INTRODUCTION

The HR Policy Association ("HRPA" or "Association") submits the following comments for consideration by the National Labor Relations Board ("NLRB" or "Board") in connection with the Notice of Proposed Rulemaking and Request for Comments, published in the Federal Register on September 24, 2018 related to the joint employer standard applicable under the National Labor Relations Act ("NLRA" or "Act"), hereafter "Notice."[1] The Association's comments are particularly directed at the Board's 2015 *Browning-Ferris Industries* decision,[2] and a recent ruling by the United States Court of Appeals for the District of Columbia regarding the Board's *BFI* joint employer standard.[3]

I. STATEMENT OF INTEREST

The Association is a public policy advocacy organization representing the chief human resource officers of major employers. HRPA consists of more than 375 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of HRPA's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

Association members regularly have matters before the National Labor Relations Board and have closely followed the continuing debate and discussion about the state of the law regarding

[1] The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681 (proposed Sept. 14, 2018) (to be codified at 29 C.F.R. ch. 1).
[2] *Browning-Ferris Indus.*, 362 NLRB No. 186 (2015).
[3] *Browning-Ferris Indus. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

joint employer status under the National Labor Relations Act. Indeed, this subject has generated considerable discussions and questions from Association members. The lack of clarity of the law in this area is especially damaging to Association members' business planning, particularly in the franchisor/franchisee area. For example, Association members are desirous of providing safety and other training to employees of the supply chain entities and other contractors with whom they do business, but do not want to be brought into costly and protracted legal proceedings on joint employer theories as a result of such beneficial and necessary training. A number of Association members have also established corporate social responsibility (CSR) standards for their suppliers to follow with respect to their employees, including establishing a minimum number of paid sick leave days that suppliers must provide to their employees. These types of oversight arrangements, as noted below, should not be the basis to establish joint employer status. Furthermore, many Association members have agreements with supply chains and third-party entities that must be regularly evaluated and re-negotiated. Indeed, some Association members have hundreds, if not thousands of third-party arrangements. These contractual agreements are not entered into to avoid coverage of labor and employment laws—they are entered into to achieve legitimate business objectives while concurrently seeking to comply with our Nation's labor and employment laws.

HRPA thus welcomes the opportunity afforded by the NLRB's notice of proposed rulemaking to establish a clear, consistently applicable joint employer standard that is rooted in the common law and which allows entities to enter into standard business relationships without creating unnecessary regulatory involvement and potential legal liability.

II. SUMMARY OF COMMENTS

The joint employer doctrine is one of the most potent in our Nation's labor and employment jurisprudence. It exposes non-actor entities to potential liability in situations where another unrelated entity or entities engaged in conduct or omissions that the other entity(s) may not have any knowledge of let alone condoned such course of conduct. Indeed, even the potential application of the joint employer doctrine can provide a potential litigant with considerable leverage to extract monetary payments from non-acting parties due to non-acting parties' desire to avoid potential joint employer litigation. Accordingly, before joint employer status should be established, a high legal standard should be required. The *BFI* majority either failed to note the potency and potentially toxic impact of an ambiguous and expanded joint employer doctrine on the important user/supplier aspect of our economy, or the majority was fully aware of the potential reach of the expanded joint employer doctrine and deliberately proceeded in such a policy direction in an attempt to enhance union organizing objectives and to establish a way for individuals to pursue through litigation "the deeper pockets" of user employers. Further, the *BFI* majority also ignored certain aspects of common law, and as recently noted by the D.C. Circuit Court of Appeals, failed to clarify how indirect and reserved control should be interpreted and applied with respect to the joint employer doctrine.

The ambiguous and unwarranted *BFI* joint employer standard will—and has—deterred a number of large user employers in the country, many of whom are Association members, from applying corporate social responsibility standards to their suppliers. For example, as detailed in the Association's comments below, one of our members required that its supplier employers provide a certain number of paid sick leave days to employees, and as a result of this, CSR initiative was brought into an NLRB proceeding on a joint employer basis. Other Association members have withdrawn from supplier agreements with smaller and minority-owned businesses because such

smaller entities were not sufficiently capitalized to sustain litigation in the joint employer area, or such entities were not able to provide indemnity agreements to the user employer if such litigation occurred. Association members are also increasingly hesitant to provide to employees of supplier entities job safety training, substance abuse assistance, guidance to avoid hostile work situations, and other beneficial assistance and training, due to potential joint employer liability.

The above concerns regarding an expanded and ambiguous joint employer doctrine extend beyond potential NLRA liability. Indeed, the *BFI* decision has led to increased joint employer litigation in other areas, including under the Fair Labor Standards Act ("FLSA"). For example, courts when fashioning standards for analysis under Title XII and other federal labor and employment laws have often looked to the NLRA for guidance.[4] Further, the United States Department of Labor in the Obama Administration issued administrative guidance tracking the Board's *BFI* standard, thus increasing joint employer liability under the FLSA for employers and deterring socially desirable CSR initiatives.

Simply stated, the *BFI* majority got it wrong as a matter of law and also as a matter public policy. The *BFI* decision also lacks common sense and clearly was an unwarranted overreach that needs to be corrected.

A summary of the Association's comments to the Board's proposed joint employer standard include the following:

- The Board was correct in proceeding to clarify the law under the National Labor Relations Act regarding the joint employer doctrine by engaging in rulemaking—such

[4] *In re Enterprise Rent-a-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d. 462,469-70 (3d Cir. 2012).

clarification of the law is long overdue, especially after the 2015 *Browning-Ferris* decision and the subsequent D.C. Court of Appeals decision regarding such holding.

- The *BFI* majority and the D.C. Circuit Court of Appeals recent decision in the *BFI* case provides a further rationale for the Board to proceed with rulemaking as the Circuit Court specifically asked the Board on remand to clarify the joint employer doctrine with respect to indirect and reserved control issues.

- The D.C. Circuit Court majority opinion ignores important aspects of the historic development of joint employer law by the courts (i.e., the common law), and also failed to apply important parts of *The Restatement (Second) of Agency*, especially in the loaned servant area. Further, the *BFI* majority opinion and the D.C. Court majority failed to properly apply the important teachings of *The Restatement of Employment Law.*

- The *BFI* majority decision was based in large part on an incorrect premise regarding the number of employees in the gig economy—such a miscalculation undermines a significant policy rationale of the *BFI* majority opinion. However, recent Bureau of Labor Statistics data and academic research in this area rebuts this premise—this segment of the economy has not expanded on the scale the *BFI* majority predicted.

- Involvement of employers in multi-employer bargaining associations should not be a basis to find joint employer status for employers that participate in such collective bargaining arrangements.

- Employer implementation of corporate social responsibility (CSR) oversight standards and the application of such standards to their supplier entities in the employment area should not be the basis to establish joint employer status between user and supplier employers. Indeed, proceeding in this fashion will deter socially minded companies from providing valuable safety and other beneficial training to employees of their suppliers, and also discourage user employers from requiring supplier entities to provide a basic level of benefits to their employees.

- The *BFI* majority joint employer standard creates legal "traps" for employers. Such a standard is inextricably intertwined with academic discussions of indirect and reserved control issues that provide no practical guidance to stakeholders under the NLRA. The *BFI* majority's standard is also lacking by failing to provide a workable definition of what constitutes indirect and reserved control. Such an unneeded and ambiguous standard interferes with the decision-making process of employers with respect to ongoing arrangements with their provider entities, and thereby harms our nation's economy that substantially relies daily on hundreds of thousands of contractual and supplier chain user-supplier arrangements.

- The Board's proposed standard should be modified in certain areas, including the suggestions outlined in the NLRB General Counsel's comments regarding the proposed standard. The HR Policy Association fully endorses the recommendations contained in the General Counsel's comments and commends them to the attention of the Board. Specifically, the Board should accept the following modifications outlined in the General Counsel's comments:

- The Board should include in its final rule a definition of the essential terms and conditions of employment that an entity necessarily must control before being found to be a joint employer. Such "essential terms and conditions of employment" should include at a minimum: (1) the authority to determine and set wage and benefits, (2) the hiring and firing of employees, and (3) the authority to discipline, supervise, and direct employees.

- The Board should also include in its final rule a definition of what constitutes "substantial and actual" control of employees' terms and conditions of employment, and also a requirement that such control be direct and immediate and not "limited and routine."

- The Board's final rule should require that a joint employer exercise actual supervision and direction on an ongoing basis of the employees in question.

- The final rule should clarify that no punitive joint employer can be required to bargain with the union unless it has actual, direct, and immediate control over, at a minimum, wages and benefits of the employees in question.

- No entity that is found to be a joint employer should be held liable for any act or omission of other entities that also are potentially deemed to be joint employers unless the nonacting entity knew or should have known about the unlawful activity and did nothing to prevent or mitigate it.[5]

[5] *See, e.g.*, *Capitol EMI Music*, 311 NLRB 997 at *1000, *enforced*, 23 F.3d. 399 (4th Cir. 1994).

- The *BFI* majority standard will not encourage or enhance collective bargaining—it will only confuse and prolong bargaining relationships between employers and unions. For example, while the Board in *BFI* emphasized that indirect and reserved control could be a basis to find joint employer status, it concurrently held that entities would only have to bargain over mandatory subjects with which they exercise control—how will such subjects be determined? Apparently, an entity that is found to be a joint employer under the new *BFI* standard only on an indirect control or reserved control basis would have no bargaining obligations to the union or unions involved in such situations. Former NLRB Members Philip Miscimarra and Harry Johnson correctly pointed out the collective bargaining problems with the *BFI* standard in their dissent in such case—the issues that Messrs.' Miscimarra and Johnson outlined in their dissent should be addressed by the current Board in its joint employer rulemaking deliberation.

- The *BFI* joint employer standard is potentially subject to misuse and abuse in the secondary boycott area, as its liberal and expansive reach can considerably nullify Section 8(b)(4)(ii)(B) of the NLRA which prohibits secondary employee protest activity such as picketing, boycotts, and strikes. For example, unions may also be disadvantaged by the ambiguous *BFI* standard. If unions engage in secondary activity which is later found to be violative of the law—which especially may be the case because joint employer status can only be established in the bargaining area over subjects which a joint employer has control—they may be subjected to considerable liability.

- The unwarranted and expanded *BFI* joint employer standard will be—and has been—a significantly negative influence on the application of the joint employer doctrine in other labor and employment laws including, in particular, the Fair Labor Standards Act, where expensive collective actions are particularly prevalent under the joint employer doctrine.

Finally, the Association, which is a member of the Coalition for a Democratic Workplace (CDW), strongly endorses the comments to the proposed standard submitted by the CDW. The Association also fully endorses comments to the proposed standard made by a number of its fellow employer trade associations regarding the proposed standard, including particularly the well thought out and thoroughly researched comments by the International Franchise Association and the U.S. Chamber of Commerce.

III. FACTUAL BACKGROUND

The Board proposes to amend the regulation codified at 29 C.F.R. part 103 to add a new Section 103.40, as follows ("proposed standard"):

> **§ 103.40: Joint employers.**
>
> An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually

> exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.[6]

The NLRB created a new joint employer standard three years ago in its decision in *Browning-Ferris Industries*.[7] The Board's *BFI* standard permits joint employer status to be established not only through direct control, but also on the basis of indirect and reserved control.

In establishing this new test, the 2015 *BFI* Board stated it would broadly construe "essential terms and conditions of employment" as encompassing a non-exhaustive list of "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction."[8] The 2015 *BFI* Board held that it would remove certain joint employer requirements that had regularly been applied in the past, stating it would

> no longer require that a joint employer [that] possess[es] the authority to control employees' terms and conditions of employment, . . . [actually] . . . exercise that . . . authority, and do so directly, immediately, and not in a "limited and routine" manner…[9]

Instead, according to the 2015 *BFI* Board, "[t]he right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect."[10]

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[6] 83 Fed. Reg. 46681, 46696-46697.
[7] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 N.L.R.B. No. 186, 2015 N.L.R.B. LEXIS 672 (Aug. 27, 2015), *petition granted in part, enforcement denied and remanded*, 911 F.3d 1195 (D.C. Cir. Dec. 28, 2018).
[8] *Id.* at *70.
[9] *Id.* at *72.
[10] *Id.*

The *BFI* holding was subsequently appealed and the United States Court of Appeals for the District of Columbia recently issued a decision on such appeal. The Circuit Court granted the petition in part, but also rejected part of the *BFI* decision and remanded it to the Board for further consideration. Specifically, the Court stated

> In sum, we uphold as fully consistent with the common law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis. We reverse, however, the Board's articulation and application of the indirect-control element in this case to the extent that it failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment. We accordingly grant Browning-Ferris's petition in part, deny the Board's cross-application, dismiss without prejudice the Board's application for enforcement as to Leadpoint, and remand for further proceedings consistent with this opinion.[11]

The NLRB now has sought commentary on specific topics related to the newly-proposed joint employer standard. Among them, the NLRB

> seeks comments regarding the current state of the common law on joint employment relationships. Does the common law dictate the

[11] *Browning-Ferris Indus. v. NLRB*, 911 F.3d 1195, 1222-23 (D.C. Cir. 2018).

> approach of the proposed rule or of *Browning-Ferris*? Does the common law leave room for either approach?[12]

It is these questions to which the Association, in this filing below, submits comments for the Board's consideration.

IV. HR POLICY SUPPORTS, WITH MODIFICATIONS, THE NLRB'S PROPOSED JOINT EMPLOYER STANDARD AND SUBMITS THAT THE BOARD'S 2015 *BROWNING-FERRIS* STANDARD SHOULD BE ABANDONED

A. Policy Concerns—The Board's 2015 *BFI* Decision is Ambiguous, Unwarranted, and Unworkable

Part VIII, below, addresses the common law relative to the Board's proposed standard and the standard created by the 2015 *Browning-Ferris* decision ("*BFI* Standard"). Preliminarily, however, HR Policy wishes to affirmatively and clearly express its support for the Board's initiative to provide greater clarity to the law in the joint employer area.

The Board's Proposed Rule is an excellent initial step in providing greater understandability and clarity to the regulated business community. It contains understandable principles that long applied to the business community before the 2015 *Browning-Ferris* decision. The ability to reasonably determine the type of conduct or activities that establish joint employer status, and those that do not, is a critical factor in a company's consideration as to whether to enter into a particular contract, and to its ability to structure that contract in such a way to achieve its business objectives while simultaneously complying with the law.

To be clear, the Association does not expect absolute certainty in all joint employer situations. Nevertheless, a core set of reasonably understandable principles is critical to any

[12] 83 Fed. Reg. 46681, 46687.

company's ability to satisfy the important business fundamentals that are necessary to productively and strategically operate its business, including meeting operating (including labor) expenses. It is critical that a company's ability to effectively operate business benefits all stakeholders, from the micro to the macro level. Beyond that, businesses must satisfy any number of commitments and obligations to various stakeholders to safeguard and conserve corporate assets. All of this is affected, at least in part, by the extent to which risks of violations and liability under the NLRA (or any law) are capable of being reasonably understood. When the extent of that risk is largely unknown, a prudent business entity has no choice but to exercise considerable caution or fail to proceed at all.

For three years, the 2015 *Browning-Ferris* standard has obscured a basic understanding of how to discern, even in broad strokes, the line between when a company's engagement with another company crosses over into status as a "joint employer." Businesses have struggled to understand the *BFI* standard, the scope of its application, and its actual reach. What is meant by "the right to control, in the common law sense" simply begs the question. The line between an un-exercised reserved right to control and the "indirect" exercise of control, and conduct falling short of either, is at best legal conjecture. Nor is there any guidance as to how much weight the Board, when determining the potential for a joint employment relationship, will afford the various factors evidencing indirect or reserved control.

Because the inherent vagaries of the *BFI* Standard are incapable of fostering at least a reasonable understanding of how to discern what language, conduct, and activities they attach legal significance to, the *BFI* Standard threatens to ensnare companies with a finding of joint employment at the intersection of virtually any business-to-business arrangement. Undesirable consequences have included declining contractual arrangements and/or moving away from

contracting with smaller, "mom and pop" companies and minority start-up entities in favor of larger, potentially more expensive contractors, thereby harming small businesses. Indeed, that is exactly the position certain of our members have taken since the 2015 *BFI*.[13]

The D.C. Circuit Court of Appeals' decision on BFI's appeal of the 2015 NLRB decision, issued this past December, itself recognized the uncertainty associated with the *BFI* Standard. Although the Circuit Court concluded that indirect control is a factor of potential joint employer status rooted in the common law, it provided no meaningful guidance on what analytical standards should be utilized in determining joint employer status under the NLRA. Specifically, the D.C. Circuit faulted the Board and stated:

> The problem with the Board's decision is not its recognition that indirect control (and certainly control exercised through an intermediary) can be a relevant consideration in the joint-employer analysis. It is the Board's failure when applying that factor in this case to hew to the relevant common-law boundaries that prevent the Board from trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts. …The Board's analysis of the factual record in this case failed to differentiate between those aspects of indirect control relevant to status as an employer, and those

[13] According to data from the Census Bureau's Annual Survey of Entrepreneurs, employer firms with fewer than 500 workers employed 46.8 percent of private sector payrolls in 2016; firms with fewer than 100 workers employed 33.4 percent. Also, small businesses create the bulk of new jobs. *See* https://sbecouncil.org/about-us/facts-and-data/ ("Small businesses accounted for 61.8% of net new jobs from the first quarter of 1993 until the third quarter of 2016.").

> quotidian aspects of common-law third-party contract relationships.[14]

Accordingly, the Court's remand to the Board further underscores the pressing need to develop a joint employer standard that creates clarity and consistency within the law.

V. MULTI-EMPLOYER BARGAINING RELATIONSHIP ISSUES

The proposed standard should be modified to avoid an interpretation that would burden multi-employer associations with claims of joint employer status, and the liabilities that could result, by virtue of acting as a collective bargaining agent for a group of employers in a particular industry. The Association does not understand that to be the intent of the proposed standard, but wants to make sure that there is no misinterpretation of the proposed standard on this point.

As the Supreme Court has recognized, multi-employer bargaining is a critical component of our national labor policy.[15] Multi-employer negotiations exist in numerous industries—including the construction, hotel, maritime, professional sports, and trucking industries—and can have a substantial impact on commerce. An association that represents multi-employer groups typically exists for the purpose of acting as a collective bargaining agent for their employer-members. It is unnecessary to treat these multi-employer associations as joint employers based on the actions they take on behalf of their employer-members. The Act already regulates their conduct as agents of their employer-members. Therefore, the proposed rule should be modified to make clear that an association which acts as a multi-employer collective bargaining agent will not be treated as a joint employer of the employees of each of its employer-members.

[14] *BFI Indus. v. NLRB*, 911 F.3d 1195, 1219-20 (D.C. Cir. 2018).
[15] *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410 (1982); *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 95 (1957).

VI. CSR STANDARDS IMPOSED BY USER EMPLOYERS ON SUPPLIER ENTITIES SHOULD NOT BE THE BASIS TO FIND JOINT EMPLOYER STATUS

Many corporations choose to act as good corporate citizens by adopting ethical standards that exceed their legal obligations. Such policies and practices are generally referred to as "corporate social responsibility" (CSR) initiatives.[16] Firms use CSR initiatives to promote the social good. Understanding CSR initiatives and companies' incentives for adopting such policies provides important context for appreciating the consequences of a joint employment rule that is too broad, both in the plain text of the rule itself and in its application. It is therefore critical that any proposed joint employer standard include carve-out exceptions for CSR initiatives, thus allowing companies to set important ethical oversight standards for their supplier entities without being subject to unnecessarily expansive liability pursuant to ambiguous joint employer standards.

A. CSR Initiatives Allow Firms to Promote a Wide Range of Policy Goals

CSR initiatives come in all shapes and sizes, ranging from corporate accountability initiatives to human rights provisions to environmental stewardship.[17] A grocery store, for example, might commit to selling fish caught using only sustainable fishing techniques. An apparel manufacturer might decide to make its sweatshirts only in countries with a strong record of fair labor practices and respect for human rights. Or a firm may choose to work only with certain suppliers that provide their employees with a certain number of days of annual paid leave.

A company may adopt a CSR initiative for a number of reasons. It might act for altruistic reasons—believing that sourcing from sustainable fisheries simply is the right thing to do. Alternatively, it might act to develop a socially conscious brand reputation to appeal to consumers. Or it may believe that paid time off produces healthier workplaces and a stronger society. Whatever

[16] David Millon, *Shareholder Social Responsibility*, 36 SEATTLE U. L. REV. 911, 920-921 (2013).
[17] Ved P. Nanda, *What is Corporate Social Responsibility*, 1 TRANSNATIONAL BUSINESS TRANSACTIONS § 1:5 (2018).

the motivation, in each case the company works to further the social good by adhering to a higher standard than the law requires.

CSR initiatives allow companies to drive social change. Unlike the government, which legislates through often prolonged decision-making processes, corporations can act quickly and autonomously, pursuing niche areas of social change. Often, CSR initiatives address issues that are already in the public eye and will give the corporation, its investors, and consumers a chance to make real change on vital issues, such as human rights and sustainability. Other CSR initiatives target and address social problems that may be otherwise largely invisible to the public. These initiatives can move issues to the forefront and provide consumers with a mechanism to make meaningful change by choosing to do business with enterprises whose core values and policies they support.[18]

B. CSR Initiatives are Most Effective When They Extend Throughout Supply Chains and Other Third Party Entities

Companies can enhance the effectiveness of their CSR efforts by directing these efforts down their supply chains and with third-party entities.[19] By doing business only with other enterprises that share their CSR goals, firms can ensure that their policies gain broader effect. For example, a company's internal environmental sustainability initiatives will have a diminished effect if the company contracts with manufacturers that use unsustainable raw materials. The same is true of companies that seek to improve worker well-being. For example, CVS delivers comprehensive benefits and compensation to its own employees, and works only with suppliers that provide their respective employees with fair wages and benefits.[20]

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[18] *See* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 595 (2009).
[19] *Id*. at 590-92.
[20] CVS, *Prescription for a Better World: 2015 Corporate Social Responsibility Report* 103 (2015), http://cvshealth.com/sites/default/files/2015-csr-report.pdf.

When corporations magnify the effects of CSR initiatives by directing them down their supply chains, they enhance their brands as socially conscious, responsible corporate citizens. This is true across a broad range of CSR policies. Starbucks, for example, has cultivated relationships with farmers in developing countries that supply it with coffee beans.[21] It pays them fair trade prices, which ensures their livelihood while fostering their independence.[22] Starbucks advertises its ethical sourcing to consumers, which has gained positive attention in the press.[23]

Firms with internal CSR initiatives also find that applying these policies to their supply chains enhances the initiatives' effectiveness. For example, Microsoft's paid leave CSR initiative demonstrates how this occurs. Through the initiative, Microsoft—a company that provides industry-leading benefits to its own employees—commits to doing business only with suppliers sharing its commitment to providing paid leave. Microsoft believes that the initiative benefits the company in a number of material ways, by enhancing its brand, affording it more stable and consistent supplier support, and even enhancing the health and welfare of Microsoft's own employees by reducing their exposure to illness. Without supplier involvement, Microsoft believes, it would not be able to realize these same benefits.[24] In Microsoft's experience, which may not be shared by all companies, when a supplier's employee comes to work sick and contagious with the flu because he or she has no access to paid sick leave, and then comes into

[21] *Ethical Sourcing: Coffee*, STARBUCKS, http://www.starbucks.com/responsibility/sourcing/coffee (last visited Jan. 7, 2019); Kelsey Timmerman, *Why Now is the Time to Start Drinking Fair Trade Coffee*, HUFFINGTON POST: THE BLOG (Jan. 23, 2014), http://www.huffingtonpost.com/kelsey-timmerman/drinking-fair-trade-coffee_b_4646960.html.
[22] *Id.*
[23] *Id.*
[24] HR Policy Association represents companies with a diversity of views on how much paid leave should be provided to employees and whether providing paid time off should be a qualification criteria for suppliers. This diversity of approaches is one of the benefits of a legal framework that enables companies to freely adopt CSR initiatives without adverse legal consequences. Under such a framework, companies would be permitted to innovate and seek to differentiate themselves with CSR initiatives that meet their customer demands and support their own values.

contact with a Microsoft employee, Microsoft doubly suffers. The ill supplier worker's performance is subpar, and on top of that, the worker spreads the flu virus through Microsoft's own workforce. Microsoft has accordingly decided that it is in its interest to work only with suppliers that provide paid leave to ameliorate those real and substantial costs.[25] By working only with suppliers who provide paid leave, Microsoft enhances the stability and productivity of its own workforce and lowers its healthcare costs.[26] As former President Obama explained, "a big company like Microsoft can start influencing some of their subcontractors and suppliers down the chain. That can end up having a huge impact."[27]

In all, CSR initiatives like Microsoft's, and those of CVS, Starbucks, and others, provide "powerful benefits to society" while distinguishing the companies that create them.[28] CSR initiatives often have a greater effect, and companies are accordingly more likely to adopt them, when they extend throughout companies' supply chains. Although companies may differ on the CSR initiatives they choose to extend throughout their supply chains, they agree that it is critical to ensure that laws and regulations do not discourage companies from selecting suppliers that share a commitment to the same CSR initiatives that the companies hold themselves.

C. An Expansive Joint Employer Rule Will Deter Companies from Adopting CSR Initiatives That Can Improve Working Conditions for Employees of Supplier Employers

1. CSR Initiatives that Set Supplier Eligibility Criteria are not Probative of Joint Employment Status

[25] Supriya Kumar, et al, *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent-Based Model*, 103 AM. J. PUB. HEALTH 1406, 1406-1411 (2013).
[26] Satya Nadella, *Empowering People to Do Great Work*, MICROSOFT: OFFICIAL MICROSOFT BLOG (April 17, 2015), http://blogs.microsoft.com/blog/2015/04/17/empowering-people-to-dogreat-work-2/.
[27] *Remarks by the President in Working Mothers Town Hall*, OFFICE OF THE PRESS SECRETARY (Apr. 15, 2015), https://www.whitehouse.gov/the-press-office/2015/04/15/remarks-president-working-mothers-town-hall.
[28] Mark Kramer & John Kania, *Changing the Game*, STANFORD SOCIAL INNOVATION REVIEW (Spring 2006), available at http://ssir.org/articles/entry/changing_the_game.

A company's CSR initiative governing eligibility to provide supplier services is not indicative of a common-law employment relationship with the employees of the suppliers that follow the initiative.

A company does not exert the requisite "substantial," "immediate control" when it sets eligibility criteria for suppliers to provide services. As an initial matter, that is so because setting the parameters and standards for a supplier to meet in rendering services does not establish an employment relationship, and setting supplier *eligibility* criteria is one step further removed from setting the parameters and standards of the job eligible suppliers may perform.[29]

Setting and enforcing basic job parameters and standards is "fully compatible with the relationship between a company and an independent contractor."[30] For example, in *North American Van Lines*, a trucking company exerted global oversight over drivers with whom it contracted to deliver a third party's products. It developed a detailed system of incentives and penalties to encourage higher productivity, and it communicated with drivers regarding perceived faults in their performance.[31] The D.C. Circuit court held that the company was not a joint employer because this significant oversight did not amount to control over the "means and manner of the worker's performance of the task."[32] Rather, the trucking company used these systems to "ensure that the drivers' overall performance me[t] the company's standards."[33]

In *Doe I v. Wal-Mart Stores, Inc.*, the Ninth Circuit determined that a CSR initiative establishing and monitoring implementation of a code of conduct for suppliers did not exert the "comprehensive and immediate level of 'day-to-day' authority over employment decisions"

[29] *Int'l Chem. Workers*, 561 F.2d 253, 256 (D.C. Cir. 1977).
[30] *N. Am. Van Lines*, 869 F.2d at 599.
[31] *Id.* at 602-03.
[32] *Id.* at 602.
[33] *Id*. at 603.

necessary to establish employment relationships.[34] There, Wal-Mart required "foreign suppliers to adhere to local laws and local industry standards regarding working conditions like pay, hours, forced labor, child labor, and discrimination."[35] Wal-Mart even monitored and inspected suppliers to verify compliance with the code.[36] The Ninth Circuit declined to find that Wal-Mart established a common-law employment relationship with its suppliers' foreign workers, reasoning that Wal-Mart engaged in this monitoring to ensure that "suppliers were meeting their contractual obligations, not to direct the daily work activity of the suppliers' employees."[37] Such oversight and standard-setting is commonplace in a supplier contracting relationship and is not the type of control that can support a finding of joint employment.[38]

When a company establishes supplier eligibility criteria that promote the public interest as part of a CSR initiative, those criteria are even less relevant to the joint employer analysis. Another example is the *Seafarers Int'l Local 777 v. NLRB* case.[39] There, a company's decision to scrutinize the qualifications of its contractors to protect the public from "hazards" was a policy "in the public interest … [that was] not indicative of that control that influences a determination of employee status."[40]

As in *Seafarers*, companies do not create across-the-board social responsibility policies to control their suppliers' workers. Rather, they determine general supplier contract eligibility requirements to reflect their values, social ethos and ethical branding preferences. If, per *North*

[34] *See Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682 (9th Cir. 2009) (citation omitted).
[35] *Id.* at 680.
[36] *Id.*
[37] *Id.* at 683.
[38] *See Int'l Chem. Workers*, 561 F.2d at 256 (finding no joint employment relationship under NLRA when user firm conducted a daily headcount of supplier's employees, monitored the results of their work, and supervised their work for a short period of time); *Radio City Music Hall Corp. v. United States*, 135 F.2d 715 (2d Cir. 1943) (theater company was not a common-law employer of its vaudeville acts when its actions, although occasionally exerting direct control over actors, were confined largely to shaping the bounds of the ultimate show).
[39] *Seafarers Int'l Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978).
[40] 603 F.2d at 901-02.

American Van Lines, a company can promote worker productivity with a detailed incentive system without becoming a joint employer, it should be able to promote the ethical treatment of its suppliers' workers without altering its legal status. Either way, the company seeks to ensure that its suppliers meet certain baseline standards consistent with its goals, without interfering in the "manner and means of that performance."[41]

Of course, suppliers may choose to adjust their practices to meet a user firm's eligibility requirements. But this is nothing new, and such response is not considered probative of joint employment. As the D.C. Circuit explained in *FedEx*, such adjustments made by suppliers are merely "[e]vidence of unequal bargaining power," which "d[oes] not establish control" over the suppliers—let alone their employees.[42] For example, a homeowner having a kitchen redone may insist that the contractor use experienced, trained workers (and not minimum wage day workers), to complete a big project in a short time frame. Those demands on the contractor may very well affect the staffing and pay of the workers. But even the *BFI* majority indicated that the homeowner would not be exercising the requisite control over the workers' performance of their jobs to be treated as a "joint employer" of the contractor's workers under the common law.[43]

CSR initiatives are further irrelevant to the joint employment analysis because they are driven by "customer demands" for socially conscious goods and branding.[44]

As in *Wal-Mart*, such ends-driven policies are not probative of joint employment, even when they affect working conditions.[45] In *C.C. Eastern*, for example, the D.C. Circuit explained

[41] *N. Am. Van Lines*, 869 F.2d at 600.
[42] 563 F.3d at 497.
[43] *BFI*, 362 N.L.R.B. No. 186, at 20.
[44] *C.C. E., Inc. v. NLRB*, 60 F.3d 855, 859 (D.C. Cir. 1995); *see also FedEx*, 563 F.3d at 501; *Carnation Co. v. NLRB*, 429 F.2d 1130, 1134 (9th Cir. 1970) ("[E]vidence of economic control … oriented toward brand-name protection and market penetration" is not probative of an employment relationship.). The market demand for altruism drives the design of the product, services, and the brand itself. *See* Henderson, *supra*, at 575 ("[P]eople 'purchase' altruism like they do other goods").
[45] *Wal-Mart*, 572 F.3d at 683.

that a company's control over its drivers' pickup and delivery schedules was not probative of the existence of an employment relationship, because it was "motivated by a concern for customer service."[46] Therefore, while consumer demand for ethically produced products may influence working conditions, it does not make those conditions any less a part of the contracted-for ethical product. In these circumstances, the company's oversight over consumer-driven results is consistent with normal supplier contractual relationships.

In all, CSR policies that set supplier eligibility criteria are not evidence of direct control; they are even farther removed from the "pervasive … control over the means and method" of the work performance of suppliers' employees than the potential "indirect control" at issue in *Seafarers*, which was insufficient to create an employment relationship under the common law.[47] Further, under Microsoft's initiative, for example, Microsoft will engage suppliers only if the suppliers provide at least fifteen days of paid leave annually to their employees. Microsoft is not seeking to control or manage the suppliers' workers. As noted above, Microsoft seeks to stabilize supplier support, promote the health and welfare of Microsoft's own employees, and enhance the Microsoft brand by responding to a market eager for socially conscious products and services. Suppliers, in such situations, maintain the relevant control and management of their employees and choose whether and how to implement this CSR standard, including whether to exceed Microsoft's paid-leave floor.

D. The Board's Adoption of an Ill-Defined And Overbroad Joint Employer Rule Will Deter Companies from Adopting CSR Initiatives

[46] 60 F.3d at 859.
[47] *Seafarers*, 603 F.2d at 899 (cab company's opportunity to exercise "indirect control" through short-term leases not probative of an employment relationship).

Notably, the Board suggested in *BFI* that a company may be a joint employer if it merely "retain[s] the contractual right to set a term or condition of employment."[48] Similarly, the Board indicated that a user firm that sets broad job parameters through intermediaries and checks that suppliers comply might be labeled a joint employer.[49] Under that approach, unions can be expected to argue that CSR initiatives relating to workers' treatment show a joint employment relationship because they set the broad parameters of the job and take measures to verify compliance. Companies with existing CSR initiatives now have a strong incentive to terminate them, and others considering such policies will be more likely to table their plans.

It comes as no surprise, then, that numerous law firms responded to the Board's ruling in *BFI* by issuing alerts cautioning companies to limit requirements that they impose on their business partners affecting those partners' employees to avoid inadvertently creating joint employment relationships. For example, lawyers at Baker & McKenzie cautioned clients to "[e]valuate 'control' language in contracts relating to labor and working terms and conditions, and eliminate those which … are not truly necessary." [50] A Nixon Peabody client alert likewise suggested that "language regarding employee specifications for third-party contractors or franchisees be amended to be suggestive rather than mandatory."[51] Many other law firms have followed suit with similar alerts.[52]

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[48] *Id*. at 19 n.80.
[49] *Id*. at 14 & n.44 (discussing *S. Cal. Gas Co.*, 302 N.L.R.B. 456, 461-462 (1991)).
[50] Jennifer L. Field et al., *Strategies to Minimize Joint Employer Liability Post* Browning-Ferris (Sept. 16, 2015), http://www.bakermckenzie.com/ALUSJointEmployerLiabilitySep15/.
[51] Tara E. Daub, et al., *What* Browning-Ferris *means to you: The NLRB's new test for joint employer status* (Aug. 28, 2015), http://www.nixonpeabody.com/Browning-Ferris-NLRB-new-test-for-joint-employer-status.
[52] Michael Lotito et al., *NLRB Imposes New "Indirect Control" Joint Employer Standard in* Browning-Ferris (Aug. 28, 2015), https://www.littler.com/publication-press/publication/nlrb-imposes-new-indirect-control-joint-employer-standard-browning ("Employers will need to revisit and revise their current business practices to eliminate the risk of being found a joint employer under the NLRA, though the Board has given little guidance on how to guarantee non-joint status under the new standard."); David I. Rosen, et al., *What Browning-Ferris Means to Union and Non-Union Employers* at 2-3, (Sept. 2015), http://www.sillscummis.com/Repository/Files/2015_September_Alert.pdf ("In light of the Board's decision, employers should review carefully their contracts with staffing agencies and consider eliminating potential examples of shared control or of the right to control the staffing agencies' workers.");

The fear that the *BFI* Standard will impose adverse consequences on companies that adopt such beneficial CSR initiatives is not just hypothetical. For example, a union representing employees of Lionbridge Technologies, a Microsoft supplier, relied on *BFI* and argued that Microsoft's paid leave initiative governing supplier eligibility established a joint employer relationship with Lionbridge's workers.[53] When Microsoft declined to join the union's collective bargaining negotiations with Lionbridge on the basis that it was not a joint employer, the union filed an unfair labor practice charge with the NLRB against Microsoft.[54] Rather than being dismissed out of hand—as it should have been—the charge moved to the complaint stage on a decision by the former NLRB General Counsel. Fortunately, the complaint was ultimately withdrawn, but only after the two parties came to a private settlement.[55]

Thus, on one hand, the United States President had praised Microsoft for its market-leading CSR initiative that predicates supplier eligibility on the suppliers' provision of paid leave to its workers, and encourages others to do the same.[56] On the other hand, the Board's *BFI* Standard encourages unions to use the same policy to bring an unfair labor practices claim against Microsoft and against other companies that create similar CSR initiatives establishing eligibility criteria for suppliers.

An interpretation of the NLRA that deters firms from adopting CSR initiatives has the perverse effect of harming the interests of workers and the public more generally. Deterring such policies by the private sector is particularly questionable when the federal government itself

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Richard L. Alfred et al., *How Will* Browning-Ferris *Change the Test for Joint-Employer Status for Union and Non-Union Employers* (Aug. 27, 2015), http://www.seyfarth.com/publications/MA082715-LE (suggesting that businesses "attempt to protect themselves" by "[r]eview[ing] and modify[ing] service agreements with third parties").

[53] Matt Day, *At Microsoft Contractor, Union Win is a Mixed Result*, SEATTLE TIMES (Aug. 20, 2016), https://www.seattletimes.com/business/microsoft/at-microsoft-contractor-union-win-is-a-mixed-result/.

[54] *Id*.

[55] *Id*.

[56] *Remarks by the President*, supra note 64.

routinely issues rules imposing similar eligibility requirements on its own suppliers that exceed statutory minimums.[57] The federal government has long required federal contractors to pay laborers and mechanics working on public buildings and public works based on locally-prevailing wages and benefits for similar works.[58] And by Executive Order and regulation, the President has imposed on federal contractors and suppliers paid leave requirements (Exec. Order No. 13706, Establishing Paid Sick Leave for Federal Contractors (Sept. 7, 2015)), minimum wage standards (79 Fed. Reg. 9851, Exec. Order No. 13658, Establishing a Minimum Wage for Contractors (Feb. 12, 2014)), and affirmative action programs (41 C.F.R. part 60-2), to name only a few.[59] Given that the federal government chooses to advance social policies by establishing across-the-board eligibility standards for its suppliers, private companies should be free to do so without adverse legal consequences in implementing their own CSR initiatives.

VII. THE VAGUE AND CONFLICTING STANDARDS CREATED BY *BFI* WILL UNDERMINE THE NLRA'S SECONDARY BOYCOTT PROVISIONS AND ADVERSELY AFFECT INDUSTRIAL PEACE

A. The History of the Secondary Boycott Provision of the NLRA

[57] Whether or not the government should be advancing such policies by Executive Order is not at issue here. But particularly in light of the federal government's approach in these instances, the law should not penalize private-sector companies that choose to adopt CSR initiatives. HR Policy Association strongly opposes the recent use of the federal contracting process to pursue changes in federal employment policy.

[58] 40 U.S.C. § 3141 *et seq.*

[59] Ironically, Executive Order 13706—Establishing Paid Sick Leave for Federal Contractors—essentially mirrors the approach taken by Microsoft's paid leave policy:

> This order seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually, including paid leave allowing for family care. Providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees. These savings and quality improvements will lead to improved economy and efficiency in Government procurement.

Yet the federal government escapes entirely the uncertainty created by the new joint employer standard in *BFI* only because the NLRA does not apply to government employees. *See* 29 U.S.C. § 152(2).

One of the principle purposes of NLRA is the promotion of "industrial peace."[60] One economic weapon Congress found most harmful to industrial peace was the utilization of secondary boycotts by various labor organizations. Although the term "secondary boycott" is not defined in the NLRA, the tactic has been described as "a combination to influence A by exerting some form of economic or social pressure against persons who deal with A."[61] This tactic most often involves coercion of a third party or parties, usually called neutrals or secondary parties. For example, an entity that is a joint employer with an employer that is the primary target of a labor dispute is equally subject to union economic protest activities.[62] These entities, generally, are considered innocent third parties because such entities are interjected into a labor dispute merely because they have some relationship to the primary employer that is subject to the labor dispute. The use of secondary boycott tactics greatly expands industrial strife beyond the primary employer involved in the dispute to any entity that does or may in the future do business with the primary employer. For example, *Developing Labor Law* described the harms associated with secondary boycotts as follows:

> Following World War II, the clamor for revision of the [NLRA] was fueled by accounts of perishable foods and milk rotting when unions refused to handle non-union products, small business men and farmers being driven into bankruptcy by the effects of secondary boycotts, and of laborers being denied the right to choose their representative freely when union leaders imposed jurisdictional strikes that were sometimes enforced by boycotts.[63]

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[60] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).
[61] FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 43 (1930).
[62] *See, e.g.*, *Teamsters Local 688*, 211 NLRB No 71 at *496-97 (1974).
[63] JOHN E. HIGGINS, JR. ET AL., DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1750 (5th Ed., 2006).

Congress reacted to the concerns associated with secondary boycotts by adding Section 8(b)(4) to the NLRA in the 1947 Taft-Hartley Amendments. These sections of the NLRA became known as the secondary boycott provisions of the Act. Certain loopholes, however, remained in this area of the law. They were corrected as part of the Landrum-Griffin Amendments in 1959. In the words of then-Senator John F. Kennedy:

> The chief effect of the conference agreement . . . will be to plug loopholes in the secondary boycott provisions of the Taft-Hartley Act. There has never been any dispute about the desirability of plugging these artificial loopholes.[64]

Simply put, the legislative history of the NLRA secondary boycott provisions clearly shows that Congress understood that secondary boycotts were not only a serious threat to industrial peace, but had adverse consequences for the U.S. economy. Accordingly, there was bipartisan support to prohibit such a spreading of industrial strife to neutral third parties not directly involved in a labor dispute.

B. Application of the NLRA Secondary Boycott Statutory Provisions

The most often cited and applied portion of the secondary boycott provisions of the NLRA is Section 8(b)(4) which makes it unlawful for a union or its agents:

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

[64] 105 Cong. Rec. 16413 (1959).

> (B) forcing or requiring any person . . . to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees.[65]

Thus, Section 8(b)(4)(ii)(B) is violated when: (1) the union's conduct threatens, coerces or restrains any neutral employer; and (2) the conduct object is to force or require any person to cease doing business with any other person, or to force another employer to recognize and bargain with a union that has not been certified.[66]

Congress felt so strongly about prohibiting secondary boycotts that it also added a provision applicable to speech related to secondary boycott activities. Specifically, Congress added to the NLRA Sections 8(b)(4)(i) and (ii)(B) which state that it is an unfair labor practice for a labor organization:

> (i) to engage in, or to induce or encourage any individual employed by any person . . . to engage in, strike or a refusal in the course of his employment to . . . handle . . . any goods . . .; or (ii) to threaten, coerce, or restrain any person engaged in conduct where in either case an object thereof is . . . (B) forcing or requiring any person to cease …[67]

[65] 29 U.S.C.A. §§ 158 (b)(4)(ii)(B).
[66] *Kentov v. Sheet Metal Workers' Intern. Ass'n Local 15, AFL-CIO*, 418 F.3d 1269, 1264 (11th Cir. 2005); *Service Emps. Local 87 Trinity Bldg. Maint. Co*., 312 NLRB 715, 742-43 (1993), *enf'd* 103 F.3d 149 (9th Cir. 1993).
[67] 29 U.S.C.A. §§ 158 (b)(4)(ii)(B).

Other proof of the seriousness of the secondary boycott issue is that damages for such wrongful conduct can be sought by a private party in federal court under Section 303 of the Taft-Hartley Act. Additionally, the Act provides that secondary boycott cases are to be given priority by the Board, and when the Board finds such illegal activity, it must immediately go to federal court to attempt to obtain a restraining order to halt the secondary activity in question.

Further, the secondary boycott provisions of the Act are violated if there is any influence or persuasion by a labor organization to encourage the refusal to handle goods or withhold their services where there is a prohibited object. The U.S. Supreme Court has ruled that: "The prohibition of inducement or encouragement of secondary pressure by [§] 8(b)(4)(A) carries no unconstitutional abridgement of free speech."[68] Further, it is the inducement itself that is a violation whether or not the inducement succeeds in causing a work stoppage. Thus, even the First Amendment does not protect communications directed at neutral employees merely because the form of communications is speech. The "inducement" theory does not require any type of coercion of third parties to establish a violation.

An important additional provision of the NLRA pertaining to secondary boycotts is the "construction industry proviso." This proviso is contained within Section 8(e), and states in pertinent part:

> Provided, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction…[69]

[68] *Elec. Workers Local 501 v. NLRB*, 341 U.S. 694, 705 (1951).
[69] 29 U.S.C.A. §§ 158 (e).

Thus, it is clear the Congress was quite concerned with the adverse impact of secondary boycotts on industrial peace, and therefore, enacted comprehensive and strong provisions to the NLRA to prohibit their use. It is important that the definition of joint employer status not become an "end run" around the application of these important provisions of the NLRA. Stated alternatively, a union should not be permitted to engage in secondary boycott activities against an employer with whom it has a dispute by immersing neutral third parties into the dispute on hollow and weak joint employer theories. Indeed, before any type of secondary boycott activity could legally occur, there should be a clear and convincing finding that the neutral party has direct and immediate control over the wages and benefits of the employees in question—indirect and reserved control should not be a sufficient basis to permit toxic secondary boycott activities to occur.

C. Supreme Court Interpretations of the NLRA Secondary Boycott Provisions Inform the Discussion on how a Joint Employer Standard Should be Developed Under the Act

Supreme court case law construing the secondary boycott provisions of the NLRA is a useful source to help define how joint employer status should be defined under the NLRA. For example, the construction industry plays a significant role in the development of the secondary boycott and separate employer law due to the common industry practice of having various contractors and subcontractors working in close proximity on the same construction site. Indeed, the construction proviso of the secondary boycott provisions is designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interest among various contractor/subcontractor entities working at such sites. Therefore, a limited construction site exception was allowed to the general secondary boycott ban because of

the close contact and close community of interests on construction sites that would be deemed unlawful in any other industries.[70]

Because of the close proximity of various employer entities on a construction site, it is not surprising that the leading Supreme Court case on secondary boycotts and on joint employer and independent contractor issues arose in the construction industry. The lead case on this issues is *NLRB v. Denver Bldg. & Const. Trades Council*.[71] Indeed, this case is cited by both the majority and dissenting opinions of the December 2018 *BFI* D.C. Circuit appellate decision.[72]

The issue in *Denver Bldg.*, as defined by the Supreme Court, was whether a union committed an unfair labor practice by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a certain subcontractor on that project. Union representatives had told the general contractor that the unions would not work on the job with the non-union subcontractor being part of the project. Significantly, the union contended no secondary activity was involved because all of the contractors and subcontractors on the site were the same "employer." The Supreme Court rejected the union's argument and definitively answered that contention as follows:

> We agree with the Board and also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor to make the employees of one the

[70] *See Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).
[71] *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951).
[72] *Browning-Ferris Indus.*, supra note 11.

employees of the other. A business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.[73]

1. The *BFI* Standard Conflicts with Supreme Court Precedent

The *BFI* standard rejects the U.S. Supreme Court ruling in *Denver Bldg. & Constr.* Specifically, common supervision by a general contractor over the subcontractors' work does not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. *Denver Bldg. & Constr.* states that the business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.[74] The 2015 *BFI* ruling, in contrast, would almost by definition expand industrial strife by expanding the scope of a labor dispute to include separate entities doing business with or having some type of association with a primary employer, whereby under secondary boycott law such disputes must be limited to the primary employer.

Additionally, both the NLRB and appeals court ruling in *Browning-Ferris* suggests that the reservation of a single right to control a single essential term and condition of employment could create a joint employment relationship, but the Board opinion goes on to say that any entity found to be a joint employer will be required only to bargain with a union with respect to such terms and conditions which it possesses the authority to control. The NLRB, in essence, seems to be creating a "special rule" for joint employment only applicable to collective bargaining issues, but that same rule will presumably have to apply to secondary boycott cases as well. There is no logic or consistency to such an approach.

[73] *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 689 (1951).
[74] *Id.*

2. The Vague and Overbroad *BFI* Standard may also Present Significant Problems for Labor Organizations

Labor organizations, before engaging in any secondary boycott activity, must accurately determine whether there is "joint employment" among employees of different entities, before engaging in coercive union activity against both or indeed against multiple entities. If the labor organization somehow "gets it right" on the common law issue, it must also "get it right" on the "meaningful collective bargaining" point. If the labor organization guesses wrongly that the dispute must be limited to a single employer entity, it loses its right to utilize its economic weapons. But if the union guesses wrongly and expands its coercive activities too broadly among separate employer entities, it may be liable unfair labor practices under the NLRA. Indeed, unions have been subject to millions of dollars of liability in such situations. This danger to labor organizations is also shared by the many innocent third-party employers who may be subject to secondary boycott activity, based upon the union's wrong guess as to the application of the standards of joint employment to secondary boycott activity. Thus, the *BFI* standard leaves unions, employees, and employers with an intolerable level of uncertainty.

VIII. THE NLRB'S PROPOSED JOINT EMPLOYER STANDARD IS A PERMISSIBLE INTERPRETATION OF JOINT EMPLOYER COMMON LAW PRINCIPALS, AND WHILE INDIRECT AND RESERVED CONTROL DISCUSSIONS ARE POTENTIALLY INTERESTING FROM AN ACADEMIC PERSPECTIVE, THEY ARE LARGELY IRRELEVANT AND ONLY CONFUSE THE DISCUSSION PERTAINING TO THE ESTABLISHMENT OF A WORKABLE JOINT EMPLOYER STANDARD

The term "common law" means "[t]he body of law derived from judicial decisions."[75] As such, judicial decisions are the source for discerning the principles and doctrine of "common-law" agency—including those applicable to deciding NLRA employee status.[76] Such decisions, when

[75] BLACK'S LAW DICTIONARY (10th ed. 2014).
[76] *See Field v. Mans*, 516 U.S. 59, 70 n.9 (1995) (stating that a "common law" rule means "the dominant consensus of common-law jurisdictions").

objectively reviewed, ultimately lead to multiple examples of the necessity for unrelated entities to exercise actual control in co-determining the essential terms and conditions of employment of employees of the unrelated entities. For reasons outlined below, not only is the Board's proposed standard a permissible interpretation of the common law, but the discussion of indirect and reserved control does little to inform the discussion in this area of the law. Indeed, such discussions only lead to confusion of what standards should determine joint employer status.

A. The Board's Decision in *BFI* and the Partial Affirmance of Such Standard by the D.C. Circuit Court Failed to Understand that as a Matter of Common Sense Some Type of Control over Essential Terms and Conditions of Employment of Employees of Unrelated Entities is Necessary to Establish Joint Employer Status

The Board's *BFI* decision, and the D.C. Circuit Court's discussion on such decision, place too much emphasis on questions of whether so-called indirect and reserved control can establish a joint employer situation. While these discussions may be of some academic interest, they only create confusion of this area of the law and do not provide any type of meaningful guidance.

Any discussion of joint employer status by necessity always leads to a question of "control." For example, Employer A could "control" indirectly employees of another entity by utilizing an intermediary entity to establish essential terms and conditions of employees of Employer B. While such control would be "indirect" it nevertheless results in actual control. Indeed, the D.C. Court of Appeals acknowledged such a situation in its decision by stating as follows:

> Traditional common-law principles of agency do not require that "control be exercised directly and immediately" to be "relevant to the joint-employer inquiry". In fact, the National Labor Relations

> Act itself expressly recognizes that agents acting "indirectly" on behalf of an employer could also count as employers…common-law decisions have repeatedly recognized that indirect control over matters commonly determined by an employer can, at a minimum, be weighed in determining one's status as an employer or joint employer, especially insofar as indirect control means control exercised "through an intermediary."[77]

The Board in its discussion of the proposed standard included a hypothetical example that specifically recognized that "control" could be exercised indirectly through an intermediary.[78]

By contrast, when an entity only reserves the right, contractually or otherwise, to control essential terms and conditions of employment of employees of other entities, the failure to exercise such right necessarily cedes the exclusive actual control to the other entity or entities. Stated alternatively, the entity with the so-called reserved control rights by practice never exercises any type of influence or control over the terms and conditions of employment over the workers of other entities and therefore cannot be said to co-determine or influence the essential working conditions of such workers. Reserved rights never utilized therefore should not be the basis to establish joint employer status.

The proposed standard requires a finding of actual control rather than control that is potentially available by virtue of a contractual provision, *i.e.*, more than "reserved" control. The proposed standard also requires more control than in situations where minimum qualification have

[77] *BFI Indus. v. NLRB*, 911 F.3d 1195, 1216-167 (D.C. Cir. 2018) (internal citations omitted).
[78] 83 Fed. Reg. 46697

been established for employees that one company provides to another. And any such control must genuinely affect the essential terms and conditions of a worker's employment so that both employers have power at the bargaining table. Thus, under the proposed rule: "A putative joint employer must possess and *actually exercise* substantial *direct and immediate control over [the actual employer's] employees'* essential terms and conditions of employment in a manner that is *not limited and routine*." [79]

B. The Requirement that a Company *Actually Exercise Control,* that such control is *Direct and Immediate* and that such Control is not *Limited and Routine,* are Consistent with (if not Required by) Applicable Common Law Principles

1. Congress Observed in 1947 That Under Common Law, an "Employee" Within the Meaning of the NLRA must be "Under Direct Supervision."

The legislative history leading to the NLRA's enactment in 1935 clearly establishes that common law standards shall apply when deciding if an employment relationship exists under the NLRA. Congress reaffirmed this basic principle in 1947 when it amended the NLRA to reverse the Board's and Supreme Court's decisions that had expanded—and actually abandoned—the "narrow technical" definitions of employment relationships covered by the Act by substituting an overly-broad standard. Several years earlier, the Board had concluded that even independent contractors were NLRA "employees," and the Supreme Court upheld that view in its decision in *NLRB v. Hearst Publications, Inc.* [80] In particular, the Supreme Court in *Hearst* acknowledged that the newspaper workers at issue could be classified as independent contractors under common law principles.[81] Nevertheless, the Court reasoned it should adopt a broad definition of "employer"

[79] 83 Fed. Reg. 46681, 46686 (emphasis added).
[80] *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (overruled in part by 29 U.S.C. § 152(3)).
[81] *E.g., Hearst*, 322 U.S. at 129 (stating that with respect to "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants," that "[t]here is no good reason for invoking them to restrict the scope of the term 'employee' sought to be done in this case. That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship.")

and "employee" for the NLRA in order to sweep in business-to-business relationships that may not fit within what the Supreme Court described as "*the narrow technical legal relation of 'master and servant,' as the common law had worked this out in all its variations.*"[82] Congress, via the Taft-Hartley Amendments, clearly repudiated such a broad definition of employment relationships under the NLRA. The amendments narrowed the definition of "employee." New language was added, providing that "[t]he term 'employee' . . . shall not include . . . any individual having the status of an independent contractor."[83] This amended, narrowed definition continues to apply today.

These events bear special significance here. They shine a bright light on a significant consensus of the courts as to the common law rule for determining employer-employee status. Congress, in a Committee Report from the House of Representatives (where the Taft-Hartley Amendments originated) canvassed "*the law as the courts have stated it*"—*i.e.,* the common law rules—and made clear that, above all else, proof of being "under direct supervision" is elemental to an employment relationship:

> 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 National Labor Relations Board, means someone who works for another for hire . . . "Employees" work for wages or salaries *under direct supervision*…It must be presumed that when Congress passed the Labor Act, it intended words it used [such as "employee"]

[82] *Id.* at 124 (emphasis added).
[83] 29 U.S.C. § 152(3).

> to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up…It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished.[84] (Emphasis added).

The 1947 Amendments stand as a significant event in NLRB history—an act of Congress rejecting the failure of the Board to apply a basic common law standard. Indeed, the House Conference Report at the time explained that the 1947 Amendments were necessary to overturn the *Hearst* decision and reverse the NLRB's belief "that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act." [85]

Thus, for purposes of the NLRA, proof that a worker was "under direct supervision" is an "ordinary test of the [common] law of agency" applicable for the specific purpose of evaluating employment relationships that qualify for NLRA regulation—and for weeding out those relationships that are outside its purview.

2. The Common Law "Under Direct Supervision" Standard Affirmed by Congress is Reflected in the "Actually Exercise," "Direct and Immediate," and "Not Limited and Routine" Elements

A putative employer must actually exercise direct control over a worker and, by virtue of that action, place the individual "under [its actual] direct supervision."[86] Also, consistent with such standards, such supervision must not be "limited and routine" control. An employee, therefore,

[84] H.R. REP. NO. 245, at 309, 80th Cong., 1st Sess., 18 (1947) (emphasis added).
[85] H.R. REP. NO. 510, at 536-37.
[86] *Id.*

must "work . . . under direct supervision" and perform the essential elements of his or her job. This control must be direct and immediate control by a supervisor and without limitation. These elements within the proposed standard thus reflect the common law rule applicable under the NLRA as addressed by Congress 71 years ago.

These events of 1947 also belie the depiction of "The Evolution of the Board's Joint-Employer Standard" set forth in the 2015 *Browning-Ferris* decision standard. Congress did not originate this rule in 1947; it simply observed "the law as the courts have stated it."[87] In fact, the events of 1947 simply cannot be reconciled with the *BFI* majority. The common law standard in 1947—conditioning NLRA employment status on a showing that a worker was "under direct supervision"—by definition precludes the idea that such same status can arise based solely on "indirect" control, *i.e.*, supervision, or from language in a contract "reserving" the right to control, but with no actual exercise of it.

More to the point, the events of 1947 demonstrate that the proposed standard is not the result of an NLRB gone awry. Such events supply the common-law foundation to the proposed standard. In other words, if "the law as the courts have stated it" in 1947 required workers to be "under direct supervision," then the NLRB (and judicial) decisions over the 31-year period from 1984 through 2015 did not head "in a new and different direction" by requiring the actual exercise of control that was direct and immediate and not limited and routine. The opposite is true. They returned to the 1947 common law criteria.

[87] H.R. REP. NO. 245, 80th Cong., 1st Sess., 18 (1947).

In sum, Congress specifically identified as bedrock to NLRA "employee" status the "under direct supervision" test. That test is reflected in the requirements of the proposed standard. Thus, these conditions in the proposed standard clearly align with common law.

3. The Common Law—the "Judicial Decisions"—Likewise Show that the Proposed Standard is Consistent with Common Law Principles.

a. Control that is "Actually Exercised"

Under common-law agency principles, employment status depends on an evaluation of the degree and nature of the control—if any—exercised over putative employees. Thus, for example, the United States Court of Appeals for the Third Circuit in 1982 stated that a finding of joint employment requires "evidence" showing that "two or more employers exert significant control over the same employees . . . [and] share or co-determine those matters governing essential terms and conditions of employment."[88] Indeed, in that decision, Browning-Ferris was a joint employer not only because it "shared with the brokers the right to hire and fire the drivers," but because it also exercised such control by "establish[ing] the work hours of the drivers;" utilizing a "supervisor [who] considered himself 'boss' and acted as 'boss' with respect to the employees' functions;" and "devis[ing] the rules under which the drivers were to operate."[89] It was "[t]he existence of all these facts" that "constitute[d] substantial evidence . . . support[ing] the Board's finding that *BFI* exerted significant control over the work of the drivers."[90] The NLRB adopted this same test two years later, and judicial and Board decisions applied it for over thirty years until the 2015 *Browning-Ferris* test was announced.

[88] *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982).
[89] *Id.* at 1124–25.
[90] *Id.*

Yet even before 1982, courts demanded evidence that putative employers exercised, rather than merely retained, control.[91] Additionally, more modern cases applying common-law agency principles to decide employment status follow the same principle: they seek evidence of exercised control prior to finding joint employment. This principle is evident in a recent decision by the Ninth Circuit, in *Jones v. Royal Administration Services, Inc*. In this case, the Ninth Circuit in 2018 affirmed the finding that a telemarketer's employees were not jointly employed by the defendant under a contract for their services between defendant and the plaintiff's actual employer.[92] Addressing the existence of an employment relationship under the federal Telephone Consumer Protection Act, which relied on common law principles for this purpose, the Ninth Circuit adopted the ten factors set forth in Section 220(2) of the *Restatement (Second) of Agency* (to assess whether there was sufficient grounds for finding Royal vicariously liable under the *Restatement (Third) of Agency*).[93] The Ninth Circuit observed that "the extent of control exercised

[91] *See, e.g., Zapex Corp. v. NLRB*, 621 F.2d 328, 333 (9th Cir. 1980) (finding that "[a]lthough the Army wields some influence over wages, promotion, and discharge . . . [it] did not exercise substantial control over the appellants' labor relations," and was therefore not a joint-employer with Zapex); *Bonomo v. Nat'l Duckpin Bowling Cong., Inc.*, 469 F. Supp. 467, 471 (D. Md. 1979) ("The joint employer theory is only applied where it is shown that the defendant possesses 'sufficient indicia of control' over the work of the purported employee") (citing *Boire v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966) (after remand from United States Supreme Court decision in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964))); *Lutheran Welfare Servs. of Ill. v. NLRB*, 607 F.2d 777, 778 (7th Cir. 1979) ("The NLRB has long held that if two or more employers exert significant control over the same employees, they constitute 'joint employers' under the NLRA"); *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 776-77 (D.C. Cir. 1969) (holding that the joint employer "inquiry must extend beyond the language of the contract to the evidence describing the parties' actual practice"); *NLRB v. Condenser Corp. of Am.*, 128 F.2d 67, 71 (3d Cir. 1942) ("What is important for our purpose" of finding joint-employers "is the degree of control over the labor relations in issue exercised by the company charged as a respondent"); *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 263 (1938) (two or more companies are joint-employers when "*[t]ogether*, respondents act as employers of [shared employees] . . . and *together actively deal* with labor relations of those employees") (emphasis added); *see also Stoudt, H. E., & Son, Inc.*, 114 N.L.R.B. 838, 862 (1955) (finding that "although Stoudt had no specific contractual right directly to hire or discharge employees of Weisker, it in fact specified, and thus exercised control over, the source and manner of their hiring," which made Stoudt and Weisker joint-employers). The majority in the 2015 *Browning-Ferris* decision stated that it had returned the applicable standard to "the traditional test used by the Board (and endorsed by the Third Circuit in *Browning-Ferris*)" as it existed prior to 1984. *Browning-Ferris Indus. of Cal., Inc., d/b/a BFI Newby Island Recyclery*, 362 N.L.R.B. No. 186, 2015 N.L.R.B. LEXIS 672, at *68 (Aug. 27, 2015), *review granted in part, enforcement denied and remanded*, No. 16-1028 (D.C. Cir. Dec. 28, 2018). However, as the case law set forth in the main text illustrates, courts have consistently sought evidence of exercised control rather than control that was merely hypothetical.

[92] *Jones v. Royal Administration Services, Inc*., 887 F.3d 443 (9th Cir. 2018).

[93] 887 F.3d at 450.

by the [principal] is the 'essential ingredient'" in its analysis.[94] Other more recent cases are in accord.[95]

b. Control that is "Direct and Immediate"

Since 1947, Congress has emphasized that the NLRA defines an "employee" as one who works "under direct supervision," and the "direct and immediate" element has remained constant in cases examining joint-employment.[96] Many of the cases cited above, supporting the actual exercise of control, reflect this very requirement.[97] In addition, in 1963, fifteen years after the Taft-

[94] *Id.* (citation omitted).

[95] *See also Butler v. Drive Auto. Indus. of Am., Inc.*, 38 793 F.3d 404, 409 (4th Cir. 2015) (holding as a matter of first impression that the joint employment doctrine may be used in Title VII cases, the Fourth Circuit applied common-law principles focused "on determining which entities actually exercise control"); *Cink v. Grant Cty., Okla.*, 635 F. App'x 470, 471 (10th Cir. 2015) ("[B]oth the [single employer and joint employer tests] look to the control the alleged employer-entities exercised over conditions of employment—in either a separate-but-joint or effectively-unitary manner"); *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994) (noting that the "common law definitions of [an employer/employee] relationship" are tested by "measuring the amount of control an ostensible employer exercised over a putative employee"); *Serv. Emps. Int'l Union, Local 434 v. Cty. of L.A.*, 225 Cal. App. 3d 761, 773 (1990) (noting that while a joint-employment "relationship arises only where both the general employer and the special employer have the right to control the employee's activities," the fact-finder must determine whether "the right to control existed and was exercised" because when the "substantial evidence supports . . . finding that the [putative employer] does not exercise control over and direct the activities" of an employee, it is not a joint-employer); *Auto. Trade Ass'n of Md. v. Harold Folk Enters., Inc.*, 301 Md. 642, 660 (1984) ("The test for determining whether dual employment exists is whether 'there is evidence to support an *inference* that more than one individual or company controls or directs a person in the performance of a given function.'") (emphasis in original; citation omitted). *See, e.g., Greene v. Harris Corp.*, 653 F. App'x 160, 163 (4th Cir. 2016) (utilizing a "nine-factor test to determine whether an employee of a staffing agency also was employed by the client to which she was assigned, focusing on the amount of control the client exercised over the putative employee"); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) (dismissing a joint-employment based claim under common-law principles where plaintiff failed to assert factual allegations "that Wal-Mart exercised control over their day-to-day employment"); *Gulino v. New York State Educ. Dep't*, 460 F.3d 361, 379 (2d Cir. 2006) (holding that, although the State Education Department retained control over "basic curriculum and credentialing requirements," it did "not exercise the workaday supervision necessary to an employment relationship" under common law principles, and therefore did not jointly employ the plaintiff);[95] *Vernon v. State of Cal.*, 116 Cal. App. 4th 114, 127, 10 Cal. Rptr. 3d 121, 131 (2004) (concluding that the State of California did not jointly-employ the plaintiff because "[t]he ultimate control over the means and manner of [his] employment was exercised separately and exclusively by the City's Fire Department, not the State").

[96] H.R. REP. NO. 245, 80th Cong., 1st Sess., 18 (1947).

[97] *See, e.g., Serv. Emps. Int'l Union,* 225 Cal. App. 3d at 773 (finding defendant was not a joint employer as it did not "direct the activities" of employees); *Browning-Ferris Indus.*, 691 F.2d at 1124 ("[T]wo or more employers" are joint-employers under the NLRA "where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment"); *Herbert Harvey*, 424 F.2d at 776 (joint employer inquiry "must extend beyond the language of the contract"); *Pennsylvania Greyhound Lines*, 303 U.S. at 263 (noting the importance that "together [both putative employers] actively deal with labor relations of those employees").

Hartley amendments, the Supreme Court relied on turn-of-the-century precedent when it pointed out the importance of this element, stating that "under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services."[98] Indeed, since the 1982 *Browning-Ferris* decision, courts have enforced Board orders which used the "direct and immediate" standard; none stated that this criterion was inconsistent with *Browning-Ferris*.[99] As these cases show, the law of agency looks to the degree of control the principal exerts over the details of the agent's performance.[100] And, without evidence of direct and immediate supervision, courts are leery of finding joint employment.

c. Control that is "Not Limited and Routine"

The proposed rule conditions joint employer status on proof that an employer exercise "substantial" control instead of exercise "limited and routine" authority. Preliminarily, the phrase "limited and routine," as used in prior NLRB decisions, is a term of art.

The standard recognizes that control, even over essential terms and conditions of employment, can be comprehensive or, to the contrary, only exercised as to a narrow facet thereof. The hiring of employees, for example, clearly amounts to an exercise of substantial control – control over the entirety of the tasks and decisions involved in hiring. In contrast, a putative joint employer that requires that a company supplying temporary workers only supply those who have satisfactorily passed a background check—which is sometimes necessary due to the user

[98] *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1, 6 (1963) (applying *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909)). *See also Int'l House v. NLRB*, 676 F.2d 906, 913 (2d Cir. 1982) ("[A]n essential element under any determination of joint employer status in a sub-contracting case is distinctly lacking in the instant case-some evidence of immediate supervision or control of the employees").
[99] *See, e.g., Serv. Emps. Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 445-46 (2d Cir. 2011); *Gen. Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894, 894 (3d Cir. 1985).
[100] *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (3d Cir.1979) (citing *NLRB v. Keystone Floors, Inc.*, 306 F.2d 560, 562 (3d Cir.1962)).

company's own need to comply with industry regulatory requirements to which it is subject—does not "control" the essential elements of employment and, as such, falls in the "limited and routine" category.

The standard in use before the 2015 *BFI* Standard reflected the "limited and routine" element.[101] Thus, the "limited and routine" standard incorporates a long-standing, essential element that a putative joint employer's control amount to "sufficient command of employment conditions to enable efficacious bargaining with the Union."[102] A lack of such control demonstrates "impotency at the bargaining table," and thus courts long-sought evidence of such power prior to finding joint employment.[103] Moreover, common law agency theory similarly

[101] *See, e.g.*, *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 326 (1984) (noting the limited nature of a company's ability to resolve workplace conflict when "[a]ll major problems relating to the employment relationship [we]re referred back to [the employer] for resolution")[101]; *TLI, Inc.*, 271 N.L.R.B. 798, 799 (1984) (distinguishing between the broader power to terminate an employee, and the much more limited right to file "an 'incident report' whereupon [an employer's] representative[] investigates"). This standard arguably was incorporated in the 2015 *BFI* decision, wherein the Board noted "a joint employer will be required to bargain only with respect to those terms and conditions *over which it possesses sufficient control* for bargaining to be meaningful." *Browning-Ferris Indus. of Cal., Inc. d/b/a BFI Newby Island Recyclery*, 362 N.L.R.B. No. 186, 2015 N.L.R.B. LEXIS 672, at *7 n.7 (Aug. 27, 2015), *petition for review docketed Browning-Ferris Indus. of Cal., Inc. v. NLRB*, No. 16–1028 (D.C. Cir. filed Jan. 20, 2016) (emphasis added). In the *TLI* decision, NLRB Board Member Dennis dissented in part from the majority Board decision on factual grounds, and, in fact, would have found joint-employer status specifically because the putative employer "not only . . . ha[s] the authority under the lease to control the manner and means by which drivers perform, it in fact does so." 271 N.L.R.B. at 799.

[102] *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 779 (D.C. Cir. 1969).

[103] *Id.* at 777. *Compare Tanforan Park Food Purveyors Council v. NLRB*, 656 F.2d 1358, 1361 (9th Cir. 1981) (concluding that "Hapsmith must . . . be considered a joint employer" because the "areas within Hapsmith's control [were] wage rates, vacation, holiday, and work schedules, and employee supervision [which] lie within the core of mandatory collective bargaining"), *Sun-Maid Growers of Cal. v. NLRB*, 618 F.2d 56, 59 (9th Cir. 1980) ("A joint employer relationship exists when an employer exercises authority over employment conditions which are within the area of mandatory collective bargaining"), *Ohio Inns, Inc.*, 205 N.L.R.B. 528, 528 (1973) (noting the "degree of control by the State of Ohio over the operations and labor relations of the Employer demonstrates that the State is at least a joint employer here"), *and NLRB v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966) (enforcing the Board's finding of joint-employer status as the "'evidence cogently demonstrates that Greyhound and Floors share, or co-determine, those matters governing essential terms and conditions of employment'") (quoting *Greyhound Corp.*, 153 N.L.R.B. 1488, 1495 (1965)) *with Zapex*, 621 F.2d at 333 (contractual provisions concerning "[d]ress requirements," the sharing of facilities, and minimum wages were sufficiently limited that the Army "did not exercise substantial control over the appellants' labor relations," and was therefore not a joint-employer with Zapex), *and NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689–90 (1951) ("We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not . . . make the employees of one the employees of the other").

requires that a putative employer must "direct [both] the manner in which the business shall be done, as well as the result to be accomplished."[104] Indeed, the multi-factor, common-law agency test referenced by the United States Supreme Court to assess employee status requires close analysis of the extent of a putative employer's control over a worker, probing the "means by which the product is accomplished."[105] The Proposed Rule's "limited and routine" prong reincorporates these foundational, common law principles.

4. The Proposed Standard is Also Consistent with Common Law Principles as Articulated in the *Restatements*

a. The *Restatement of Employment Law* Provides More Useful Guidance to the Joint Employer Doctrine than the *Restatement (Second) of Agency*

Significantly, to the extent the Board wishes to refer to a *Restatement of Law* for guidance on the appropriate test for determining joint employer status under the NLRA, the *Restatement of Employment Law* is a more appropriate resource than the *Restatement (Second) of Agency*. The *Restatement of Employment Law* was prepared over the course of nine years, by the same American Law Institute, and published in 2015. Its specific focus is "restating common-law principles" meant "to set out the rights and duties of the parties to the employment relationship rather than to delimit the bounds of enterprise liability in tort to third parties," which remains the purview of the

[104] *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889); *Standard Oil Co. v. Anderson*, 212 U.S. 215, 222 (1909) (courts must "carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking"); *Restatement (Second) of Agency § 220* cmt. a (1958) ("The word 'servant' . . . connote[s] a person . . . who performs continuous service for another and who, as to his physical movements, is subject to the control or to the right to control of the other as to the manner of performing the service"); *Restatement of Employment Law § 1.01* ("[A]n individual renders services as an employee of an employer if . . . the employer controls the manner and means by which the individual renders services.").

[105] *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

Restatement of Agency Law.[106] As such, the same common law agency principles applicable to the specific agency relationship of employer-employee (*i.e.*, master-servant) are addressed and illustrated, but within the exact scenario where the NLRA joint employer issues arise: the employment environment.[107]

The proposed standard mirrors the *Restatement of Employment Law's* approach to joint employment. As framed in the *Restatement*, "[a]n individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers *each control or supervise* such rendering of services."[108]

[106] RESTATEMENT OF EMPLOYMENT LAW 1 Intro, at Note. Additionally, the location of Section 220 within the *Restatement (Second) of Agency* shows that it resides within a broader chapter addressing the topic of "liability for torts within the scope of employment, and the special duties and immunities of the master to servants." *Restatement (Second) of Agency* Ch.7, Topic 2, Title B, Intro. Note. Thus, as used in the *Restatemen*t, the phrase "right to control" is informed by years of jurisprudence restricting employers, who lacked any realistic means of supervising a worker, from escaping *respondeat superior* liability. *See, e.g.*, *Boswell v. Laird*, 8 Cal. 469, 489 (1857) ("The relation between parties to which responsibility attaches to one, for the acts or negligence of the other, must be that of superior and subordinate . . . The responsibility is placed where the power exists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable"); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 522–23 (1889) ("A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, . . . And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished"). This recognizes a long-established principle of agency law; that "the master is answerable for the act of his servant, if done by his command, either expressly given, or implied . . . whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command." William Blackstone, Commentaries.

[107] The Dissent to the proposed standard has referenced the *Restatement of Employment Law*, with no critique as to its application. *See* 83 Fed. Reg. 46681, 46689, n.23. (The Dissent did note that two labor law scholars involved with commenting on the *Restatement of Employment Law* have endorsed the *BFI* Standard as "'the better approach'"; however, their view (also quoted by the Dissent) that such test is "'consistent with the goals of employment law, especially in the context of a changing economy,'" suggest the very type of consideration of economic factors/influence accepted by the Board and *Hearst* Supreme Court, and excluded by the NLRA's Taft-Hartley Amendments.

[108] RESTATEMENT OF EMPLOYMENT LAW § 1.04(b) (emphasis added).

A putative employer must exercise such control.[109] That control must be direct, not indirect.[110] And such control must be neither limited nor routine.[111]

b. To the Extent that the *Restatement (Second) of Agency* is Consulted as Guidance in Determining the Applicable Joint Employer Standard Under the NLRA, the Dissent's Approach to the Proposed Standard is Impermissibly Narrow

The Dissent to the proposed standard relies on the *Restatement (Second) of Agency* as the primary source for evaluating the joint employer standard and contends that the proposed standard fails to show employment as explained in such *Restatement*.[112] This view is incorrect. First, to be sure, the *Restatement (Second) of Agency* can guide and assist in evaluating the question of joint employer liability. Yet this resource has limitations. It is axiomatic that judicial decisions, not *Restatements*, are the primary source of common law principles. And such decisions (discussed above), as affirmed by Congress in 1947, show common law principles that support the proposed standard. Second, the Dissent's position allows consideration of only specific sections of the *Restatement (Second) of Agency* and disallows others.[113] Other portions of the *Restatement (Second) of Agency* afford guidance at least as relevant, if not more relevant, to joint employment (*see* discussion of "loaned servant doctrine" in Section 227, below).

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[109] *See id*. § 1.04 cmt. a (noting that its subsection 1(b) "refers to situations where individuals provide services to more than one employer that, at least in combination, exercise control as provided in § 1.01(a)(3).").
[110] *See id*. § 1.04 cmt. c ("[A] company that uses and benefits from the services of a supplying company's employees is not an employer of the supplied employees if the company does not have the power to direct and control their work or set their compensation.")
[111] *See id.* § 1.04, Illustration 5 ("A is a driver of a large concrete-mixer truck owned and operated by the P corporation. The R construction company rents the truck for a particular project. P assigns A to operate the truck . . . while it is used on R's project. R's supervisors tell A what work they want the truck to accomplish, . . . If dissatisfied with A, R can request that P assign another driver. Only P can discharge A. . . . A is an employee of P but not of R. P alone . . . controls the details of how A is to operate the truck in providing service to R.").
[112] *See* 83 Fed. Reg. 46681, 46689 ("The *Browning-Ferris* Board carefully explained that none of these limiting requirements is consistent with common-law agency doctrine, as the *Restatement (Second) of Agency* makes clear.")
[113] *See, e.g.*, 83 Fed. Reg. 46681, 46689 ("The *Restatement* specifically recognizes the common-law 'subservant' doctrine, addressing cases in which one employer's control is or may be exercised indirectly, while a second employer directly controls the employee."); 365 N.L.R.B. No. 156, at *203 (dissent arguing "the 'loaned-servant' doctrine" has "no bearing on the joint-employer issue . . . ").

Further, the Dissent's to the proposed standard narrowed view conflicts with Supreme Court precedent. In *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), the plaintiff worker was an employee of a trucking company, PMT, but also claimed employment by Southern Pacific. After he was injured while working, he alleged he was "sufficiently under respondent's control to bring him under the coverage of the FELA," or the Federal Employers' Liability Act.[114] The FELA makes a covered railroad liable for negligently causing injury or death to any person "'while he is employed' by the railroad."[115] Citing the *Restatement (Second) of Agency*, the United States Supreme Court observed that:

> Under common-law principles, there are basically three methods by which a plaintiff can establish his "employment" with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. *See Restatement (Second) of Agency* § 227, . . . Second, he could be deemed to be acting for two masters simultaneously. *See Restatement* § 226, . . . Finally, he could be a subservient of a company that was, in turn, a servant of the railroad. *See Restatement* § 5(2).[116]

Thus, as *Kelley* established, each one of the *Restatement's* Sections 227, 226 and 5 afford guidance on the issue of whether an individual is an "employee" under common law. No one path is

[114] *Id.*
[115] *Id.* at 319-20, 318 (citing FELA, 45 U.S.C. §§ 51-60).
[116] *Id.* at 324 (case citations omitted).

mandated; there is no requirement that the analysis must stop and start at Section 220 of the *Restatement*.

Finally, the two sections on which the Dissent bases the *BFI* Standard, Section 220 and Section 5 of the *Restatement (Second) of Agency*, are not dispositive in the context of the joint employer analysis. Section 220 recites the definition of a servant under common law in subsection (1) and sets forth factors for assessing that definition in subsection (2). Yet, as the Supreme Court noted in *Kelley*, Section 220 "is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship," not a situation with one undisputed employer, a separate putative employer, and a worker.[117] Thus, under the Supreme Court's decision in *Kelley*, in multi-party situations like joint employment is not restrictively evaluated solely under Section 220. That Section is "helpful" and "can" be instructive, but is not dispositive, as it does not squarely pertain to the joint employer context.[118]

Section 5 of the *Restatement* addresses the common law sub-servant doctrine. The context involves an actual employer and a possible second employer, plus workers, but within a distinct context different than that applicable to the NLRA joint employer issue. The sub-servant doctrine involves a vertical relationship with a servant who has both a master and his own sub-servant; the question is whether the sub-servant is an agent of both the direct master and the next-level master. Liability switches from one employer to the next in the sub-servant context based on which one exercises "control." In contrast, the joint employer standard does not necessitate "either-or" liability; both entities, "jointly," can be liable.

[117] 419 U.S. at 324.
[118] *Id.*

Thus, the loaned servant doctrine addressed in Section 227 of the *Restatement (Second) of Agency* supplies more relevant guidance. The doctrine addresses the legal status of workers of a "supplier" company who are loaned out to assist another "user" company. Cases involving loaned workers are much more akin to the multi-party structure at issue in the joint employer context than that in the sub-servant context. Further, "under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services."[119]

Thus, like the proposed standard, such doctrine has been applied to require, for joint liability purposes, the *actual exercise* of control. The *Restatement (Second) of Agency*'s discussion of the loaned servant doctrine echoes court decisions requiring proof of the actual exercise of control. For example, a company using employees of another company is deemed a joint employer only upon the *actual exercise* of control over such workers.[120] As with the *Restatement of Employment Law*, such requirements parallel those set in the proposed standard.

CONCLUSION

Congress, in 1947, expressly affirmed that "according to the law *as the courts have stated it* . . . 'Employees' *work* for wages or salaries *under direct supervision*."[121] The 2015 joint employer standard established in the *Browning-Ferris* decision excludes such requirement, ignores decades of precedent and common law. Until 2015, the presence of control or lack thereof

[119] *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1, 6 (1963).
[120] The *Restatement (Second) of Agency* notes that simply "obey[ing] the requests of the temporary employer as to the act does not necessarily cause [a person] to be the servant of such employer. If, however, the temporary employer exercises such control over the conduct of the employee as would make the employee his servant were it not for his general employment, the employee as to such act becomes a servant of the temporary employer." RESTATEMENT (SECOND) OF AGENCY § 227 cmt. d (1958) (emphasis added).
[121] H.R. REP. NO. 245, 80th Cong., 1st Sess., 18 (1947) (emphasis added).

remained dispositive in finding joint employment situations, but not ethereal or hypothetical control. Rather, control manifested only if actually exercised, direct, and neither limited nor routine. Control failing to meet these thresholds is not meaningful for NLRA purposes, rendering a putative employer effectively impotent at the bargaining table.

The proposed standard is rooted in and consistent with applicable common law principles. The Association urges the Board to adopt the proposed standard with the modifications outlined in these comments and reject the current overly-broad *BFI* Standard.

Sincerely,

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