IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; AMERICAN HOTEL AND LODGING ASSOCIATION; ASSOCIATED BUILDERS AND CONTRACTORS; ASSOCIATED GENERAL CONTRACTORS OF AMERICA; COALITION FOR DEMOCRATIC WORKPLACE; INTERNATIONAL FRANCHISE ASSOCIATION; LONGVIEW CHAMBER OF COMMERCE; NATIONAL ASSOCIATION OF CONVENIENCE STORES; NATIONAL RETAIL FEDERATION; RESTAURANT LAW CENTER; TEXAS ASSOCIATION OF BUSINESS; and TEXAS RESTAURANT ASSOCIATION,

Plaintiffs,

v.

NATIONAL LABOR RELATIONS BOARD; LAUREN MCFERRAN, Chair; MARVIN KAPLAN, Board Member; GWYNNE WILCOX, Board Member; and DAVID PROUTY, Board Member,

Defendants.

Civil Action No. 6:23-cv-553

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Board tries to run away from the unprecedented and unduly expansive nature of its newly minted definition of "joint employer." But in doing so, the Board renders its Rule circular and superfluous. According to the Board, there are two steps for establishing that an entity is a joint employer: first, the purported joint employer "must qualify as a common-law employer of the disputed employees," and second, "it must also have control over one or more essential terms and conditions of employment, as those are defined in the Rule," of the same employees. Defs.' Cross-Mot. for Summ. J. 9 ("Cross-Mot."), Dkt. 34. And according to the Board, the portion of the Rule allowing for joint-employer status based on reserved or indirect control applies "only *after* a common-law employment relationship is established" between the joint employer and those employees. *Id.* at 34.

The Board's misdescription of how the Rule works is nonsensical. There will *never* be a scenario where an entity that satisfies the first step (common-law employer) does not satisfy the second step (control over any essential term of employment). An entity cannot be a "common-law employer" unless it controls the material details of how its employees perform work. The Board does not and cannot provide any example where an entity is a common-law employer of a particular employee but lacks control (actual or reserved; direct or indirect) over at least one essential term of employment for the same employee. Thus, the Board is left with a rule in which the second step does no work and where a joint employer is simply a common-law employer. That is no rule at all—and seemingly contrary to the Board's own understanding. For that reason alone, the Rule is arbitrary and capricious.

In any event, the Board overreads the common law. The Board ignores the established common-law consensus that a joint employer must share and exercise direct and substantial control over the essential terms and conditions of employment of the same employees. Against that

consensus view, the Board insists that even unexercised, indirect, and de minimis control over a third party's employees is enough—to be determined on an "iterative" basis—to form a joint employment relationship. But under the relevant common-law agency principles, a common-law employer must share a sufficient quantum of actual and direct control over the essential terms and conditions of employment of the employees of another common-law employer to be considered a joint employer.

Not only does the Rule fail to satisfy that requirement, it is contrary to Congress's purpose in requiring collective bargaining to create industrial peace through comprehensive labor agreements. The Board's brief confirms the practical effect of the Rule: the Rule makes it nearly impossible for actual employers to negotiate a comprehensive collective bargaining agreement without getting bogged down in piecemeal bargaining alongside putative joint employers who exercise no actual, direct, or substantial control over even a single term or condition of employment. That can hardly be the type of meaningful bargaining required by the NLRA. The Rule is thus contrary to law.

Finally, the Board ignores the many destabilizing problems that the Rule creates for business arrangements across industries. The Board repeatedly insists that it was required to replace the clear and easily applied standard in the 2020 joint employer rule with the new Rule's vague test, which the Board promises to flesh out through case-by-case adjudications. Yet the Board declines to take a position (over and over) on how its new Rule would operate in even the most routine situations. Again, that is tantamount to having no rule. For that reason as well, the Rule is arbitrary and capricious.

For any or all of these reasons, this Court should set aside the Rule.

ARGUMENT

I. THE BOARD'S MISCONCEPTION OF THE RULE RENDERS IT NONSENSICAL

The Board accuses Plaintiffs of a "fundamental misunderstanding" of the Rule that "elides the threshold inquiry" and "assumes that *any* reserved or indirect control will automatically create a joint-employment relationship." Cross-Mot. 9. But the Board's supposedly more restrictive, two-step conception strips the Rule's primary inquiry of all substance: it collapses the Rule into the empty assertion that a joint employer is a common-law employer, as determined by the Board on a "case-by-case" basis. That is reason enough to deem the Rule arbitrary and capricious.

For starters, it is the Board that misdescribes the Rule. What the Board now calls the "first step" (29 C.F.R. § 103.40(a)) simply captures the undisputed point that a *joint* employer must be an "employer" in the first place, while the so-called "second step" (*id.* § 103.40(b)-(f)) sets forth the Board's overly expansive view of what it means to be an "employer" under the common law (and, thus, under the NLRA). Indeed, the Rule is explicit about that. Although subsection (e) purports to define control "under common-law agency principles," the Rule instead specifies those "principles": "For the purposes of this section," authority to control any essential term and condition of employment is sufficient "regardless of whether control is exercised," and exercising power to control indirectly is sufficient "regardless of whether the power is exercised directly." *Id.* § 103.40(e). As explained in Plaintiffs' opening brief, these provisions radically expand the common law.

The Board now retreats from the sweeping implications of its attempted redefinition by proposing a two-step framework—but, in doing so, it renders its promulgated Rule a complete muddle. According to the Board, determination of joint-employer status under the Rule has two separate steps: "First, as a threshold matter, the entity in question must qualify as a common-law

employer of the disputed employees (as opposed to, for instance, an independent contractor)." Cross-Mot. 9. Second, "*if and only if* the entity is a common-law employer," the entity "must also have control over one or more essential terms and conditions of employment, as those are defined in the Rule, to qualify as a joint employer." *Id.* Per the Board, "[t]he portion of the rule allowing for joint-employer status under the Act based on reserved or indirect control alone comes into force only *after* a common-law employment relationship is established." *Id.* at 34.

But there will never be a scenario in which an entity satisfies the first step but not the second, because entities that satisfy the first step *necessarily* satisfy the second. Under the common law, an entity cannot be an "employer" unless it controls "the material details of how the work is to be performed." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995). That is why the factors defining the common-law employment relationship "focus on the master's *control* over the servant," and why the Restatement distinguishes between servants and independent contractors by first looking at "'the extent of control' that one may exercise over the details of the work of the other." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003) (emphasis added) (quoting RESTATEMENT (SECOND) OF AGENCY § 220(2)(a)); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-324 (1992) (listing employment-relationship factors). Thus, a common-law employer will *always* have control over at least one essential term and condition of employment. So the second step adds nothing to the analysis.

The Board's claim that the second step ensures "meaningful collective bargaining" (Cross-Mot. 23) does not change that conclusion. By definition, all "employer[s]" under Section 2(2) of the NLRA—which, per the Rule, "is governed by common-law principles," *id.* at 18—can meaningfully bargain their employees' essential terms and conditions of employment. *See* 29 U.S.C. § 152(2). Section 8(a)(5) prohibits employers from "refus[ing] to bargain collectively with

the representatives of [their] employees." *Id.* § 158(a)(5). Section 8(d), in turn, defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *Id.* § 158(d). And section 9(a) sets forth the procedures for employees to choose their bargaining representatives. *See id.* § 159(a). Together, those provisions "establish the obligation of the employer to bargain collectively, 'with respect to wages, hours, and other terms and conditions of employment.'" *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971) (quoting 29 U.S.C. § 158(d)). In other words, there is no need for a "second step" to ensure that a common-law employer can engage in meaningful collective bargaining because, if an entity is a common-law employer of certain employees under step one of the Rule—and thus necessarily qualifies as an "employer" under Section 2(2) of the NLRA—that entity *already* has "the obligation . . . to bargain collectively" with those employees.

That the Board fails to come up with *any* example (real or hypothetical) of its purported two-step process in action confirms the process's incoherence. The Board does not describe a single situation in which an entity would qualify as a common-law employer of "particular employees," 29 C.F.R. § 103.40(a) (2023), thus satisfying the first step of the Rule's test, but lack sufficient control (especially as capaciously defined in the Rule) over "the same particular employees" to be their joint employer, *id.* § 103.40(b). Nor does the Board point to a scenario in which an entity would qualify as a common-law employer but lack the ability to meaningfully bargain the terms and conditions of employment. There is none.

In short, the Board cannot avoid reality. If the Board is correct about how its Rule works, the "second step" of its two-step process for determining joint-employer status is superfluous:

every common-law employer of "particular employees" necessarily has at least some control (actual or reserved; direct or indirect) over at least one essential term and condition of employment of those "same particular employees." The Board is thus left with a one-step rule that the Board itself apparently did not intend: a joint employer under the NLRA is simply a common-law employer. No one could call such a roundabout rulemaking reasonable.

What's more, the Board leaves the critical (if not sole) step of common-law employment "to be determined case by case, with the [Board] here saying, in effect, 'trust us, we'll be reasonable,' even though nothing in the text of the rule constrains the Board from drawing the line unreasonably." 88 Fed. Reg. 73,946, 73, 992 (Oct. 27, 2023). For that reason alone, the Rule is arbitrary and capricious. *See ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) ("If a purported standard is indiscriminate and offers no meaningful guidance to affected parties, it will fail the requirement of reasoned decisionmaking.") (internal quotation marks omitted); *see also Trans-Pac. Freight Conf. of Japan/Korea v. Federal Mar. Comm'n*, 650 F.2d 1235, 1244-1245 (D.C. Cir. 1980) (regulated parties must be "given advance notice of the standards to which they will be expected to conform in the future," so that "uniformity of result is achieved").

II. THE RULE IMPERMISSIBLY BROADENS THE DEFINITION OF "JOINT EMPLOYER" FAR BEYOND ITS COMMON LAW UNDERSTANDING

A. To Be A Joint Employer, The Common Law Requires Shared Control To Be Actual, Direct, And Substantial

Even if the Board's conception were coherent, the Rule still contradicts the common law (which the Board acknowledges it receives no deference in interpreting, *see* Cross-Mot. 17). When the NLRA was amended in the Taft-Hartley Act to include its current definitions of "employer" and "employee," the common-law consensus for joint-employer status required shared control over the same employees to be actual, direct, and substantial. The Rule—which does not require

any such control—ignores that basic principle. Both the Board's Rule and its rescission of the 2020 Rule are thus contrary to law.

1. The Rule Improperly Permits Joint Employer Status Without Actual And Direct Control

The Board does not dispute that the Rule abandons any requirement that joint employers actually exercise control, let alone direct control, over the same employees. Pls.' Mot. 18-21. The Board contends that the common law requires much less—that even unexercised or indirect potential control is enough. But the Board has not provided a single example in which unexercised or indirect control was dispositive of joint-employer status under the common law. Every case that the Board cites finding joint employment involved actual exercise of direct control over employees. As Member Kaplan wrote with respect to those same cases:

> A reader might reasonably expect the [Board] to follow up [its] assertions with citations to judicial decisions, involving the NLRA and other materially similar statutes, in which the courts have found joint-employer status based exclusively on a never-exercised contractual right to control and/or indirect control of an essential term and condition of employment. Such readers will be sorely disappointed.

88 Fed. Reg. at 73,992.

Reserved control. None of the Board's cases (Cross-Mot. 24-26, 29-31) found joint employment based on reserved control alone. In *NLRB v. Zayre Corp.*, the Fifth Circuit found that the putative joint employer actually engaged in the "direct exercise of control over the employees of the licensees, their wages, hours, and other working conditions." 424 F.2d 1159, 1165 (5th Cir. 1970). Similarly, in *Maltz v. Jackoway-Katz Cap Company*, there was no dispute that the putative joint employer "exercised" control over the employees, including directing the specific details of their work through daily oral "commands" to those employees. 82 S.W.2d 909, 918 (Mo. 1934). The only dispute was whether the putative joint employer had the legal "right to assert or exercise control" or whether it had contractually relinquished that right. *Id.*

That the Restatement and many of the cases from the time of the Taft-Hartley Amendments *also* required the right to exercise control (in addition to actual exercise) only underscores the shortcomings of the Rule. All this means is that under the common law (and unlike the Rule), the *unauthorized* exercise of control would not establish a joint-employment relationship. *Compare, e.g.*, RESTATEMENT OF EMPLOYMENT LAW § 1.04 (joint employment assumes two employers with "the right to control an employee's conduct" who have "exercised control over the employee and both benefited to some degree from the employee's work"), *with* RESTATEMENT (FIRST) OF AGENCY § 2 cmt. b (person who "who contracts" to do work "for another and who reserves no direction over the conduct of the work" is not a "servant" because he is "subject to no control as to his conduct"). And all the cases cited in Plaintiffs' opening brief involved the actual exercise of control over employees, too. *See* Pls.' Mot. 18-21; *see also Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75-76 (D.C. Cir. 1990) (holding "[t]he extent of the actual *supervision* exercised by a putative employer over the 'means and manner' of the workers' performance is the most important element" of joint employment). Indeed, the Fifth Circuit has expressly required it when "endors[ing]" the Board's "actual control" standard from *NLRB v. Browning–Ferris Industries Inc.* ("*Browning-Ferris I*"), 691 F.2d 1117 (3d Cir. 1982)—holding that the "reservation of [the] right to discipline [another employer's] staff for violation of rules and policies is insufficient to establish a joint-employer finding, absent evidence that the right was ever exercised." Pls.' Mot. 21 (alterations in original) (quoting *Adams & Assocs., Inc. v. NLRB*, 871 F.3d 358, 377 (5th Cir. 2017)). The Board's only response (Cross-Mot. 30) is that the *Browning-Ferris I* test (as adopted by the Fifth Circuit) might not have accurately reflected the common law, but (again) its contrary cases come up woefully short.

Indirect control. Nor did any of the Board's cases (Cross-Mot. 34-36) find joint employment based on indirect control alone. In fact, most of the Board's cases applied a broader test than the common law—the "economic realities" test—that Congress rejected in the Taft-Hartley Amendments. And those cases required direct and actual control, too. For example, in *Butler v. Drive Automotive Industries of America, Inc.*, the putative joint employer exercised a "substantial degree of control over the circumstances of [the putative employee's] employment," handling the "day-to-day supervision of [the employee] on the factory floor." 793 F.3d 404, 415 (4th Cir. 2015). In *U.S. EEOC v. Global Horizons, Inc.*, the putative joint employer actually hired the employees and assumed the obligation "to provide [the employees] with housing, transportation, and either low-priced meals or access to cooking facilities." 915 F.3d 631, 639 (9th Cir. 2019).

The Board seeks to distract from the lack of common-law support for joint employment based on indirect control alone. It argues that "the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship." Cross-Mot. 32 (quoting *Browning-Ferris Indus. of Cal., Inc. v. NLRB* ("*Browning-Ferris II*), 911 F.3d 1195, 1217 (D.C. Cir. 2018)). But Plaintiffs do not dispute that an entity's sufficient control over putative employees through a third party—including, for example, an "instruct[ion to] supervisors of its sub-entity to terminate . . . employees," Cross-Mot. 34-35—could create a joint-employment relationship. The key is that such use of an intermediary would constitute direct, not indirect, control. As the dissent explained, "an intermediary (e.g., a supervisor employed by the undisputed employer) who operates as a mere conduit of the putative joint employer's commands functions as its agent." 88 Fed. Reg. at 73,991 n.434; *see id.* ("Under the 2020 Rule, control exercised through an intermediary could establish joint-employer status if it was otherwise

sufficient."). Under those circumstances, the putative joint employer "is exercising control even more directly than when it engages in collaborative decision-making with the undisputed employer, which is direct control." *Id.* That uncontroversial point explains the Fifth Circuit's decision in *NLRB v. Deaton, Inc.*, 502 F.2d 1221 (5th Cir. 1974), on which the Board relies (Cross-Mot. 31-32), where the joint employer forced the undisputed employer "to act as conduits for [the joint employer's] control over" the employees, *id.* at 1223 n.3.

By contrast, the common law (unlike the Rule) has never permitted a joint employment finding based on an entity's control over conditions that only indirectly affect a putative employee's terms of employment. For example, in *Shankle v. United States*, the Fifth Circuit held that air force officers who planned and approved civilian pilots' flight formations were not the pilots' employers because the officers' control over the pilots was too "indirect and attenuated." 796 F.2d 742, 746-747 (5th Cir. 1986). The Rule ignores that critical distinction and "leave[s] the door open" to a joint employer finding through the "kinds of indirect control" that have never created an employment relationship under the common law. 88 Fed. Reg. at 73,991 n.434.

The Board's argument that indirect (or reserved) control "can be [a] relevant factor[] in the joint employment analysis" is a straw man. Cross-Mot. 31 (alterations in original) (quoting *Browning-Ferris II*, 911 F.3d at 1222). Everyone agrees that such control can be *relevant*. Although the Board now refers to the 2020 Rule's purported "extreme marginalization of reserved and indirect control" (Cross-Mot. 34), the 2020 Rule expressly stated that reserved and indirect control can be "probative"—just not dispositive. *See* 29 C.F.R. § 103.40(a) (2020) (evidence of indirect control and reserved but never exercised authority "is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment").

In any event, *Browning-Ferris II* declined to find joint employment even though the facts showed *actual and direct* control. 911 F.3d at 1213 ("Browning-Ferris both had a 'right to control' and had 'exercised that control"); *id.* at 1218 ("[The Board's] concern about whether indirect control can be 'dispositive' is not at issue in this case because the Board's decision turned on its finding that Browning-Ferris exercised control 'both directly and indirectly.'"). That is why the case did "not present the question" whether reserved or indirect control "could alone establish a joint-employer relationship." *Id.* at 1213, 1218. The answer to that question is clear here: the Board's expansion of the common law to allow a joint employer finding without any evidence of actual and direct control is contrary to law.

2. The Rule Discards The Common-Law Requirement Of Substantial Control To Be A Joint Employer

Even if the Board could demonstrate a common-law consensus that shared actual and direct control are not required for joint employment, the Rule still would fail. Unlike the 2020 Rule, the new Rule allows the Board to find joint employment based on *insubstantial* control—*i.e.*, control that is sporadic, isolated, or de minimis. *Cf.* 29 C.F.R. § 103.40(d) (2020) ("Such control is not 'substantial' if only exercised on a sporadic, isolated, or de minimis basis."). The Board nowhere disputes that is what the Rule does. Rather, the Board tries to shore up it up by arguing that the Rule "never indicates that a joint-employer relationship will *categorically* be found based on an isolated instance of reserved or indirect control." Cross-Mot. 22-23 (emphasis added). But the Board admits that it would "not rule out joint-employer status simply because only a single form or instance of control has been shown." *Id.*

The Board's failure to require substantial control for joint employment is contrary to both the common law and Fifth Circuit precedent. For joint employment, the Fifth Circuit requires "substantial control," *Zayre Corp.*, 424 F.2d at 1165-1166, in contrast to "minor controls" which

are "too insubstantial" to be a joint employer, *Local 777, Democratic Union Organizing Comm., Seafarers Int'l Union of N. Am., AFL-CIO v. NLRB*, 603 F.2d 862, 904 (D.C. Cir. 1978). This is in line with the common law: the "touchstone" at common law is whether the putative joint employer "sufficiently controls" putative employees. *Clackwamas*, 538 U.S. at 448-449. As the Board's own cases make clear, to have sufficient control, the putative joint employer must determine "not only what shall be done, but how it shall be done." *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889); *see* Cross-Mot. 25. And that control must be "pervasive." *Local 777*, 603 F.2d at 901-904. The Rule violates the common law because it makes no allowances for "minor" or "limited and routine" control.

The Board tries to avoid this conclusion by asserting that "business relationships are 'innumerable'" and a single contractual reservation of right to control one term or condition of employment "could be dispositive." Cross-Mot. 23. But the Board cites no authority in support of that assertion, and for good reason: the common law has *always* required a substantial quantum of control to distinguish between an employment relationship and the oversight inherent in any contractual relationship. *See* 27 AM. JUR. 2D EMPLOYMENT RELATIONSHIP § 5 (distinguishing non-employment relationships from "dual employment," which may only exist "if two employers *exercise substantial control* over the employee by participating in the selection, hiring, and paying of the employee, by having the power to discharge the employee, and by controlling the employee in the performance of his or her duties" (emphasis added)).

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Because the Rule badly misconstrues the common-law joint employer inquiry to permit reserved, indirect, or insubstantial shared control to be sufficient, it should be set aside as unlawful. And because the Board's justification for rescinding the 2020 Rule rested on the same

misconstruction—namely, that the Board attempted to "broaden[] the standard within common-law bounds," Cross-Mot. 35-36—that rescission should be set aside as well.

B. The Rule's Definition Of "Joint Employer" Fails To Distinguish Routine Contracting From Common-Law Employment

The Board's nebulous articulation of the Rule fails for another reason: it does not "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." *Browning-Ferris II*, 911 F.3d at 1219.

The Board's approach is flawed because, unlike other areas where Congress granted the Board authority to use its expertise to navigate the "complicated realities" of workplace democracy (Cross-Mot. 21), here Congress anchored employment relationships in the common-law understanding at the time of the Taft-Hartley Amendments. *See NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968) (recognizing that the NLRA requires the terms "employer" and "employee" to be construed under the general "common law of agency"). As Plaintiffs explained in their opening brief, the Supreme Court has recognized that distinguishing independent contractors from employees is central to that understanding. Pls.' Mot. 28-31. That distinction requires considering the hiring party's actual control over "the manner and means by which the product is [to be] accomplished." *Nationwide Mut. Ins. Co.*, 503 U.S. at 324. "[T]raditional" common law employment, as opposed to contracting, entails "[c]ontrol of 'physical conduct in the performance of the service'" and necessitates a "proximate legal relation of employee to the particular employer involved in the labor dispute." *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 124, 128 n.27 (1944). Thus, to be a joint employer under the NLRA, an entity must be an actual common-law employer—as opposed to, for example, a business contracting for services undertaken by an independent contractor's agents.

The Board contends that the so-called "first step" of its joint employment test will weed out routine contracting relationships. Putting aside the flaws with that framework (discussed in Part I, *supra*), that is insufficient. Rather than flesh out the difference between common-law employment and routine contracting, the Board simply declares that "distinctions among different types of contracting relationships are best rendered through case-by-case adjudication[,]" and that the Board "will not give weight to evidence of indirect control that is indicative of . . . a true independent-contractor relationship." Cross-Mot. 20-21. But the Board never explains what sort of indirect control is "indicative of" a contractor relationship or how it is different from the control that is relevant to joint-employer status. Even in its attempt to rebut Member Kaplan's straightforward CleanCo contracting example (88 Fed. Reg. at 73,987), the Board declines to say "whether [CleanCo's] clients are common-law employers of CleanCo's employees." Cross-Mot. 41 n.169 (deeming the answer "unknown").

Instead, the Board contends that the "application of the Rule will be defined through 'specific factual records,'" Cross-Mot. 23, because the "innumerable variations in the ways that companies interact" would make it difficult to distinguish the type of control "grounded in routine, company-to-company" contracting and that which would "give rise to an employment relationship," *id.* at 21. But clarifying which types of control create a joint-employment relationship is the purpose of having a rule in the first place. The Board also admits that the Rule avoids dealing with "the exact 'rubric'" that the common law requires and simply asks the Court to take it at its word that the Rule "would be applied to confine all joint-employment findings within the borders of the common law." Cross-Mot. 22. But as the dissent observed, at best, "[t]his is precisely how the determinations would be made if there were no rule at all." 88 Fed. Reg. at 74,005.

If anything, the Board's "iterative" approach to tackling "the nuanced, varied differences" between independent contractors and employees based on the "complicated realities" and "all the incidents of a relationship" in each case (Cross-Mot. 19-21) smacks of the Supreme Court's pre-1947 approach of determining employer status based on "underlying economic facts rather than technically and exclusively by previously established [common-law] legal classifications." *Hearst Publ'ns*, 322 U.S. at 129. But Congress soundly rejected that approach in the Taft-Hartley Amendments. *See Local 777*, 603 F.2d at 905 (Congress labeled *Hearst* approach "fanciful"); *Pittsburgh Plate Glass Co.*, 404 U.S. at 167 ("Congress reacted" to *Hearst* by amending the NLRA.). The Board should not be permitted to resurrect it in the Rule.

III. THE RULE VIOLATES THE NLRA BY DEFINING "JOINT EMPLOYERS" TO INCLUDE THOSE WHO CANNOT ENGAGE IN MEANINGFUL COLLECTIVE BARGAINING

The Board's articulation of the Rule fails to satisfy another basic requirement of the NLRA: that all employers and joint employers must be able to meaningfully bargain the terms and conditions of employment of their employees.

As Plaintiffs explained in their opening brief (Mot. 31-34), the Rule violates the NLRA by defining "joint employer" to include entities that lack sufficient control over the essential terms and conditions of employment to bargain meaningfully. The Board contends that the Rule avoids these pitfalls "by first requiring that an employment relationship exist" and then "only obligat[ing a putative joint employer] to bargain over those subjects it controls." Cross-Mot. 36-37. But that framework is at odds with the text of the NLRA. The NLRA requires an employer, at a minimum, to bargain over the core subjects identified in Section 8(d) of the NLRA—"wages, hours, and other terms and conditions of employment"—not just isolated issues over which the employer has occasional unexercised or indirect control. *See* 29 U.S.C. § 158(d).

The Board further contends that "[r]arely, if ever, will any employer (joint or not) have total control over all relevant topics." Cross-Mot. 38. That misses the point. Although an employer cannot control every uncertainty that might influence collective bargaining, control over the essential terms and conditions of employment is critical to bargaining. As the dissent explained, Congress's goal in requiring bargaining was to create "a process that could conceivably produce agreements." 88 Fed. Reg. at 73,999. The object of collective bargaining under the NLRA is "an agreement between employer and employees as to wages, hours and working conditions." *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523 (1941). Absent shared control over all those essential terms and conditions of employment, putative joint employers could not negotiate such a comprehensive collective bargaining agreement.

Indeed, Member Kaplan warned against this outcome, describing a "scenario in which an undisputed employer has exercised complete control over every aspect of its employees' essential terms and conditions," and "a second entity possesses, but has never exercised, a contractual reservation of right to codetermine the employees' wages." 88 Fed. Reg. at 73,999. Under the Rule, "that second entity will be deemed a joint employer," creating "a substantial risk of frustrating agreement" if "the two employer-side entities were each to insist, in good faith, on different wage rates." *Id.* Such a result conflicts with Congress's purpose of leaving collective bargaining to the free flow of economic forces and forbidding the Board from "either directly or indirectly, compel[ling] concessions or otherwise sit[ting] in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). The Rule instead ignores the negotiating tradeoffs between employers and employees inherent in bargaining and imposes an obligation on putative joint employers with no control over most essential terms and conditions of employment necessary to make informed tradeoffs.

The Board's framework is not supported by the only two cases on which the Board relies. In *Herbert Harvey, Inc. v. NLRB*, the D.C. Circuit held that a joint employer must be "able to bargain effectively in the areas of prospective negotiation—hiring, firing, promotions, wages, benefits and other conditions of employment." 424 F.2d 770, 778 (D.C. Cir. 1969). *Management Training Corporation* concerned a different question than the one here: whether a business loses its status as an "employer" if it contracts with government entities that are exempt from the NLRA. 317 NLRB 1355, 1357 (1995); *see* 29 U.S.C. § 152(2) (exempting from the definition of "employer" any "wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof"). The Board in *Management Training* held merely that an entity is not exempt from the definition of "employer" in Section 2(2) of the NLRA because it contracts with the government. 317 NLRB at 1357. That case had nothing to do with whether the contractor could meaningfully bargain the terms and conditions of its own employees' employment.

The Board's effort to distinguish piecemeal bargaining is similarly flawed. According to the Board, piecemeal bargaining is an unfair labor practice that occurs only when an employer "*insists* on siphoning certain issues away from the bargaining table, one by one, to separately negotiate before reaching an overall collective-bargaining agreement." Cross-Mot. 39. Even accepting that characterization, piecemeal bargaining is the predictable result of compelling to the bargaining table an entity that lacks control over most essential terms and conditions of employment. The Board's own cases hold that *allowing* piecemeal bargaining and piecemeal implementation of labor agreements "would empty the duty to bargain of meaning." *Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 997-999 (7th Cir. 2000). That is what the Rule does by making joint employers of entities that cannot "engage in meaningful negotiations." *E.I. Du Pont*

de Nemours & Co. v. NLRB, 489 F.3d 1310, 1315 (D.C. Cir. 2007) (quoting *Decker Coal Co.*, 301 NLRB 729, 740 (1991)); *see also Visiting Nurse Servs. of W. Mass. v. NLRB*, 177 F.3d 52, 59 (1st Cir. 1999) ("[U]nder this approach, form, rather than substance, becomes the determinative factor in deciding whether the bargaining obligation has been fulfilled. In consequence, meaningful collective bargaining is precluded.") (alteration in original).

IV. THE RULE IS ARBITRARY AND CAPRICIOUS BECAUSE THE BOARD IGNORED ITS DISRUPTIVE IMPACTS AND UNCERTAINTIES

The Board's response to Plaintiffs' concrete examples of industry concerns boils down to a hollow refrain: the Board will just figure out the Rule's implications for putative joint employers through *ad hoc* decisions. That approach is arbitrary and capricious. *See ACA Int'l*, 885 F.3d at 700 ("Administrative action is arbitrary and capricious [if] it fails to articulate a comprehensible standard for assessing the applicability of a statutory category" (alteration in original) (internal quotation marks omitted)); *Trans-Pac. Freight*, 650 F.2d at 1244-1245 (similar).

The Board failed to consider the disruptive impact of the Rule on various industries and has offered circular responses to others. For example, the Board's rejoinder to the concerns of franchisors is barely a response. The Board claims the Rule recognized that "[m]any common steps franchisors take to protect their brands have no connection to essential terms and conditions of employment and therefore are immaterial to the existence of a common-law employment relationship." Cross-Mot. 42 (alteration in original). But the Board ignored the brand protection measures in franchise agreements that arguably *do* bear on the terms and conditions of employment, such as "[s]taffing guidance," "[t]raining requirements," "[s]afety and security requirements," "hours of operation," "payroll processing" software, and "trade dress provisions ensuring the visual consistency of [the] brand." Ex. C. to Pls.' Mot., Comments of International Franchise Association 37, Dkt. 10-4. As the dissent noted, "the rule's vast reach creates a

significant risk that many franchisors will be held liable as joint employers of their franchisees' employees" simply because they require "franchisees to adhere to [these] strict brand standards," while giving their franchisees otherwise unfettered discretion over the essential terms and conditions of employment. 88 Fed. Reg. at 74,001.

The Board also claims the Rule would not treat "a general contractor as the employer of a subcontractor's employees *solely* because the general contractor has overall responsibility for overseeing operations on the jobsite." Cross-Mot. 42 (emphasis added). But the Board ignored the many terms and conditions of employment that bear on the operation of a construction jobsite. In fact, the Rule calls for a joint employer finding based on only indirect or reserved control over the "supervision of the performance of duties." 29 C.F.R. § 103.40(d)(4). Yet, as the Board admits (Cross-Mot. 42), the Supreme Court precluded finding employer or joint employer status where a general contractor has "some supervision over the subcontractor's work." *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689-690 (1951).

The Board's response to the many hospitals that use contracted labor to fill critical staffing gaps is similarly flawed. The Board simply "declined" to adopt "any industry-specific standards or carveouts." Cross-Mot. 42. But the Board was required to consider the "disadvantages" of its rule, *Michigan v. EPA*, 576 U.S. 743, 753 (2015)—including the potentially disruptive impact of the Rule on particular industries. Moreover, the concerns of hospitals are not limited to the critical care industry. The Rule provides no exceptions for *any* routine contractor decisions concerning necessary staffing levels. As the dissent pointed out, the very same uncertainty facing the critical care industry would force many other industries to choose between bringing their "contracted-out work in-house" and setting necessary staffing levels or foregoing services through "reduced headcount." 88 Fed. Reg. at 74,002.

The Board seeks to escape these problems by pointing to features of the Rule that only add uncertainty. *First*, the Board argues that the Rule provides clarity by "moving from an open-ended list to 'specifically enumerating the essential terms and conditions of employment.'" Cross-Mot. 43. But the categories of "essential terms" in the Board's list are so vague and open-ended that they include practically all mandatory (and even some non-mandatory) subjects of bargaining. *Second*, the Board asserts that the Rule "defin[es] the scope of bargaining obligations in the event a joint-employer relationship is found." *Id.* Yet, as explained above, the Board's description of a putative joint employer's bargaining obligations only injects obstacles to reaching agreement into collective bargaining.

In the end, the Board's approach defeats the purpose of rulemaking. It reduces bright-line legal rules, mandated by Congress, to questions for another day. The Board repeatedly insists that these questions will be decided through "case-by-case adjudication" lacking any legal rubric. Cross-Mot. 11, 21-22, 43. That approach is arbitrary and capricious.

CONCLUSION

For the reasons explained above and in Plaintiffs' motion, the Court should set aside the Joint Employer Rule, enjoin its application, and vacate the Board's rescission of the 2020 Rule (before the new Rule's February 26 effective date).

Dated: January 16, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 16, 2024, the foregoing document was electronically submitted with the clerk of the court for the United States District Court, Eastern District of Texas, using the electronic case file system of the court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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