INSTITUTE FOR THE AMERICAN WORKER

New Civil Liberties Alliance

December 7, 2022

Submitted electronically at www.regulations.gov

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

Re: Comments on Proposed Rule, Standard for Determining Joint-Employer Status (RIN 3142-AA21)

Dear Ms. Rothschild,

On September 7, 2022, the National Labor Relations Board ("NLRB" or "Board") published a notice and request for comments on its proposed rule in the Federal Register that rescinds and replaces the existing rule on the standard for determining joint-employer status under the National Labor Relations Act ("NLRA" or "the Act"). This submission represents the views of the New Civil Liberties Alliance ("NCLA") and the Institute for the American Worker ("I4AW").

NCLA and I4AW oppose the proposed rule because it defines employment more broadly than permitted by the NLRA's common-law standard; is arbitrary and capricious under the Administrative Procedure Act ("APA"); and would inflict economic harm, especially on small businesses.

STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization founded by Philip Hamburger to defend constitutional freedoms against unlawful exercises of administrative power. NCLA challenges constitutional defects in the modern American legal framework by bringing original litigation, defending Americans from unconstitutional actions, filing *amicus curiae* briefs, and petitioning for a redress of grievances in other ways, including by filing rulemaking comments like these. Although Americans still enjoy the shell of our Republic, a very different sort of

government has developed within it—a type, in fact, that our Constitution was designed to prevent.

I4AW is a nonpartisan, nonprofit organization co-founded by F. Vincent Vernuccio that seeks to inform policy makers and stakeholders in Washington, DC, about developments in labor policy. I4AW educates on the benefits of freedom, innovation, and collaboration between workers and job creators with policy solutions that remove roadblocks which hamper worker freedom. I4AW's leadership has decades of knowledge and experience on labor issues, the inner workings of congressional labor committees, and federal outreach.

BACKGROUND OF THE JOINT-EMPLOYER STANDARD

a. Three Decades of Consistent Joint-Employer Standard

The Board has long recognized that, for NLRA purposes, a business may qualify as the "joint employer" of a worker who is nominally employed by a separate company, if the business plays a significant role in determining the worker's essential terms and conditions of employment. The NLRA does not define the term "joint employer." The Act's only reference to the meaning of "employer" is as follows: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. § 152(2). The Supreme Court has explained that Congress, in adopting federal labor laws, "mean[t] to incorporate the established meaning" of the term "employer," and "intended to describe conventional master-servant relationships understood by common-law agency doctrine." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (citations omitted).

The Board did not develop a consistent view of the common-law test for joint-employer relationships until 1984. In two cases decided that year—*Laerco Transp.*, 269 NLRB 324 (1984), and *TLI, Inc.*, 271 NLRB 798 (1984)—the Board adopted the standard articulated several years earlier by the Third Circuit in *NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117 (3d Cir. 1982). According to the Third Circuit, "the 'joint employer' concept recognizes that the business entities are in fact separate but that they *share or codetermine those matters governing the essential terms and conditions of employment*." *Id.* at 1123 (emphasis added). As such, a joint-employer relationship exists only "where two or more employers exert significant control over the same employees." *Id.* at 1124. In that case, the Third Circuit found a company was the joint employer of drivers employed by the company's contractor because the company directly hired and fired drivers, and "together [with the contractor] determined the drivers' compensation and shared in the day to day supervision of the drivers." *Id.* at 1125. Other courts of appeal followed the Third Circuit's approach. *See, e.g.*, *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 440 (D.C. Cir. 2004) *3750 Orange Place Ltd. P'ship v. NLRB*, 333 F.3d 646, 660 (6th Cir. 2003); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993); *Tex. World Serv. Co., Inc. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991); *Clinton's Ditch Co-op v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985).

The NLRB applied the Third Circuit's standard in both *TLI* and *Laerco* to conclude that the "user" firms were not joint employers of drivers provided to them by the "provider" firms—even though the user firms exercised "some" control over the drivers and had sufficient economic

power to dictate to the provider firms the essential terms and conditions of the drivers' employment. This was because the user firms had never actually attempted to dictate those essential terms and conditions. The Board did not suggest that evidence of an unexercised contractual right to control, or of indirect control, could never be relevant to the joint-employer inquiry. Rather, its *TLI* and *Laerco* decisions held that any such evidence was insufficient to "meaningfully affect" the essential terms and conditions of employment and thus could not by itself create joint-employer liability under the Act.

b. The Board's Failed Attempt to Depart from Its Longstanding Joint-Employer Standard Through Adjudication

The NLRB adhered to its *TLI*/*Laerco* standard for over 30 years before suddenly repudiating it in its 2015 decision in *Browning-Ferris*, 362 NLRB 1599 ("*BFI*"). In *BFI*, the full Board canvassed a 30-year history of its joint-employer cases beginning with *TLI* and *Laerco* to conclude that the prevailing standard during that period focused on a putative employer's actual and direct control. *Id.* at 1608 "Most significantly," the Board confirmed its line of "decisions ha[s] implicitly repudiated … reliance on reserved control and indirect control as indicia of joint-employer status." *Ibid.* Rather, the Board's longstanding joint-employer standard "foreclosed consideration of a putative employer's right to control workers, and has instead focused exclusively on its actual exercise of that control—and required its exercise to be direct, immediate, and not 'limited and routine.'" *Ibid.* (quoting *AM Property Holding Corp*, 350 NLRB 998, 1001 (2007), *aff'd in relevant part sub nom., SEIU Local 38BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011)). *BFI* highlighted *Airborne Express* as a typical joint-employer decision that held "[t]he essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate." *Id.* at 1608 (quoting *Airborne Express*, 338 NLRB 597, 957 n.1 (2002)).

Having established that the preexisting standard required "direct and immediate" control, *BFI* then went on to criticize that longstanding standard as "not mandated by the Act … and does not best serve the Act's policies." *Id.* at 1609. In particular, the Court said a broader joint-employer standard was needed to bring its regulations "[into] step with changing economic circumstances." *Id*. at 1599. The Board thus announced it "will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner." *Id.* at 1613-14. The Board explicitly "overrule[d] *Laerco*, *TLI*, *A&M* [*sic*] *Property*, and *Airborne Express*," *id.* at 1614—and by extension the joint-employer standard used by numerous courts of appeal, *see, e.g., SEIU*, 647 F.3d at 442 ("An essential element of any joint employer determination is sufficient evidence of immediate control over the employees.") (cleaned up) (enforcing *AM Property*'s joint-employer holding); *Tex. World*, 928 F.2d at 1432 ("[T]he essential element is immediate control over the employees.").

BFI held that even when two companies have never exercised joint control over essential terms and conditions of employment, and even when any joint control is not "direct and immediate," the two companies can still be joint employers based on the mere existence of unexercised contractual authority, indirect control, or control that is "limited and routine." 362 NLRB 1599, 1613-14. The Board also greatly expanded the Board's previous understanding of what constitutes "control" over essential terms and conditions of employment. Such control exists,

the Board held, even if a company does not dictate the work performance of individual employees of one of its independent contractors, if the terms of the contract between the two entities impose economic constraints on how the independent contractor determines the terms and conditions of its employees' work:

> Where the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user's guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees' working conditions are a byproduct of two layers of control.

Id. at 1612.

Applying its new standard, the Board held that Browning-Ferris Industries of California, Inc. was the joint employer of workers employed by one of its independent contractors, Leadpoint Business Services. Among the factors cited by the Board in support of its holding was that Browning-Ferris and Leadpoint entered into a cost-plus contract. *Id.* at 1617. The Board also noted that Browning-Ferris on several occasions reported to Leadpoint the misconduct of Leadpoint employees, and that sometimes Leadpoint responded by disciplining those employees after an independent inquiry. *Id.* at 1602.

On July 11, 2017, the House of Representatives passed the Save Local Business Act to explicitly overrule *BFI* and restore the joint-employer standard that the Board had been following for decades. H.R. 3441, 115th Cong. (as passed by House, July 11, 2017). The bill was pending before the Senate when, in December 2017, the Board issued a decision that repudiated the unprecedentedly broad standard announced in *BFI* and re-adopted the joint-employer standard that had been in effect from 1984 to 2015. *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017). The *Hy-Brand* decision explained: "We find that the *Browning-Ferris* standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations." *Id.* at 1-2. But two months later, the NLRB vacated its *Hy-Brand* decision after a determination that one Member of the Board should not have participated in the matter.

In the meantime, Browning-Ferris petitioned for review of *BFI* in the D.C. Circuit, and the NLRB cross-appealed for enforcement of its order. The D.C. Circuit declined to enforce the Board's order against Browning-Ferris. *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018) ("*Browning-Ferris*"). The D.C. Circuit affirmed that that "direct control is typically or usually present in employment relationships." *Id.* at 1218 (cleaned up). While indirect and reserved control *could* be relevant in the joint-employer analysis, the court concluded *BFI* "overshot the common-law mark" by failing to distinguish between relevant types of indirect control and "routine contractual terms" that are irrelevant. *Id.* at 1216. Thus, while the Board "need not avert its eyes from indicia of indirect control," the manner in which *BFI* "applied that indirect-control factor … pushed beyond the common law's bounds" regarding the meaning of "employer." *Id.* at 1218, 1221.

The "routine contractual terms" that the D.C. Circuit deemed irrelevant to the joint-employer analysis included: use of a cost-plus contract; generalized caps on contract costs; and advance description of tasks to be performed under the contract. *Id.* at 1220. "Whether Browning-Ferris influences or controls the basic contours of a contracted-for service—such as requiring four lines' worth of sorters plus supporting screen cleaners and housekeepers—would not count under the common law." *Id.* at 1221. A company's economic control over an independent contractor's performance—a routine component of contracting arrangements—does not establish control by the company over the terms and conditions of employment of the contractor's employees.

The D.C. Circuit also faulted the Board for failing to "meaningfully apply" the requirement that the putative employer's control must extend to essential terms and conditions of employment. *Id.* at 1221-22. The court did not affirm and left undecided the Board's conclusion that indirect control, or an unexercised reversed right of control, can establish joint-employer status absent direct and immediate control. *Id.* at 1218.

c. The Board's Reestablishes Its Longstanding Joint-Employer Standard Through Rulemaking

While the D.C. Circuit's *Browning-Ferris* decision was pending, the Board acted on its own to propose a joint-employer standard through rulemaking. The rulemaking effort culminated in a final rule that was issued on February 26, 2020. *Joint Employer Status under the National Labor Relations Act*, 85 Fed. Reg. 11,184 (Feb. 26, 2020) ("Current Rule"). The Current Rule restored the longstanding principle that an employer will be considered a joint employer of a separate company's employees only if it possesses and exercises substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees. The Current Rule specifies that these essential terms and conditions of employment are wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. It further provides that even where an employer exercises direct control over another employer's workers, it will not be held to be a joint employer if such control is "limited and routine."

With respect to indirect control, or control that is contractually reserved over terms and conditions of employment but never actually exercised, the Current Rule states that while such control may be probative of joint-employer status, it is only so to the extent that it reinforces evidence of direct and immediate control. It makes clear that joint-employer status cannot be based solely on indirect influence or the reservation of a right to control that is never exercised. Consistent with the D.C. Circuit's *Browning-Ferris* decision, the Current Rule states that routine elements of an arm's-length contract will not result in a contractor becoming a joint employer, and it provides definitions of key terms, including what does and does not constitute "substantial and direct immediate control" over each essential employment term.

d. The Board Again Attempts to Depart from Its Longstanding Joint-Employer Standard Through Rulemaking

On September 7, 2022, the Board proposed to revise yet again its standard for determining joint-employer status under the NLRA. *Standard for Determining Joint-Employer Status*, 87 Fed. Reg. 54,641 (Sep. 7, 2022) ("NPRM"). The NPRM rejects the Current Rule's focus on "direct and

immediate control" and restores *BFI*'s "indirect" and "reserved" control standard. The NPRM goes further than *BFI* because it makes clear that indirect or reserved control standing alone may be sufficient to prove joint-employer status. *Id.* at 64,663 ("Possessing the authority to control *is sufficient* to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly *is sufficient* to establish status as a joint employer, regardless of whether the power is exercised directly.") (emphases added).

The proposed rule provides that two or more employers will be held to be joint employers where either employer "share[s] or codetermine[s] those matters governing employees' essential terms and conditions of employment." *Id.* at 54,663. The NPRM defines "share or codetermine" to mean "possess the *authority* to control (*whether directly, indirectly, or both*) or to *exercise* the power to control (*whether directly, indirectly, or both*) one or more of the employees' essential terms and conditions of employment." *Ibid.* (emphases added). The proposed rule states that essential terms and conditions of employment "generally include, but are not limited to: wages, benefits, and other compensation, hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance." *Ibid.*

THE PROPOSED RULE IS UNLAWFUL AND WOULD CAUSE ECONOMIC LOSS

I. THE PROPOSED RULE DEFINES EMPLOYMENT MORE BROADLY THAN THE NLRA'S COMMON-LAW STANDARD

a. The NLRA Requires the Board to Adhere to Common-Law Agency Principles in Defining the Employment Relationship

Proper construction of the NLRA's definitions of "employer" and "employee" requires an understanding of a 1947 amendment to the Act adopted in response to a 1944 Supreme Court decision. That amendment made clear the NLRB was to look to common-law agency principles alone in determining whether an employer-employee relationship exists for purposes of the Act.

In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Supreme Court upheld NLRB's determination that workers to whom Los Angeles newspapers sold their papers for resale to readers were employed by the newspapers for purposes of the NLRA and thereby entitled to collective-bargaining rights. The Court recognized that the common law would have classified the resellers as independent contractors, not employees, but stated that Congress intended the NLRA to define employment more broadly. According to the Court, the NLRA applies to workers whenever "the economic facts of the relation" between the workers and those from whom they received compensation were such that collective bargaining would be "appropriate and effective for the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions"—such as when there exists "[i]nequality of bargaining power in controversies over wages, hours, and working conditions." *Id.* at 127. The Court concluded that the NLRA applied to such relationships, notwithstanding that the relationships might not fit within "the narrow technical relation of 'master and servant,' as the common law had worked this out in all its variations." *Id*. at 124.

Congress responded to *Hearst* in 1947 by expressing its strong disagreement with the Court's broad definitions of "employer" and "employee" under the NLRA and amended the Act to reverse the outcome of that case. The House Report accompanying the 1947 Taft-Hartley Amendments stated:

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the [NLRB], means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying on the theoretic "expertness" of the Board, upheld the Board. … 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*.

H.R. Rep. 245, 80th Cong. 1st Sess. 18 (emphasis added) (quoted in *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 905 (D.C. Cir. 1978)). To make explicit its disagreement with *Hearst*, Congress amended the NLRA's definition of "employee" in 1947 as part of the Taft-Hartley Amendments, by adding a provision stating that "[t]he term 'employee' ... shall not include … any individual having the status of an independent contractor." 29 U.S.C. § 152(3).

The Supreme Court later concluded that "the obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968). Moreover, federal courts that have addressed the NLRA's definitions of "employer" and "employee" in other contexts have similarly looked to the common law in determining whether such a relationship exists. *See, e.g.*, *Clinton's Ditch Co-op*, 778 F.2d at 138-140 (overturning NLRB determination that a joint-employer relationship existed).

b. The Common Law Does Not Recognize Employment Relationships Absent Evidence of the Putative Employer's Direct and Immediate Control over Workers' Essential Terms and Conditions of Employment

A standard is not part of the common law unless it is grounded in prior court decisions applying that doctrine. Yet, glaringly absent from the NPRM's analysis are citations to *any* court decisions finding that an entity is an "employer" despite failing to exercise control over the conditions of employment of workers nominally employed by another, or despite the lack of authority to *directly or immediately* control such conditions of employment.

The NPRM's reliance on the Board's decision in *Greyhound Corp*., 153 NLRB 1488 (1965), *aff'd*, 368 F.2d 776 (5th Cir. 1966), cited at 87 Fed. Reg. at 54,642, is misplaced. In that case, the Board concluded Greyhound was a joint employer of its cleaning contractor's employees because the cleaners were "under the detailed supervision of other Greyhound employees" and

"Greyhound management … exercise[d] close control over their daily work." *Id.* at 1495. While the Board gave some consideration to contractual rights, what mattered was that Greyhound exercised its contractual right of control "in actual practice" and thus "[t]he joint employer finding [in *Greyhound*] is premised on the common control *exercised* by Greyhound and [the cleaning contractor] over the employees." *Id.* at 1492, 1495 (emphasis added). In short, the 1965 *Greyhound* case was based on the actual exercise of direct and immediate control by a joint employer.

The NPRM nonetheless claims that "for nearly two decades after *Greyhound*"—*i.e*., before the Board settled on a consistent joint-employer standard in *TLI* and *Laerco*—the Board treated the right to control employees' work and their terms and conditions of employment as *determinative* in the joint-employer analysis." 87 Fed. Reg. at 54,642 (emphasis added). In support of this proposition, the NPRM cited cases in which "courts endorsed the Board's consideration of reserved control as *probative* in the joint-employer analysis." *Ibid.* But determinative and probative do not mean the same thing. Reserved right to control could weigh in favor a joint-employer determination where the putative joint employer exercises direct and immediate control, and thus could be probative. But it hardly follows that reserved right could be the basis of a joint-employer determination in the absence of any exercise of direct or immediate control.

To the contrary, courts of appeal have consistently said that a joint employer under the common law must "exert significant control" over essential terms and conditions of employment. *Browning Ferris Indus. of Pa*, 691 F.2d. at 1124. They have explicitly rejected the NPRM's broad reading of the common law in the context of joint-employer claims. In *AT&T v. NLRB*, 67 F.3d 446 (2d Cir. 1995), the Second Circuit refused to enforce an NLRB bargaining order that was based on the Board's determination that AT&T was a joint employer of workers nominally employed by a cleaning contractor. The court rejected the NLRB's contention that evidence of AT&T's participation in collective-bargaining negotiations demonstrated, by itself, "the type of control necessary to establish a joint employer," explaining that:

> "an essential element of any determination of joint employer status in a subcontractor context is ... sufficient evidence of immediate control over the employees." In determining immediate control, we weigh whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process.

Id. at 451 (citing *Clinton's Ditch Co-op*, 778 F.2d at 138).

The Second Circuit continues to adhere to this understanding of the circumstances under which the common law recognizes the existence of a joint-employer relationship. *See, e.g., SEIU*, 647 F.3d at 442-43 (affirming the requirement of *Clinton's Ditch* that no joint-employer determination is permissible in the absence of evidence of "immediate control" over the workers in question). The Fifth Circuit likewise interprets the common law to require "immediate control over the employees" as an "essential element" for finding joint-employer status. *Tex. World*, 928 F.2d at 1432.

The reason why direct or immediate control is an essential element for common-law employment should be obvious to anyone who has ever hired a contractor or subcontractor, whether on a commercial scale or for personal reasons such as home renovation. The hiring party in any contracting arrangement inevitably must exert some measure of indirect control over the project to ensure he gets the benefit of the bargain. A home-renovation customer, for instance, indirectly affects the wages of a contractor's employees by setting a price of the work to be done. He also indirectly affects their hours of work by setting deadlines and times when work can be performed. And if he catches any worker misbehaving on the job—such as drinking or stealing—he could indirectly cause their termination by alerting the contractor that employs them. But no reasonable person would confuse the homeowner as the workers' employer.

As Judge Learned Hand explained in holding that a production company was not the employer of entertainers under the common law:

> In the case at bar the [production company] did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. By far the greater part of [the production company's] intervention in the 'acts' was no more than this. It is true, as we have shown, that to a very limited extent he went further, but these interventions were trivial in amount and in character; certainly not enough to color the whole relation.

Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717-718 (2d Cir. 1943). In other words, counting all indirect control as indicia of joint-employer status would result in error because all joint undertakings between arms-length contracting parties involve a degree of indirect control. What matters is the amount of direct and immediate control, which in *Radio City* was insufficient to establish an employment relationship.

Under the NPRM's proposed definition of "employer," all employees of bona fide independent contractors could be classified as employees of the person who hired the contractors. The economic realities of every contract are such that the hiring person has the potential to indirectly control the conduct of the independent contractor's employees. For example, the hiring person could threaten to terminate the contract unless the work is performed in a certain way or by certain types of workers.

Take the Broad's flawed "indirect control" analysis in *BFI*, 362 NLRB 1599, which the "new rule … incorporates," *see* 87 Fed. Reg. 54,642. There, a Browning-Ferris (the hiring company) manager observed two Leadpoint (the contracting company) employees drinking whiskey on the job, notified their Leadpoint supervisor, and requested their dismissal. *BFI*, 362 NLRB at 1602. After subjecting the two employees to alcohol-and-drug screening, Leadpoint terminated one and reassigned the other. *Ibid.* The Browning-Ferris manager also notified the Leadpoint supervisor that a security camera recorded a Leadpoint employee vandalizing a paperwork drop box and sent an email stating that he hoped the Leadpoint supervisor agreed this

"Leadpoint employee should be immediately dismissed." *Ibid.* The Leadpoint supervisor "reviewed the video" and terminated the responsible employee "after an investigation." *Ibid.*

The Board interpreted these incidents as examples of "indirect control" showing Browning-Ferris jointly employed not only the dismissed or reassigned employees but the entire Leadpoint workforce. *Ibid.* But any rational hiring party who catches a contractor's employees drinking or vandalizing property on the job would want the contractor to dismiss or reassign those troublesome employees. And any reasonable contractor would accommodate such a request. If the contractor refuses to accommodate, the hiring party could and indeed should hire a new contractor. This ability to hire a new contractor always gives the hiring party a measure of indirect control, but such indirect control has no bearing on whether the hiring party is an employer of the contractor's employees. Indeed, had Browning-Ferris exercised control sufficient to be the employer of Leadpoint's employees, it would have directly terminated the drunk or vandalizing employees instead of alerting a Leadpoint supervisor, who disciplined them only after conducting independent investigations. Thus, the "indirect control" that *BFI* concluded weighed in favor of joint-employer status indicates the opposite. Browning-Ferris clearly was not the drunk workers' employer because if it were, it simply would have disciplined them directly. *Browning-Ferris*, 911 F.3d at 1232 (Randolph, J. dissenting).

The NPRM would go further than the flawed *BFI* decision and transform hiring companies into employers of their contractors' employees based solely on such irrelevant "indirect control." 87 Fed. Reg. at 54,663 ("Control exercised through an intermediary person or entity is sufficient to establish status as a joint employer."). Congress amended the NLRA's definition of "employee" in 1947 for the explicit purpose of foreclosing this type of flawed logic, which threatens to extinguish the concept of independent contractors by transforming employees of such contractors into the employees of the hiring party. Specifically, the 1947 amendment adopted a common-law definition of the employer-employee relationship based on the understanding that, under the common law, "'[e]mployees' work for wages or salaries under *direct supervision*" of the employer company. H.R. Rep. 245 (quoted in *Local 777*, 603 F.2d at 905) (emphasis added). Congress distinguished a company's employees from "[i]ndependent contractors" who "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon … profits." *Ibid*. The "others" whom a contractor hires to do the work are not the employees of the company that hired the contractor unless they also work under the hiring company's "direct supervision."

Hence, courts applying the common law focused on the existence of direct and immediate control, as opposed to indirect or routine control that any hiring company would exercise over the employees of a bona fide independent contractor. *See, e.g., Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan*, 179 F.2d 882 (8th Cir. 1950) (not attaching any importance to indirect control in finding real estate agents were not employees); *Glenn v. Standard Oil Co*., 148 F.2d 51 (6th Cir. 1945) (not attaching any importance to indirect control in finding operators of bulk distribution plants were not Standard Oil's employees); *Spillson v. Smith*, 147 F.2d 727 (7th Cir. 1945) (not attaching any importance to indirect control in finding the musicians of an orchestra were the employees of its leader and not the restaurant where they played). The proposed rule would overturn this logic and allow employment relationship to exist in the absence of the putative employer's direct supervision. Such a result is simply not permitted under the common law.

c. Even an Employment Standard That Is Broader Than the Common Law Forecloses Joint-Employer Status in Circumstances Permitted under the Proposed Rule

The NLRA's common-law definition of employment is narrower than employment under certain other federal statutes. Notably, the Fair Labor Standards Act ("FLSA") defines employ to "include[] to suffer or permit to work," and the Family Medical Leave Act ("FMLA") adopts the same definition. 29 U.S.C. §§ 203(g), 2611(3). The Supreme Court has explained that the FLSA's "suffer or permit" language is "the broadest definition [of employment] that has ever been included in any one act" *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong Rec. 7657), and "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles," *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). Yet, the proposed rule would find joint employment in circumstances that would not be allowed under even the FLSA/FMLA's broader-than-common-law concept of employment. That is a sure sign that the proposed rule far exceeds the bounds of the common law.

One obvious indication that the Board has proposed an unlawfully broad joint-employer test is the failure to limit the type of indirect control that may be probative of joint employment. The Board's 2015 *BFI* decision "overshot the common-law mark" by "failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting." *Browning-Ferris*, 911 F.3d at 1216. The Board now doubles down on that error with proposed § 103.40(e), which states: "Control exercised through an intermediary person or entity is sufficient to establish status as a joint employer," while failing to explain what types of indirect control are sufficient or even probative.

In assessing indirect control exercised through an "intermediary person or entity" in the joint-employer context, two relationships are relevant. The first is the relationship between the intermediary entity and the employee: The intermediary employer must exercise direct control over the employee, *e.g.*, by firing, hiring, setting schedules, or determining pay. This is usually a noncontroversial inquiry—for example there was no dispute that Leadpoint was the employer of its employees in *BFI*. The second relationship is between the putative joint employer and the intermediary employer: If the putative joint employer directs the intermediary entity's exercise of control over the intermediary entity's employee, then indirect control potentially could be probative (though not determinative) of joint employment. However, if the putative joint employer merely makes suggestions or recommendations, which the intermediary follows based on its independent business judgment, that is not indirect control weighing in favor of joint employment.

Courts have drawn a sensible distinction between mandatory directions, which could be relevant in the joint-employer analysis, and mere suggestions or requests, which are irrelevant. The Third Circuit articulated this distinction in a case concerning joint employment under the FLSA—which, again, is broader than in the NLRA context. *In re Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d 462 (3d Cir. 2012). There, Enterprise Holdings lacked direct control necessary to be the joint employer of a subsidiary's assistant manager. *Id.* at 471. The plaintiffs

nonetheless sought to establish joint-employer status based on indirect control by arguing that Enterprise Holdings "functionally held many of these [authority] roles by way of the guidelines and manuals it promulgated to its subsidiaries." *Ibid.* But the Third Circuit found "no evidence that Enterprise Holdings, Inc.'s actions at any time amounted to mandatory directions rather than mere recommendations." *Id.* at 470. Therefore, "[i]nasmuch as the adoption of Enterprise Holdings, Inc.'s suggested policies and practices was entirely discretionary on the part of the subsidiaries, Enterprise Holdings, Inc. had no more authority over the conditions of the assistant managers' employment than would a third-party consultant who made suggestions for improvements to the subsidiaries' business practices." *Ibid.*[1] The Third Circuit's reasoning is grounded in common sense: If Enterprise Holdings lacks authority to require a subsidiary to adopt certain employment practices, it could not indirectly require the subsidiary's employee to adopt such practices.

Enterprise concerned joint employment under the FLSA, which the court acknowledged contains a "the broadest definition [of employer] that has ever been included in any one act." *Id.*at 467-68 (quoting *Rosenwasser*, 313 U.S. at 363 n.3). Yet, that broad definition did not permit joint-employer status based on supposed "indirect control" arising from one employer's decision to follow another employer's request regarding personnel policy. Thus, the NLRA's joint-employer test must be even stricter when it comes to weighing indirect control. At the very least, the Board should make clear that an intermediary entity's independent decision to follow a putative joint employer's request or recommendation is not indirect control that weighs in favor of joint-employer status.

Under that rubric, contrary to *BFI*, Leadpoint's decision to discipline employees whom a Browning-Ferris manager found drinking on the job and vandalizing property is not evidence of indirect control that suggests joint employment. That is because Leadpoint dismissed or reassigned those employees only after it conducted its own alcohol-and-drug screening and its own investigation of the vandalism. *BFI*, 362 NLRB at 1602. *BFI*'s conclusion these incidents constituted indirect control weighing in favor of Browning-Ferris being a joint employer of *all* Leadpoint employees was therefore far out of step with the common law. The proposal to "replace [the Current Rule] with a new rule that incorporates the *BFI* standard" regarding indirect control would compound that egregious error. *See* 87 Fed. Reg. 54,642.

A second way to see how the proposed rule is unlawfully broad is the lack of limiting principle in proposed § 103.40(d)'s non-exhaustive list of "essential" terms and conditions of

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[1] *Accord Martin v. Sprint United Mgmt*., 273 F. Supp. 3d 404, 436 (S.D.N.Y. 2017) (recognizing that a putative joint employer's mandatory payments rates would involve the exercise of control over a subcontractors' field agents, but that mere suggested rates that the subcontractor could ignore would not show control); *Copantitla v. Fiskardo Estiatorio, Inc*., 788 F. Supp. 2d 253, 309 10 (S.D.N.Y. 2011) (weighing against joint-employer status where the facts that a putative joint employer "sometimes makes recommendations on hiring" but the hirer "is free to disregard them[.]"); *Dixon v. Zabka*, No. 3:11–cv–982 (MPS), 2014 WL 6084351, at *11 (D. Conn. Nov. 13, 2014) ("None of this evidence demonstrates that [the putative joint employer] exercised control … beyond mere suggestions and recommendations. Such evidence is not sufficient to create a genuine issue of fact[.]").

employment. *BFI*'s joint-employer test was incompatible with the common law in part because the Board failed to delineate what terms are "essential" and instead declared it would adhere to an "'inclusive' and 'non-exhaustive' approach." *Browning-Ferris*, 911 F.3d at 1221-1222 (citation omitted). The D.C. Circuit explicitly instructed the Board to "not neglect to … explain which terms and conditions are 'essential' to permit 'meaningful collective bargaining." *Id.* at 1222. In direct contravention of this instruction, proposed § 103.40(d) would replace the Current Rule's concrete list of essential terms and conditions with a lengthy and non-exhaustive list of items. 87 Fed. Reg. at 54,663 ("Essential terms and conditions of employment will generally include but are not limited to" a laundry list of items). Thus, the NPRM is proposing the same "inclusive and non-exhaustive approach" already rejected by the D.C. Circuit.

What's worse, some of the items explicitly listed in proposed § 103.40(d), such as "workplace health and safety," decidedly do not qualify as essential terms or conditions of employment, control over which could evince or establish joint-employer status. *See Moreau v. Air France*, 356 F.3d 942, 951 (9th Cir. 2004). *Moreau* concerned whether an airline was the joint employer of its ground-handling contractors' employees under the FMLA, which defines employment more broadly than the NLRA's common-law standard.[2] The Ninth Circuit held that evidence of "indirect control" did not suggest joint-employer status because "the indirect supervision or control exercised by Air France over the ground handling employees was purportedly to ensure compliance with various safety and security regulations, such as ensuring that food equipment was properly stowed or that the plane's load was adequately balanced." *Id.* at 950. Such "purported control or supervision [for safety reasons] is qualitatively different" from control that indicates joint employment. *Ibid.*

Even under the "striking breadth" of the FLSA definition of employment, *see Darden*, 503 U.S. at 326, courts agree that imposing safety standards on another entity's employee is qualitatively different from control that suggests joint-employer status.[3] The same must be true under the NLRA's narrower common-law definition of employment. The reason is simple: any rational business will take steps to ensure the safety of those within its premises, whether employees, customers, or contractors. Because employers and non-employers alike are motivated to enact safety standards, the imposition of those standards is not probative as to a business's joint-employer status. Proposed § 103.40(d) turns this logic on its head and would transform health and safety standards into "essential" terms or conditions of employment. Such a result would not only be nonsensical but also perverse. By threatening businesses with joint-employer liability under the

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[2] The FMLA defines "employ" to have the same meaning as that term is given in the Fair Labor Standards Act, which "includes to suffer or permit to work." *See* 29 U.S.C. §§ 203(g), 2611(3).

[3] *Zampos v. W & E Comms., Inc.*, 970 F. Supp. 2d at 803 (requiring installation contractors to subject applicants to background checks and drug tests does not suggest joint-employer status under FLSA because "this purported control, relating to the safety and security of Comcast customers, is qualitatively different from the control exercised by an employer"); *Godlewska v. HDA*, 916 F. Supp. 2d 246, 259 60 (E.D.N.Y. 2013), *aff'd sub nom. Godlewska v. Human Dev. Ass'n, Inc.*, 561 F. App'x 108 (2d Cir. 2014) (contrasting "quality control[ ] … to ensure compliance with the law or protect clients' safety'' with ''control over the employee's 'day-to-day conditions of employment' [that] is relevant to the joint employment inquiry").

NLRA for setting health and safety standards, proposed § 103.40(d) actively discourages measures designed to promote workplace health and safety.

In summary, the proposed rule should not be adopted because it expands the concept of joint employment more broadly than permitted under NLRA's common-law definition of employment, and indeed even more broadly than permitted under the FLSA/FMLA's extremely broad definition of employment.

II. THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS UNDER THE APA

The APA prohibits administrative agencies from acting arbitrarily and capriciously, meaning that "agency action [must] be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Where an agency changes a preexisting policy, it must "provide reasoned explanation for its action … [and] must show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (internal citation omitted). The agency must further "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *DHS v. Regents of the Univ. of Cal*., 140 S. Ct. 1891, 1915 (2020).

a. The Board Fails to Explain Its Departure from the Current Rule

The Board claims that replacing the Current Rule with the proposed rule would establish "a definite, readily available standard [that] will assist employers and labor organizations in complying with the Act" and thereby "reduce uncertainty and litigation over the basic parameters of joint-employer status." 87 Fed. Reg. 54,645. The proposed rule, however, provides far less certainty and predictability than the Current Rule, which largely follows the longstanding *TLI/Laerco* standard.

The *TLI/Laerco* standard focused on evidence of direct and immediate control of essential terms of employment, thereby establishing a discernible and rational line between what does and does not constitute a joint-employer relationship under the NLRA. While the Current Rule recognizes that indirect control could be probative in certain situations, it likewise focuses the joint-employer analysis on the simple concept of direct and immediate control and further clarifies what constitutes essential terms and conditions of employment.

In sharp contrast, the proposed rule makes no effort to draw clear lines of demarcation, thereby depriving companies of any means of predicting whether or when they might be subject to joint-employer liability. It jettisons the focus on direct and immediate control and elevates the amorphous concepts of indirect control. It explicitly states that unexercised or indirect control could, by itself, establish joint-employer liability under the Act but fails to provide any guidelines regarding what types of unexercised or indirect control is probative—let alone determinative—of joint-employer status. It also refuses to provide concrete guidance regarding "essential" terms and conditions of employment and instead proposes an all-encompassing and non-exhaustive list.

While the Board claims to "reduce uncertainty," its proposal would accomplish the opposite by promulgating a vague standard that leaves businesses in the dark regarding

circumstances that may result in joint-employer liability. This obvious mismatch between the Board's justification—*i.e.*, regulatory clarity—and the proposed rule's effect—*i.e.*, regulatory confusion—renders the proposal arbitrary and capricious. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (courts "cannot ignore the disconnect between the decision made and the explanation given"). Moreover, the proposed rule's vague joint-employer standard raises serious due-process concerns, both because they fail to provide fair notice of potential liability and because they invite arbitrary enforcement. *See, e.g., FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012) (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"); *Kolander v. Lawson*, 461 U.S. 352, 357-58 (1983).

b. The Board Fails to Adequately Consider Reliance Interests

The Board fails to consider the reliance interests of businesses in the Current Rule, which is in turn based on the longstanding joint-employer *TLI/Laerco* standard that stretches back to 1984. *See Regents*, 140 S. Ct. at 1915 (stating that an agency must consider reliance interest when it is "not writing on a blank slate"). Businesses across the country in countless sectors, ranging from staffing agencies to subcontracting to franchisees, have negotiated contracts with the understanding that they face little to no risk of NLRA joint-employer liability absent direct or immediate control of a contracting party's employees.

The NPRM devotes only a single sentence to reliance interests: it requests comments regarding whether "there [are] any reliance interests related to the 2020 Rule, and if so, how should the Board assess those interests." 87 Fed. Reg. 54,651. This question betrays the Board's failure to even acknowledge the *existence* of obvious reliance interests—let alone attempt to address them.

III. THE PROPOSED RULE INFLICTS ECONOMIC HARM, ESPECIALLY ON SMALL BUSINESSES

NCLA and I4AW are concerned by the proposed rule's failure to account for reasons why a company might hire contractors to perform work. For example, if the contractor performs highly specialized work, it likely is far more economically efficient for a company to contract out the work rather than seek to attract its own specialized workforce. Yet, by raising the threat of a joint-employer determination in connection with any of these specialized contracts, the NLRB's new standard discourages use of such contracts and thereby promotes economic inefficiency and loss.

This loss hits small businesses the hardest. Small businesses often get their start by finding niches where they can provide a larger company with services at a cost lower than the larger company's costs of performing the services itself. By adopting a rule that discourages larger businesses from hiring niche firms to perform a portion of their work, the NLRB is destroying valuable business opportunities for start-up firms.

CONCLUSION

The Board should reject the proposed rule and keep the Current Rule in effect. Doing so would be consistent with the NLRA while providing clear guidance to employers and workers.

Very truly yours,

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