



December 6, 2022

By electronic submission: <http://www.regulations.gov>

Ms. Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

RE: RIN 3142-AA21: Notice of Proposed Rulemaking: Joint Employer Status Under the National Labor Relations Act

Dear Ms. Rothschild,

On behalf of the Restaurant Law Center (the “RLC” or “Law Center”) and the National Restaurant Association (“Association”), we are pleased to submit these comments in response to the National Labor Relations Board’s (the “Board” or “NLRB”) Notice of Proposed Rule Making (“NPRM” or “Proposed Rule”) published at 87 FR 54641 (September 7, 2022). We also join the comments to be submitted by the Coalition for a Democratic Workplace because we agree with the general points made therein. However, we are also filing our own separate comments herein to provide more detail on our specific industry’s concerns with the Proposed Rule.

I. INTRODUCTION

The Proposed Rule would rescind and replace the comprehensive joint-employer standard it codified less than three years ago in its final rule entitled “Joint Employer Status Under the National Labor Relations Act” (the “2020 Final Rule”). The 2020 Final Rule took effect after the

Board thoroughly considered tens of thousands of public comments and carefully analyzed the legal landscape. 87 FR 54652. Furthermore, the 2020 Final Rule is consistent with common-law agency principles and provides clear guidance to regulated parties. For the reasons set forth in detail below, we urge the Board not to rescind and replace the current standard for determining joint employer status, i.e., the 2020 Final Rule, with this Proposed Rule or something akin to it. Doing so would destabilize labor-management relations—contrary to one of the principal purposes of the National Labor Relations Act (the “Act”)—and harm restaurant businesses across the country.

Nationally, the foodservice industry consists of over one million restaurant and foodservice outlets employing about fifteen million people—about ten percent of the American workforce. Despite being mostly small businesses, the foodservice industry is the nation’s second-largest private-sector employer. The Association is the largest foodservice trade association in the world, representing more than 500,000 restaurant businesses. The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the American foodservice industry in the judicial system and before quasi-judicial bodies like the NLRB. Through amicus participation, the Restaurant Law Center regularly provides courts and agencies, including the NLRB, with the industry’s perspective on legal issues that significantly impact its members and the health of the foodservice industry.

Thus, the Law Center has, and historically has had, a significant interest in the development and application of the Board’s joint employer doctrine.¹ After BFI sought review of the Board’s decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (August 27, 2015) (“*BFF*”), by the

¹ See also, Petition of the RLC, In the Matter of Proposed Rule to Establish the Standard for Determining Joint-Employer Status Under the National Labor Relations Act.

U.S. Court of Appeals for the District of Columbia Circuit, RLC filed an *amicus* brief in June 2016 in support of the long-standing “direct and immediate” joint employer standard. RLC intends its legal advocacy on this issue, including these joint comments, to create a stable and beneficial environment for management and labor alike.

Foodservice industry employers, including many in the franchise context, face unique legal challenges in the context of the joint employer standard. We oppose rescinding the 2020 Final Rule because it created a clear and responsible way to determine joint employer status and led to greater stability and predictability for both management and labor, especially considering the distinct challenges faced by the foodservice industry. The Proposed Rule would have the opposite effect.

II. SUMMARY OF COMMENTS

The following points summarize our comments on the proposed rule:

1. *The Board’s 2020 Final Rule codified the “direct and immediate” joint employer standard the Board used for more than 30 years, while the Proposed Rule is arbitrary and capricious in part because it fails to provide meaningful guidance.* The Board’s 30-year standard, as articulated under *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transp.*, 269 NLRB 324 (1984), provided a clear and stable method for all stakeholders, management and labor alike, to know with a reasonable degree of confidence who employed any particular group of employees. In its *BFI* decision, the Board reversed that 30-year precedent and created an amorphous joint employer standard that expanded the definition of joint employer status substantially, but provided no guidance to employers, unions or even its own regional directors about where to draw the line. Thus, the Law Center supported the Board’s decision to engage in rulemaking to clarify this

doctrine,² and supported the Board’s solution: a codification of the long-standing “direct and immediate” standard. The result was the 2020 Final Rule. Meanwhile, the Proposed Rule is a step backward from the 2020 Final Rule, as it robs parties of certainty and predictability, and provides less certainty and predictability than they would have if joint-employer status were decided by adjudication.

2. *The BFI standard for determining joint employer status was amorphous, unstable and failed in its essential function, while the Proposed Rule is worse while erroneously claiming to return to the common-law standard.* The standard for determining joint employer status should allow an interested party to reliably determine whether or not a given business arrangement would result in joint employer status. The *BFI* standard does not. It merely provides for the Board to make post-hoc conclusions drawn after result-oriented inquiries. Employers attempting to apply the *BFI* standard have no way of knowing whether they are joint employers. This undermined the Act’s purpose of encouraging effective bargaining. Meanwhile, the Proposed Rule would also not return the Board to the common-law standard but, instead, would employ a standard significantly more amorphous and extreme than *BFI*.

3. *The D.C. Circuit’s decision underscored the need for the 2020 Final Rule with its clear guidance and does not support the Proposed Rule.* The December 28, 2018, D.C. Circuit decision reviewing *BFI* did not clarify the issue. *See Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (2018). To the contrary, the court held that the *BFI* joint-employer standard appropriately recognized that indirect and potential control are “relevant” factors in determining joint-employer status under the Act. Yet, the court then went on to hold that the Board had not

² See n. 1, *supra*.

applied those relevant factors appropriately under common law and remanded the case to the Board to “erect some legal scaffolding”—despite the fact that the Board had already issued a notice of proposed rulemaking to address this issue more broadly with the assistance of public comments.

4. *The 2020 Final Rule conforms with the common law and the language, legislative intent and fundamental policies of the Act; the Proposed Rule does not.* The current majority’s criticism of the Board’s 2020 Final Rule on the ground that it is inconsistent with common law, are based on a patently flawed misunderstanding of the independent contractor agency test and most significantly, its history, which is the source of the common law test they claim to champion. The Supreme Court made it abundantly clear that direct supervision of the putative employee defines the employment relationship governed by the Act. The Supreme Court firmly rejected the Board’s attempt to expand the definition of the term “employee” beyond its ordinary meaning. Nevertheless, in the Proposed Rule, and in *BFI*, the Board adopts a far-fetched definition of “employer” that dramatically expands the meaning of the word by eliminating the fundamental touchstone of an employer-employee relationship—direct control of the employee.

5. *The “direct and immediate” standard fits the traditional business relationships in the foodservice industry and benefits industry stakeholders.* A significant portion of the restaurant industry operates on the franchise model. That model thrived under the Board’s “direct and immediate” standard because franchisees and franchisors could maintain an arms-length business relationship that allowed both franchisees and franchisors to be confident about their status and of their obligations to their respective employees. The *BFI* standard’s use of indirect influence to determine joint employer status created massive uncertainty, leading to confusion and a dramatic rise in operational and risk management costs at many franchise restaurants. The Proposed Rule’s

expansion of the joint employer standard to include a never-exercised contractual reservation of right to control would, likewise, create even more havoc.

6. *The examples in the 2020 Final Rule provide helpful guidance to address concerns regarding various common business arrangements raised by the BFI decision.* The examples provided in the 2020 Final Rule offer helpful guidance in addressing concerns created by the expansive test established in *BFI*. The Proposed Rule does away with these examples and fails to draw clear lines between what counts (*e.g.*, co-determining essential terms and conditions of employment) and what does not count (*e.g.*, brand standards in franchise agreements) for determining joint employer status.

7. *The Board already resolved this issue through its prior rulemaking process and should now defend it.* Reversals and re-reversals on issues of fundamental importance under the Act undermine the Board’s credibility—including with the federal judiciary and the public. These drastic shifts also create uncertainty for those impacted with little meaningful guidance from the agency that could be relied on, rendering it impossible for long-term planning with any reasonable expectation that a current Board decision or regulation will stand the test of time.

III. COMMENTS TO THE JOINT EMPLOYER NPRM

1. **The Board’s 2020 Final Rule codified the “direct and immediate” joint employer standard the Board used for more than 30 years, while the Proposed Rule is arbitrary and capricious in part because it fails to provide meaningful guidance.**

The Law Center and the Association supports the language in the 2020 Final Rule and objects to it being rescinded as proposed by the Board’s current majority. Throughout the course of their advocacy on this issue, the Law Center and the Association have consistently supported the “direct and immediate” standard for joint employer status and do so again in these comments. We believe that employers—including those in the restaurant industry—deserve a clear standard

that comports with sound jurisprudence and good business sense, and that fosters stability in the labor-management relationship. The “direct and immediate” standard used by the Board for over 30 years met these requirements admirably. Thus, we urge the Board not to follow through with its current proposal and maintain the 2020 Final Rule, which codified the over 30 years old standard.

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

By linking joint employer status to direct and immediate control over the fundamental aspects of the employment relationship—hiring, firing, discipline, supervision and direction—the Board’s pre-*BFI* joint employer standard ensured that both employers were actually involved in matters material to the scope of the Act, rather than merely engaged in a market relationship that may have a coincidental, dispersed, or attenuated impact on employees. Additionally, by requiring that the control be direct and immediate, the old standard assigned joint employer status only to those entities who actually affected the employment relationship—the singular focus and subject matter of the Act—and, thus, had the ability to actually engage in effective collective bargaining.

The standard articulated by the Board in *Laerco* and *TLI* was clear, rational, and withstood the test of time for 30 years. Indeed, the Board’s direct control standard was “settled law” from 1984 until August 27, 2015. *See Airborne Express*, 338 NLRB 597, n.1 (2002). And for the “direct and immediate” standard, the Board and the courts have already developed a coherent body of law over the span of several decades that elucidated the facts, circumstances, and scenarios under which an entity becomes a joint employer.³ Reviewing courts likewise have adhered to the Board’s bright-line test for decades.⁴

³ *See, e.g., Aldworth Co.*, 338 N.L.R.B. 137, 139-40 (2002) (affirming ALJ’s finding of joint employer relationship because “[biased upon a thorough review of the record, the judge determined that Respondents Aldworth and Dunkin’ Donuts together share control over the hiring, firing, wages, benefits, discipline, supervision, direction and oversight of the truck drivers and warehouse employees and thereby meet the standard for joint employer status”); *Mar-Jam Supply Co.*, 337 N.L.R.B. 337, 342 (2001) (affirming finding of joint employment after analyzing all terms and conditions of employment and finding that putative employer directly hired and fired employees, solely supervised and directed the employees with regard to work assignments, time, attendance and leave, and disciplined the employees); *C. T Taylor Co.*, 342 N.L.R.B. 997, 998 (2004) (affirming finding of no joint employment where none of essential terms and conditions of employment were controlled by putative employer); *Mingo Logan Coal Co.*, 336 N.L.R.B. 83, 95 (2001) (stating that the putative joint employer meaningfully affected all five essential terms and conditions of employment); *Villa Maria Nursing & Rehab. Ctr., Inc.*, 335 N.L.R.B. 1345, 1350 (2001) (affirming finding of no joint employer relationship where “Villa Maria does not have any authority to hire, fire, suspend or otherwise discipline, transfer, promote or reward, or lay off or recall from layoff ServiceMaster’s employees. Villa Maria does not evaluate them or address their grievances.”); *Windemuller Elec., Inc.*, 306 N.L.R.B. 664, 666 (1992) (affirming ALJ’s finding of joint employment based on facts that putative joint employer shared or co-determined hiring, firing, discipline, supervision and direction); *Quantum Resources Corp.*, 305 N.L.R.B. 759, 761 (1991) (affirming joint employer finding and specifically adding to Regional Director’s decision that FP&L’s control over hiring, discipline, discharge and direction “[t]ogether with the close supervisory relationship between FP&L and [contract] employees ... illustrate[s] FP&L’s joint employer status”); *D&S Leasing, Inc.*, 299 N.L.R.B. 658, 659 (1990) (finding joint employment based on facts that putative joint employer shared or co-determined the hiring, firing, discipline, supervision and direction of contract employees); *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 1000 (1988) (affirming joint employer finding based on fact that G. Heileman shared or co-determined all five essential terms and conditions of its contract employees’ employment, and in addition negotiated directly with the union); *Island Creek Coal*, 279 NLRB 858, 864 (1986) (no joint employer status because there was “absolutely no evidence in this record to indicate that the normal functions of an employer, the hiring, firing, the processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leaves of absences, were in any way ever performed by [the putative joint employer].”)

⁴ *See, e.g., SEIU Local 32BI v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding that supervision which is “limited and routine” in nature does not support a joint employer finding, and that supervision is generally considered “limited and routine” where a “supervisor’s instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.”) (citation omitted); *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (finding no joint employment where only one indicium of control (participating in the collective bargaining process) existed and there was no direct and immediate control over hiring and firing, discipline, supervision or records of hours, payroll, or insurance); *Holyoke Visiting Nurses Ass’n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (finding joint employer status where the putative joint employer had “unfettered” power to refuse to hire certain employees, monitored the performance of referred employees, assumed day-to-day supervisory control over

The stability and predictability provided by the Board’s pre-*BFI* “direct and immediate” standard allowed thousands of businesses—large and small, with varied business models—to structure their business relationships in a sensible and optimal fashion, including subcontracting discrete tasks to other companies with specialized expertise to provide services that would otherwise be far more difficult or costly. At the same time, that “direct and immediate” standard did not deny any employee the right to union representation as granted by the Act, nor did it prevent any union from bargaining with the employer directly involved in setting essential terms and conditions of employment in a workplace. The Law Center and the Association continue to fully support the “direct and immediate” standard for determining joint employer status and urges the Board not to move forward with its Proposed Rule.

Furthermore, the Administrative Procedure Act (“APA”) bars administrative agencies from acting arbitrarily and capriciously. The Supreme Court has explained that the APA demands the agency to “provide reasoned explanation for its action. . . . An agency may not, for example, depart from a prior policy *sub silentio*. . . . And of course the agency must show that there are good reasons for the new policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (internal citation omitted). Recently, the Supreme Court concisely held that “[t]he APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 592 U.S. ___, 141 S. Ct. 1150, 1158 (2021). The Proposed Rule fails this obligation as well.

such employees, gave such employees their daily assignments, reports, supplies, and directions, and held itself out as the party whom employees could contact if they encountered a problem during the work day); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (finding joint employer status where the putative joint employer “exercised substantial day-to-day control over the drivers’ working conditions,” was consulted “over wages and fringe benefits for the drivers,” and “had the authority to reject any driver that did not meet its standards” and to direct the actual employer to “remove any driver whose conduct was not in [the putative joint employer’s] best interests.”)

The majority justifies their decision to move forward with the Proposed Rule by alleging that it will establish “a definite, readily available standard [that] will assist employers and labor organizations in complying with the Act” and “reduce uncertainty and litigation over the basic parameters of joint-employer status” as opposed to deciding joint-employer status through adjudication.⁵ However, as explained in more detail in the NPRM’s dissent, the Proposed Rule will not accomplish its stated goals. It provides less certainty and predictability than the current rule, and amplifies that uncertainty and unpredictability going forward as it explicitly envisions joint-employer status to be determined through adjudication under the common law, not under the conditions of the Proposed Rule.

The 2020 Final Rule, as opposed to the Proposed Rule, provides clearer guidance that stakeholders understand ahead of time of what conduct will or will not violate the Act or trigger joint employer status. For restaurants making long-term planning decisions, predictability is highly beneficial. Given the arbitrary and capricious nature of the Proposed Rule, and its lack of reliable guidance to parties, the 2020 Final Rule should be defended in court, instead of being rescinded.

2. The *BFI* standard for determining joint employer status was amorphous, unstable and failed in its essential function, while the Proposed Rule is worse while erroneously claiming to return to the common-law standard.

As the Supreme Court has opined, “[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 569 U.S. 239, 253 (2012) (holding due process required fair notice even when regulations imposed no criminal penalty or monetary liability).

⁵ 87 FR 54645

Inherent in the notion of due process is the requirement that the obligation be clear enough that citizens can reasonably ascertain to whom it applies.

The “standard” the Board adopted in *BFI*, however, did not meet the basic requirements of fair notice and due process; rather, it merely allowed the Board to make post-hoc conclusions drawn after result-oriented inquiries. If the Board wished to find joint employer status, it could, because *BFI* was a standard without clear limits and without predictive guidance. *BFI* asserted that the required element of a common law employment relationship would limit the applicability of the new standard. *BFI*, 362 NLRB No. 186, at *13. However, the Board then failed to explain how the common law test—which was never developed to resolve disputes over which entity was an individual’s employer—should be applied to any of the numerous business arrangements that pervade our economy, or how any particular factor is to be weighed and the scales balanced.

The common law test was designed to distinguish between employee and independent contractor, not to distinguish among potential employers of a given employee.⁶ When there is no dispute that the workers in a group are, in fact, employees of some entity, many of the factors of the common law test are already satisfied and provide no meaningful guidance to help determine whether a joint employer exists. Further, as the dissent in the D.C. Circuit’s *BFI* decision pointed out, “employees of a true independent contractor cannot be considered employees of the company who hired the contractor” 911 F.3d at 1228 (citing 39 C.J. *Master and Servant* § 8 (1925) (“The relation of master and servant does not exist between an employer and the servants of an

⁶ Cf. *Clackamus Gastroenterology Associates v. Wells*, 538 U.S. 440, n.5 (in coming as close as the Court ever has to defining the term “employer” under a labor or employment law, the Supreme Court concluded that the common law factors for determining whether an individual is an employee [the factors the *BFI* standard expressly adopted] were “not directly applicable to this case [under the Americans with Disabilities Act] because we are not faced with drawing a line between independent contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer”).

independent contractor”); Restatement (Second) of Agency, § 5 (Am. Law. Inst. 1958) (“In no case are the servants of a nonservant agent the servants of the principal.”). Finally, as explained further below, the Act grants and protects the rights of employees as a group, not as individuals, making the application of the common law test ill-suited to the purposes of the Act and yielding results antithetical to the Act’s goals.

Furthermore, the Board’s application of the common law test to the facts of *BFI* demonstrated that the reserve or indirect test found in the Proposed Rule can be manipulated to improperly find almost any company is a joint employer if it contracts with another for services to be rendered on its property. Leadpoint, the actual employer in *BFI*, hired, fired, disciplined, paid, and supervised its employees. Nevertheless, because Leadpoint provided services that were part of BFI’s business operation on BFI’s property during operational hours set by BFI as property owner, the Board concluded that BFI was a joint employer of Leadpoint’s workers. *BFI*, 362 NLRB No. 186, at *18.

There is simply no clear delineation in the *BFI* standard, or the expanded standard found in the Proposed Rule, regarding where the concept of reserve or indirect control ends. Such a vague standard must inevitably lead to unpredictable, absurd, post-hoc determinations of joint employer status. Business relationships today typically involve an agreement or physical realities that necessarily but indirectly result in one entity impacting the terms and conditions of employment for the other’s employees. That should not be enough to trigger the full panoply of obligations that come with joint employer status.

Service contracts, in particular, often involve significant control by the customer over the service provider and, where a provider performs services on the customer’s property, the amount of control is even greater. That control, in turn, can indirectly impact the service provider’s

employees' terms and conditions of employment. The hours that the services are performed, the skills of the individuals who will perform them and the relevant conduct requirements to ensure the customer's employees, property and its own customers are reasonably protected—not to mention the amount the customer is willing to pay for the services—all necessarily impact the service provider's employees' terms and conditions of employment.

Under both the *BFI* and the Proposed Rule standards, the customers in such cases could be deemed to jointly employ the service providers' employees. Yet, it would be absurd to treat a homeowner as the joint employer of the workers a contractor hires to remodel her home simply because she and the contractor have agreed to a specified amount she will pay for the services, she controls the location and environment where the work is done, she dictates the hours that services will be performed, and she dictates what the workers must do to leave her home clean and free of hazards at the end of every day.

While the majority feels that the Proposed Rule “will reduce uncertainty and litigation over the basic parameters of joint-employer status,” the opposite is true. The Board's sudden effort to *sua sponte* reverse thirty years of settled precedent that produced detailed, varied factual scenarios analyzed in Board cases over the years and a 2020 Final Rule that could be relied on to replace it with an entirely new standard with no clear delineation and an increased risk of being found to be a joint employer when the company has no direct and immediate control over terms and conditions of employment will create more uncertainty and, therefore, more litigation.

In addition to leading to absurd results in its application, the *BFI* standard led to confusion among employers, who simply could not predict with any reasonable degree of confidence what degree of indirect or reserved control and what type of business relationships would prompt a joint employer finding. The same is true about the Proposed Rule. The lack of clear guidance on the

essential question of what behaviors and relationships can trigger joint employer status would leave employers and unions in the dark and lead to a great deal of unnecessary and expensive uncertainty and instability. All of that uncertainty would be very harmful to the franchise business model, which depends on clear distinctions between franchisor, franchisee, and franchisee's employees. For these reasons, we, once again, oppose the Proposed Rule and encourage the Board to keep the "direct and immediate" standard as found in the 2020 Final Rule.

Another problem with the Proposed Rule is the additional uncertainty it would bring into the recognition of "essential" terms and conditions of employment. The 2020 Final Rule offered an exhaustive list, while the Proposed Rule takes a "broad, inclusive" approach. The Proposed Rule exacerbates the uncertainty by hinting that whether a particular issue is "essential" may be contingent on the specific industry involved, and further, that the classification of "essential" terms may change over time.

Finally, as highlighted in more detail in the NPRM's dissent, in *Browning-Ferris Industries of California, Inc. v. NLRB*, the D.C. Circuit faulted the *BFI* decision for neglecting to delineate what terms and conditions are "essential" to make collective bargaining "meaningful" and instead simply declaring that it would adhere to an "'inclusive' and 'non-exhaustive' approach." 911 F.3d at 1221-22 (citation omitted). In remanding the case to the Board, the D.C. Circuit articulated its trust that, before finding a joint-employer relationship, the Board "would not neglect to . . . explain which terms and conditions are 'essential' to permit 'meaningful collective bargaining,'" *id.* at 1222—referring, in that last phrase, to the second step of the *BFI* standard.⁷ 87 FR 54656. Ignoring the required explanation called for by the D.C. Circuit in *BFI*, the majority in the Proposed Rule

⁷ See *BFI*, 362 NLRB at 1600 ("If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.").

keeps *BFI*'s "inclusive" and "non-exhaustive" approach to "essential" terms and conditions, while completely tossing out the second step of the *BFI* standard and pronouncing that "any required bargaining under the new standard will necessarily be meaningful." 87 FR 54656.

Meanwhile, the 2020 Final Rule specified the factors to be considered in making a joint-employer determination and made clear how they relate to each other. This allows parties to determine whether a joint-employer relationship would be found based on the text of the 2020 Final Rule itself, which reflects the boundaries established by the common law. The 2020 Final Rule also specifies the terms or conditions of employment that would be considered essential in determining joint-employer status. As explained above, the Proposed Rule does not.

3. The D.C. Circuit's decision underscored the need for the 2020 Final Rule with its clear guidance and does not support the Proposed Rule.

In its review of the *BFI* Board decision, the D.C. Circuit majority further clouded the matter. *Browning-Ferris Indus. of Cal.*, 911 F.3d 1195 (2018). Indeed, various news publications ran conflicting headlines discussing the decision, with one reporting the court had "upheld" the NLRB's *BFI* standard while many others reported that the court had "nix[e[d]"] it. Based on its reading and application of the common law, the D.C. Circuit majority claimed that it was "affirm[ing] the Board's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment." *Id.* at 1200. The current Board's majority relies on this and similar language for its Proposed Rule.

However, the court also held that, "in failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting, the Board overshot the common-law mark." *Id.* at 1220. The court went on to identify a number of facts demonstrating indirect or potential, but

unexercised, control that the Board had relied upon in *BFI*, but which would not provide meaningful help when conducting a common law analysis because they did not show joint control over “the essential terms and conditions of employment.”

Specifically, the court observed that setting “the objectives, basic ground rules, and expectations for a third-party contractor” would not provide meaningful guidance for a common law joint-employer analysis. *Id.* at 1220. Consequently, the court remanded the case to the Board for further consideration to “erect some legal scaffolding” to address, first, when a company is a common law joint employer and, second, when the putative joint employer possesses sufficient control over essential terms and conditions of employment to permit meaningful collective bargaining. *Id.*

However, in attempting to distinguish allegedly indirect control over essential terms and conditions of employment from indirect control over “quotidian aspects of common-law third-party contract relationships” such as “‘global oversight’ [that] is a routine feature of independent contracts,” the court’s examples of the former really amounted to *direct* control over essential terms and conditions of employment. For example, the court distinguished between “an advance description of the tasks to be performed under the contract” as “too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis” versus the “use of an intermediary . . . to transmit Browning-Ferris directions to a Leadpoint sorter . . . [that] may well be found to implicate the essential terms and conditions of work.” *Id.* at 1220. In reality, both define the workers’ job duties—the only question is how often and in what detail.

Ultimately, the court found the former to be simply a routine function of third-party business contracts in setting the general expectations, which can include the general services or products to be provided, the amount of time it should take to provide such products or services,

and the general hours of operations. The latter, on the other hand, appears more akin to *direct* control by the putative employer through detailed, day-to-day work directions—even if conveyed to the workers through their direct employer as an intermediary—that would have supported a joint employer finding under the pre-*BFI* standard. See *TLI, Inc.*, 271 NLRB 798, 798 (1984) (joint employer test evaluated whether the putative joint employer “meaningfully affects matters relating to the employment relationship such as . . . direction” and whether that entity’s control over such matters is direct and immediate) (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

Other examples relied on by the majority in the D.C. Circuit’s *BFI* decision similarly detail what is more akin to *direct* control by the putative joint employer, such as “preventing hiring of [driver] applicants of which he did not approve,” *Dunkin’ Donuts*, 363 F.3d 437,440 (D.C. Cir. 2004), and a hypothetical example where, “for example, a company entered into a contract with Leadpoint under which that company *made all of the decisions* about work and working conditions, *day in and day out*, with Leadpoint supervisors reduced to ferrying orders from the company’s supervisors to the workers, the Board could sensibly conclude that the company is a joint employer,” 911 F.3d at 1219 (emphases added).

Nothing in any of those examples suggests that truly indirect or reserved control can establish a joint employer relationship. Furthermore, even the D.C. Circuit majority opinion recognized that “this case does not present the question of whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship.” 911 F.3d at 1213. In the end, the ruling really only stands for the proposition that “both reserved authority to control and indirect control *can be relevant factors* in the joint-employer analysis.” *Id.* at 1222 (emphasis added).

Ultimately, the 2020 Final Rule reached the right balance and falls right within the holding in *BFI* when addressing the issues of reserved control and/or indirect control. Explicitly, as discussed by the dissent in the NPRM, the 2020 Final Rule stipulates that those forms of control are “probative of joint-employer status.” See § 103.40(a) of the Board’s Rules and Regulations. Each may serve to supplement and bolster evidence the putative joint employer either possesses or has exerted substantial direct and immediate control over workers’ essential terms.

To be sure, reserved control and indirect control may be relevant to whether the control possessed and exercised is substantial. 85 FR 11186. Nevertheless, by itself, indirect and reserved control cannot establish that one company is the joint employer of another’s employees, as the Proposed Rule asserts. See § 103.40(a) of the Board’s Rules and Regulations. The 2020 Final Rule properly requires proof that the putative joint employer actively played a role in establishing the employees’ essential terms. The D.C. Circuit left this issue open for the Board to determine when it remanded the *BFI* case back to the Board. We agree with the dissent in the NPRM that the Board appropriately did so in the 2020 Final Rule.

4. The 2020 Final Rule conforms with the common law and the language, legislative intent and fundamental policies of the Act; the Proposed Rule does not.

The Board’s *BFI* decision inflated the definition of “employer” beyond any cognizable meaning of that word and the current Board’s majority does so again in the NPRM. Although the Supreme Court has never defined the term “employer” under the Act, it has made it abundantly clear that direct supervision of the putative employee defines the employment relationship. *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167-68 (1971). In *Allied Chemical*, the Court rejected the Board’s attempt to expand the definition of the term “employee” beyond its ordinary meaning, observing that:

It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . “Employees” work for wages or salaries under direct supervision. . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings, but ordinary meanings.

Id. at 167-68 (quoting H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis in original)). Just as the Board cannot define the term “employee” in a manner inconsistent with its ordinary meaning, it cannot adopt a far-fetched definition of “employer” that dramatically expands it by eliminating the fundamental touchstone of an employer-employee relationship: substantial direct control of the employee. *Cf. NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (6th Cir. 1995) (“The deference owed the Board . . . will not extend, however, to the point where the boundaries of the Act are plainly breached.”).

If Congress meant “employee” to be defined by the fact that she is directly controlled by her employer, it is axiomatic that Congress meant “employer” to be the entity that is exercising that direct control. Moreover, the Act clearly limits the certification of any bargaining unit to employees of a single employer. Although the Board has developed the fiction of a single, joint employer, to be consistent with the dictates of the Act, its approach in *BFI* and the Proposed Rule are utterly inconsistent with the common law, the clear language of the Act, and the Act’s fundamental policies and purposes.

The current Board’s majority purported reliance on the common law test for agency based on independent-contractor-or-employee cases are based on a patently flawed misunderstanding of that test and most significantly, its history, which is the source of the common law test they claim to champion. The basic problem with the attempt to rely on the common law’s multi-factor test is

that it is a test developed for particular purposes, none of which were to resolve whether an entity is a joint employer of another's employees.⁸

Rather, the multi-factor test was largely developed to guide the resolution of whether defendant-entities were liable to third parties for the wrongs of one person (its servant) as distinguished from the wrongs of another (independent contractor) for which it was not liable. Accordingly, many of the test's factors provide no guidance in determining whether individuals who are concededly one entity's employees are also some other entity's employees.⁹

By the time a question of joint employment status arises, most factors would already have been answered in a manner that establishes the individuals at issue are employees, not independent contractors. Consequently, those factors are largely irrelevant to determining whether an entity other than their employer should be deemed to jointly employ them. *BFI*, and the Proposed Rule's reliance on these independent contractors' cases, utterly failed to explain how those factors would help in any way to resolve the issue of joint employer status under the Act.

Indeed, the Board's early attempts to ignore the distinction the common law had established to separate independent contractors and employees were met with resoundingly hostile Congressional reaction, resulting in the Labor Management Relations Act (more commonly called

⁸ Although the common law was later restated (in 1958) as a multi-factor test applicable beyond questions of *respondeat superior* liability, it was not a restatement of court decisions interpreting federal labor and employment laws. At the time, there simply were too few federal labor and employment laws to interpret and the one with the longest history, the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 et seq., came with a unique and expansive definition of "employer" provided by Congress (i.e., "any person acting directly or indirectly in the interest of an employer in relation to an employee"). *Id.* at § 203(d).

⁹ These factors include (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, at 751-752 (1989).

the Taft-Hartley Act), 29 U.S.C. § 141-197. The Taft-Hartley Act sought to curtail the Board's expansion of liability under the Act to entities that were not common law employers of individuals because those individuals were independent contractors, not employees (because the putative employers did not directly supervise them).

Another limiting change Congress made through the Taft-Hartley Act was to preclude the Board from certifying a unit based solely on the extent to which a union had been successful in organizing; instead, the unit must be appropriate for bargaining. 29 U.S.C. § 159(c). Clearly, the purpose of the Act today is not merely to encourage collective bargaining for its own sake but, rather, to encourage collective bargaining that can meaningfully address the workplace concerns of a group of an employer's employees that shares a community of interest.

The attempts to anchor the analysis in the common law agency test ignores not only the purpose for which the common law test was developed to serve, but the unique nature of the statute Congress has entrusted the Board to interpret and administer. The NLRA is unique among the many labor and employment laws Congress has adopted because it focuses on the rights of groups of employees. Congress did not generally provide individual employees protections under the Act unless they were acting in concert with or on the behalf of others.

Moreover, the Act's purpose of encouraging collective bargaining is a process that requires individual employees to be part of an "appropriate unit" (*i.e.*, group) to participate. Simply put, the common law test, developed to determine whether an individual is an employee of anyone (or an independent contractor), improperly ignores the Act's purpose and focus on groups rather than individual employees.

Furthermore, as the dissent in the NPRM points out, the D.C. Circuit explained in *Browning-Ferris v. NLRB* that the common-law independent-contractor standard and the joint-

employer standard also have another significant difference in that the joint-employer standard has a crucial second step that asks who is exercising control, when, and how. 911 F.3d at 1215.

The court stated that “using the independent-contractor test exclusively to answer the joint-employer question would be rather like using a hammer to drive in a screw: it only roughly assists the task because the hammer is designed for a different purpose.” *Id.* The Proposed Rule purports to rely on this very court decision, while ignoring the second step of the common-law joint-employer standard identified by the D.C. Circuit. The NPRM does so because it attempts to eliminate any requirement of actual exercise of control, which makes it inconsistent with the common law.

Conversely, the Board’s 2020 Final Rule makes clear that an occasional, individual exercise of direct control would not make an entity a joint employer under the Act. The 2020 Final Rule recognized that deeming such an entity to be a joint employer of the other’s employees based on an atypical exercise of direct control toward a single employee of the other entity would undermine the purpose of the Act by creating and imposing unworkable bargaining relationships. The Act is concerned with fostering effective collective bargaining and stable labor relations, not with searching for any opportunity to impose bargaining obligations and liability on entities that do not exercise substantial direct and immediate control over a group (*i.e.*, appropriate unit) of employees.

The “direct and immediate control” test the Board had consistently applied for decades before *BFI*, which is enshrined in the current 2020 Final Rule, focuses on the relevant inquiry: whether one entity actually exercises substantial direct and immediate control over meaningful employment terms and conditions of another’s group of employees sufficient to deem it a joint employer under the Act. The Board’s historical standard codified in the 2020 Final Rule fosters

the Act's purposes while remaining fully consistent with the common law. It is a standard better suited to the purpose for which it was developed and comports with the language, legislative intent, and fundamental policy of the Act. Therefore, the Law Center and the Association oppose the new standard found in the Proposed Rule and support instead the substantial direct and immediate control standard found in the 2020 Final Rule.

Further, the majority also fails to recognize the obstacles created by forcing two different businesses to bargain over the terms of employment for a group of employees over which only one of them exercises substantial direct control. Proposed contract terms that might be crucial to one of the employers, and for which it might be willing to make significant concessions, might be irrelevant to, or contrary to the interests of, the other—leading to less effective bargaining. Moreover, some issues that might be significant to the union, and which might be acceptable to the direct employer if negotiating alone, likely will be barriers to any agreement in a joint-employer situation because the direct employer will not agree to be bound to certain terms when its contract with the other joint employer can be terminated on short notice. It belies logic to assume that, simply because unions want to have both businesses at the bargaining table, more effective bargaining will result. Indeed, precisely the opposite is true.

Viewed in practical terms, the Proposed Rule's standard is plainly intended to change the way businesses negotiate with one another and structure their relationships. The Proposed Rule will inevitably cause friction between businesses to a far greater extent than it will facilitate the negotiation of employment relationships. Congress has made the latter the focus of the Act and its regulation the proper function of the Board. Congress, however, in no way has authorized the Board to unnecessarily interfere with, impair, or invalidate business-to-business relationships.

5. The “direct and immediate” standard fits the traditional business relationships in the foodservice industry and benefits industry stakeholders.

In contrast to the problem of amorphous expansion of joint employer status promised by the Proposed Rule’s standard, the 2020 Final Rule’s “direct and immediate” standard suits the distinct challenges facing the restaurant industry. The restaurant industry relies heavily on the franchise model, which functions as an arms-length business relationship that benefits both franchisors and franchisees, as well as their respective employees and franchise customers.

The franchisor sets standards to maintain brand uniformity, such as what food the restaurant serves and how it is prepared. On the other hand, the day-to-day operations of the restaurant—whom to hire or fire, business hours, setting wages and schedules—is entirely within the control of the franchisee restaurant.¹⁰ The Board’s traditional “direct and immediate” joint employer standard allowed this business model to thrive, and has therefore “helped this economy create millions of restaurant jobs through the franchisor/franchisee model.”¹¹

As the dissenting opinion in the Board’s *BFI* opinion recognized, “in many if not most instances, franchisor operational control has nothing to do with labor policy but rather compliance with federal statutory requirements to maintain trademark protections...Federal franchise law recognizes this benefit and requires that the franchisor maintain the mark by maintaining enough control over the franchisee to protect consumers. However, even while franchise law requires some degree of oversight and interaction, it was never the intent of Congress, by that interaction, to make

¹⁰ See Jerry Reese, *Testimony on Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship, before the U.S. House Committee on Education and the Workforce*. (July 12, 2017) (“At Dat Dog, we provide our franchisees a certain level of independence with which they can operate their business, allowing them to offer flexible concepts for their restaurants, like indoor/outdoor dining, areas for live music, beer gardens or art markets.”), available at https://edworkforce.house.gov/UploadedFiles/Reese_-_Testimony.pdf.

¹¹ See letter from Angelo I. Amador, Vice President of Labor & Workforce Policy, National Restaurant Association, to David P. Roe, Chairman, Health, Employment, Labor, and Pensions Subcommittee, Committee on Education and the Workforce, U.S. House of Representatives (June 24, 2014).

a franchisee the agent of its franchisor for any purpose.” *BFI*, 362 NLRB No. 186, at **45-47 (Members Miscimarra and Johnson, dissenting). Accordingly, “[f]or many years, the Board has generally not held franchisors to be joint employers with franchisees, regardless of the degree of indirect control retained.” *Id.*

Unfortunately, the franchise model in the restaurant industry would become much more uncertain under the Proposed Rule’s joint employer standard. Businesses lack meaningful guidance to determine how much reserved or potential control over a franchisee could trigger a finding of joint employer status. Worse yet, businesses lack meaningful guidance to determine when a franchisor’s necessary exercise of control to protect its brand and trademarks could inadvertently trigger joint employer status.

Indeed, the majority acknowledges that “Franchising is a method of distributing products or services in which a franchisor lends its trademark or trade name and a business system to a franchisee, which pays a royalty and often an initial fee for the right to conduct business under the franchisor’s name and system.” 87 FR 54660. But it then follows with the ominous and vague statement that “Franchisors generally exercise some operational control over their franchisees, which potentially renders the relationship subject to application of the Board’s joint-employer standard.” *Id.* In other words, under the Proposed Rule, franchisors could be inappropriately put at risk of being deemed joint employers merely by undertaking the very steps that are necessary for franchisors to maintain their marks under the Lanham Act and federal franchise law. That should not be the law.

The Proposed Rule should also be rejected because the uncertainty and increased risk of liability originally created by the Board’s *BFI* decision led to a dramatic rise in operational costs at certain franchise restaurants. For example, prior to *BFI*, it was common for franchisors to deliver

free employment-related education or assistance to franchisees—such as providing training, recruitment materials, employee handbooks, or educational materials on new pertinent regulations.¹² Afterwards, because some franchisors were concerned that providing these materials could trigger joint employer status, some franchisees were forced to pay out of pocket for these services. That is money that a franchisee cannot reinvest in his restaurant, use to hire new workers, or use to grant wage increases. Yet to forgo education, training, or other such assistance creates a risk of liability on the part of the franchisee that is detrimental to the franchisee and franchisor alike.¹³

We also disagree with the NPRM’s assertion that an Initial Regulatory Flexibility Analysis (“IRFA”) for the Proposed Rule is not required because the rule will not have a significant economic impact on a substantial number of small entities, particularly after finding that 125,989 franchisees (96.5% of total) are small businesses. 87 FR 54659-60. We also disagree that the total cost for “reporting, recordkeeping and *other compliance requirements*” will only be \$151.51 for small businesses, particularly franchisees. 87 FR 54661-62. Our experience tells us that the Proposed Rule, if finalized, would have the same chilling effect, if not greater, than the *BFI* decision had, harming restaurant owners and employees alike and increasing compliance and other costs by much more than “\$151.51.”

¹² See Tamra Kennedy, *Testimony on H.R. 3441, the Save Local Business Act, before the Subcommittees on Workforce Protections and Health, Employment, Labor and Pensions*. (September 13, 2017).

¹³ Likewise, the majority also claims without evidence that the COVID-19 pandemic revealed that workplace health and safety issues should be considered in determining joint-employer status. 87 FR 54647. Conversely, we are aware of several examples in which franchisors went beyond any requirements from the federal government to provide tools for franchisees to help keep the American workforce as safe and healthy as possible. These measures included compiling and providing information on the ever-changing regulations, sharing best practices, and facilitating vaccination drives. If these types of actions could be considered to trigger joint employer status, franchisors would be deterred from offering franchisees similar assistance in any future crisis.

The U.S. Small Business Administration Office of Advocacy (Advocacy) reached a similar conclusion.¹⁴ Congress established the Office of Advocacy to represent the views of small entities before Federal agencies and Congress.¹⁵ “Advocacy is concerned that the Board has underestimated the compliance costs and burden of this rule for small businesses” and “encourages the Board to reassess the compliance costs of this regulation.”¹⁶ Advocacy reached this conclusion after hearing from small businesses representing “a variety of industries including construction, finance, hospitality, and transportation.”¹⁷ Not surprising, Advocacy finds that some of the issues related to the costs and burdens of the Proposed Rule are caused by the same concerns we raise in our comments above, i.e., the Board’s Proposed Rule with its “new joint employer standard is too ambiguous and broad, providing no guidance for contracting parties on how to comply or how to avoid liability.”¹⁸

In contrast, the 2020 Final Rule’s codification of the “direct and immediate” joint employer standard strikes the right balance by allowing a franchisor the ability to monitor and oversee the performance of its franchisees for reasons such as brand protection and consistency, while ensuring that the franchisor will not be held liable for workplaces over which they have little or no control.

¹⁴ See Advocacy’s public comments signed by Major L. Clark, III, Deputy Chief Counsel and Janis C. Reyes, Assistant Chief Counsel on “Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641” addressed to Chairman McFerran and Ms. Rothchild (November 29, 2022).

¹⁵ See Pub. L. 94-305.

¹⁶ See Advocacy’s public comments on the “Standard for Determining Joint-Employer Status” at 5.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 1 and 5.

It provides certainty and predictability for restaurant owners and provides them with the confidence to reinvest capital back into their businesses and their employees.¹⁹

Even the General Counsel’s brief in the *BFI* case recognized that “[t]he Board should continue to exempt franchisors from joint employer status to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand.” *Id.* (Members Miscimarra and Johnson, dissenting, and discussing the General Counsel’s memo as it related to franchises). Accordingly, if the Board does not reject the Proposed Rule, at a minimum it should make expressly clear that the Proposed Rule does not apply to franchise agreements or other provisions relating to legitimate business reasons such as brand control and product quality.

6. The examples in the 2020 Final Rule provide helpful guidance to address concerns regarding various common business arrangements raised by the *BFI* decision.

The 2020 Final Rule should be preserved for the additional reason that it provides valuable examples that address the concerns raised by the expansive test established in *BFI*. As the dissent noted in that case, the *BFI* decision established “an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships” even on just indirect control or reserved, but never exercised, control. 362 NLRB No. 186, at *25. That “new test leaves employees, unions, and employers in a position where there can be no certainty or predictability regarding the identity of the ‘employer,’ . . . threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties.” *Id.*

¹⁹ As noted in the RLC Rulemaking Petition, *supra* n.1, a predictable and easily understood joint employer standard would also help to encourage apprenticeship programs in the hospitality industry.

The 2020 Final Rule examples serve to address multiple common business relationships that do not involve an exercise of control over employment but could nonetheless be misinterpreted to support a joint-employer finding under the *BFI* standard or the Proposed Rule. As the dissent to the NPRM points out, these examples are a “primary benefit of the 2020 Rule.”

The examples clearly do not—and cannot—address every factual situation that may arise in a given alleged joint-employer case. However, they identify common business relationships and contracts that, while they may indirectly relate to terms and conditions of employment, should not create a joint-employer relationship unless the putative employer actually exercises direct and immediate control over essential terms and conditions of employment.

For example, a cost-plus contract allowing the employer discretion to set wages and benefits is very common in current subcontracting relationships. Obviously, cost-plus provisions can have an indirect effect on wages—while the customer or other putative joint employer is not directly setting particular employees’ wage rates, the direct employer rationally would not set wage rates above what it can recover through the cost-plus contract. However, even the D.C. Circuit majority in *BFI* recognized that a cost-plus contract, “a frequent feature of third-party contracting and sub-contracting relationships,” should not in and of itself establish a joint employer relationship. 911 F.3d at 1220.

Similarly, it is important to recognize that one business with a contractual relationship with another business may set standards or raise concerns regarding the product or services being provided without becoming a joint employer of its counterparty’s employees. In the same vein, it should be recognized that a franchisor may set general expectations—such as product quality and production, uniforms with the company trademark and general hours of operation—without becoming a joint employer of the franchisee’s employees, absent evidence that the franchisor

directly controlled essential terms and conditions of employment, such as setting specific employees' schedules, granting or denying leave requests, or making hiring and disciplinary decisions. Furthermore, the Board should recognize that property owners may have legal obligations to address serious misconduct or risks on their premises—such as assault or property damage—and not inappropriately convert property owners into joint employers merely because they seek to fulfill those legal obligations.

7. The Board already resolved this issue through its prior rulemaking process and should now defend it.

Adopting the Proposed Rule risks the perception of a policy about-face driven by shifts in political control. Such a perception would erode confidence in the Board as an institution and in its jurisprudence. Adjudication is susceptible to trending political currents, creating a situation where “new” Boards reverse decisions made by “old” Boards, as Board majorities change with presidential administrations. Reversals and re-reversals on issues of fundamental importance under the Act have unfortunately become commonplace despite their pervasive impact and consequent controversy. Lack of predictable decision-making and respect for long-established precedent inevitably undermines the Board’s credibility with the federal judiciary and the public.

Those circumstances create uncertainty that undermines the rule of law, leaving those impacted with questions but lacking meaningful guidance. Such uncertainty is particularly damaging to the Board’s constituents—businesses, labor unions, and employees—because they cannot understand their rights and obligations at any given time, rendering it impossible for long-term planning with any reasonable expectation that a current Board decision will be the same rule four years from now much less farther in the future.

Unpredictability and chaos in the law harms more than the Act’s stakeholders; it damages the rule of law that depends upon citizens knowing their rights and obligations before they are

required to follow them or are punished for violating them. Moreover, one of the Board's primary purposes is to ensure stability in labor relations, but the uncertainty the Board has created by reversing long-standing precedent without clear evidence of compelling justification undermines the stability the Board is charged to provide. It risks doing so again now with a Proposed Rule that rescinds a rule finalized less than three years ago and without it being tested in court, as it has not been applied in a single case. 87 FR 54652. Moving forward with the Proposed Rule would undercut the Board's own regulatory authority and further damage the Board's credibility.

The Board's 2020 Final Rule does provide an advantage over adjudication that is unique in rulemaking generally, as it adopted a standard that immediately included 30-plus years of Board and court development and explanation. It essentially codified the "direct and immediate" standard that, until *BFI*, had been settled law for decades. Such transparency and clarity is crucial to the restaurant industry members, many of which are small businesses and franchisees that operate on small profit margins. Those margins can quickly evaporate when businesses must re-evaluate and repeatedly change long-term plans due to ambiguous, unanticipated, and whipsawing Board directives on far-reaching issues that significantly impact business models and operations. Rescinding the 2020 Final Rule and re-defining what constitutes a joint employer under the Act with an amorphous and unstable standard like the Proposed Rule would erode the Board's purpose of fostering stability in labor relations.

IV. CONCLUSION

The rationale that led the Board to adopt a "direct and immediate" control standard three decades ago remains fully applicable today. The Board in the 2020 Final Rule, recognizing that fact, codified the "direct and immediate" standard that prevailed prior to *BFI*. The Restaurant Law Center urged the Board then to codify the "direct and immediate" standard now found in the 2020

*Ms. Roxanne Rothschild
Re: RIN 3142-AA21
December 6, 2022*

Final Rule, just like it is urging the Board now not to throw away years of work and analysis that led to a workable standard with clear guidance.

We thank you for the opportunity to submit these comments and look forward to working with the Board moving forward to continue to bring clarity to this issue that affects so many business relationships in our industry.

Sincerely,



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