live in Grand Forks, ND with my husband and our two amazing children, Harrison and Isabella. Thank you very much for the invitation to appear before this committee to share my story of small business ownership and discuss the concerns of local business owners everywhere regarding the National Labor Relations Board's (NLRB) recent decision to change the "joint employer" standard.

It is an honor to be in Washington before the distinguished members of this committee today. Likewise, it will be an honor to attend the "White House Summit On Worker Voice" tomorrow. This is an issue of great importance to franchise businesses like mine, and it is important that small business perspectives are heard by our Nation's leaders.

I am here to speak on behalf of the hundreds of small business owners like myself who are members of the Coalition to Save Local Businesses. I joined the Coalition because I believe saving local businesses is what's at stake in this so-called joint employer issue.

Today I will share why it's so critical for the future viability of millions of small businesses and the 780,000 franchise businesses in America that this committee and Congress reinstate the very successful joint employer standard by passing S. 2015. This simple, one-sentence legislation will restore certainty to small businesses and our employees. I urge every member to support the bill.

MY NORTH DAKOTA SMALL BUSINESS STORY

Mr. Chairman, I am a franchisor. By working extremely hard and expending immeasurable time and energy, I founded a successful brand that has grown into a franchise. While some people may hear the term "franchise" or "franchisor" and think only of major corporations, they can also think of me, my story, and the story of hundreds of thousands of both franchisors and franchisees who are small business owners.

Nine years ago, I opened my first retail store, Mama Mia, a high-end maternity store, in Fargo, ND. Shortly after, I developed the concept for MODE, and we opened our first location right next door to Mama Mia. In 2008, I chose to merge the two stores into what was our first MODE location, as you would see it today. We wanted to build a brand. We began offering franchise opportunities in 2011, and we have successfully expanded to 12 locations across the Midwest and South Carolina. We hope to continue growing. Our goal is to have 75 stores by 2024.

I am here today because my goal is to grow our business and continue creating opportunities for future franchisees and their employees. The uncertainty introduced by the NLRB's *BFI*'s decision jeopardizes the expansion of my business. As a small business owner who meets countless public and private demands and competes against massive corporations each day, I find it terribly frustrating to have regulators harming my business and the careers of so many others in our system.

To understand my frustration, you must understand how franchising actually works. When our franchisees enter into an agreement to run a MODE franchise store, they sign up to own and operate their own business. I simply provide franchisees with a foundation from which to launch their business: our recognized brand and trademark, a set of business practices to ensure consistency and quality across all locations, and support for marketing and advertising. From there, our franchisees are responsible for operating their own stores and enacting their own employment practices, including hiring and training their own employees, setting their wages, and offering benefits based on their own competitive local markets. Franchisees obtain their own tax ID number and pay their own taxes. And, as part of their contract, they are required to abide by and operate under all existing laws, labor and otherwise. They are truly an independent business. I want to see each and every one of my franchisees succeed, and I try to support them however I can, but I am not a joint employer of their employees. I don't need to be. I would not lend my trademark, business model, and reputation to any of my franchisees if I had any reservations about their ability to handle the operations of the business themselves. In fact, the very reason I started a franchise instead of opening stores under the "company-owned" business model, was to ensure that every MODE location is run by local business women who had "skin in the game." I wanted these women to be able to have the full responsibility of owning and operating their own

MODE store versus being a mere manager with constant oversight from hundreds of miles away in Fargo.

I am extremely proud of my success, and the success of our franchisees. From the very beginning, I believed that each franchisee gave me the opportunity to help foster a leader. Together with my team in North Dakota, we mentor, train, and work with our franchisees to create a successful business that strengthens its community. We want each of these talented individuals to grow in their leadership skills so that they too can pay it forward to what some may refer to as employees, but whom I call rising entrepreneurs.

One of our primary goals as a franchisor is to motivate women to dream big and take risks in all areas of their lives. Last week during our industry's annual meeting here in Washington, DC, I was thrilled to celebrate the success of one of my entrepreneurs, Heather Pitsiladis, as she was recognized by her peers as the recipient of the "Franchisee of the Year Award" Heather has worked incredibly hard and is truly a leader in her community. I could not be happier to see her recognized for her hard work and determination. As part of the "Lean In" generation, I am overwhelmed by the extent to which MODE is contributing to the success of women in business. These are successes that we should all be celebrating, especially the strong women on this committee, rather than watching while the NLRB takes actions that have the intended or unintended effect of upending their businesses. Because that is what is happening.

Mr. Chairman, franchising works. There are more than 780,000 franchise establishments employing nearly 9 million professionals in America today. Franchise businesses generate $890 billion of economic output for the U.S. economy, representing 3 percent of the Gross Domestic Product. And, they have grown faster than the U.S. economy for 5 consecutive years. Franchising is perhaps the most successful business model in American history. It has been a successful model for myself, allowing me to take my concept and vision and allow other business women to realize their own success through its principals. Franchises are small businesses. Franchising jobs cannot be outsourced. Franchising means economic opportunity for people from any background. Why is this not precisely the business model that every regulator and Member of Congress supports?

Our businesses are threatened because the NLRB's new, "indirect" standard may make employers liable for employees, even if they are not in their direct control. No longer can businesses be sure they will be safe from liability simply because they do not control the hiring, wages, or supervision of another business's employees. No one can safely assure me or any other small business that we are safe from joint employer liability with our franchisees or contractors.

SCOPE OF THE BROWNING-FERRIS INDUSTRIES DECISION

On August 27, 2015, the NLRB issued its *Browning-Ferris Industries* (*BFI*) decision and invented a new joint employer standard based on one company having "indirect control" and "reserved contractual authority" over another company's employees. The Board's ruling is troublesome for numerous reasons.

First, the majority of NLRB members made clear that this is a significant, not a minor, change in Federal labor law. The Board members write that "we have decided to revisit and to revise" the joint employer standard after being urged by the NLRB General Counsel "to abandon (the) existing joint-employer standard."

Second, the *BFI*'s decision was not an isolated one. The Board writes,

> "We have decided to restate the Board's legal standard for joint-employer determinations and make clear how that standard is to be applied going forward."

Furthermore, small and growing franchise businesses like mine are not the only ones jeopardized by this ruling. As the dissenting NLRB members write,

> "(T)he number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited."

All businesses covered by the National Labor Relations Act and their business partners may face liability under the Board's new joint employer doctrine.

Third, the expansion of joint employer liability from "direct" control to both direct and "indirect" leaves small businesses facing serious uncertainty. As the Board majority states,

> "(W)e will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority."

In other words, under the Board's new doctrine, an entity need not actually commit a crime to be found guilty; it need only to possess the ability to commit it. That

alone creates the uncertainty and risk that will directly affect my willingness to continue moving forward and growing my business.

Mr. Chairman, we need some common sense. The joint employer standard that has existed for decades works and protects small businesses from liability. Why change it? Because of issues pertaining to control? Let's address that. I do not have direct control over my system's employees. Do I have indirect control over my franchisees? Of course I do. And so does any franchise system with its local franchisees. While I have nothing to do with their employment decisions, I have a lot to do with their brand. Our brand was my idea, and it is in my best interest to protect it. Some other people thought our store concept was a good idea, so we gave them the permission to use it. That is the spirit of franchising. And now it needs the protection of Congress. The NLRB has now prepared such a nebulous, unpredictable joint employer test that practically allows them to target any business relationship.

CONSEQUENCES OF BFI DECISION ON LOCALLY OWNED BUSINESSES

How will the new joint employer standard impact local businesses throughout the country? Under the new indirect control test, prime companies may be held liable for the employment and labor actions of third-party vendors, suppliers, staffing firms, franchisees, or subcontractors, over which they have no direct control. Consequently, local business owners may forfeit operational control of their stores, clubs, inns or restaurants to their franchisors, or their contractual business may dry up because no one wants to partner with a business for which they could be held liable. The enterprise value of thousands of franchises and small businesses may be reduced due to their decreased operational control. Future franchise development is jeopardized as brands expand using a corporate ownership model.

Another real world effect of the new joint employer standard relates to small business insurance coverage. Employment practices liability insurance, known as EPLI, provides coverage to employers against claims made by employees alleging discrimination, wrongful termination, harassment or other issues. Insurers determine EPLI coverage based on the number of a company's employees; the more employees a business has, the higher the premium. All businesses carry management liability insurance, which insures directors and officers from employment practices liability, fiduciary liability, and fidelity coverage, which is crime coverage related to employee dishonesty. In the eyes of any carrier, the more employees you have, the higher their risk. Under this new joint employer definition, if a franchisor takes responsibility for the total number of employees on the payroll of all franchisees—which you can be sure is how insurance companies will perceive that ruling, and not on a "case-by-case" basis—our premiums will either skyrocket or we may be unable to secure coverage at all. The risk to the carrier is much greater, in terms of class action lawsuits, so insurance companies will have no choice but to charge more. Inevitably, that cost will trickle down from the franchisor to the franchisee. And the only people who win in that scenario are class action lawyers.

As a franchisor who is now potentially facing new indirect control liability over my franchisees, I am faced with countless questions. Should I be compelled to start meddling in my franchisees employment decisions, such as their hiring, direction, supervision, and training practices? Should I distance myself from my franchisees or allow existing franchise agreements to expire? As I think about myself, my husband, and my two children, the bigger question becomes: Should I stop franchising altogether? I cannot afford the risk this would bring to our family.

Under the expanded joint employer standard, Main Street will see small businesses replaced by big businesses. There will be fewer local businesses because franchises will consolidate or choose to open corporate locations instead of franchises. Large companies will be less likely to expose themselves to unpredictable liability by contracting with small businesses for their products and services. Local entrepreneurs will not open new businesses in their local areas as small business opportunities decrease. As a result, America's Main Street will lose small businesses created by independent owners in their local communities.

Employees will lose too. They will have reduced opportunities to learn and advance in a massive corporation than in a locally owned business. There will be fewer mentoring opportunities because owners will be in distant corporate headquarters. They will earn lower wages because they are not advancing. And they will enjoy less workplace flexibility because they will no longer be managed by small business owners in their hometown, but rather by corporate management in faraway headquarters.

This issue is undoubtedly confusing. As we heard at last week's House hearing, labor law scholars and even NLRB members cannot agree what the impact of this

ruling will be on my business. The Board who implemented this new ruling didn't bother clarifying it. My concerns are many, but they boil down to this: Why are businesses like mine not being given a fair shake by our government? Why can't we have a government that supports small businesses? Why are small business owners facing the artificial threat of losing our businesses because of unelected bureaucrats? All we want is a commonsense solution so we can continue to grow our businesses in the communities we care about, and in so doing, contribute something to our world. Certainly, we can find more clarity in a one sentence piece of legislation than in an arcane regulatory body's 50-page decision.

In response to our concerns about our livelihoods, some academics and legal scholars have practically patted small business owners like me on the head and said "Don't worry, the NLRB will make its decisions on a 'case-by-case basis.'" Case-by-case inconsistency based on an unpredictable "indirect" control joint employer standard makes small business owners fear when we might be in the crosshairs of regulators. Small business leaders deserve more certainty and protection from Senators than the NLRB and its apologists provide.

FRESHII MEMORANDUM OFFERS NO COMFORT TO SMALL BUSINESSES

While the NLRB's *BFI* decision has created tremendous uncertainty and fear within the small business community, we heard from some advocates at the U.S. House subcommittee hearing on September 29, 2015 that there is no reason for franchise business people to be concerned. Certain witnesses told the U.S. House subcommittee that the *BFI* decision does not involve franchising, but they contended that the more important recent NLRB opinion to franchising involved a franchisee called Freshii.

The Freshii advice memorandum is simply a distraction. While I am not an attorney, I do understand that the Freshii advice memorandum was issued in May 2015 not by the NLRB, but rather by the Division of Advice, which is part of the General Counsel's office of the NLRB. The distinction is that the General Counsel is the prosecutor and the Board members are the judges. The General Counsel's office wrote the Freshii advice memo, and the Board members decided the *BFI* case.

Mr. Chairman, importantly, the Freshii memorandum does not have the force of law. The *BFI* decision does. Freshii deals with one specific case, which is not being prosecuted, while BFI has been litigated and applies to all industries and all kinds of contracts held by businesses, small and large. And importantly, while the *BFI* decision was a contracting case, every franchisor-franchisee relationship is based on a contractual franchise agreement. Franchising is contracting.

As I've previously mentioned, this issue may seem confusing to members of the committee, and it is also confusing to small business owners. And that is the point: confusion produces uncertainty and more litigation and less growth. Hard-working local business owners need the common sense clarity of S. 2015.

NEED FOR THIS LEGISLATION CANNOT BE OVERSTATED

All Senators will soon have an opportunity to stand up for small businesses in their States and support S. 2015. There is no time to lose. Prior to the *BFI* decision, some elected leaders told concerned small business owners not to worry and, effectively, "Let's wait for BFI to come out." Now, too many Members of Congress are saying, "It's too soon after BFI came out to rush to judgment." I cannot overstate the urgency needed in responding to a dangerous, unpredictable "indirect" control standard. What the NLRB has done is establish a nebulous joint employer doctrine that allows it to target any business relationship it wants. Which one of our small businesses will be their next target?

Mr. Chairman, as I've outlined in this testimony, there are real-world consequences to this ruling. Senators who refuse to support the one-sentence "Protecting Local Business Opportunity Act" will have to explain to their constituents why companies like mine may be liable for workers I don't even employ; why franchisees can no longer get Employment Practices Liability Insurance; why franchisees may lose operational control of the stores they established and built; why franchisees find that their franchise agreements are not being renewed; and why small business livelihoods are being taken away. The fact is, this legislation means everything to us and our futures. We need your help. I need your help.

My grandfather was an entrepreneur. My father was an entrepreneur. I have created jobs in my own State through the growth of my company, and I now give the opportunity to countless business women to also own their own business through franchising. I want this freedom and opportunity for my son and daughter should they choose to pursue the American Dream by starting their own business.

Thank you Mr. Chairman, for recognizing and responding to an overreach by another branch of the Federal Government by authoring S. 2015. I urge all members of this committee to support locally owned businesses in your States by working to enact the "Protecting Local Business Opportunity Act." I look forward to answering any questions you may have.

The CHAIRMAN. Thank you, Ms. Stockeland.

Mr. Martin.

STATEMENT OF EDWARD MARTIN, PRESIDENT/CEO, TILSON HOME CORPORATION, AUSTIN, TX

Mr. MARTIN. Thank you, Chairman. Good morning. Thank you for the opportunity to testify today. My name is Eddie Martin. I am a home builder from Austin, TX, and president and chief executive officer of Tilson Home Corporation.

I have been active in the National Association of Home Builders throughout my career. The NAHB is also a member of the Coalition to Save Local Businesses, which was formed to protect the traditional joint employer standard. I am honored to participate in this hearing.

I have over 30 years of experience in the home building industry. Tilson Homes has been a family-owned and -operated company since 1932. We currently have 140 employees with a wide range of disciplines, including construction supervisors, design and drafting professionals, warranty tech, and administrative staff.

Beyond our full-time staff, Tilson contracts with 287 companies to perform a range of specialized services that are required to build a home, like roofers, framers, and cleaners. On average, each of our contractors has about 15 employees.

Because we contract with so many small companies, we are very concerned about the potential impact of NLRB's *Browning-Ferris'*s decision. The *Browning-Ferris'* decision leaves employers guessing over how much indirect control constitutes a joint employer.

Of particular concern to me is whether basic business acts, like choosing a project's completion date or scheduling an electrician to come to a job site at a certain time, would trigger a finding of joint employment. For example, if Tilson contracted with a paint company for a home in Austin, TX, we would be prevented from telling a subcontractor when to paint the walls or even when the walls would be constructed.

You might argue that indirect or potential control over just one essential term of employment, like scheduling, would not be sufficient to justify a finding of joint employment. Because the new indirect test is so vague and nonspecific, the NLRB has not excluded that possibility.

Browning-Ferris simply does not make sense in the real world. I ask the question of whether I have indirect control if I ask a contractor to bring on extra staff to make up for delays. In an industry that is at the mercy of weather, if rain sets my schedule back, shouldn't I be able to ask a contractor to increase the labor on the job site without becoming a joint employer?

Browning-Ferris is so ambiguous and creates such blurry lines that even a homeowner doing a remodel project could be viewed as a joint employer. In the real world, a homeowner is going to be involved in decisions regarding when workers begin and end the

work day and will set deadlines for the completion date. Those acts could meet the test of joint employer.

Or consider a homeowner who has a clogged drain. They may call a plumbing company and ask for a specific plumber that they've used in the past. Does that homeowner have indirect control over staffing by requesting a specific employee and then scheduling a time for completion? This new standard is fundamentally flawed because it does not provide a clear and definite role for determining if a company is a joint employer.

Home building is highly decentralized, supporting numerous local small businesses. Having a large number of such small firms in the industry promotes competition, which ultimately benefits home buyers by helping them keep construction costs down. How can a business like mine work with hundreds of other businesses to navigate this maze of uncertainty?

If the goal of the NLRB is to put small firms out of business, then congratulations are in order. This ruling may very well do that. Ultimately, less competition among small firms leads to higher home prices for consumers. Congress must act quickly to restore the traditional definition of joint employment so that companies like Tilson can have a clear picture of our responsibilities.

Thank you again, and I look forward to your questions.

[The prepared statement of Mr. Martin follows:]

PREPARED STATEMENT OF EDWARD MARTIN

INTRODUCTION

I appreciate the opportunity to participate in today's hearing on the National Labor Relations Board's (NLRB) joint employer standard. My name is Ed Martin. I am a home builder from Austin, TX, and the president and chief executive officer of Tilson Home Corporation. I am also a past president of the Texas Association of Builders and have been active in the National Association of Home Builders' (NAHB) leadership structure at the local, State and national levels throughout my career.

I have more than 30 years of broad-based experience in the housing industry. I have worked as an HVAC technician, a leasing agent, and as an attorney representing the multifamily industry. Currently, I am the President of Tilson Homes, one of the largest custom home building production companies in the United States.

I began working at Tilson Homes during law school, and the company has grown considerably since that time. We currently employ 140 individuals, including construction supervisors, design and drafting professionals, and warranty technicians. The majority of these employees are full-time staff with competitive salaries and benefits.

We are a "Build on Your Lot" custom home builder, meaning we design and construct every inch of the home to the customer's specifications on their own personal property. On average, we build 300–500 homes per year at an average price of $270,000. This year, we will construct approximately 400 homes. Building quality, affordable housing for our customers and their families is our top priority.

The building industry is made up of a vast system of general contractors and subcontracted businesses. Beyond our full-time staff, Tilson Homes contracts with 287 companies and specialty trades to perform a range of services, including HVAC work, cleaning, landscaping, and roofing, amongst other specialties.

It is important for our company and the housing industry at large to stay current on policies that affect our ability to contract with the myriad of specialty trades needed to build a home. Timely delivery of homes is inextricably tied to our ability to promptly schedule trades and manage issues that could lead to production delays, such as weather-related incidents or labor shortages. For these reasons, we have been closely monitoring the developments at the NLRB regarding its joint employer standard.

THE NEW BROWNING-FERRIS STANDARD IS LIMITLESS, UNREALISTIC IN REAL WORLD

The new joint employer standard adopted by the NLRB in *Browning-Ferris* is alarming. Under the decision, Tilson Homes could be considered a joint employer if it has indirect control or the potential to exercise control or co-determine the essential terms of a subcontractor's employee's employment, including hiring and firing, discipline, supervision, scheduling, seniority and overtime, and assigning work and determining the means and methods of performance. This is a radical departure from the traditional standard of "direct and immediate control."

According to the dissenting opinion in *Browning-Ferris*, all business-to-business relationships, including subcontracting, could fall under the umbrella of this standard. The NLRB acknowledged that issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment "are best examined and resolved in the context of specific factual circumstances." [1] That being said, one of the factors of significant discussion in both the majority and dissenting opinions in *Browning-Ferris* is scheduling.

The discussion of scheduling is important to home builders because we are, by our very nature, schedulers. At Tilson Homes, our construction supervisors' chief responsibility is to ensure the specialty trades are scheduled on time in order to meet the consumer's delivery date. With an average of 22 subcontractors needed to build a home, we are greatly concerned about our inability to limit our exposure to joint liability under the National Labor Relations Act (NLRA) under the new *Browning-Ferris* test.

The new "indirect or potential" control standard in *Browning-Ferris* is ambiguous, at best. We question whether the simple act of choosing a project's completion date would trigger a finding of joint employment. For example, if Tilson Homes contracted with a painting company for a home in Austin, would we be prevented from telling the subcontractors when to paint the walls or even when the walls would be constructed? Would we be prevented from scheduling installation of the fire sprinklers or cabinets? Would the roof be completed in time for the codes inspector to visit? This would be akin to ordering a pizza, but allowing the delivery service to show up at the driver's discretion.

It is also common for general contractors to request additional labor or time on the job site when weather-related delays jeopardize deadlines. Would the act of requesting two additional workers to get a deck installed trigger a finding of joint employment? If a project gets delayed due to heavy rainfall, would I not be able to tell the contractor to double his labor and meet the construction deadline? If I know one of the trades' employees is a diligent and efficient worker, would I not be able to request the specific worker on my job site? Would it be fair for the NLRB to prohibit this worker from being requested?

Let us take another example from a typical relationship between a homeowner and a remodeler. If I am, as a homeowner, doing a renovation of my bathroom, I may very well meet the standards set by *Browning-Ferris* as a joint employer. In the real world, the homeowner is going to be involved in decisions regarding when the workers begin their day, leave for the day, and will generally set deadlines for project completion. If, as the homeowner, I am dissatisfied with the work product, I will not hesitate to fire the company doing the work. If I am uncomfortable with one of the workers coming into my home, I will ask the company to send someone else. This is not atypical for a remodeling project, but *Browning-Ferris* creates such blurry lines that a homeowner *could* be viewed as a joint employer in certain circumstances.

Under the new standard, I believe that each of these factors could be assessed in a finding of joint employment. It could be argued that indirect or potential control over just one of the essential terms of employment, such as scheduling, would not be sufficient to justify a finding of joint employment. The NLRB, however, has not excluded such a possibility. In reality, businesses could be found to be joint employers of another company's workers by merely doing one of the aforementioned actions—scheduling or requesting additional labor or even a specific worker. There is no certainty or predictability regarding the identity of the employer under this new standard. It is fundamentally unrealistic.

BROWNING-FERRIS WILL HARM HOUSING AFFORDABILITY

The Nation's housing markets are beginning to see widespread consistent, sustainable growth. Home builders are major job creators. Currently, the industry employs 694,000 individuals in the builder category and 1.761 million as residential

[1] *Browning Ferris Industries* at 16.

specialty contractors, for an industry total of 2.46 million. These workers and entrepreneurs are spread out across the Nation. Since the start of 2014, 201,000 jobs have been added by home builders and remodelers. More are expected with continued gains in construction activity.

In order to meet the housing needs of a growing population and replacement requirements of older housing stock, the industry should be constructing about 1.4 million new single-family homes each year and more than 1.7 million total housing units. In comparison, home builders in 2014 constructed only 647,000 single family homes and 354,000 multifamily units.

According to NAHB estimates, construction of 1,000 single family homes creates 2,970 full-time equivalent (FTE) jobs. Similarly, 1,000 new multifamily units results in 1,130 FTE jobs and $100 million in remodeling expenditures creates 890 jobs. This means as we return to normal levels, home builders will have millions of jobs to fill. According to the most recent release of the NAHB/First American Leading Markets Index, the U.S. market is running at 92 percent of normal economic and housing activity. As the recovery continues, there will be millions of more jobs in home building and related trades. Congress should consider policies that support a continued housing recovery.

Policies that reduce labor market flexibility, such as those that limit the use of independent contractors, will reduce the number of local home building firms. The industry is highly decentralized, supporting a large number of local, competitive firms.[2] At Tilson Homes, each of the specialty trades we contract with has an average of 15 employees, varying from 5 to 150 employees. Besides being a sector that supports local small businesses, a large number of such small firms in the industry promotes competition, providing a benefit for prospective home buyers.

The *Browning-Ferris* decision will make home builders employers of other company's workers. The decision calls into question the very basic idea of what it means to be a business. Employers will be forced to re-examine their entire business model since it affects their responsibilities not only at the NLRB, but with other Federal agencies such as the Internal Revenue Service, the U.S. Department of Labor, or for the purposes of the *Affordable Care Act*.

Without the human resources departments typical of large firms, small firms will find it challenging to compete. This will lead to a centralization of the industry, with less competition among small firms and higher home prices. Decentralization of the market is better for the housing recovery because more competition among small firms will yield more affordable housing options for consumers. If the goal of the NLRB is to put small home builders out of business, this may very well be the outcome.

CONCLUSION

Codifying the NLRB's traditional definition of "direct and immediate control" will provide certainty and predictability of the identity of the employer. If left unchecked, the *Browning-Ferris* decision will be damaging to the marketplace and housing affordability. For these reasons, I strongly encourage Congress to restore the traditional definition of joint employment and ensure a level playing field for all businesses. It is imperative that our government does not act to raise the cost of housing through policies that limit the ability of businesses to organize as independent contractors.

Thank you again for the opportunity to testify today.

The CHAIRMAN. Thank you, Mr. Martin.

Mr. Kisicki.

STATEMENT OF MARK G. KISICKI, SHAREHOLDER, OGLETREE DEAKINS, NASH, SMOAK & STEWART, P.C., PHOENIX, AZ

Mr. KISICKI. Thank you, Chairman Alexander and Ranking Member Murray. I appreciate the opportunity to be here and testify about this very important legislation.

The Protecting Local Business Opportunities Act would amend the National Labor Relations Act, but it would accomplish far more than its title or its simple language suggests. It would require the

[2] As of 2012 (the most recent data available), there were 48,557 residential construction firms. *See* "Construction Job Openings Steady, Hiring Slowing" by Robert Dietz at *http://eyeonhousing.org/2015/09/construction-job-openings-steady-hiring-slowing/*.

NLRB to employ an ordinary meaning of the term, employer, when interpreting the Act, just as Congress intended, not the far-fetched definition that the Board just adopted in *BFI* or *Browning-Ferris*.

The touchstone of the National Labor Relations Act is the right of employees, as a group, to collectively decide if they want union representation to act on their behalf collectively, or if they want to deal directly with their employer on an individual basis. In order for them to exercise that right and, indeed, for employers to know what their rights and obligations under this law are, it is of fundamental importance to be able to identify who is the employer of any particular group of employees.

Yet the Board has limited who can be defined as an employer, and, in fact, Congress has limited who can be defined as an employer to just one employer of any particular unit. That employer can be two companies acting together as an employer, but it can only be one employer.

Because it's so important for employees and employers to know their rights and the limits of this act, defining who is a joint employer is necessary. The Board, however, failed to define what a joint employer was or provide any clear standards until 1984, when it finally did so, and it adopted the ordinary meaning that we all understand constitutes an employer. It's the entity that actually exercises direct and immediate control over significant terms and conditions of employment, the things that we all associate with an employer, the ability to hire, to direct the employee by supervision, to reward the employee through compensation, and, when necessary, to discipline and discharge.

In *Browning-Ferris*, however, the Board undid that clarity that had existed under this Act, uninterrupted for 30 years. It adopted a new standard that, in reality, is no standard at all. Employers and, indeed, no union can be comfortable thinking it can determine who is a joint employer under this standard, because the NLRB failed to give us any guidance as to how this very nebulous standard is going to be applied.

For example, the new joint employer standard is a two-part test. The first part of the test is itself another multi-part test, and the Board failed to give us any standard as to how those factors would be weighed or evaluated.

In fact, the standard that the Board adopted, the common law test, is, in fact, rooted in the common law. It was a test that was developed not to determine an employer-employee relationship, but to distinguish between employees and independent contractors. When there's no question that individuals at issue are somebody's employees, this test does very little to help us figure out whose employees they actually are.

Moreover, the Board failed to give us any guidance as to how it would weigh the remaining factors of this test that are actually relevant once we conclude that we're dealing with an individual who is somebody's employee. The Board left that entirely to its own discretion in future cases and the discretion of its general counsel.

One thing that the Board did make clear, however, in *Browning-Ferris*, is that indirect control by one company over another's employees, or the potential to control them, is enough to create a joint employer standard and a relationship as a joint employer. That

standard is inherently nebulous, because the ability to exercise indirect control or the ability to potentially control employees is inherent, at least to some extent, I would posit, in every business relationship where one employer is supplying goods or services to another.

It will take years of litigation and cost before we have standards that can be applied consistently and can be understood by all the constituents of this Act, employers, unions, and employees alike. Until then, this standard that the Board has adopted in *BFI* will do violence to the very purpose of the National Labor Relations Act, which is to provide stability in labor relations.

Further undermining the purpose of the Act is the damage this new standard will cause to the collective bargaining process. Bargaining initial contracts is a very difficult and time-sensitive, time-consuming commitment. Typically, it takes more than a year. This new standard is going to put together employers that may have some interests in common, but certainly have competing interests, because they are, in fact, different employers. It is going to require them to have to come to an agreement as to what the appropriate——

The CHAIRMAN. Could you wind up your testimony, please?

Mr. KISICKI. Thank you, Senator—what the appropriate terms of a collective bargaining agreement should be. Congress should act to restore stability in labor relations to protect the National Labor Relations Act's fundamental purpose by adopting this legislation.

Thank you.

[The prepared statement of Mr. Kisicki follows:]

PREPARED STATEMENT OF MARK G. KISICKI[1]

I. EXECUTIVE SUMMARY

The Protecting Local Business Opportunity Act is a simply worded amendment to the National Labor Relations Act (the "NLRA" or "Act") that would accomplish far more than its name and simplicity suggest. It would require the National Labor Relations Board (the "NLRB" or "Board") to give the term "employer" its ordinary meaning—as Congress intended not the "far-fetched" one that the Board just adopted in *Browning-Ferris Industries of California, Inc. d/b/a BFI* Newby Island Recyclery, 362 NLRB No. 186 (August 27, 2015) ("*BFI*"). Although the Board's new standard might serve a political agenda in the short run, in the long run, it will cause serious damage to large sections of our economy and to the Act itself.

Notably, the Act never references the term "joint employer," and expressly limits the Board's ability to certify bargaining units to groups of individuals who are employed by a single employer. 29 U.S.C. §151, *et seq*. The Board, however, recognized the reality that two entities could, in fact, exercise such control over a group of employees' terms and conditions of employment that, collectively, the two employers should be deemed "the employer" of those employees. Initially, the Board applied the approach to situations where the two entities were not truly separate, and developed the "single employer" test for such situations. In the 1960s, the Board expanded on that approach by recognizing that wholly distinct business entities could, despite their separate identities, collectively control as a "joint employer" a group of employees' terms and conditions of employment. The Board, however, failed to articulate any consistent standard for determining when two entities would be found to be a joint employer. The lack of any readily identifiable standard led to confusion, even by the Board. *See*, e.g., *NLRB* v. *Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d

[1] Mr. Kisicki is a shareholder in the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. ("Ogletree Deakins"), one of the Nation's largest law firms dedicated to representing management in labor and employment matters. Mr. Kisicki is a member of the ABA Section of Labor and Employment Law Committee on Practice & Procedure Under the NLRA. The statements and opinions contained in this testimony are those of Mr. Kisicki personally and are not being presented as views or positions of Ogletree Deakins or any of the firm's clients.

1117 (3d Cir. 1982) (noting that "there has been a blurring of these concepts at times by some courts and by the Board").

The Board soon adopted the standard articulated in the Third Circuit's 1982 *Browning-Ferris Industries* decision and applied it consistently for more than 30 years. In its recent *BFI* decision, however, the Board reversed 30 years of established labor law to adopt a new but amorphous standard for determining when two legally separate companies jointly employ a group of employees. In particular, the Board adopted a two-part test. The first part of that test is, itself, a multi-factor test that the Board asserts determines whether a "common law employment relationship" exists between a particular group of workers and the putative joint employer. If so, and "the putative joint employer possesses sufficient control over those employees' essential terms and conditions of employment to permit meaningful collective bargaining," then both employers will be deemed to jointly employ the unit of employees. *Id.* at p. 2. The common law employment test the Board adopted, however, is not particularly helpful for identifying "the employer" of a group of employees because that was not the purpose it was developed to serve. That test was not developed to identify which one (or more) of several entities was an individual's employer, but to determine whether an individual was an employee or an independent contractor.[2] When there is no dispute that the workers in a group are, in fact, employees of some entity, many of the factors of the common law test are already satisfied and provide no meaningful guidance to help determine which particular entity (or entities) is (or are) their employer(s). Also, the common law test the Board purportedly incorporates was rooted in judicial efforts to resolve questions of liability for the torts committed by individuals while acting on behalf of others, not in any effort to define statutory employer-employee relationships. Indeed, the unique nature of the NLRA, which grants and protects the rights to employees as a group, not as individuals, makes the application of the Board's proposed test ill-suited to the purposes of the Act and yields results antithetical to the Act's goals.

In addition, the Board's decision in *BFI* fails to provide any guidance as to how the common law test is to be applied. It does not, for example, explain how its particular factors are to be weighed and balanced. It provides no help to employees, employers, unions, or the Board's own regional directors in enabling them to determine, with any reasonable certainty, what entity is, will or should be deemed to be a joint employer. Instead, *BFI* holds that an entity's indirect control over another's workers is sufficient *in itself* to render that entity a joint employer of the employees. *BFI* also dictates that the theoretical ability one entity has to control another's workers, even if not exercised, is also sufficient to establish a joint employer relationship. Indirect control and the unexercised theoretical potential to control another company's workers are inherent aspects of almost every business relationship where one entity provides goods or services to another. Moreover, the right to control the workers of another company is always inherently reserved *by operation of law* to any business that owns or leases property on which another company's workers perform their jobs. Obviously, the extent of such indirect control or unexercised right to control varies dramatically in business relationships. *BFI* gives employers, employees and unions no basis for guessing how much indirect control or reserved but unexercised right to control will be deemed sufficient by the NLRB to find that two entities are joint employers.

Being able to determine, with a degree of certainty, the statutory "employer" of a particular unit of employees is crucial under the NLRA for employers, employees, and unions alike. Without reasonable certainty, companies will be unable to know what legal rights and obligations they have and what risks they have assumed. Without being able to identify their employer with reasonable certainty, employees will not know the extent of their rights under the Act, and unions will not know whether their picketing is legal or illegal under the Act. The lack of reasonable certainty will, in itself, have profound economic consequences on businesses that cannot make rational decisions in the marketplace because they have no meaningful standards to apply in assessing their potential costs, risks and rewards. This lack of certainty will adversely affect all businesses, and will disproportionately affect small businesses and franchisees by adding yet another layer of legal complexity

[2] *Cf. Clackamus Gastroenterology Associates* v. *Wells*, 538 U.S. 440, 444 n.5 (2003) (in coming as close as the Court ever has to defining the term "employer" under a labor or employment law, the Supreme Court concluded that the common law factors for determining whether an individual is an employee [the factors the Board's new standard expressly adopts] were "not directly applicable to this case [under the Americans with Disabilities Act] because we are not faced with drawing a line between independent contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer").

and expense to their entrepreneurial efforts. The latter comprise the segment of the employer community that has led the country in creating jobs, and in providing the greatest opportunity for women and minorities to move from being employees to becoming business owners. Moreover, that same lack of certainty undoubtedly will lead to a serious instability in labor relations, undermining the most fundamental purpose of the Act.

For more than 30 years, the Board has provided that stability by giving all of its stakeholders the ability to know, with reasonable certainty, who employed any particular group of workers. The Board's prior standard deemed two separate entities to be joint employers of a unit of workers if they shared, or co-determined, "the essential terms and conditions of employment" of those workers in a manner that "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *TLI, Inc.*, 271 NLRB 798 (1984). Moreover, the Board provided further clarity to that standard by requiring that the putative joint employer's control over the employment matters was direct and immediate. *Id.* (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

Remarkably, the Board's stated reason for overturning the stability that its 30-year-old standard had provided is to address what it perceives to have been the prior standard's failure to "keep pace with changes in the workplace and economic circumstances" in light of the "more than 2.87 million of the Nation's workers employed through temporary agencies."[3] However, the standard the Board has been applying for the past 30 years already provided that protection. Under the pre-*BFI* standard, contingent employees of one company who worked at another and were under the second company's direct supervision—as is almost always the case—already would have been deemed to be jointly employed by both companies. No change in the standard was necessary for the Act to accommodate the changes in employment patterns that the Board posits as the rationale for its radical revision of a long-settled standard. In the absence of any legitimate rationale, the unquestionable dislocation and uncertainty that will ensue by such revision cannot be justified.

Unless Congress acts through this proposed amendment, it will take years of litigation and untold cost to determine how the NLRB will apply its new standard to the diverse business arrangements that exist today. In the meantime, the economy—and the fundamental purposes of the Act itself—will have been seriously damaged.

II. ANALYSIS

A. For Thirty Years Before BFI, the Board Applied a Clear and Appropriate Standard For Determining Joint Employer Status.

For more than three decades before *BFI*, the Board provided stability in labor relations for all parties by applying a clear and appropriate standard for determining when two separate entities were joint employers under the Act. That standard required that each entity exert direct and significant control over the same employees such that they "share or codetermine those matters governing the essential terms and conditions of employment . . ." *TLI, Inc.*, 271 NLRB 798, 798 (1984). The Board applied that test by evaluating whether the putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction" and whether that entity's control over such matters is direct and immediate. *Id.*, (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

By tying joint employer status to direct and immediate control over the fundamental aspects of the employment relationship—hiring, firing, discipline, supervision and direction—the Board's pre-*BFI* standard ensures that the joint employer is actually involved in matters material to the scope of the Act, and is not merely engaged in a market relationship that may have an indirect impact upon employees. Additionally, by requiring that the control be direct and immediate, the standard assigns joint employer status only to those entities with the actual authority to impact the employment relationship, the singular focus and subject matter of the Act.

In articulating the joint employer standard in *Laerco* and *TLI*, the Board provided further clarity by applying it to the detailed, particular facts of each case. *Laerco* involved a group of drivers that another company, CTL, supplied to it under a cost-plus contract. 269 NLRB 324, 325 (1984). CTL made all the decisions regarding hiring, discipline and discharge of the drivers it provided. *Id.* at 324–25. CTL also made all legally required contributions and deductions from the drivers' paychecks and provided them with benefits. *Id.* at 325. Once a driver was assigned to a Laerco facility, CTL representatives sometimes provided the driver with his or her initial

[3] *Board Issues Decision in Browning-Ferris Industries*, Aug. 27, 2015; *https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries*.

job duty instructions; however, other times Laerco provided those initial instructions alone or with CTL representatives. *Id.*

Beyond occasionally providing CTL's drivers with their initial instructions, Laerco supplied the drivers' vehicles and required them to comply with Laerco's safety regulations. *Id.* at 324. Under Laerco's contract with CTL, Laerco was permitted to establish driver qualifications and refuse to accept any drivers provided by CTL. *Id.* On occasion, Laerco pointed out issues regarding the drivers' performance to CTL, which CTL then resolved. *Id.* at 325. CTL supervisors were seldom at the Laerco facilities to which CTL assigned its drivers, so Laerco provided what little supervision the CTL drivers needed, such as directing them where to go for a pick-up or delivery and setting the drivers' priorities. *Id.* Laerco would attempt to resolve minor problems that arose for the drivers in the workplace, but CTL handled any significant issues. *Id.* at 326.

In reviewing the facts of the case, the Board noted:

> 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. [Citing *Biore* v. *Greyhound Corp.*, 376 U.S. 473 (1964) and *NLRB* v. *Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982)] Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *Id*. at 325.

Examining the facts before it in *Laerco*, the Board held that the level of control exercised by Laerco was inadequate to establish that Laerco and CTL functioned as a joint employer. *Id.* Although Laerco provided some supervision of the CTL drivers, it was "of an extremely routine nature" and "the degree and nature of Laerco's supervision" failed to render it a joint employer. *Id.* at 326. Moreover, while Laerco exercised some control in resolving minor issues raised by CTL's drivers,

> "[A]ll major problems relating to the employment relationship" were handled by CTL. *Id.* Consequently, the Board concluded that Laerco was not a joint employer because its control of the CTL employees' terms and conditions of employment was not meaningful, given "the minimal and routine nature of Laerco's supervision, the limited dispute resolution attempted by Laerco, [and] the routine nature of the work assignments." *Id.*

TLI, Inc. also involved a situation where one company, TLI, provided drivers to another company, Crown. 271 NLRB 798 (1984). Each day, Crown directed the drivers as a group about which deliveries to make, but the drivers selected their specific assignments based on seniority. *Id.* at 799. The drivers reported their accidents to Crown; however, TLI investigated the accidents and determined whether discipline was warranted. *Id.* When a driver engaged in conduct that concerned Crown, Crown would give an incident report to TLI and TLI conducted its own investigation. *Id.* Crown did not hire, fire or discipline TLI's employees. *Id.*

The Board analyzed these facts under the standard set forth in *Laerco* and the Third Circuit's 1982 *Browning-Ferris* decision and determined that,

> "[A]lthough Crown may have exercised some control over the drivers, Crown did not affect their terms and conditions of employment to such a degree that it may be deemed a joint employer." *Id.*

The Board found that Crown's daily supervision was not "meaningful":

> "The supervision and direction exercised by Crown on a day-to-day basis is both limited and routine, and considered with [Crown's] lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint employer finding." *Id.* (emphasis added).

Furthermore, even though a Crown representative actually attended bargaining sessions between TLI and the union and discussed cost savings, the Board found his involvement did not amount to sharing or co-determining terms and conditions of employment because the Crown representative left the actual savings determinations to TLI and the union. *Id.*

The standard articulated by the Board in *Laerco* and *TLI* is clear, rational and withstood the test of time for 30 years. Indeed, the Board's direct control standard was "settled law" since 1984, until August 27, 2015. *See Airborne Express*, 338 NLRB 597, n.1 (2002). Over that span of years, the Board developed a coherent body of law from *Laerco* and *TLI* that elucidates the facts, circumstances and scenarios

under which an entity becomes a joint employer.[4] Reviewing courts likewise have adhered to the Board's bright-line test for decades.[5]

The stability and predictability provided by the Board's pre-*BFI* standard has allowed thousands of businesses, large and small, to structure their business relationships in a sensible and optimal fashion, subcontracting discrete tasks to other companies with specialized expertise to provide services that would otherwise be far more difficult or costly. At the same time, that joint employer standard did not deny any employee the right to union representation granted by the Act, nor prevent any union from bargaining with the employer directly involved in setting the terms and conditions of employment in a workplace.

B. The BFI Standard for Determining Joint Employer Status is Amorphous and Contrary to the Language, Legislative Intent and Fundamental Policies of the Act.

As the Supreme Court has opined,

> "[A] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."

FCC v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317–18 (2012) (holding due process required fair notice even when regulations imposed no criminal penalty or monetary liability). Inherent in the notion of due process is the requirement that

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[4] *See, e.g., Aldworth Co.*, 338 N.L.R.B. 137, 139–40 (2002) (affirming ALJ's finding of joint employer relationship because "[b]ased upon a thorough review of the record, the judge determined that Respondents Aldworth and Dunkin' Donuts together share control over the hiring, firing, wages, benefits, discipline, supervision, direction and oversight of the truck drivers and warehouse employees and thereby meet the standard for joint employer status"); *Mar-Jam Supply Co.*, 337 N.L.R.B. 337, 342 (2001) (affirming finding of joint employment after analyzing all terms and conditions of employment and finding that putative employer directly hired and fired employees, solely supervised and directed the employees with regard to work assignments, time, attendance and leave, and disciplined the employees); *C. T Taylor Co.*, 342 N.L.R.B. 997, 998 (2004) (affirming finding of no joint employment where none of essential terms and conditions of employment were controlled by putative employer); *Mingo Logan Coal Co.*, 336 N.L.R.B. 83, 95 (2001) (stating that the putative joint employer meaningfully affected all five essential terms and conditions of employment); *Villa Maria Nursing and Rehab. Center, Inc.*, 335 N.L.R.B. 1345, 1350 (2001) (affirming finding of no joint employer relationship where "Villa Maria does not have any authority to hire, fire, suspend or otherwise discipline, transfer, promote or reward, or lay off or recall from layoff ServiceMaster's employees. Villa Maria does not evaluate them or address their grievances."); *Windemuller Elec., Inc.*, 306 N.L.R.B. 664, 666 (1992) (affirming ALJ's finding of joint employment based on facts that putative joint employer shared or co-determined hiring, firing, discipline, supervision and direction); *Quantum Resources Corp.*, 305 N.L.R.B. 759, 761 (1991) (affirming joint employer finding and specifically adding to Regional Director's decision that FP&L's control over hiring, discipline, discharge and direction "[t]ogether with the close supervisory relationship between FP&L and [contract] employees . . . illustrate[s] FP&L's joint employer status"); *D&S Leasing, Inc.*, 299 N.L.R.B. 658, 659 (1990) (finding joint employment based on facts that putative joint employer shared or co-determined the hiring, firing, discipline, supervision and direction of contract employees); *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 1000 (1988) (affirming joint employer finding based on the fact that G. Heileman shared or co-determined all five essential terms and conditions of its contract employees' employment, and in addition negotiated directly with the union); *Island Creek Coal*, 279 NLRB 858, 864 (1986) (no joint employer status because there was "absolutely no evidence in this record to indicate that the normal functions of an employer, the hiring, firing, the processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leaves of absences, were in any way ever performed by [the putative joint employer]).

[5] *See, e.g., SEIU Local 32BJ* v. *NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding that supervision which is "limited and routine" in nature does not support a joint employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.") (citation omitted); *AT&T* v. *NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (finding no joint employment where only one indicium of control (participating in the collective bargaining process) existed and there was no direct and immediate control over hiring and firing, discipline, supervision or records of hours, payroll, or insurance); *Holyoke Visiting Nurses Ass'n* v. *NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (finding joint employer status where the putative joint employer had "unfettered" power to refuse to hire certain employees, monitored the performance of referred employees, assumed day-to-day supervisory control over such employees, gave such employees their daily assignments, reports, supplies, and directions, and held itself out as the party whom employees could contact if they encountered a problem during the work day); *Carrier Corp.* v. *NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (finding joint employer status where the putative joint employer "exercised substantial day-to-day control over the drivers' working conditions," was consulted "over wages and fringe benefits for the drivers," and "had the authority to reject any driver that did not meet its standards" and to direct the actual employer to "remove any driver whose conduct was not in [the putative joint employer's] best interests.").

the obligation be clear enough that citizens can reasonably ascertain to whom it applies.

The "standard" the Board adopted in *BFI*, however, is no standard at all; rather, it merely provides for the NLRB to make post-hoc conclusions drawn after results-oriented inquiries. It fails to explain how the common law test—which was never developed to resolve disputes about which entity was an individual's employer—is to be applied to any of the numerous business arrangements that pervade our economy, much less, how any particular factor is to be weighed and the scales balanced. Absent such guidance, that standard fails to provide the notice required by due process.

Rather than provide meaningful guidance that reasonably limits the new joint employer standard, the Board has demonstrated through other recent cases that its view of that standard is expansive and untethered to either the clear language or the intent of the NLRA. In *CNN America, Inc.*, 361 NLRB No. 47 (2014), for example, the Board found *CNN* to be a joint employer of employees provided by a contractor (TVS), **despite the fact that the Board had certified TVS as "the employer" of those employees some 20 years earlier**. As noted above, the Act envisions that a group of employees has one and only one employer. Although two employers can be deemed to jointly employ a group of employees, it belies the language and purposes of the Act for the Board to ignore its own certification as to who is "the employer" of a group of employees. The Board has processes that can be used to modify a certification when economic situations change, but, in the absence of the certification being modified, employers must be able to rely on the Board's certification to conclude whether they are, or are not, the employer of any particular group of employees.[6] Yet, despite its own certification to the contrary, the *CNN* Board found *CNN* to be a joint employer liable for back pay awards for approximately 300 highly compensated individuals for up to a 10-year period of time. If a Board certification of employer status can be ignored at the whim of a subsequent NLRB on a joint employer theory, then it will be, as a practical matter, impossible for employers to determine their rights and potential obligations under the Act. Moreover, the 10-year lapse of time it took the Board to resolve *CNN* is indicative of the lengthy delays we can expect before countless dollars are spent by employers to figure out what the parameters of the Board's new joint employer standard are.

Indeed, the *BFI* standard is incapable of clear application because business relationships today typically involve an agreement or physical realities that necessarily but indirectly result in one entity impacting the terms and conditions of employment for the other's employees. Service contracts, in particular, often involve significant control by the customer over the service provider and, when services are performed on the customer's property, the amount of control is even greater. That control, in turn, can indirectly impact the service provider's employees' terms and conditions of employment. Hours the services are performed, the skills of the individuals who will perform them and conduct requirements to ensure the customer's employees, property and its own customers are reasonably protected—not to mention the amount the customer is willing to pay for the services—all necessarily impact the service provider's employees' terms and conditions of employment. Under the Board's new test, the customers in such cases apparently would be deemed to jointly employ the service providers' employees. Yet, it would be absurd to treat a homeowner as the joint employer of the workers a contractor hires to remodel her home simply because she and the contractor have agreed to a specified amount she will pay for the services, she controls the location, environment and hours where and when the work will be performed, and what the individual must do to leave her home clean and free of hazards at the end of every day.

The Board's assertion that its indirect control test is limited because it applies only to common law employees is simply incorrect given that the multi-factor test it adopted provides no basis for determining who an employee's employer is. Moreover, the fact that the Board applied that test on the facts of this case demonstrate that the purported common law test can be manipulated to find almost any company is a joint employer if it contracts with another for services to be rendered on its property. In particular, Leadpoint hired, fired, disciplined, paid and supervised its employees. Yet, it provided services that were part of BFI's business operation on its property during hours BFI mandated the services be performed, and the Board had no difficulty concluding that BFI was a joint employer of Leadpoint's workers under its new standard.

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[6] A union or employer, for example, may file an "AC Petition" asking the Board to modify a prior certification. NLRB's *Rules and Regulations*, 29 C.F.R. §102.60(b).

1. The BFI Standard Would Violate the Clear Provisions and Dictates of the Act

Although the Supreme Court has never defined the term "employer" under the Act, it has made it abundantly clear that an employment relationship is defined by direct supervision of the putative employee. *Allied Chemical & Alkali Workers of Am., Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167–68 (1971). And in *Allied Chemical*, the Court rejected the Board's attempt to expand the definition of the term "employee" beyond its ordinary meaning, observing that,

> "It must be presumed that when Congress passed the Labor Act, it intended words it used 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. . . . *"Employees" work for wages or salaries under direct supervision*. . . . 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. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings, but ordinary meanings."

Id. at 167–68 (quoting H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis in original)). Just as the Board cannot define the term "employee" in a manner inconsistent with its ordinary meaning, it cannot adopt a "far-fetched" definition of "employer" that dramatically expands it by eliminating the fundamental touchstone of an employer-employee relationship; namely, direct control of the employee.[7] *Cf. NLRB* v. *Lundy Packing Co.*, 68 F.3d 1577 (6th Cir. 1995) ("The deference owed the Board . . . will not extend, however, to the point where the boundaries of the Act are plainly breached."). If Congress meant "employee" to be defined by the fact that she is directly controlled by her employer, it is axiomatic that Congress meant "employer" to be the person who directly controls the employee. Moreover, the Act clearly limits the certification of any bargaining unit to employees of a single employer. Although the Board has developed the fiction of a single, joint employer, to be consistent with the dictates of the Act, its new approach in *BFI* is utterly inconsistent with the clear language of the Act and its policies and purposes.

2. The BFI Joint-Employer Test, in Practice, Will Undermine the Act's Purpose of Encouraging Effective Bargaining

When Congress adopted the Act, it made clear its primary purpose was to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. §151. As noted above, however, a series of cases that had expanded the Act's reach beyond what Congress intended caused Congress to revisit and substantially revise the Act in ways that directly or practically limited the process of collective bargaining. For example, Congress amended the Act to protect employee rights to *not* engage in collective bargaining or otherwise support unions and it made clear that the Act's reach was not as extensive as the Board and Court seemed to believe. Taft-Hartley Act, Pub. L. No. 80–101, 61 Stat. 136 (1947) (amending 29 U.S.C. §157). Another limiting change Congress made through the Taft-Hartley Act was to preclude the Board from certifying a unit based solely on the extent to which a union had been successful in organizing; instead, the unit must be appropriate for bargaining. 29 U.S.C. §159(c). Clearly, the purpose of the Act today is not merely to encourage collective bargaining for its own sake but, rather, to encourage collective bargaining that can *meaningfully* address the workplace concerns of a group of an employer's employees that shares a community of interest.

In *BFI*, however, the Board failed to recognize the obstacles created by forcing two different businesses to bargain over the terms of employment for a group of employees only one of them directly controls. Proposed contract terms that might be crucial to one of the joint employers, and for which it might be willing to make significant concessions, might be irrelevant to, or contrary to the interests of, the other. Moreover, some issues that might be significant to the union, and which might be accept-

[7] Similarly, Congress limited the Board's ability to certify a unit of employees employed by more than one company in requiring that all employees in a unit be employed by a single employer. *Oakwood Care Ctr.*, 343 NLRB 659 (2004). Obviously, had Congress intended to allow for the certification of a unit of workers with different employers, it would have done so by simply adding the two words, "or employers," to section 9(b). As noted above, the Board has overcome this limitation by utilizing the fictional "joint employer" entity. That fiction, as it has been applied historically, may be consistent with congressional intent. But the fiction that two wholly separate companies constitute a "joint employer" entity cannot be legitimately extended as far as the Board directs in *BFI* such that it includes as a joint employer any entity that has the right to control some terms and conditions of another's employees without ever having exercised that right. Such a definition is inconsistent with any reasonable interpretation of what Congress meant by using the singular term, "the employer," in the Act.

able to the direct employer if negotiating alone, likely will be barriers to any agreement in a joint-employer situation because the direct employer will not agree to be bound to certain terms when its contract with the other joint employer can be terminated on short notice. It belies logic to assume that, simply because unions want to have both businesses at the bargaining table, more effective bargaining will result. Indeed, precisely the opposite is true.

Viewed in practical terms, the Board's new standard is plainly intended, and will inevitably result in changes in the way the two businesses negotiate with one another and structure their own *business relationship*, far more than it will facilitate how an employer and its employees negotiate and order their *employment relationship*. Congress has made the latter the focus of the Act and its regulation of the proper function of the Board. Congress, however, in no way has authorized the Board to unnecessarily interfere, impair, or invalidate business to business relationships. Yet, under the Board's new standard, a general contractor easily could be deemed the joint employer of its subcontractor's employees and, if the subcontractor's employees are unionized, the general contractor and now joint employer could be limited in terminating its relationship with the subcontractor, and have an obligation to bargain with the union before doing so.

The problems for effective bargaining caused by forcing two different business entities into a bargaining relationship are clear because:

> [T]he interests of [the] employers will [ ] necessarily conflict. Unlike joint employers that have explicitly or tacitly agreed to a common undertaking, here the employers are buyer and seller—roles that are complementary in some respects and clearly conflicting in others. Each derives some benefit from the other. However, only the user employer derives the ultimate profit from the work of the employees; the supplier is merely one of many resources utilized in the user's enterprise. The structure of the relationship between these employers is voluntary and contractual. . . . Requiring that the employers also engage in involuntary multiemployer bargaining injects into their relationship duties and limitations beyond those established and allocated in their agreement, creating severe conflicts in the underlying business relationship and rendering impossible the productive collective bargaining the majority envisions.

M.B. Sturgis, 331 NLRB 1298, 1320–21 (2000) (Member Brame, dissenting) (citations omitted). Although *Sturgis* involved true multi-employer unit considerations, the Board's new joint-employer test would result in nothing more than deeming a multi-employer unit a joint-employer unit by adjudicatory fiat. And, regardless of whether the Board decides to call two different business entities a "joint employer" even though one does not exercise direct control over the other's employees, the practical problems that will arise in collective bargaining are no less real than those that exist in what the Board currently recognizes as a multi-employer unit.

3. The BFI Joint-Employer Test, in Practice, Will Eviscerate the Protections Afforded in Section 8(b)(4) of the Act

Congress fundamentally re-structured the NLRA in 1947 with the passage of the Taft-Hartley amendments. Taft-Hartley Act, Pub. L. No. 80–101, 61 Stat. 136 (1947). The amendments, for the first time, delineated certain actions by unions that would henceforth constitute unfair labor practices. Chief among these was a new prohibition against unions engaging in secondary boycotts. The statutory prohibition and resulting protections are contained in Section 8(b)(4) of the Act, as amended. 29 U.S.C. §158.

The Act reflects the understanding of Congress that employees and unions are entitled to, and will, engage in various activities including handbilling, picketing and striking to influence employers through the economic pressure attendant to such activities. However, Congress has also expressly recognized, in particular by enacting section 8(b)(4), that the right to exercise such economic leverage is not unlimited, and must be closely regulated. When the immediate target of that economic pressure is the employer with whom the employees have a direct employment relationship and/or a labor dispute, that employer is deemed to be the "primary employer" and the handbilling, picketing and striking is thus deemed to constitute legitimate primary activity. When, however, the target of the economic pressure is an employer that has a business relationship with the primary employer, that employer is deemed to be a "secondary" or "neutral" employer, and activity is deemed to be "secondary" and outlawed by section 8(b)(4).

In enacting section 8(b)(4) Congress made clear that direct, primary activity was legitimate and lawful. It made equally clear, however, that secondary pressure aimed against neutral employer with the object of causing that employer to adversely alter its business relationship with the primary employer is unlawful. The prohibitions against secondary activity in section 8(b)(4) are designed to protect sec-

ondary or neutral employers from being enmeshed in the labor disputes of the primary employer.

The Board's new joint employer standard would destroy the concept of "neutrality" by finding the secondary employer to be a joint employer whenever the primary employer is economically dependent on the secondary employer. That would be so even though the secondary employer has no ability or authority to control the employees' terms and conditions of employment or to remedy the union's labor dispute. Under the proposed standard, the secondary employer would become a joint employer with the primary employer and the protections that Congress specifically added to the Act through the enactment of section 8(b)(4) would become meaningless.

4. The BFI Joint Employer Test Will Impose Massive Costs on Businesses That Do Not Directly Control the Daily Operations of the Other Joint Employer

Saddling a putative joint employer with all of the duties and responsibilities required of direct employers under the Act could have enormous financial and time-consuming consequences. For example, large-scale franchisors who retain only the control required to protect their brand, trade name and trademark could be drawn into hundreds of collective bargaining relationships where they have little or no involvement with the workplace. Additionally, joint employers with limited involvement in the workplace would be required by section 8(a)(5) to execute bargaining agreements and subject themselves to contractual and unfair labor practice liabilities without having any control over day-to-day operations at myriad locations throughout the country. Rather than accept such liabilities with no control over the workplace, or engage in endless bargaining across the country, many companies undoubtedly will opt to cancel subcontracts or franchise arrangements, or subcontract overseas, thus displacing small businesses and the millions of jobs that small businesses create. The impact upon the economy of the Board's misguided new standard will be as consequential as it is harmful.

III. CONCLUSION

The rationale that led the Board, three decades ago, to adopt a direct control standard remains fully applicable today. No new facts or industrial developments justify abandoning that test, and the language, legislative history and purpose of the Act militate against the purported "standard" the Board adopted in *BFI*. That new standard sweeps too broadly and will enmesh separate businesses with different interests in bargaining relationships that will render meaningful negotiations far more difficult, result in far greater situations of impasse in negotiations, and not benefit employees. It would create massive uncertainty throughout large segments of American industry and would cause significant economic upheaval. Moreover, it is not justified by the reason the Board identified for the change because contingent workers are already afforded the full protection of the Act.

The Board's adoption of the new standard is particularly troubling given that it creates a host of practical and legal issues without recognizing them, much less addressing them or providing guidance as to how the amorphous standard might apply. Companies will learn for the first time that they are supposedly the joint employer of workers who are employed by wholly separate businesses when they face prosecution by the Federal Government for unfair labor practices they did not commit, or that only the employer of a group of workers' could have committed. Without prior notice, the Board can subject them to bargaining obligations and liabilities, and deprive employees of the right to decide that they want a union to represent them in their dealings with this newly discovered employer.

The Amendment would restore the standard for determining when a particular group of workers is, for purposes of the Act, jointly employed by more than one company. The Board had used that standard consistently for more than 30 years and it is a standard that gave the term "employer" its ordinary meaning, not a "far-fetched" one that serves short-sighted political goals but undermines the Act. Congress should act quickly to restore the labor stability that the Board's *BFI* decision has thrown into turmoil before that decision causes the serious damage that will otherwise be its inevitable consequence.

The CHAIRMAN. Thank you, Mr. Kisicki.

Mr. Rubin.

STATEMENT OF MICHAEL RUBIN, PARTNER, ALTSHULER BERZON LLP, SAN FRANCISCO, CA

Mr. RUBIN. Thank you, Senator Alexander, Senator Murray, and members of the committee. Thank you for giving me this oppor-

tunity to testify about the practical impacts of the National Labor Relations Board's *Browning-Ferris'* decision.

I would like to focus on why the Board's joint employer standard is entirely consistent with the purposes of the National Labor Relations Act and why the Board reached the proper result on the actual facts of that case.

I've had more than 30 years of experience representing low-wage workers in industries like warehousing, garment production, and janitorial services. In those industries and in others where the use of perma-temp employees has become increasingly common, violations of State, Federal wage and hour and discrimination laws are rampant. Often, those violations can be traced to the economic pressures that result when a company that in the past would have employed those workers directly instead decides to obtain its workers through a staffing agency and then tries to contract away to the staffing agency all responsibility for legal compliance.

Particularly in low-wage industries, staffing agencies and labor services contractors are frequently undercapitalized, and they operate on the tightest of profit margins. Even when they are caught breaking the law, they often lack the resources to pay significant back-pay awards, and they almost always lack the ability to provide reinstatement or meaningful injunctive relief. They also know that at the very first sign of workplace dissent, not to mention union organizing activity, their staffing contract is likely to be terminated, leaving them and their workers without work.

The statistics cited by the Board dramatically illustrate the recent upsurge in labor outsourcing. Between 1990 and 2008, the number of workers hired through staffing agencies doubled from 1.1 million to 2.3 million. Last year, the number was almost 3 million, and it is expected to jump to almost 4 million by 2022.

Not surprisingly, studies have shown a strong correlation between labor outsourcing and high levels of employment law violations, as well as lower wages, limited or no benefits, and tremendous job insecurity. Fifty years ago, there would have been no question that a worker performing conveyor belt or assembly line work in a plant like Browning-Ferris would be considered the employee of the company that owned and operated that plant. Fifty years ago, it was unusual for a company like Browning-Ferris even to consider contracting out its core operational functions.

In the *Browning-Ferris* case, the Board recognized that although Browning-Ferris had contracted out its in-plant recycling work, it continued to control crucial terms and conditions of the plant workers' employment. Browning-Ferris required Leadpoint's workers to meet its own pre-employment screening standards. It trained them how to do their jobs. It reserved the right to reject any worker offered by Leadpoint for any reason or no reason at all.

Browning-Ferris also set the pace of the conveyor belts that the workers worked on. It decided when to allow the workers to take breaks. It established safety and productivity standards. It decided when overtime would be required and how many workers would be required to work that overtime, and it gave job instructions to those workers, both directly and through their supervisors. It also placed a cap on the hourly rate that any Leadpoint worker could

be paid, and it prohibited Leadpoint from increasing any worker's wages without its express approval.

On these facts, it should have come as no surprise that the Board found that Browning-Ferris and Leadpoint were both statutory employers of the in-plant workers for purposes of collective bargaining. It makes sense that a company with the power to determine or co-determine workplace conditions should have a corresponding duty to engage in collective bargaining over those conditions.

The Board's ruling was entirely consistent with the longstanding collective bargaining policies of the Act and with decades of common law authority, including the right to control language in the restatement of the law of agency which has set forth the common law standard since before the National Labor Relations Act was enacted. To limit the definition of employer under the NLRA to accompany whose control is actual, direct, and immediate, as the proposed Republican bill would do, would be to impose a harsh standard that would undercut the goal of encouraging meaningful collective bargaining, and it would be far more restrictive than the common law standard or other workplace statutes, like the Fair Labor Standards Act, the Equal Pay Act, and many State law statutes.

Certainly, the proposed bill's change in the definition of employer would have seriously negative impacts on workers, leaving those most in need of statutory protection without any meaningful remedy, temporary at-will workers. It would also hurt small business owners, because it would make them solely responsible for collective bargaining, even when they lack meaningful authority to fulfill their statutory responsibilities.

There's no need for such a change, because any company that wants to avoid responsibility for bargaining can simply give its supplier companies greater independence in controlling wages, hours, and working conditions.

We've seen the practical impacts of the modern fissured workplace in industry after industry, warehouse workers, garment workers, performing piece rate work for fly by-night contractors——

The CHAIRMAN. Could you wind it up soon, Mr. Rubin?

Mr. RUBIN. I will. Thank you—who compete based on low labor costs. The NLRA's central promise is to promote collective bargaining as an alternative to labor strife. Before *Browning-Ferris*, those workers had no realistic opportunity to bargain for improved conditions with a company that could actually co-determine their terms and conditions of employment.

Thank you.

[The prepared statement of Mr. Rubin follows:]

PREPARED STATEMENT OF MICHAEL RUBIN

Let me begin by thanking the committee Chair, Senator Alexander, Ranking Member Senator Murray, and the other committee members for giving me this opportunity to testify about the Board's recent *Browning-Ferris* decision and its practical impacts in the modern workplace. Based on my more than 30 years of experience representing low-wage workers in industries where the use of staffing agencies and labor services contractors has become pervasive, I will principally address why the Board's joint employer test under *Browning-Ferris* is critical to protecting the rights of workers and to achieving the stated purposes of the National Labor Rela-

tions Act, and why the Board reached the only proper result given the facts of that case.

I am a lawyer in private practice in San Francisco who frequently represents low-wage workers in wage-and-hour, discrimination, and other labor and employment cases. My clients have included warehouse workers, janitors, security guards, restaurant employees, and concession stand hawkers, among others. In my experience, especially in recent years, it has become far easier to prove that low-wage workers' fundamental statutory rights have been violated than to obtain a meaningful remedy that will make those workers whole and prevent future violations. Often this is because the company that ultimately controls their wages, hours, and working conditions has contracted away (or tried to contract away) its legal duty to comply with State and Federal employment law.

In the low-wage economy in which many of my clients are employed, wage-and-hour violations, discrimination, and other unlawful conduct is rampant, yet the workers whose rights are violated rarely complain or join together to enforce their rights. There are several reasons why that is so. Often, the workers' direct employer is an undercapitalized temp agency or labor services subcontractor. Even when that direct employer has plainly violated the NLRA or other workplace statute, it may be judgment-proof or unable to pay a significant back pay award or other money judgment. An injunction or reinstatement order against such a company—whether it supplies garment workers in Los Angeles, janitors in Texas, or warehouse workers in California or Illinois—may be worthless, because the "user" company can simply terminate its contract, leaving the supplier company *and* its workers without any work at all. Labor services contracts are almost always at will, terminable upon short notice; and user companies can and do terminate their suppliers' contracts at the first sign of legal claims filing or labor organizing efforts. The user company then simply re-bids the job to the next supplier company that promises to keep its labor costs low enough to win the bid.

If the only company that can be held responsible for back pay or reinstatement in this increasingly common scenario is a staffing company whose labor services contract can be terminated at will, the workers' statutory right to overtime pay, a fair wage, and protection from discrimination, retaliation, and other unfair labor practices becomes little more than an empty promise.

The statistics cited in *Browning-Ferris* and elsewhere dramatically illustrate how rapidly the composition of the American workplace has changed. Between 1990 and 2008, the number of workers employed through temp agencies doubled from 1.1 million to 2.3 million. A year ago, the number was close to three million workers, or roughly 2 percent of the American workforce. That number is expected to rise to almost four million by 2022. It should come as no surprise that in industries in which such outsourcing is common, studies have shown significantly higher levels of employment law violations, lower wages, and job insecurity.

This increasingly fissured nature of the America workplace was the source of the problem facing the Board in *Browning-Ferris*. Fifty years ago, there would have been no question that the workers who perform conveyor belt or assembly line work were "employees" of the plant owner. But 50 years ago, it was unusual for any company even to consider contracting out the core job functions required to operate its business. Just as the Board now has to consider the workplace impacts of social media and other technology that no one dreamed possible in the 1930s, so was it required in *Browning-Ferris* to evaluate the parties' bargaining obligations in light of their actual workplace relationships, consistent with its statutory duty to "adapt the Act to changing patterns of industrial life," as the Supreme Court required in *NLRB* v. *Weingarten*.

Browning-Ferris arose in the context of an election petition filed by a Teamsters local seeking to represent approximately 240 workers. The union alleged that those employees were jointly employed by *Browning-Ferris* and Leadpoint Business Services, its labor services contractor. The Board began by tracing the history of the joint-employer doctrine under Board law. It concluded that although the standards governing joint employment under the NLRA had been fairly consistent between at least the *Greyhound* case in 1964 (which the 5th Circuit had enforced) and an earlier *Browning-Ferris* case in 1984 (which the 3d Circuit had enforced), that standard had been significantly narrowed by a series of Board decisions starting in the mid-1980s that—without explanation or apparent justification—made it much harder to prove joint employer status by adding requirements that were never part of the original common law test. Under those cases, which the Board overruled in *Browning-Ferris*, the General Counsel had been required to prove not only that the user company had the right to control the affected workers' terms and conditions of em-

ployment, but that it *actually* exercised that control, and did so in a manner that was both "direct" and "immediate." [1]

The Board in *Browning-Ferris* found no basis for those additional requirements "in the common law, or in the text or policies of the Act," and it supported that conclusion with citations to more than two dozen prior cases as well as the First and Second Restatements of Agency, which set forth the basic common law test that has been in effect since well before the NLRA was enacted.

Turning to the evidentiary record (as is required in these fact-specific cases), the Board conducted a detailed review and concluded that Browning-Ferris and Leadpoint were joint employers of the recycling plant workers for purposes of collective bargaining. Many facts supported this conclusion. Although the companies' contract stated that Leadpoint was the workers' sole employer, Browning-Ferris in fact dictated many of the terms and conditions of those workers' employment. Browning-Ferris had the absolute right under its contract to terminate the entire Leadpoint workforce, without cause. Browning-Ferris provided training to the workers, required them to undergo rigorous pre-employment screening, and prohibited Leadpoint from sending it any worker whom Browning-Ferris declared ineligible for re-hire. Browning-Ferris also retained the contractual right to reject any worker sent by Leadpoint "for any or no reason," and twice it told Leadpoint to remove workers from its plant for violating workplace rules.

Browning-Ferris also co-determined workplace conditions by controlling the speed of the conveyer belts, setting productivity standards for the workers, deciding when to stop the conveyer belts to permit breaks, and establishing safety standards that the workers had to satisfy. It was solely responsible for determining when and how many shift workers would be required to work overtime. It conducted pre-shift meetings with Leadpoint supervisors every day to tell them what work was required on each shift, and its managers gave direct instructions to those workers concerning job tasks and quality control. Browning Ferris also placed a cap on what those workers could be paid and required Leadpoint to obtain its express approval before increasing any worker's wages.

Based on these facts viewed as a whole, the Board concluded that Browning-Ferris and Leadpoint were both statutory "employers" of those workers for purposes of collective bargaining. Those two companies "share[d] or codetermine[d] . . . matters governing the essential terms and conditions of employment" and "possess[d] sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."

That outcome of *Browning-Ferris* should have come as no surprise. Under the Board's former joint-employer test, which required proof that a company exercised actual control that was both direct and immediate, Browning-Ferris might have been able to continue dictating the most crucial terms and conditions of the workers' employment, while avoiding any obligation to bargain over those terms and conditions by using Leadpoint as an intermediary. That would not have been the proper result, given the Board's statutory mandate to protect the right of employees to engage in concerted activity and to bargain collectively with their employers—the entities that can meaningfully determine, or co-determine, terms and conditions of employment. The Board's ruling in *Browning-Ferris* ruling was entirely consistent with prior Board law and considerable Federal appellate authority, and it was completely in line with the Restatements of Agency—which State the common law standard and which the Board quoted at length in its ruling—and with prior rulings of the U.S. Supreme Court under other common law statutes.

A "joint" employer, whether under the NLRA or any other State and Federal workplace statute, is simply an "employer"—as defined by applicable statute or common law doctrine—in circumstances where more than one entity (or individual) satisfies the legal definition of "employer." No person or entity can be a "joint employer" without first being an "employer."

The standards for determining who is an employer differ from statute to statute and from jurisdiction to jurisdiction. For example, the NLRA, ERISA, and the Internal Revenue Code adopt different variants of the common law "right to control" test, adapted to suit the purposes of those statutes,[2] while the FLSA, Family and Medical Leave Act, and the Agricultural Workers Protection Act adopt the more protective "suffer or permit" standard that was derived from the State child-labor statutes of

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[1] *See, e.g., TLI, Inc.*, 271 NLRB 798 (1984), *enf'd mem.* 772 F.2d 894 (3d Cir. 1985); *Laerco Transportation*, 269 NLRB 324 (1984); *Airborne Express*, 338 NLRB 597 (2002); *AM Property Holding Co.*, 350 NLRB 998 (2007), *enf'd in relevant part sub nom. SEIU Local 32BJ* v. *NLRB*, 647 F.3d 435 (2d Cir. 2011).

[2] *See* 29 U.S.C. §152(2) (NLRA); 29 U.S.C. §1002(5) (ERISA).

the early part of the 20th century.[3] Because the definition of "employer" can vary, it is possible for a particular labor services contractor to be in a joint-employer relationship for purposes of providing FMLA leave, but not with respect to a claim for NLRA retaliation; just as a worker may be an "employee" for purposes of minimum wage and overtime protections, but not for purposes of the right to collectively bargain; or under California, but not Texas employment law.

If the recycling plant workers in *Browning-Ferris* had been denied minimum wage payments or overtime under the FLSA, or had been deprived of rights under the California Labor Code (which incorporates, in part, the same suffer-or-permit standard as the FLSA), they would surely have been able to establish that Browning-Ferris was their "employer" within the meaning of those laws. FLSA cases going back to at least *United States* v. *Rutherford* in 1947 make that clear.

Even though the common law standard under the NLRA is not as protective of worker rights as the suffer-and-permit standard under the FLSA and other Federal labor statutes, the proposed Republican bill would make the NLRA standard far *less* protective still, allowing companies to avoid bargaining over workplace conditions they have the authority to control, simply by funneling that control indirectly through an at-will supplier. To limit the definition of "employer" under the NLRA to a company whose control over essential terms and conditions is "actual, direct, and immediate" would be to create a standard that is far less protective than the common law itself, and that would undermine the right to bargain collectively by imposing restrictions that are entirely inconsistent with Congress' broad delegation of authority to the Board to construe the NLRA in light of evolving workplace conditions.

Enacting the proposed narrow definition of "employer" would have seriously negative impacts not only on workers, but on small business owners as well. First, of course, it would leave without remedy the workers most in need of statutory protection, those who are most susceptible to exploitation because they are temporary at-will employees without union representation or collective voice. But it would also leave small business owners in the untenable position of being solely responsible for labor law compliance and collective bargaining even when they lack the authority or means to fulfill that legal responsibility. And such a change is not necessary, because any user company that does not want to be responsible for bargaining over the workplace conditions it controls can simply restructure its relationships to give its suppliers greater independence and leeway in controlling wages, hours, and working conditions.

The pressure to cut labor costs while meeting productivity quotas inevitably results in a race to the bottom, where the supplier company often can only make a decent profit by violating its workers' right to legally mandated wages and other workplace protections. We have seen this scenario repeated in low-wage workplaces throughout the country, and in a broad range of industries—with the resulting heavy burden on social services and State and Federal tax receipts.

In a recently completed case involving warehouse lumpers in southern California, for example, where I was one of the attorneys for the plaintiffs, hundreds of workers were employed in four Walmart warehouses, unloading and re-loading trucks for deliveries to Walmart distribution centers throughout the country. Walmart owned the warehouses and all of the contents of the trucks. A subsidiary of Schneider Logistics, Inc. operated the warehouses. The workers were hired by two labor services contractors. By contract, all responsibility for legal compliance rested solely with the labor services contractors. Yet the facts set forth in the district court's joint employer rulings showed that Walmart and Schneider had retained for themselves—the contractual—the right to control almost every aspect of those warehouse workers' employment, both directly and indirectly.

The violations we found in those warehouses were extensive. But the only reason the workers were eventually able to obtain relief—through a $22.7 million settlement that resulted in many class members receiving tens of thousands of dollars each as compensation—was because of a series of court rulings that found the warehouse workers had established a likelihood of success in proving that Walmart, Schneider, and the staffing agencies were the workers' joint employers. The two staffing agencies were undercapitalized (which is why they could only afford to pay a combined 7.5 percent of the total settlement amount). They were pressed past the point of lawfulness by the economic and operational pressures imposed by Walmart and Schneider. They had no ability to make the workers whole or to provide any meaningful injunctive relief. Nor could they push back by forcing Walmart or Schneider to pay them more money or ease productivity or operational standards. Only because the Federal courts focused on the actual working relationships in

[3] *See* 29 U.S.C. §203(g) (FLSA); 29 U.S.C. §2611(3) (FMLA); 29 U.S.C. §1802(5) (AWPA).

those warehouses, as the Board did under the NLRA in *Browning-Ferris*, were the workers able to be compensated for past violations, to obtain higher wages and significant benefits, and hopefully, to have deterred future violations.

We have seen the practical impacts of the modern fissured workplace in industry after industry: garment workers performing piece rate work for fly by-night contractors who compete almost solely based on low labor costs; restaurant workers whose immediate employer declares bankruptcy after the workers seek back pay for Federal and State overtime violations; and sports arena hawkers who nominally work for a staffing agency but are told by the sports arena's managers what to sell, where to sell it, what they can and cannot say, what they must wear, and how they can appear. Without a meaningful opportunity to pursue remedies against *all* joint employers having a right to control essential working conditions, many of these workers would be left remediless, despite their statutory "right" to minimum labor standards protection. And despite the NLRA's central promise of promoting collective bargaining as an alternative to labor strife those workers would have no opportunity to bargain for improved conditions with the company that in fact co-determines the terms and conditions of their employment.

Judge Frank Easterbrook famously noted in the Seventh Circuit case of *Reyes* v. *Remington* that if the joint employer standards are properly enforced, the inevitable result (assuming economically rational actors) will be a significant decrease in workplace violations and a corresponding increase in worker protection, because companies with the *ability* to control workplace conditions will also have the *incentive* to ensure legal compliance. Similarly, under the NLRA, the inevitable result of *Browning-Ferris* is that the purposes of the NLRA will be furthered, not undermined, because the companies having the ability to control workplace conditions will be required to bargain over those conditions, allowing their employees to act collectively for the purposes of mutual aid and protection in furtherance of the ultimate goal of labor peace.

The CHAIRMAN. Thank you, Mr. Rubin, and thanks to all of you. We'll now have a 5-minute round of questions, and I'll begin.

Mr. Kisicki, 40 years ago when I was a young lawyer, I represented a company called Ruby Tuesday. They only had 10 stores. I owned a little bit of it. It wasn't worth much then. I could understand then the issue of what direct control might be over a Ruby Tuesday franchisee. I'm not involved with it anymore and haven't been for some time—but the company has now grown to 800 restaurants. Some are franchises, and some are owned by the parent company.

I'm trying to figure out how I could advise the headquarters of Ruby Tuesday or any other restaurant company how they could not have unexercised potential to control hiring, firing, wages, all these decisions, or how they could not have indirect control of all these decisions. It would cause me to suggest to them that if they wanted to avoid liability, they should simply own all their stores rather than allow them to be franchised. What would you advise them?

Mr. KISICKI. I'm afraid that I'm not going to try and advise Ruby Tuesday. It sounds like you could take care of that yourself, Senator. I would like to, however, observe that you're absolutely right, that the lack of clarity in this area makes it extremely difficult for us as counselors to——

The CHAIRMAN. Wouldn't a franchisor have an unexercised potential to do about anything with a franchisee? Over a period time, they certainly would.

Mr. KISICKI. They certainly can terminate the franchise contract, which then——

The CHAIRMAN. They could say, "If you don't do this, I can terminate the contract." That seems to me to be *de facto*, unexercised potential to control any franchisee.

Mr. KISICKI. The test that the NLRB has adopted allows for just that. We just don't know.

The CHAIRMAN. Based on your experience and knowledge of companies, would you not think that as a result of that liability or that uncertainty that the tendency for a lot of large companies would be to own their own stores rather than to allow franchisees to own stores?

Mr. KISICKI. Yes, Senator. Because of potential liabilities under various other labor and employment laws, in particular, and concerns about protecting their interest, many companies would be inclined to try and extend their power and control.

The CHAIRMAN. Ms. Stockeland, let me ask you. You started your company 9 years ago. You've got 11 franchisee establishments. Would you have been able to grow so quickly without relying on the franchise model?

Ms. STOCKELAND. No. The franchise model really gave me the opportunity to take my brand and to expand it and to create jobs and give opportunities to other potential entrepreneurs around the country. I did not want to run a company-owned business from a remote location in North Dakota and manage those employees. Franchising really gave me the vehicle to expand my brand throughout the United States.

The CHAIRMAN. How would it change your business if instead you owned all 11 sites, and what would your employees think about having you set their schedules, pay, and benefits instead of the person who hired them?

Ms. STOCKELAND. It would be really disheartening, both to the employees of those franchises and to the franchisees themselves. Those women who own my franchises around the country got into the MODE business model because they want to own a business and control both their business and their employees. To take that away from them and make them virtually the middle man, middle manager, would be very disheartening to them.

The CHAIRMAN. Mr. Kisicki, the UCLA Labor Center's Victor Narro stated in an article last month,

> "The NLRB has the power to influence the Department of Labor and other Federal agencies to cover other areas of worker law. It's very easy to see a possible scenario where you're using the same joint liability standard. You could argue that in court and go before a judge or you could try to get the Department of Labor to change its definition."

We've noticed through a leaked document from the Occupational Health and Safety Administration that it is beginning to use a similar joint employer definition. Do you believe the Department of Labor or the EEOC could merely adopt this much broader joint employer standard without going through the rulemaking process? Why do you suppose that OSHA is going around trying to figure out whether some employer is a joint employer when its job is really worker safety?

Mr. KISICKI. The only answer I have for that, Senator, is it appears to be part of a concerted effort by labor and its allies to hold incredible leverage over employers by being able to use Federal agencies to step outside of the bounds for which they were created

by Congress, to protect, and try and go after other areas that then give labor leverage in various ways in our economy.

I don't understand OSHA's reach, and I certainly think it is possible that other Federal agencies will try the same thing and try and extend the NLRB's *BFI* decision, or *Browning-Ferris*, to their statutes to try and expand the scope of liability.

The CHAIRMAN. Thank you.

Senator Murray.

Senator MURRAY. Mr. Rubin, let me start with you. We all know that we have a lot of workers today who are struggling with stagnant wages, poor working conditions on the job, and you, as representative, have worked with a lot of them. Oftentimes, those workers have very little recourse to try and join together to improve their working conditions, even as some of the major corporations are making massive profits.

Today we have some colleagues who want to continue to advocate for a return to a very narrow standard that has perpetuated some of those problems for the working families. Could a return to that old standard, as advocated in the Protecting Local Business Opportunities Act, have a negative impact on small businesses and their employees?

Mr. RUBIN. Absolutely. First of all, the standard that the Board in *Browning-Ferris* adopted is the old standard. It's the common law standard. It's the standard that has been in effect for the first—quite a few decades after the Board was enacted. To go back to a standard that requires actual direct and immediate control in this era, given the large number of contingent workers, would certainly hurt the workers, but even more, it would hurt the contractors.

The contractors are caught in vice-like pressure between the contractors that hire them and their obligation to comply with the law. They have no real power to meaningfully bargain. They're often under-capitalized.

In the garment industry and the warehouse industry, where I've had extensive experience, they have no choice but to keep the contractor that hires them happy. They need to get the next job. They're more interested in getting those contracts than in legal compliance because they know the workers are powerless. The workers fear retaliation. They know that their entire contract will be terminated if the workers begin to organize or complain about working conditions.

A return to the old standard, the addition of actual, direct, and immediate, would harm small businesses. It would deprive them of the opportunity to become truly independent, to become true entrepreneurs, because if the larger companies back off and let them control their own workforces and bargain for themselves, then they're much better off.

Senator MURRAY. In its decision on BFI, the Board noted its Supreme Court mandated responsibility to adapt the National Labor Relations Act to the changing patterns of industrial life. In your testimony, you touched on these, especially the current fissured nature of the workplace that you're talking about. In your practice, what real-world issues have you seen with current work arrange-

ments, and what impact will this decision have on those arrangements?

Mr. RUBIN. This will help a great deal. It would help both the workers, the local economies, and the contractors that employ them. The reality is that in the low-wage industries where my clients often work, the workers are absolutely powerless. They have to take whatever the temp agencies or staffing agencies give them.

They know if they complain—this happened in my warehouse workers case. We had a situation where a Walmart-owned warehouses. It had another company, Schneider, operate them. Schneider hired two grossly under-capitalized labor services contractors. The workers, as soon as they complained, were terminated by bringing a lawsuit and by making joint employer allegations, not under the *Browning-Ferris* standard, but under the far more protective FLSA and State law standard.

It's important to bear in mind that what the Board has done here is just bring the NLRA in compliance with common law. There are plenty of statutes out there passed by this Congress that are far more protective and establish joint employer liability much more quickly. In that circumstance, the workers had no opportunity in these warehouses to complain.

By bringing a joint employer claim under the FLSA and State law, we were able to ensure that they kept their jobs, they got raises, they were compensated for the violations. Otherwise, you've got a very vulnerable workforce subject to exploitation because they know if they do anything to organize, their jobs are gone and their co-workers' jobs are gone. There's group pressure to keep your mouth shut and just take whatever the employer dishes out.

Senator MURRAY. The Supreme Court has said the Board has a responsibility to adopt the Act to the changing patterns of industrial life. What you're talking about with major corporations who are actually controlling the franchises, controlling workers' pay, controlling their working conditions, is vastly different than what I heard Ms. Stockeland talk about with her franchisees.

Mr. RUBIN. Absolutely. That's not the problem. What she's doing with her company is great, the way she describes it. The problem is with the massive use of temp agencies, staffing agencies, contract workers that compete among each other in a race to the bottom, based on labor costs alone.

By contracting out this work, the companies are able to save a tremendous amount in labor costs. We've seen it in case after—in the warehouse case, there was a jump of $8 per hour or so between what the direct employees were making and what the perma-temps were making. In cases around the country, we've seen that disparity, because all the temp agencies have to compete on is labor costs, and, therefore, they have a great incentive to cut it to the bone or below the legally required minimum.

Senator MURRAY. Thank you.

The CHAIRMAN. Thank you, Senator Murray.

Senator Isakson.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Mr. Chairman.

Mr. Martin, if I got your numbers right, you've been in business 83 years, and you have 140 employees. Is that right?

Mr. MARTIN. Yes.

Senator ISAKSON. You have 287 contractors with whom you do business to construct houses?

Mr. MARTIN. Yes.

Senator ISAKSON. They average 15 employees or independent contractors per contractor?

Mr. MARTIN. Approximately, yes.

Senator ISAKSON. If the indirect standard were applied, as has been portended by some of the testimony today, that means you would go from employer responsibility for 140 people to 4,305. Is that about right?

Mr. MARTIN. If all of them were considered employees.

Senator ISAKSON. You'd be doing no more business. You'd be doing the same business. Could you stay in business adding that many employees to your responsibilities?

Mr. MARTIN. The biggest problem—there's all sorts of problems with it. One of the biggest problems is we schedule subcontractors to work on our jobs. If we had to schedule subcontractors and their workers, the logistics of that, doing it over statewide, would be unsurmountable. The other problem is I would have to gear up my human resources department to such a degree it would quadruple it, quadrupling our cost in trying to manage our employees.

I would be very concerned about staying in business with doing the same amount of homes with 4,000 or, even if you were very conservative, 200 to 300, which is still double my size. It would be very difficult.

Senator ISAKSON. Which would probably mean you would have to consider selling your company. Is that not correct?

Mr. MARTIN. Yes, I'd probably have to sell to a——

Senator ISAKSON. Somebody like Ryan or Riley or one of the big——

Mr. MARTIN. Right, DR Horton, Centex.

Senator ISAKSON. That had the critical mass to hopefully absorb that? Is that not correct?

Mr. MARTIN. Right.

Senator ISAKSON. The second question—when you get a subcontractor to do HVAC or grading work or sheet rock or whatever, you require probably two things of that contractor. One is a bond, and second is insurance. Is that correct?

Mr. MARTIN. We require insurance. We don't require a bond, not typical in residential construction.

Senator ISAKSON. Beyond that requirement, in residential construction, the work schedule is determined by the weather, by other conditions, and not determined by you. You determine what you need done, but they have to do it within the confines of that product. Is that not right?

Mr. MARTIN. That's correct. We have a critical path that we try to stick to, given the weather and homeowner involvement.

Senator ISAKSON. You don't pour concrete when it's below 32 degrees, right?

Mr. MARTIN. No. It doesn't get below 32 degrees too much in Texas, but you——

Senator ISAKSON. But you never know.

Mr. MARTIN [continuing]. Never know.

Senator ISAKSON. Thank you for—I was in the business for 33 years——

Mr. MARTIN. I knew you were.

Senator ISAKSON [continuing]. And I appreciate homebuilders very much. I couldn't have educated my kids had it not been for homebuilders building houses to sell, and I appreciate that very much.

Mr. MARTIN. Same here.

Senator ISAKSON. Mr. Rubin, I want to make sure I get this right, and I certainly don't want to say something that's not correct in what you said. I was listening to your testimony. You talked about the economic pressures—you were talking about staffing companies, first of all, talking about the economic pressures on those staffing companies because they have the tightest of margins. That was your quote, if I'm not mistaken.

Mr. RUBIN. That's part of it, that plus the quotas, the productivity requirements, the auditing, the real time. Yes, it's one of a number of factors—but great economic pressures. That's correct.

Senator ISAKSON. If the company that was getting the staffing company to provide independent contractors all of a sudden was a co-employer, they might have a deeper pocket. Is that not correct?

Mr. RUBIN. In many cases, they do. As long as they hire a sufficiently capitalized contractor and ensure that the contractor doesn't commit any unfair labor practices, they don't have anything to fear from the *Browning-Ferris* decision. It only applies in the narrow circumstances where there could be a Board proceeding, and there are only two circumstances where that can happen.

The first is where there are unfair labor practices committed. If there are no unfair labor practices, then there's no problem at all, no matter what the standard is. And, second, it only arises if there is a request for bargaining by a majority of the employees of the contractor, and there the question is simply is there going to be meaningful bargaining without the larger company.

It's not as much a deep pocket problem as it is what's the point of having collective bargaining unless you can meaningfully affect the terms and conditions. That's why you have to include the company that can share or co-determine the essential terms and conditions of employment.

Senator ISAKSON. Don't take any offense to this statement, but as somebody who has been on the other side—and I respect lawyers, especially my own, so I have nothing against lawyers. Is a reasonable fear by a lot of franchisors that they might all of a sudden be the deeper pocket that trial lawyers would go after because the franchisee had a smaller pocket?

Mr. RUBIN. Not because of the NLRA. The concern that franchisors would have about the deep pocket would be under statutes like the FLSA or others that have the suffer or permit test which is going to make them liable as a joint employer far before the NLRA.

The back pay awards under the National Labor Relations Act are usually not very large. Discrimination claims, wage and hour claims—those are the claims where the deep pocket might be a con-

cern. This decision has nothing to do with that, and the standard is far less protective of workers' rights than the standard under those other Acts.

Senator ISAKSON. Mr. Chairman, could I ask unanimous consent that a letter from the Asian American Hotel and Owners Association be entered into the record?

The CHAIRMAN. It will be.

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

Thank you, Senator Isakson.

Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman.

We've heard a number of claims that the Board's *Browning-Ferris* decision would be bad for small businesses, and, in fact, the title of today's hearing, "Stealing the American Dream: The NLRB's Joint Employer Decision." It's a pretty—it's a provocative title, I would say.

Mr. Rubin, how does the joint employer standard under the NLRB's *Browning-Ferris* decision differ from the traditional interpretation of the law which was used prior to 1984, a period where countless small businesses and businesses flourished and the middle class expanded?

Mr. RUBIN. It does not differ. The new standard goes back to the common law standard, to what the standard had been as set forth in numerous Board cases and Court of Appeals cases. The point I made in my opening statement and my prepared remarks is it's completely consistent with a restatement of agency in its comments which set forth that standard. The Board, at great length, went through that law.

Senator FRANKEN. Mr. Martin, your company has been in existence for 83 years, 51 years under the standard that we're talking about now. I don't understand how this would be the death of small business or of business ownership.

Mr. Rubin, in your testimony, you cite figures showing that in industries where outsourcing is common, studies have shown significantly higher levels of employment law violations, lower wages, and job security. These figures confirm what I've been hearing in Minnesota from subcontracted janitors across the Twin Cities area who have been fighting to bargain for better working conditions.

Can you tell us about what your 30 years of experience representing struggling low-wage workers have shown you about the fissured workplace? What do you think has been the effect of narrowing the definition of joint employer during the Reagan-Bush era decisions? What effect have these long-term pressures been on workers' wages and the opportunities for Americans to work their way to middle-class life?

Mr. RUBIN. It's had a significant decreased effect on—wages were lower, there were fewer benefits. I've experienced this in case after case. Workers fear complaining, bringing lawsuits. They can't find attorneys who would pursue claims. They have no right to bargain. The percentage of bargaining in these industries is extremely law,

and large companies are encouraged because of the weak laws, the formerly weak laws, to exert more and more control.

The reason it's hard as a small business person is that the large companies not only dictate productivity and price and so many other elements, but because of modern technological advances, they can audit the workplace more. It's not just GPSs and bar codes anymore. They know exactly in many industries—warehousing, in particular, deliveries—where any product is at any time, what any worker is doing at any time. Workers have to press bump bars after they finish every particular task.

There is much more detailed control over what the workers do. The larger companies know about it, and they're pressuring their subcontractors to cut labor costs to the bone, knowing that the workers can't complain.

Senator FRANKEN. What we've seen in the last 31 years is really a flattening of the median wage, if not lowering, and we hear on the campaign trails, the Presidential campaigns, talk about the middle class and getting into the middle class, those who are aspiring to be in the middle class. I hear from workers that they can't afford to be a good parent.

You have—we talk about the woman who worked as a housekeeper in a hotel, people in warehouses, janitors. Their wages make it impossible for them—I hear from them, saying, "I can't make enough money to be a good parent."

A single parent who has to take—this isn't their only job. They do two jobs. They don't make enough money so that their kid can go to camp in the summer, and they can't be home with their kid because they're working two jobs. That's because they're getting such low wages from these subcontractors who are being controlled by the contractor.

This isn't about your business, Ms. Stockeland. This is about a different thing. To say that this—we're killing the American Dream with this—the American Dream worked pretty good before 1984. We're not trying to kill the American Dream. We're trying to stir the American Dream.

The CHAIRMAN. Thank you, Senator Franken.

Senator Roberts.

STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Thank you, Mr. Chairman. Thank you for holding this hearing.

Thank you all for being here today. I want to point out that 96 percent of the businesses in Kansas are small businesses. That's the answer in terms of economic development for our State. With those folks being our job creators, we need to act as partners with businesses and not against them to ensure high employment and economic growth across our State and the Nation.

This new standard delivered by the National Labor Relations Board seems to stand in the way of opportunity and growth. Millions of franchisors, franchisees, contractors, subcontractors, temporary staffing firms will be harmed in addition to those who wish to be employed by one of those industries.

I've heard from folks all around Kansas asking me what this means for their business. That means uncertainty, because that

means they can't really predict the future, and that's a pretty good question. The uncertainty this new standard brings is open-ended.

In fact, just yesterday, I had a chance to hear from a woman in Wichita who recently opened her first business as a franchisee. She opened the doors 10 weeks ago. The endeavor of this concept began 6 months ago, and the experience she needed to start began a lifetime ago working with our local businesses in the community. She got a lot of help.

As a franchisee and a new business owner, she looked for a strong brand name that would do well in her community. She enjoyed the franchise model, which included the foundation from which to launch her business.

When asked if she would still have opened her dream store if this standard had been in place at that time, she answered, "You know, I'm not sure. This would have been a huge red flag. I didn't open a store to have others run it." The franchisor happens to be Ms. Stockeland, and this is a designer outlet, and it's an outstanding business.

She makes a good point. The standard, when applied, disincentives young entrepreneurs from startups and would make franchisors liable for folks they didn't intend to be liable for.

Ms. Stockeland, you remarked in your testimony when you enter into an agreement with a franchisee, they believe they are signing up to own and operate their own business. Is that correct?

Ms. STOCKELAND. That is correct.

Senator ROBERTS. Are you exploiting anybody?

Ms. STOCKELAND. I am not.

Senator ROBERTS. I didn't think so. You do this because you have confidence in them to use your trademark, your business model, and the reputation of the franchise you have strongly built. I see that you hope to open 75 stores by 2024. Is that correct?

Ms. STOCKELAND. That is correct.

Senator ROBERTS. That's a wonderful goal, and I wish you the best of luck in this opportunity. It's not a matter of luck. It's a matter of expertise. Do you think the possibility of this standard applying to your new franchisees will impact the number of entrepreneurs that contact you and, therefore, negatively impact the road that you're trying to take?

Ms. STOCKELAND. Absolutely, and it will also impact the interest to take those phone calls by me.

Senator ROBERTS. I appreciate that very much.

Finally, a store owner in Overland Park—which is the fastest growing community we have in the State of Kansas, full of small business people and exactly the people that were described by the distinguished Senator when he was in business himself. He told me, "Look, I bought a business model, not a business manager." I fear when potential franchisees hear of this standard, they will choose not to invest into business in their community or in what could turn out to be a family-run business.

I don't know why we continue with all of the Federal agencies involved with this regulatory overkill that makes it almost impossible to progress. I just had an old boy call me out in western Kansas, who said, "I don't feel governed. I feel ruled." And that's the problem. I don't care if it's energy, education, small business, farm-

ing and ranching, or whatever, the regulatory overkill is just unbelievable. I just don't know why we continue down this road.

Ms. Stockeland, thank you for your example, and I hope you're able to continue with the way you want to run your business.

Ms. STOCKELAND. Thank you.

Senator ROBERTS. Thank you all for your time.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Roberts.

Senator Warren.

STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you, Mr. Chairman.

Historically, if an employer violated the rights of its workers through, for example, an illegal firing, the employer would be on the hook for damages. Today, though, some giant companies have figured out that they can hide behind complex arrangements like subcontracts or franchises to dodge their legal responsibilities toward their workers.

I just want to pull this together about how this works. A big parent company controls every tiny detail of what the workers do, including how much they get paid, how they're trained, and when they have bathroom breaks.

When, for example, an employee doesn't get paid their guaranteed overtime or when the employees want to exercise their legal right to collective bargaining, the big company steps back and dumps all the legal responsibilities and all the costs on the subcontractors. That way, the big company get all the benefits of having a bunch of employees with none of the responsibilities that go with it. Small companies can't do that. They're still on the hook to their employees, but not the big guys.

Mr. Rubin, you've spent a long time representing workers who get hurt when their legal rights are violated, and the big parent companies that are making the money throw up their hands and say, "Don't look at me. The problems are for the subcontractor." How do we get to a point where little companies have a whole bunch of legal obligations to their employees, but big companies can duck out on these basic obligations for their workers?

Mr. RUBIN. The laws had softened—and that's one of the things that this new Board decision strengthens again—to give large companies the opportunity not only to contract out the work, but to contract out their legal responsibility when things go wrong, when the law is violated. That's precisely what has happened with contingent workers in the modern economy.

Senator WARREN. What's happened is the NLRB has changed the standard through a series of case-by-case decisions. What's been the consequence of narrowing the definition of an employer over the last 30 years?

Mr. RUBIN. It's meant that there is far less meaningful bargaining, because companies that control terms and conditions aren't brought to the bargaining table. There is far less responsibility. What happens in practice is that at the first sign of complaint on the workplace floor, the larger companies simply terminate—all of these are at-will contracts. They terminate the subcontractor. They terminate the workers.

That's why in our warehouse workers case, getting an injunction that required—to preserve the workers' jobs resulted in better wages and benefits for the first time and made a huge difference for these workers getting up to the middle class.

Senator WARREN. For these giant corporations, what I'm hearing you say is that, basically, this change in the rule—the earlier change in the rule at the NLRB—has just triggered a race to the bottom that has squeezed workers.

Mr. RUBIN. Absolutely. It's squeezed workers, and it's also squeezed the small companies that employ the workers. The only companies that benefit from this new arrangement, from the race to the bottom, are the ones who can get the work done for the large corporations without having any legal responsibility for the consequences.

Senator WARREN. Into this comes the NLRB last August.

Mr. RUBIN. Right.

Senator WARREN. The NLRB finally acknowledged the problem that it had created back in the 1980s, and it began closing this loophole by broadening the definition of who is an employer so that workers' rights would be protected under those circumstances. My Republican colleagues didn't seem to have a problem when the NLRB narrowed the definition, but now that the NLRB is going back to the original approach that it had used for many decades, they want to pass legislation to stop the NLRB. How would that affect workers?

Mr. RUBIN. It would be devastating to the workers. It would result in a greater race to the bottom than we are already experiencing. With a bill that passes that makes us even more public, more companies, more large companies, would be inspired to do precisely what these other companies have done to the great disadvantage of the types of workers I represent.

Senator WARREN. All right. Thank you, Mr. Rubin.

This is pretty simple. The law says that an employer has certain legal obligations to its employees, like collective bargaining or responsibility when an employee gets hurt, and small employers have to abide by those rules. Some big corporations dodge the law by pretending that they are not employers. They don't fool the NLRB or much of anyone else, and now the NLRB has called them out on this.

It is no surprise that giant corporations that use this scheme and their Republican friends don't like what the NLRB is doing. Let's be clear. The NLRB is following the law and standing up for American workers, which is exactly what the NLRB, by law, is supposed to do.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Warren.

Senator Hatch.

STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman.

Mr. Kisicki, actually, the assertion that this is a return to an old standard—it isn't, is it?

Mr. KISICKI. No, Senator. In fact, it's quite a bit of an overstatement by the Board majority in this decision, because there was, in

fact, no standard that the NLRB applied consistently at any time. In fact, it did not start even adjudicating cases where there was a dispute about what was and was not a joint employer until the 1960s.

This idea that somehow this standard existed is incorrect. In fact, the NLRB was so confused itself at times that it at times referred to entities as single employers when it, in fact, was intending to refer to a joint employer relationship. A single employer was essentially where one company is not truly independent of another, and they operate together. It's almost an alter ego theory under the law.

Senator HATCH. Let me ask you this. In 2014, the NLRB finally issued a decision in a case that had been pending at the Board for over 10 years called CNN America. The Board found CNN to be a joint employer of employees provided by a contractor, TVS. Despite the fact that the Board had certified TVS as, "the employer," some 20 years earlier, as the Board now found that CNN was a, "joint employer," CNN then owed back pay to hundreds of highly compensated employees.

If the NLRB's own certification of employer status can be overturned and significant liability imposed, how can any employer in America feel confident that this liability isn't looming over them as well? And just to add another question to it, how many employers have the resources to engage in 10 years of litigation before the NLRB?

Mr. KISICKI. Senator, let me take your second question first, which is how many employers can afford this. I don't know, but I don't think it's many, certainly not small businesses that are the engine of growth in this economy and have been for decades now. Those companies cannot afford the hundreds of thousands of dollars—it's not cheap to try and litigate a case with the NLRB, because the NLRB is the Federal Government, and they do the work. The unions don't have to spend the money on this. It is done by Federal taxpayer dollars.

I also want to correct a comment that my colleague, Mr. Rubin, made, that there's no issue if there's not an unfair labor practice violation. That's absolutely untrue. The fact is the NLRB files complaints routinely against employers—this is its practice—if there is a dispute of fact that, if they accept the employee or the union's version of the facts, would constitute a ULP, not that they, in fact, have concluded that it's likely that the employer actually violated the law.

Let's go then to the issue that you raised with CNN, and that's certainty that's provided by the NLRB in labor relations. That's why this Act exists. Again, with all due respect to my colleague, Mr. Rubin, we've heard a lot about other situations. I haven't heard anything about how those other situations actually involved employees exercising their rights under the NLRA.

It is a different law. It has a different standard for determining who is an employer, and that's absolutely necessary if the NLRB is to give effect to the purpose that motivated the statute in the first place. That purpose is to protect the stability of labor relations in America. Stability has been tossed to the wind in this last term

by the NLRB, and this case is just one of them. The CNN case that you just mentioned, Senator, is another.

If employers cannot rely upon the Federal Government agency's determination that the employer of a group of employees—that is their obligation. The NLRB has to define the employer, not an employer, but the employer. If they cannot rely upon that, and 10 years later, the NLRB can come along and just decide, "We're going to change our mind," and now you're liable for millions of dollars of back pay.

Senator HATCH. Not very consistent.

Mr. Martin, I appreciate your testimony today. I heard you make the point that the, "big guys will get bigger," and the, "small guys will go out of business," under the NLRB's redefinition of joint employers. Exposure to joint employer liability under the NLRB's new standard stifles many small business models. They're successful business models, and I know many small business owners who got their start and were able to grow their businesses from contracts with local family-owned businesses.

How will this new rule impact local business creation, and how will this ruling stifle opportunities for our Nation's plumbers, electricians, and tradesmen, one of which I was at one time?

Mr. MARTIN. Like I said, this new indirect——

Senator HATCH. I was a member of the AFL–CIO, too.

Mr. MARTIN [continuing]. This indirect test just provides so much instability that it is hard to go forward, and it's just—to repeat, you cannot—companies like ours do not have the legal resources to fight the NLRB if they come to me and say, "Because you're in direct control, you're a joint employer." I can't fight that. I don't have the funds to do that, which means I go out of business, as do subcontractors. They have the same problem.

Senator HATCH. Thank you, Mr. Chairman. Sorry I went over a little bit.

The CHAIRMAN. Thank you, Senator Hatch.

Senator Baldwin.

STATEMENT OF SENATOR BALDWIN

Senator BALDWIN. Thank you, Mr. Chairman, and I want to thank the witnesses today.

It's important to briefly mention the underlying statute that we're discussing today. In 1935, Congress enacted the National Labor Relations Act to protect the rights both of employees and businesses, to encourage collective bargaining, and to curtail practices that harm workers, businesses, and the economy at large. Congress gave the authority to the National Labor Relations Board to revise administrative decisions and to adjust for changing workplace realities, and the Supreme Court has reaffirmed that authority of the NLRB. In my view, that's exactly what the Board has done in this recent decision.

I have such great respect for small business owners in America, and this hearing gets to the heart of the very matter of what it means to be a small business owner. More specifically, does that small business owner actually have the ability to manage their workforce, or is that autonomy an illusion? The small business owners that I speak to from the State of Wisconsin are a very

proud and independent lot, and they are risk takers and innovators. They provide livelihoods for millions across the Nation.

I recently met with a group of Wisconsin small business owners, both franchisors and franchisees, and they have been following this decision, and they're concerned about the impact of the joint employer decision and what sort of impact it would have on their businesses. I want to get into some of the specifics today.

We've heard a lot of discussion about stability, bright line clarity, sort of all or none. It seems to me that one would want to have the ability to look at, say, each franchise agreement as unique and look at these issues on a case-by-case basis.

Mr. Rubin, is the new joint employer standard a blanket ruling that says in all cases, these will be considered joint employers, a franchisor and a franchisee, or an independent contractor or none, or is this a case-by-case analysis depending upon the relationship between the two?

Mr. RUBIN. Right. It's a case-by-case analysis, which is how the Board adjudicates, which is how the Board accommodates the law to evolving conditions in the workplace. The reason stability is furthered by this ruling is simply—and in responding to my colleague—because if you require every company that can meaningfully affect terms and conditions to be at the bargaining table, you can have a meaningful collective bargaining agreement, and that's what furthers the goal of achieving labor peace.

Yes, case by case is the way the Board has always done it, the way it's done it in the past, and, obviously, is the way courts do it as well.

Senator BALDWIN. Under the NLRB ruling, the Board states, and I'm going to quote,

> "Moreover, as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control."

If I am a franchisor, and I do not possess the authority to control wages, hours, hiring, firing, or disciplining, can I be forced to bargain over those terms and conditions?

Mr. RUBIN. No, and the Freshii decided by the General Counsel's Division of Advice just last April, both under the old standard and the new standard, concluded that a franchisor was not responsible for an unfair labor practice retaliation by a franchisee precisely, Senator Baldwin, because the franchisor did not maintain those elements of control over terms and conditions.

Senator BALDWIN. In looking at the Freshii case that you just referred to, as you said, it was a determination—or the General Counsel issued a memorandum of advice.

Mr. RUBIN. Advisement. That's right.

Senator BALDWIN. Can you tell the committee a little bit more about how the Freshii situation was different than the situation in *Browning-Ferris*?

Mr. RUBIN. Sure. In Freshii, the franchisor had nothing to do with personnel policies. All of its guidance was entirely optional. The franchisee used its own employee handbook. It didn't use the Freshii handbook. Freshii controlled only aspects or had input only to aspects pertaining to the product itself. There was no auditing.

The franchisee trained its own staff. There was no consultation before the individuals were fired by the franchisee.

By contrast, in *Browning-Ferris*, Browning-Ferris retained the right itself to terminate any employee. It set a cap on wages. It determined when the workers could work. It told them where to work. It decided when they could have breaks. It decided what the speed of the line was. There's a world of difference between those cases.

As you point out, in case-by-case adjudication, every one of these differences matters, and that's why you need an experienced administrative agency that is familiar with the modern workplace to evaluate the facts and decide on which side of the line a particular case falls.

Senator BALDWIN. Thank you.

Mr. RUBIN. Thank you.

The CHAIRMAN. Thank you, Senator Baldwin.

Senator Casey.

STATEMENT OF SENATOR CASEY

Senator CASEY. Thank you, Mr. Chairman. I wanted to, first of all, note that the title of the hearing is, I think, misleading. I won't go into the analysis of that. Stealing is a crime, and it's even a violation of the Ten Commandments. We're nowhere near that in this hearing.

I wanted to go back to the fundamentals, not just of the decision and the implications of it, but also the reality of what we see in the real world.

Mr. Rubin, you had maybe the best summation of what the reality is for workers. Looking at page 2 of your testimony, you say,

> "In the low-wage economy in which many of my clients are employed, wage and hour violations, discrimination, and other unlawful conduct is rampant. Yet the workers, whose rights are violated, rarely complain or join together to enforce their rights."

Then you go on to say later in terms of the advantage that the prior cases allowed, and I'm quoting here,

> "that the employer was able to kind of have it both ways, that they were able to have the advantage of dictating the terms and conditions while avoiding the bargaining about those same terms and conditions."

That's just the way I see it.

I also think it's not—this traditional standard that we're going back to now made a lot of sense. It spoke directly to this question of the control you have of the work and how much control you have.

Then the conditions set forth that had to be met, direct or indirect control over significant terms and conditions—that's a reasonable inquiry when you're a fact-based analysis. No. 2, the joint employer would have the ability to control. You have to make a determination about that. And third, that that joint employer was necessary for meaningful collective bargaining.

It makes sense in terms of the reality of the workplace today, the reality of the economy today, with—gosh, I guess it's doubled in

terms of the number of temp workers. Also it's not such a—it's not a test that is so constraining that it doesn't reflect some flexibility that comes with making a fact-based determination. It makes a lot of sense.

I wanted to ask you, Mr. Rubin, one particular question on the question of control. It's always difficult to pose a hypothetical, but could you kind of walk through the lengths to which a company like Browning-Ferris or companies like it would go to control subcontractors?

Mr. RUBIN. Sure. First of all, under the old standard, it's so easy for a company to circumvent the direct, actual, immediate standard. All you have to do is set up a company, hire a company, and instruct that company to tell the workers what to do.

Browning-Ferris did far more than that. Browning-Ferris was so involved—there were 240 workers inside this plant, sorting, cleaning the recycling line. They were working on a conveyor belt. What Browning-Ferris did is it controlled them by setting the speed, the productivity levels, deciding when to stop the line so they could take breaks. The mandatory terms and subjects of bargaining were almost all controlled directly and indirectly by Browning-Ferris.

The reality of the situation was that if Browning-Ferris was dissatisfied with a worker, even if that worker had passed the Browning-Ferris screening criteria, Browning-Ferris could get rid of him. If the workers began to organize, Browning-Ferris could get rid of the contractor all together. The old standard was susceptible to manipulation and abuse, and the ones that were hurt were the contractors squeezed in the middle and certainly the workers.

Senator CASEY. My time is up. Thank you very much.

Mr. RUBIN. Thank you.

The CHAIRMAN. Senator Isakson has questions, so I would say to Senator Baldwin and Senator Casey—I've consulted with Senator Murray—we'll go to a second round if any of you have further questions.

Senator Isakson.

Senator ISAKSON. Thank you, Mr. Chairman.

I have a question I want to ask Mr. Martin. Before I do, I also wanted to engage Senator Warren with regard to her statements regarding big businesses. I listened to her testimony. I looked around at Senator Baldwin, who has Kohler in her State, and we have Hershey in Pennsylvania and Boeing in Washington State and TVA in Tennessee and Coca-Cola in Georgia. Big business is not necessarily a bad thing in America.

We have to be very careful about castigating people generically. Rather we ought to call out people because they actually violated the law or violated the intent of it.

My question is this, Mr. Martin, have you ever heard of a lady named Ebby Halliday?

Mr. MARTIN. No, sir.

Senator ISAKSON. Do you do any business in Dallas?

Mr. MARTIN. I do some small business in Dallas.

Senator ISAKSON. Some construction. Ebby Halliday is probably the most famous woman real estate broker in the United States of America. She's 93 years old. She started out as an independent contractor in Dallas and built one of the most successful businesses

in the United States of America based on the model of incentive, compensation through sales and commissions, and the independent contractor model.

One of the things I have concern about is if you construe the indirect responsibility or indirect control too liberally to business, you'll do away with most all small business. Would you agree with that?

Mr. MARTIN. Yes, sir.

Senator ISAKSON. If you do away with most small businesses, the title of this hearing comes into play, because stealing the American Dream of business ownership is exactly an appropriate title. Ebby Halliday could not have done in Dallas what she did if that law was in place in its application today, and there are thousands of others in sales businesses, construction businesses, and agricultural businesses that operate as independent contractors and things like that who could not as well.

I just wanted for the record—there is an application about stealing the opportunity for ownership that pays attention to exactly what we talked about today. I appreciate the time, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you, Senator Isakson.

I'll go to Senator Murray and then Senator Baldwin and then Senator Casey.

Senator MURRAY. Mr. Chairman, I'll just make a remark, that I think all of us understand, that big businesses—there are good big businesses and no one is denigrating them. There are great small businesses. We all want them to survive.

What the important point about this ruling is that we do have some corporations who are completely disconnected from the workers that they control. They don't have to hold any liability before this hearing on any kind of poor working conditions or poor standards or anything, because they had a franchise owner that was carrying all the liability.

This is not fair to franchise owners themselves, who can't control their labor market, because somebody else is telling them how to do it, and they're taking all the liability for it. I just want to make that point, because it's really important to this ruling and how we go forward.

I do want to thank all of our witnesses today for your testimony, and I appreciate you being here today.

The CHAIRMAN. Thank you, Senator Murray.

Senator Baldwin, do you have any further questions?

Senator BALDWIN. One more, and I appreciate the opportunity to get to it.

I indicated that I had met with a group of franchisors and franchisees recently, specifically about this case. One of the concerns I heard from them was in regard to the ability of the franchisor to provide training to help their franchisees be successful, but also to protect their brand. There was a concern that the new standard might limit this ability.

We had a back and forth about the Freshii case and the memorandum of advice on Freshii. We see in that case that the franchisor provided an operations manual with mandatory and

some suggested specifications, standards, operating procedures and rules that were prescriptive.

In addition, all franchise owners and managers were required to undergo a 4-week training period before a new franchise could open. The franchise agreement also stated that Freshii could terminate the franchise agreement for 20 different iterated reasons, including franchisee's failure to comply with the operations manual.

Based on this information, do you believe that the franchisors that I met with in the State of Wisconsin should be concerned that their training programs could lead to being held as joint employers in and of themselves?

Mr. RUBIN. I don't think that should be a concern, no. I don't think that that would be a problem, the training by itself. In my experience in dealing with employees of franchisees, the only time we get into a joint employer issue is when the franchisor exercises far more control than in the Freshii example or the example that we heard from my fellow witness this morning.

Many franchisors control every detail of what goes on in the workplace, including not only how the product is presented to the customer, but what the employees do, how they do it, when they do it, and a range of activities that they closely monitor in real time.

Senator BALDWIN. Thank you.

Ms. STOCKELAND. Senator Baldwin, may I speak?

Senator BALDWIN. Please feel free.

The CHAIRMAN. Sure.

Ms. STOCKELAND. Thank you. I'm new to this. I just want to say that there's been some discussion about how—I feel Senator Franken brought it up, and I think Senator Murray also, that you are applauding small business and are excited and don't feel that this applies to me.

I would say that what Mr. Rubin just said is case in point. He said that he doesn't think that an operations manual should, would—excuse me, I'm nervous. He said that he doesn't think that they should have concern over that, and that's just the point. There's no definition here, and so who decides if a franchisor is big or small? Where does that line come? Who decides that, and when is that decided?

That uncertainty is what really gives me cause to pause and look at further expanding my business, because I don't want that liability of having to run and operate employees and those labor standards across the franchise systems that I have.

Thank you very much.

Mr. RUBIN. I would like to respond. I believe the Senator asked for my opinion, so I prefaced it with I think. The way we analyze issues as they arise on a case-by-case basis is we look to precedent, and we look to things like advice memos. Where we have an analysis in a case like Freshii, that guides us. I can say with confidence that that would not be a problem for you and your franchisees.

Senator BALDWIN. Thank you.

The CHAIRMAN. Senator Casey.

Senator CASEY. Thank you, Mr. Chairman.

Just one point on this question of franchises. I don't think this decision is directed that way—directed at franchises in any way. In

fact, if you look at—the NLRB majority decision even explicitly speaks to this question when it says the decision is not on franchises.

I'm reading now—this is page 20, footnote 120 of the decision—

> "None of those situations"—meaning franchise situations—"are before us today, and we decline the dissent's implied invitation to address the facts in every hypothetical situation in which the Board might be called on to make a joint employer determination."

I think even the decision itself is explicit on the question of franchises.

The CHAIRMAN. Thanks to all of you. I don't have a question. I'll just make a closing comment. I thank all four of you for coming. We appreciate your comments, and if you have anything else you would like to say, we'd be glad to receive it if you'll give it to us in the next few days.

My thought about this is I think Stealing the American Dream is pretty accurate, and this is why I think so. There are 780,000 franchise operations in the country. The new joint employer standard, according to observers like Victor Narro of the UCLA Labor Center, no longer requires direct control over the essential terms and conditions of employment. If you have a franchise agreement or a contractual relationship, depending on the industry, that's enough to show you have influence over working conditions.

It's hard for me to see how there could be any franchise in the country over which the franchisor would not have some indirect or unexercised potential to control. If that is the case, it seems to me the inevitable consequence of a decision like this is to greatly reduce the number of franchise opportunities in America. People like Ms. Stockeland will think twice before opening a new franchise. That will reduce the growth of new jobs in America. That will reduce, in my opinion, the growth of opportunities to move up the economic ladder.

We obviously have some strong differences of opinion on this committee about it. We have 45 Senators who like to restore the law to the way it was before the *Browning-Ferris* decision, and I hope other Senators will join.

I thank the witnesses once more. 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.

The committee will stand adjourned.

[Additional Material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF THE INDEPENDENT ELECTRICAL CONTRACTORS (IEC)

Chairman Alexander, Ranking Member Murray and members of the committee, Independent Electrical Contractors (IEC) would like to express its concern with the recent interpretation of the joint employer rule by the National Labor Relations Board (NLRB) in the case commonly referred to as "*Browning-Ferris*." IEC opposes this new, broad interpretation and urges the U.S. Congress to pass the Protecting Local Business Opportunity Act (S. 2015/H.R. 3459), which would codify the previous standard that has stood for over 30 years.

The Independent Electrical Contractors is an association of over 50 affiliates and training centers, representing over 2,100 electrical contractors nationwide. While IEC membership includes many of the top 20 largest firms in the country, most of our members are considered small businesses. Our purpose is to establish a competitive environment for the merit shop—a philosophy that promotes free enterprise, open competition and economic opportunity for all. IEC and its training centers conduct apprenticeship training programs under standards approved by the U.S. Department of Labor's (DOL) Office of Apprenticeship. Collectively, in the 2015 school year, IEC will train more than 8,000 electrical apprentices.

IEC is deeply concerned about the NLRB's new joint employer standard and the impact it could have on the electrical contracting industry. The new standard presents a litany of potential problems and complications for doing business by making contractors potentially liable for individuals they do not even employ. Moving forward, almost any contractual relationship our members enter into may trigger a finding of joint employer status that would make them liable for the employment and labor actions of their subcontractors, vendors, suppliers and staffing firms. In addition, as we understand it, the new standard would also expose one company to another company's collective bargaining obligations and economic protest activity, to include strikes, boycotts, and picketing.

It's clear to see just how this broad and ambiguous new standard increases the cost of doing business. It makes it more difficult for companies to continue to do great work within the community and provide well-paying jobs to more electricians. It's unclear if our members could put language into any contracts that would insulate them from being considered a joint employer, nor do we know just how much their insurance costs will go up in an attempt to shield them from this increased liability.

This new standard also prevents electrical contractors from working with certain startups or new small businesses that may have a limited track record. For example, one IEC member will sometimes take on certain small businesses as subcontractors, which will often times be owned by minorities or women, and help mentor them on certain projects. With this new standard, they are now less likely to take on that risk. Many of our members that do contracting work with the Federal Government may now be less likely to bid on Federal contracts over $1.5 million, under which the Federal Acquisition Regulation (FAR) system mandates they contract with small businesses.

In conclusion, IEC urges Congress to consider the negative consequences this new standard has on businesses and the communities they serve, and pass the Protecting Local Business Opportunity Act.

Thank you.

ASSOCIATED BUILDERS AND CONTRACTORS
(ABC), INC.,
SEPTEMBER 15, 2015.

DEAR CHAIRMAN ALEXANDER, SENATORS KLINE, ISAKSON, AND ROE: On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I write to thank you for introducing the Protecting Local Business Opportunity Act (S. 2015/H.R. 3549), which will help restore the "joint employer" standard that has been in place for over 30 years and bring stability back into the economy for contractors and subcontractors across the country.

On August 27, 2015, the National Labor Relations Board (Board or NLRB) issued its decision in *Browning-Ferris Industries* altering the "joint employer" standard under the National Labor Relations Act. The standard is used to determine when two separate companies are considered one employer with respect to a group of employees for purposes of liability and bargaining obligations under the National Labor

Relations Act. Prior to this decision, companies were only deemed joint employers when they both exercised "direct and immediate" control over the "essential terms and conditions of employment." In *Browning-Ferris*, however, the Board overturned 30 years of precedent to impose a new standard expanding the definition to include those employers who have 'indirect" control and "unexercised potential" control. The two Republican members who dissented in the case explained the potential consequences of such a change, stating that the rule will,

> "'subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential liability for unfair labor practices and breaches of collective bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts and picketing."

The Board's decision will disrupt hundreds of thousands of business operations throughout the country and threaten the ability of hardworking Americans to achieve the American dream of owning their own business. Thank you again for introducing this much-needed legislation, and we urge Congress to quickly pass it.

Sincerely,

GEOFFREY BURR,
Vice President, Government Affairs.

AMERICAN HOTEL & LODGING
ASSOCIATION (AH&LA),
WASHINGTON, DC 20005,
October 5, 2015.

U.S. SENATE,
Washington, DC 20510.

DEAR SENATOR: 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, I urge you to cosponsor and support S. 2015, the "Protecting Local Business Opportunity Act" sponsored by Senator Lamar Alexander (R–TN). This commonsense legislation would address decisions made by the National Labor Relations Board (NLRB), which undermine the National Labor Relations Act (NLRA) and create unnecessary uncertainty within the employer community.

The lodging industry is one of the Nation's largest employers. With 1.9 million employees in cities and towns across the country, the hotel industry generates $176 billion in annual sales from more than 5 million guestrooms at 53,432 properties. It's particularly important to note that this industry is comprised largely of small businesses, with more than 55 percent of hotels made up of 75 rooms or less.

For more than three decades, the joint employer standard has been one of the cornerstones of labor law, protecting small businesses from undue liability involving employees over which they do not have actual or direct control.

Unfortunately, through its *Browning-Ferris Industries* decision, the NLRB has completely re-written the joint employer standard by including "indirect" and "potential" control into its decision. In doing so, the NLRB has ignored years of legal precedence and has created an environment of uncertainty that will put pressure on primary companies to assert more authority over small businesses to limit new potential liabilities under Federal labor law.

As the minority members of the NLRB correctly state in their dissenting opinion,

> "The number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited" . . . "creates uncertainty where certainty is needed . . . and provides no real standard for determining in advance when entities in a business relationship will be viewed as independent and when they will be viewed as joint employers."

The "Protecting Local Business Opportunity Act" will bring much-needed certainty back into labor law, reversing the new ambiguous and senseless joint employer standard included in the NLRB's *Browning-Ferris Industries* decision. Thank you for your consideration of this critical legislation.

Sincerely,

BRIAN C. CRAWFORD,
Vice President, Government & Political Affairs.

ASIAN AMERICAN HOTEL OWNERS
ASSOCIATION (AAHOA),
OCTOBER 6, 2015.

Hon. JOHNNY ISAKSON,
U.S. Senator,
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 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 over 600,000 workers, accounting for nearly $10 billion in annual payroll. As small business owners, our members consistently contribute to the economy through job creation, tourism promotion, real estate development, and community investment.

We understand that the Senate Committee on Health, Education, Labor, and Pensions will soon hold a hearing entitled, "Stealing the American Dream of Business Ownership: The NLRB's Joint Employer Decision." We strongly urge you and your colleagues to overturn the regime recently manufactured by the National Labor Relations Board, which upended the previous three-decade long legal standard.

Nearly 70 percent of the over 2 million guest rooms owned by AAHOA members are located in franchised hotels. 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 will be limited significantly if the traditional franchising model becomes fatally altered by government intervention.

As hoteliers, we have come to depend on the franchise model as the most favorable means to small business ownership. For many markets in the lodging industry, associating with a nationally recognized brand determines whether or not a hotel can survive.

Consequently, we are deeply concerned that the NLRB's intrusion into business relationships will cause franchisees to lose control of our businesses. Under the expanded definition of joint employer status concocted by the NLRB, franchisors may be coerced to undertake additional liability; thus, compelled to exert more control over the daily operations of franchisees' businesses to avoid legal action. Franchisees, like the vast majority of AAHOA members, would lose independence in decisionmaking and may effectively become employees of franchisors.

Further, an added role for franchisors may also cause increases in royalties and licensing fees, or lead to demands to share in the net profits of the business. These outcomes are unsustainable for the lodging industry and frankly threaten to undo the entrepreneurial success of AAHOA members. Ultimately, under this new joint employer standard, AAHOA members may be discouraged to grow our businesses, create new jobs or invest in our local communities.

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

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

Respectfully,

JIMMY PATEL,
2015 Chairman.

BRUCE PATEL,
Vice Chairman.

BHAVESH PATEL,
Treasurer.

HITESH PATEL,
Secretary.

CHIP ROGERS,
President & CEO.

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
WASHINGTON, DC 20062,
October 20, 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 3 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 October 6, 2015 hearing entitled, "Stealing the American Dream of Business Ownership: The NLRB's Joint Employer Decision." The Chamber supports S. 2015, "Protecting Local Business Opportunity Act" (S. 2015 or PLBOA) as a commonsense solution to restore the longstanding and unambiguous "joint employer" standard under the National Labor Relations Act, which has allowed employers to develop business models that have led to increased flexibility, competitiveness, and growth. We look forward to working with you and your colleagues to pass this critical legislation.

I. THE BROWNING-FERRIS DECISION

A. The Joint Employer Standard Existing Prior to BFI Provided Clarity and Certainty

PLBOA is, of course, necessary because of the National Labor Relations Board's (NLRB or Board) controversial 3–2 ruling in *Browning-Ferris Industries* (*BFI*) on August 27, 2015. In *BFI*, the NLRB upended decades of precedent to change its standard for determining whether two businesses are "joint employers" of certain workers. For over 30 years prior to *BFI*, the Board maintained a clear test for determining whether two separate companies were joint employers: does the alleged joint employer exercise direct and immediate control over the workers at issue? This direct control was generally understood to include the ability to hire, fire, discipline, supervise and direct. *TLI, Inc*. 271 NLRB 798 (1984), enforced 772 F.2d 894 (3d Cir. 1985).

This test made perfect sense. It ensured that the putative joint employer was actually involved in matters that fall within the Board's purview, to wit, the employment relationship. It also ensured that such companies would not be embroiled in labor negotiations or disputes involving employees and workplaces over which they had little or no control. This was particularly important because a large company may have contractual relationships with hundreds or thousands of franchisees, vendors and subcontractors. Indeed, it made sense to impute liability—as the now-previous standard did—only in those cases in which an employer was in a position to investigate and remedy unlawful actions. It is no surprise that prior to the decision in *BFI* this standard had been in existence for over 30 years and had been endorsed by reviewing Federal courts of appeal.[1]

B. BFI's Joint Employer Standard is Ambiguous, Uncertain and Provides no Guidance for Employers

In *BFI*, the Board overturned this clear bright-line test in favor of an amorphous, ill-defined test which will find joint employment even where one company only has the right to exert *indirect* or *potential* control over the terms and conditions of another company's employees. This confusing, multi-factor test provides absolutely no guidance to employers on how to structure their relationships so as to avoid joint employer liability. Quite clearly, this new test is both uncertain and seemingly easy to meet, and will therefore "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have." *Browning-Ferris Industries of California*, 362 NLRB No. 186, slip op. at 21 (2015).

The new *BFI* standard is unmoored from the realities of the modern workplace, as the very nature of a contractual relationship presupposes at least *some* type of control over the services, results or product agreed to. Surely a company (or perhaps the U.S. House of Representatives[2]) that contracts with a food service business to provide cafeteria services will retain a modicum of indirect control to ensure that

[1] *TLI* and *AM Prop. Holding Corp.*, 350 NLRB 998 (2007) were affirmed by the Third Circuit and Second Circuit, respectively.

[2] *Washington Post*, June 9, 2015 "Capitol Hill to Run on Dunkin . . . at Least on the House Side" available at *http://www.washingtonpost.com/blogs/in-the-loop/wp/2015/06/09/capitol-hill-to-run-on-dunkin-at-least-on-the-house-side/*.

food quality, prices and speed of delivery are what it bargained for in the contract for services. Under *BFI*, this type of reserved and indirect control may be sufficient to establish a joint employer relationship between the two parties to the contract. *See id*., at 25–26. As one can easily imagine, these types of contractual relationships are myriad and commonplace. According to the dissent, "the number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited." *Id.*, at 37.

The NLRB claims that the application of *BFI* is limited in scope—that it is to be applied on a case-by-case basis and "does not govern joint-employer determinations" under other labor and employment statutes. But this is mere lip service to an employer community which finds itself at the mercy of one of the most controversial and politically motivated Boards in history. For example:

- This is an NLRB which lacked a constitutional quorum, yet continued to issue decisions until being stopped by the Supreme Court in a 9–0 decision. *National Labor Relations Board* v. *Noel Canning*, 573 U.S. __(2014).[3]
- This is an NLRB that has promulgated regulations to speed up the union election process, unfairly limiting employers' abilities to communicate with employees about the pros and cons of unionization. The Board issued this regulation despite the fact that prior to issuance, 94 percent of all elections were conducted in 56 days and unions won about two-thirds of all elections.[4]
- This is an NLRB which blatantly attempted to force employers to post biased workplace notices about unionization, despite having no statutory authority to do so. *See Chamber of Commerce of the United States* v. *NLRB*, 721 F.3d 152 (4th Cir. 2013).
- This is an NLRB which is willing to overturn decades of precedent in significant cases in order to, among other things: limit employees' abilities to decertify an unwanted union; require employers to remit employees' union dues to unions even upon expiration of a collective bargaining agreement, thereby providing unions with greater leverage at the bargaining table; permit union organizing on employer-owned email systems; award itself a second bite at the apple when it does not like the decision of an arbitrator; and require employers to disclose to union officials confidential witness statements made during the course of workplace investigations.[5]
- This is a Board whose *Specialty Healthcare* decision—another case overturning Board precedent—purportedly only made "modest" changes to the law, but has been applied to, among other workplaces, dog training facilities and department stores.[6]

Time and time again, the Board has stretched its legal authority in order to advance policy goals that are simply driven by the agenda of organized labor. Why should this time be any different? Clearly, the time has come to enact legislation that will reign in an out-of-control Board, and PLBOA is a vital first step.

II. BFI'S IMPACT ON EMPLOYERS

By changing its joint employer standard in *BFI*, the Board has opened up a Pandora's Box of problems that may now potentially befall almost any employer who enters into a contract for services with another business. Indeed, this new standard is really about expanding the universe of potential employers who can be targeted by the NLRB, unions, and plaintiffs' bar. Many of these problems were set forth in our letter to you dated February 12, 2015, as well as in the Chamber's Workforce Freedom Initiative's report "Opportunity at Risk."[7] However, it is worth reiterating that some negative results of this new decision include the following:

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[3] 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.

[4] *See* U.S. Chamber comments, April 7, 2014, available at *https://www.uschamber.com/sites/default/files/documents/files/NLRB%202011%200002%20US%20Chamber%20of%20Commerce.pdf*.

[5] *See*, respectively, *Lamons Gasket Co.*, 357 NLRB No. 72 (2011); *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012); *Purple Communications*, Inc., 361 NLRB No. 126 (2014); *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014); *American Baptist Homes of the West d/b/a Piedmont Gardens ("Piedmont Gardens")*, 362 NLRB 139 (2015).

[6] *Guide Dogs for the Blind*, 359 NLRB No. 151 (2013); *Macy's, Inc.*, 361 NLRB No. 4 (2014).

[7] The WFI report is available here: *http://www.workforcefreedom.com/sites/default/files/Joint%20Employer%20Standard%20Final__0.pdf*. In conjunction with this report, on March 20, 2015, the Chamber hosted a conference entitled, "The NLRB and the Joint-Employer Standard." The conference featured commentary from two former NLRB members, Andy Puzder (CEO of CKE Restaurants, Inc.), and several small business owners. Additionally, after *BFI* was issued the Chamber hosted a briefing call on September 9, 2015. Approximately 150 Chamber members dialed-in, which is indicative of the significance of this issue.

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 campaigns in hopes that the larger employer will bend to public pressure and recognize the union.

2. *Liability under the National Labor Relations Act.* Because joint employers are liable for each other's acts and omissions, expanding the pool of joint employers will result in increased labor law liability for employers, even in cases in which they exert little or no control over the workers involved.

3. *Collective Bargaining.* If the direct employer is organized, the "indirect employer" would have to participate in collective bargaining. Depending on the circumstances, the "indirect employer" could be dragged into bargaining relationships with hundreds of entities over whose day-to-day operations they have no control.

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 will likely be eviscerated under *BFI*'s new standard, allowing unions to picket and demonstrate against both entities.

Worse, the plaintiffs' bar and other enforcement agencies may attempt to import the new *BFI* standard into other areas of employment law[8] such as:

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. This would essentially eliminate carefully negotiated small business exceptions in these Federal statutes.

2. *Discrimination law. BFI*'s new joint-employer standard will 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.[9] 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. The Wage & Hour Division and the plaintiffs' bar will likely look to see how they may take advantage of *BFI*. It is no secret that the current Wage and Hour Administrator, David Weil, has a strong distaste for alternative workplace arrangements.

4. *Occupational Safety and Health Administration (OSHA) issues. BFI* 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. Moreover, a recently released internal OSHA memorandum reveals that the agency is looking at the potential for a joint-employment relationship between franchisors and franchisees when investigating workplace safety.

5. *Affordable Care Act Issues.* Under *BFI*, individual companies 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. 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.

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[8] Note that most employment laws have damages, enforced through both agency action and private court action, which exceed those under the National Labor Relations Act, some including punitive and compensatory damages with jury trials. Hence, there is a built-in incentive for the plaintiffs bar to push the envelope in this area of the law, relying on the reasoning in *BFI*.

[9] *See, e.g., Little* v. *TMI Hospitality, Inc.*, et al. 2:15-cv-02204 (C.D. Ill., September 18, 2015)(in a complaint claiming sexual harassment and race discrimination, the plaintiff cites to *BFI* and has alleged that the hotel owner and the corporate brand are joint employers).

III. CORRECTING THE RECORD OF THE OCTOBER 6TH HEARING

A. BFI Does Not Return to Any Pre-Existing Standard Because Prior to 1984, There Was No Standard At All

There was some discussion at the hearing that *BFI* is simply a return to the NLRB's joint employer standard that existed prior to the decisions in *TLI* and *Laerco Transportation*, 269 NLRB 324 (1984). In reality though, there was no consistent NLRB joint employer standard prior to these two decisions. It is notable that in his written testimony, Mr. Rubin does not cite to a Board case which established this alleged prior standard.[10] He cannot because there is no such case. In fact, a brief examination of NLRB decisions prior to *TLI* and *Laerco* reveals that the Board had no joint employer standard at all.

One need look no further than the Teamsters Local 350s (the union) initial Request for Review in *BFI* for evidence that the Board did not maintain a consistent joint employer standard prior to 1984. In its brief, the union argued to the Board that it could find *BFI* to be a joint employer under the then-existing standard, and also under multiple "broader formations" of the standard. Tellingly, the Union did not encourage the Board to return to an allegedly consistent, rock-steady formulation of the joint employer test announced in some prominent Board decision. Instead, the union's brief reads like a smorgasbord of various NLRB joint employer standards espoused over the years from which the Board could choose. Thus, the union urged the Board to adopt any of these joint employer tests with supporting cases:

- "Indirect control." *Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966).
- "Unexercised" or potential control. *Jewel Tea Co.*, 162 NLRB 508 (1966).
- "Industrial realities." *Jewell Smokeless Coal*, 170 NLRB 392 (1968), enfd. 435 F.2d 1270 (4th Cir. 1970).

In addition to these formulations, the Board also employed the "direct control" test in some cases. *See O'Sullivan, Muckle, Kron Mortuary,* 246 NLRB 164, 165 (1979) (funeral home was not joint employer with company who provided it with driving services, because service provider was "solely responsible for hiring, disciplining, and discharging its drivers"). Moreover, other pre-1984 cases expressly denounced the "indirect control" standard. *See Walter B. Cooke*, 262 NLRB 626, 641 (1982)(finding "such indirect control over wages and hours to be insufficient to establish a joint employer relationship."). Adding to the confusion, prior to 1984, the Board sometimes conflated its "joint employer" test with its test for "single employer." *See Parklane Hosiery Co.*, 203 NLRB 597, amended 207 NLRB 991 (1973).[11]

In sum, prior to 1984, the Board did not have a consistently applied joint employer test. It examined cases under the direct control test, the indirect control test, the unexercised control test, the industrial realties test and other tests. Sometimes, the Board applied the wrong test altogether. It was not until *TLI* and *Laerco* that a consistent and cogent joint employer test emerged. Enactment of PLBOA is necessary to return to this consistent and coherent standard.

B. The Freshii Memorandum Carries No Legal Weight

On April 28, 2015, the NLRB's Division of Advice issued a memorandum to Region 13 regarding whether Freshii (a franchisor) should be responsible as a joint employer for the alleged unfair labor practice committed by Nutritionality (its franchisee). The memorandum concluded that Freshii and Nutritionality were not joint employers. While this was likely welcomed news for both Freshii and Nutritionality, the memorandum has no broad application to the employer community in general. This is because the Board makes policy through its jurisprudence, not through internal advice memoranda. Simply put, "advice memoranda do not constitute Board law." *Kysor/Cadillac*, 307 NLRB 598, 603 (1992). Thus, attempts during the hearing to elevate the significance of the Freshii memorandum and downplay the significance of *BFI* were misplaced.

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[10] Mr. Rubin cites to *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964) and *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d. Cir. 1982), as "fairly consistent" precedents that existed prior to *TLI* and *Laerco*, but neither of these cases sets forth a two-part multifactor test—which relies on indirect or potential control—to which *BFI* supposedly returns. Moreover, use of the modifier "fairly" indicates that the law at the time was unsettled.

[11] "Single employer" is 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).

C. BFI Provides No Guidance to Employers

There was some patronizing comments made during the hearing that employers should not be so concerned about *BFI* because: (1) the ruling will only be applied on a case-by-case basis; and (2) it only involved "contracting", so franchisors and franchisees should have nothing to worry about. First, "case-by-case" applications of rules are inherently unpredictable. This very uncertainty of how the new criteria c*ould* be applied will raise serious concerns in the business community about how future workplace contractual relationships between two or more employers should be structured. And no employer is going to risk energy, time and capitol to volunteer as the Board's next guinea pig.[12]

Second, both Senator Franken and Senator Casey mistakenly claimed that the franchising industry is not impacted by *BFI*. Specifically, Senator Casey stated, "I don't think this decision is directed at franchises in any way." One would think that it should go without saying, but evidently it must be said: the franchise relationship is a contractual relationship. Therefore, franchisors and franchisees—just like any employer entities that enter into service agreements—have a great deal to be concerned about the uncertainty raised in *BFI*. *See BFI* slip op., at 45 ("Of the thousands of business entities with different contracting arrangements that may suddenly find themselves to be joint employers, franchisors stand out.").

IV. THE BFI DECISION IS THE LATEST ATTACK ON ALTERNATIVE WORKPLACE ARRANGEMENTS

The need for PLBOA becomes even more apparent when one considers other simultaneous efforts by the Board, Department of Labor (DOL) and State and local regulators to attack employers whose workforce structures do not fit into their ideal world view. Some of these efforts include:

- The NLRB has ignored instructions from Federal courts of appeals in an attempt to expand its jurisdiction over independent contractors.[13]
- DOL's proposed changes to regulations regarding eligibility for overtime (RIN 1235–AA11).
- DOL's Administrator's Interpretation (No. 2015–1, July 15, 2015) regarding Independent Contractor classification, which downplays the "control" factor.
- Proposed legislation in Seattle that would permit labor unions to organize independent contractors in certain transportation industries.[14]

Rather than adapting the law to keep pace with modern competitive workplaces, these regulators are trying to force companies to change their business models and strategies in order to make workplaces look the way they did in the 1930s: every worker is an employee who punches in at 9 a.m. and punches out at 5 p.m. and never checks their email outside of work. This model—which ultimately increases employer costs—will undoubtedly stifle competitiveness and result in stagnant economic growth. It also ignores the benefits of such structures for the parties involved. In particular, the independent contractor model can result in workers who "have more control over their economic destiny."[15] While PLBOA obviously does not address these other efforts, it would be a positive step forward for employers whose successful business models are under constant regulatory threat.

V. CONCLUSION

For the foregoing reasons, the U.S. Chamber supports PLBOA as a modest and reasonable solution to the problems created by the NLRB's *BFI* decision. As noted above, plaintiffs' attorneys and other enforcement agencies, such as OSHA, are already looking to take advantage of the new, broader joint employer standard. And there is no doubt that the Board's General Counsel will attempt to apply this new standard to the franchising industry in pending litigation.

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[12] The Board does not issue advisory opinions or letters, so there is no way for an employer to inquire in good-faith as to whether a certain contract or relationship makes it a joint employer.

[13] 361 NLRB No. 55 (September 30, 2014); 362 NLRB No. 29 (March 16, 2015).

[14] *http://seattle.legistar.com/ViewReport.ashx?M=R&N=Text&GID=393&ID=2296991&GUID=A1841B13-CF4F-4E5A-9409-A613DC6B2B15&Title=Legislation+Text*.

[15] Steven Cohen and William B. Eimicke, *Independent Contracting Policy and Management Analysis*, Columbia School of International Affairs, at 16 (August 2013).

We wish to thank you for taking the time to hold this important hearing on PLBOA. 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

RESPONSE BY CIARA STOCKELAND TO QUESTIONS OF SENATOR COLLINS AND SENATOR SCOTT

SENATOR COLLINS

Question 1. I have spoken to various small employers in Maine regarding this issue. They cross-cut different industries. In Maine, for example, many of our hotels and motels are locally owned franchises. I am concerned about the disincentive that this ruling would create for expansion and the addition of new jobs. Ms. Stockeland, you are a business owner who could be significantly affected by this new rule. How do you believe this ruling will affect plans to expand a franchise business and create jobs?

Answer 1. This new ruling would greatly effect my expansion plans and growth strategies for my business. We have had a very distinct and methodical growth strategy in place since our inception. With the goal of 75 stores by 2024, I am thrilled that through my small North Dakota business I continue to have the opportunity to give other entrepreneurs the opportunity to also own their own business and thus create jobs in their communities. When I think of the implications that this bill could have on us as a company, it gives me pause to consider whether or not I can afford the risk that 75 units would bring to me and my family. The reason I choose the franchise model was so that individual business owners in their own communities would have the privilege and the responsibility of hiring and managing their own employees. As a small franchisor, I cannot afford the liability that could come with the responsibility of managing employees that are in businesses miles away.

SENATOR SCOTT

Question 1a. For more than 30 years, the business community has adhered to a certain set of principles for what constitutes a joint-employer. During that time, you have been able to achieve substantial growth and franchise 11 different locations including one in my home State of South Carolina. This rule has the potential to reduce profitability for franchisees while at the same time limiting their growth. Where does that leave the South Carolinian hoping to get a job at one of your franchises?

Answer 1a. We had the privilege of opening MODE Mt. Pleasant in July 2015. Through that opening, that local entrepreneur was able to hire two women from her community. We hope to continue to grow our brand in the State of South Carolina and with each store opening more jobs are created. If I decide, because of the liability that this issue affords me, that I will no longer franchise MODE, job opportunities will be lost in both the State of South Carolina and other States across the country.

Question 1b. Who manages the employees at those 11 franchise locations—you or the franchisee?

Answer 1b. The franchisee hires the employees in her franchise location and manages every single aspect of their duties as employees.

Question 1c. What affect does the decision in *Browning-Ferris* have on the franchisee's ability to independently manage those employees?

Answer 1c. This decision greatly effects both me as a small franchisor and also each individual franchisee because it essentially makes each franchisee a middle manager between myself and their employees and creates extensive liability for me as a small franchisor in that now I need to anticipate, know and fully control all employee relations in the individual MODE stores. It effects the franchisee's ability to independently manage their employees because they may no longer have direct control over the actions, growth and accountability of their own staff.

Question 2a. It seems like the less independent franchisees become, the less likely someone in Charleston, SC would want to open a small business and hire employees. It seems to me like the additional liability and uncertainty our small businesses will be taking on will most certainly dip into their profits, and make it a less attractive investment for a lot of people. Do you find that to be the case?

Answer 2a. I absolutely agree that the additional liability and uncertainty we face will make investment in the franchise model much less attractive. My franchisees went into business to run their own operation and to directly control their business success outcome. Small business people creating local jobs and being the direct employer of their hires.

Question 2b. If so, how will that affect the growth potential for franchises?

Answer 2b. This liability and uncertainty will affect the growth penitential for franchisees because they will no longer want to open their own small businesses, knowing that they are essentially middle managers while still taking on the risk of a small business owner.

Question 3. As any business owner can tell you, one of the worst things in the world for your business is uncertainty. Unfortunately for many businesses across South Carolina, in particular small business owners, the NLRB's actions in redefining the definition and application of "joint employer" has failed to provide any real clarity and in fact, has just provided more uncertainty and questions for employers. It might seem obvious, but how do we actually expect businesses to be able to prepare for potential litigation, potential increased health insurance costs, or any of the other variety of financial challenges this rule places on them?

Answer 3. There is absolutely no way that small business owners such as myself and my individual franchisees can prepare for the liability that we may incur with this legislation. There are no clear definitions and no clear directives. This decision has created a blurry line between direct and indirect control and leaves every circumstance open to the determination of lawyers. As a small business owner, there is a multitude of risk (such as no customers, weather you cannot control, inflation, product supply, etc.) that we can never control. Why would the government feel it fitting to inflict another unnecessary uncertainty onto small business owners? I cannot be emphatic enough that this will stunt small business growth in America and small business is the driving engine of job creation in the United States.

Question 4. It's nearly impossible to run a successful operation when you have no idea what your costs will be or what you might legally be on the hook for. Won't this uncertainty have a direct impact on employees as well?

Answer 4. When my franchisees and I have no idea what costs or legal implications will be imposed on our businesses, it absolutely slows our growth and job creation.

RESPONSE BY EDWARD MARTIN TO QUESTIONS OF SENATOR COLLINS AND SENATOR SCOTT

SENATOR COLLINS

Question 1. I have spoken to various small employers in Maine regarding this issue. They cross-cut different industries. In Maine, for example, many of our hotels and motels are locally owned franchises. I am concerned about the disincentive that this ruling would create for expansion and the addition of new jobs. Mr. Martin, you are a business owner who could be significantly affected by this new rule. How do you believe this ruling will affect plans to expand a franchise business and create jobs?

Answer 1. It is with appreciation that I received your question following the Senate Committee on Health, Education, Labor, and Pensions hearing entitled, "Stealing the American Dream of Business Ownership: The NLRB's Joint Employer Decision" on October 6, 2015. I agree that the National Labor Relations Board's (NLRB) decision in *Browning-Ferris* will negatively impact the home building industry, dampen job creation, and discourage business expansion.

The *Browning-Ferris* decision calls into question the very basic idea of what it means to be a business. If any basic business act, like scheduling, can trigger a finding of joint employment, employers will be ill-prepared to determine the appropriate scope of their workforce, and consequently, their legal responsibilities to that workforce. Because the new "indirect or potential control" standard affects employers' responsibilities not only at the NLRB, but with other Federal agencies such as the Internal Revenue Service, the U.S. Department of Labor, or for the purposes of the

Affordable Care Act, businesses will be forced to re-examine their entire business model if the new joint employer standard is left unchecked by Congress.

I am equally concerned about the new standard's impact on job creation. Without the human resources departments typical of large firms, small firms will find it challenging to compete under this new standard. The broadening of joint employment will lead to a centralization of the housing industry, with less competition among small firms, higher home prices, and fewer locally based businesses in Maine and around the country. If Congress codifies the traditional "direct control" standard, this will lead to more competition among firms of all sizes, providing more affordable housing options for consumers.

Thank you for your question. I look forward to working with you as S. 2015 moves forward in the legislative process.

SENATOR SCOTT

Question 1. As any business owner can tell you, one of the worst things in the world for your business is uncertainty. Unfortunately for many businesses across South Carolina, in particular small business owners, the NLRB's actions in redefining the definition and application of "joint employer" has failed to provide any real clarity and in fact, has just provided more uncertainty and questions for employers. It might seem obvious, but how do we actually expect businesses to be able to prepare for potential litigation, potential increased health insurance costs, or any of the other variety of financial challenges this rule places on them?

Answer 1. It is with appreciation that I received your questions following the Senate Committee on Health, Education, Labor, and Pensions hearing entitled, "Stealing the American Dream of Business Ownership: The NLRB's Joint Employer Decision" on October 6, 2015. I agree that the National Labor Relations Board's (NLRB) decision in *Browning-Ferris* creates more uncertainty for employers and will be especially challenging for home builders who may be found to be employers of other company's workers.

For example, under the new test adopted in the *Browning-Ferris* decision, Tilson Homes could be considered a joint employer by merely scheduling a subcontractor to complete a roofing project at one of our job sites. The new "indirect or potential control" test is so ambiguous that employers, like myself, have an incredibly difficult time assessing where our liability ends and where another company's begins. Employers in South Carolina and around the country will find it difficult to properly prepare for potential litigation and the legal responsibilities that come with an expanded workforce. As you note, a finding of joint employment could trigger responsibilities under the *Affordable Care Act*, the *Fair Labor Standards Act*, and other labor laws. I strongly believe the new joint employer test will lead to centralization of the housing industry, which will negatively affect small businesses and housing prices.

Question 2. It's nearly impossible to run a successful operation when you have no idea what your costs will be or what you might legally be on the hook for. Won't this uncertainty have a direct impact on employees as well?

Answer 2. I strongly agree the new joint employer standard will have a negative impact on employees and job creation. The new limitless joint employer standard will not serve to better employees, but create such legal uncertainty that employers will scale back and hesitate to take on such great risk.

As you note above, a finding of joint employment could trigger responsibilities under the *Affordable Care Act*, the *Fair Labor Standards Act*, and other labor laws. Because small businesses will be ill-equipped to handle such expanded legal liabilities, large businesses with sophisticated human resources departments will be in a better position to gain market share at the expense of local firms. Firms of all sizes, however, will find it challenging to take on such an expanded workforce, which could lead to fewer projects completed, less job creation, and certainly less competition among firms for projects, which is bad for the economy and housing.

[Whereupon, at 11:38 a.m., the hearing was adjourned.]

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