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Via electronic submission: http://www.regulations.gov

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

Re: Proposed Rule, National Labor Relations Board; Standard for Determining Joint-Employer Status Under the National Labor Relations Act (87 Fed. Reg. 54,641-54,663, September 7, 2022)

Dear Ms. Rothschild:

The U.S. Chamber of Commerce ("the Chamber") submits these comments in response to the National Labor Relations Board's ("NLRB" or "the Board") Notice of Proposed Rulemaking on the Standard for Determining Joint-Employer Status, (the "NPRM" or "proposed rule").[1]

[1] The proposed rule provides, in relevant part:

§ 103.40 Joint Employers.

(a) An employer, as defined by section 2(2) of the National Labor Relations Act (the Act), is an employer of particular employees, as defined by section 2(3) of the Act, if the employer has an employment relationship with those employees under common-law agency principles.

(b) For all purposes under the Act, two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment.

(c) To ''share or codetermine those matters governing employees' essential terms and conditions of employment'' means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment.

(d) ''Essential terms and conditions of employment'' will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.

(e) Whether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment is determined under common-law agency principles. Possessing

I. Introduction

The Chamber opposed the joint-employer standard previously adopted by the Board in *Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery*, 362 NLRB No. 186 (2015) (hereinafter, "*Browning-Ferris*") and supported the effort of the Board to adopt a standard consistent with common law principles and the goals of the National Labor Relations Act ("NLRA" or the "Act") in its 2018 rulemaking. The Chamber welcomed the final rule approved by the Board in 2020 (the "2020 Final Rule") and intervened in defense of that rule in litigation challenging it. For the reasons detailed herein, the Chamber believes the current proposed rule—which claims simply to "restore" and "refine" the *Browning-Ferris* standard but which in fact goes far beyond the holding of that case—is fatally flawed and should be abandoned. The Chamber urges that the 2020 Final Rule be maintained.

The proposed rule purports to codify the joint-employer standard adopted by the Board in *Browning-Ferris*. Even cursory examination, however, reveals that the proposed rule goes far beyond the *Browning-Ferris* standard in three crucial and harmful respects. First, under the proposed rule, the Board would consider reserved or indirect control, even that which has never once been exercised, as sufficient or potentially determinative for a joint-employer finding. Second, the proposed rule wholly abandons the most important limiting principle contained in *Browning-Ferris*: that to establish joint-employer status, it is necessary to show that "the putative

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the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly. Control exercised through an intermediary person or entity is sufficient to establish status as a joint employer.

(f) Evidence of an employer's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles or control over matters that do not bear on the employees' essential terms and conditions of employment is not relevant to the determination of whether the employer is a joint employer.

87 Fed. Reg. 54663 (September 7, 2022).

joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." 362 NLRB at 1600. Finally, the proposed rule eliminates the clear and exhaustive enumeration in the 2020 Final Rule of those terms and conditions of employment relevant to a joint-employer analysis, opting instead for a broad, generalized, and non-exhaustive list of factors, the purported control over which may (or may not) in some instances (but potentially not others) be probative of joint-employer status. It would replace the clear and concise standard by which employers may tailor their business arrangements with a vague and potentially limitless range of terms and conditions that offers no clear standard for employers. Taken together, these provisions would create an undefined and virtually limitless standard, lacking any legal justification, and certain to result in profound consequences for workers, unions, and employers—none of which the proposed rule appears to contemplate.

As important, the NPRM conflicts with federal precedent directing the Board to cabin its joint-employer standard, not expand it exponentially. *See Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recycling*, 911 F.3d 1195, 1205 (D.C. Cir. 2018) (hereinafter, "*BFI*"). The proposed rule is likewise inconsistent with the "common law principles" it purports to codify. As a practical matter, it is wholly unworkable, provides no guidance to the regulated community, creates new uncertainties, and leaves unanswered a dizzying array of questions. Finally, the proposed rule violates the substance of both the NLRA and the Administrative Procedure Act ("APA"). It should be withdrawn.

II. Two Members Should Recuse Themselves Because of an Apparent Conflict of Interest.

Before turning to the substance of the proposed rule, the Chamber notes its concern with the propriety of Members Prouty and Wilcox's participation in this rulemaking. Prior to joining

the Board, Member Prouty served as General Counsel to SEIU Local 32BJ, and submitted comments in the 2018 rulemaking staunchly opposing the proposal and advocating his views concerning a proper joint-employer standard under the Act. Before assuming her seat on the Board, Member Wilcox served as Associate General Counsel to 1199SEIU United Healthcare Workers East, and through her law firm, likewise submitted detailed comments opposing the 2018 proposed joint-employer standard. The Chamber respectfully submits that their prior employment by and representation of the SEIU in these matters, and their preexisting, well-documented views as to the scope of the joint-employer standard (which demonstrates each's predisposition to this rulemaking to undo the 2018 rule) creates, at a minimum, the appearance of a conflict-of-interest in violation of the Board's ethics rules.

III. The Proposed Rule Is Contrary to the NLRA.

At the outset, we note that the Board has no particular expertise, nor is it afforded any deference, with respect to the interpretation of the common law: "The content and meaning of the common law is a pure question of law that we review *de novo* without deference to the Board." *BFI*, 911 F.3d at 1206; *see also id.* at 1207 (Congress did not give the Board "the power to recast traditional common-law principles of agency in identifying covered employees and employers."). But by simply incorporating "common-law agency principles" in three provisions of the proposed rule—while deviating from those principles in other places—the proposed rule offers *less* predictability than adjudicating joint-employer questions on a case-by-case basis. Rather than promulgate a binding rule that will make ascertaining joint-employer status less certain, the Board would better serve employers, labor unions, and employees by withdrawing this rulemaking and (at most) issuing an interpretive rule providing guidance on the Board's view of the common law in light of the NLRA—without expanding established common-law principles.

If the Board nonetheless promulgates a new rule, it should not promulgate this one. The Supreme Court held that the definition of "employer" under the Act is governed by "common-law agency principles." *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85-95 (1995). Yet the proposed rule far exceeds the bounds of the common law as courts and the Board have traditionally applied it to the NLRA. The proposed rule's failure to adhere to these common law principles in defining the standard for joint employment violates the Act, as confirmed by both (a) the D.C. Circuit's 2018 decision interpreting the Board's joint employer standard, and (b) decades of precedent defining the contours of the common law.

A. The Proposed Rule Contravenes the NLRA as Interpreted by the D.C. Circuit.

In *BFI*, the D.C. Circuit applied common-law principles in considering whether two entities were joint employers under the NLRA. That determination turned on whether each entity had sufficient control over a single workforce to permit meaningful collective bargaining. The Board found joint employment, but the D.C. Circuit held that the Board failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions employment. The proposed rule not only repeats those errors, but makes a brand new one: it jettisons the requirement that an agent must have sufficient control to permit meaningful bargaining, which is the very activity that the NLRA regulates. For those two reasons, the proposed rule contravenes the NLRA as interpreted by the D.C. Circuit.

1. The Proposed Rule's Treatment of Indirect and Reserved Control Contravenes the Decision of the D.C. Circuit in *BFI*.

Contrary to the NPRM, the *BFI* Court did not give the Board *carte blanche* to fashion a joint employer standard that treated reserved or indirect control as dispositive, on terms as broad as the Board saw fit. Instead, the D.C. Circuit held that an employer's possession of indirect or the

reserved right of control may be "*relevant considerations* in determining joint-employer status." *Id.* at 1201 (emphasis added). Indeed, this was recognized by the Board majority in *Browning-Ferris*: "The right to control … is *probative* … of joint-employer status, as is the actual exercise of control, whether direct or indirect." 362 NLRB at 1614 (emphasis added). And this is precisely the position taken by the Board in the 2020 Final Rule governing the determination of joint-employer status under the Act today. *See* 29 CFR § 103.40 (indirect control over essential terms and conditions of another employer's employees, reserved but non-exercised authority, and control over subjects of bargaining other than essential terms and condition of employment are probative of joint-employer status).

Rather than giving the Board unbounded authority to treat reserved and indirect authority as dispositive in future cases, the D.C. Circuit cautioned that the Board "is bounded by the common-law's definition of joint employer," and must "color within the common-law lines identified by the judiciary." 911 F.3d at 1208. The court specifically held that by failing to distinguish indirect control over essential terms and conditions of employment from "evidence that simply documents the routine parameters of company-to-company contracting, the Board overshot the common-law mark." *Id.* at 1216; *see also id.* at 1219 (noting Board's failure to adhere to common-law boundaries which "prevent [it] from trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts.").

In light of these facts, one might reasonably have expected the Board, were it inclined to revisit the 2020 Final Rule, to have proposed a narrower and more focused standard than that established in *Browning-Ferris*, in line with the D.C. Circuit's admonition on remand. As set forth below, the proposed rule not only fails to do so, it instead takes the opposite tack: it broadens the

Browning-Ferris standard beyond common-law recognition, and ignores the Court of Appeals' express direction to "erect some legal scaffolding that keeps its inquiry within traditional common-law bounds." *Id.* at 1220.

2. The Proposed Rule Ignores the D.C. Circuit's Recognition that the NLRA Requires an Employer to Have Sufficient Control to Permit Meaningful Bargaining.

As interpreted by the D.C. Circuit, the joint-employer inquiry is a two-step process. First, as discussed above, the putative joint employer must possess sufficient control over the employees of another employer. *See BFI*, 911 F.3d at 1221. Second, it must exert sufficient control over the employees' essential terms and conditions of employment "to permit meaningful bargaining." *Id.*

The proposed rule jettisons entirely the "meaningful bargaining" prong of the *Browning-Ferris* test by way of a footnote, explaining simply that "by focusing on whether a putative joint employer possesses the authority to control or exercises the power to control employees' essential terms and conditions of employment, any required bargaining under the new standard will necessarily be meaningful." 87 Fed. Reg. at 54645 n. 26. In support, the proposed rule offers nothing more than the conclusory assertion that, if an employer exerts *some* (undefined, unexercised, and unmeasured) degree of control over *some* (undefined, non-inclusive) term of employment, collective bargaining will necessarily be meaningful. Unsurprisingly, the Board offers no factual support or legal authority for this far-reaching proposition.

As noted in the dissent to the proposed rule, the rejection of this prong of the test flies in the face of the D.C. Circuit's remedy, which specifically faulted the Board in *BFI* for failing to apply this analysis in its *Browning-Ferris* decision and remanded for further proceedings. *See* 87 Fed. Reg. at 54658 (Members Kaplan and Ring dissenting) ("Presumably, the court would not

have remanded for that purpose if the inquiry were unnecessary to the joint-employer determination").

As a legal matter, the omission of this limitation pushes the proposed rule beyond the authority of the Board to interpret and administer the Act in the manner in which Congress has directed. As a practical matter, under the proposed rule, the scope of a joint-employer's obligations—with respect to unfair labor practice liability, secondary activity, and bargaining—is wholly untethered to the "control" it is alleged to exercise over another company's employees, and the terms and conditions of employment over which it possesses such control. In the absence of some nexus of control and the subject at issue, the proposed rule leaves completely unclear precisely what are a joint employer's obligations or liabilities under the Act.

By way of example, assume Company A, which exercises meaningful control over the hours and schedules of Company B's employees, but indisputably does *not* exercise or reserve, directly or indirectly, any control over the hiring, firing, or disciplining of Company B's employees or supervisors, or the health and safety of its working conditions. Under the proposed rule, it seems clear that the Board would take the position that Company A is a joint employer with Company B with respect to the setting of work hours and schedules. Assume, however, that a Company B supervisor fires an employee for engaging in protected, concerted activity under section 7 wholly unrelated to hours or scheduling (*e.g.*, complaining about sanitary work conditions at Company B's facility). Is Company A liable in an Unfair Labor Practice proceeding, even where the alleged ULP is one over which it indisputably has no control, under any standard?

Similar questions arise with respect to secondary activity. Under section 8(b)(4), a union may not boycott a business uninvolved in a labor dispute between a union and a neutral company (such as a supplier or distributor). On the same facts as above, in response to Company B's firing

of a worker for complaining about unsafe working conditions, the union representing Company B's employees calls a strike to protest their co-worker's termination, and safety and health conditions at Company B's facility generally. Would it also be legal for the union to boycott and picket Company A because Company B is in a labor dispute over terms and conditions of employment over which Company A had absolutely no control of any sort?

As discussed *infra*, these same concerns are paramount with respect to the bargaining obligations of the multitude of "joint employers" the proposed rule will create. Once more using the facts of the above example, one might reasonably infer that under the proposed rule the Board would take the position that Company A is required, with Company B, to bargain over hours and scheduling. What the proposed rule fails to make expressly clear is what, if any, is Company A's responsibility with respect to bargaining over the multitude of terms and conditions of Company B's employment over which it exercises or reserves no control?

The Preamble to the rule suggests (again by way of footnote) that a joint employer would be required to bargain only over those essential terms and conditions of employment over which it exercises the power to control. *See* 87 Fed. Reg. at 54645 nn.26, 69. Setting aside the unworkable application of this standard in practice, as discussed *infra*, the Chamber respectfully suggests that if this is the position the Board seeks to take, it must make this limitation expressly clear in any final rule by way of regulatory text, not merely in footnoted observations which will not be codified in the Code of Federal Regulations. Such an approach would not only provide needed clarity and certainty, but would accord the rule with prior Board law. *See, e.g.*, *Miller & Anderson, Inc.*, 364 NLRB 39 (2016) ("Our case law makes clear that each employer is obligated to bargain only over the employees with whom it has an employment relationship and *only with respect to such terms and conditions that it possesses the authority to control*.") (emphasis added).

B. The Proposed Rule Cannot Be Squared with the Common Law Understanding of Joint Employment Under The NLRA.

1. The Proposed Rule Conflicts with How Courts Have Consistently Defined "Employer" and "Employee" Under the NLRA.

The definition of "employer" in section 2(2) of the Act, and "employee" in section 2(3) of the Act, are indisputably governed by common-law principles. *See Town & Country Electric, Inc.*, 516 U.S. at 85-95 (1995) (finding that where Congress used the term "employee" in a statute without providing clear definition, it "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine"). Those principles have long been applied to require direct and substantial control over the employees of another firm for joint-employer liability under the NLRA: "While dual employment does not necessarily exist whenever two entities affect the actions of a single employee, it may exist if two employers exercise substantial control over the employees 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." 27 AM. JUR. 2D Employment Relationship § 5. The U.S. Supreme Court has adopted the Board's finding of joint employment as existing where two entities "possesse[d] sufficient control over the work of the employees" and "exercised common control over the employees." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

For decades, case law under the Act adhered to these principles. *See, e.g.*, *Laerco Transportation & Warehouse*, 269 NLRB 324, 325 (1984) (to establish a joint employer relationship, employer must "meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" of another employer's employees); *see also TLI, Inc.*, 271 NLRB 797, 799 (1984) (no joint employer relationship where supervision exercised by putative joint employer was "limited and routine" and putative joint

employer lacked authority over, *inter alia*, hiring, firing, and discipline); *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 677 (1993) (noting Board previously rejected reliance on the mere existence of contractual control provisions and instead "determined that it was more appropriate to look to the actual handing of day-to-day business").

Likewise, numerous circuit court decisions have found in applying the common law that no joint employer relationship existed in the absence of evidence that the putative joint-employer exercised actual control over another employer's workers. *See, e.g., Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682–683 (9th Cir. 2009) (quoting *Vernon v. State,* 10 Cal. Rptr. 3d 121 (Cal. Ct. App. 2004)) (finding no joint-employer status where Wal-Mart did not exercise an "immediate level of day-to-day control" over its suppliers' employees); *Gulino v. N.Y. State Education Dep't.*, 460 F.3d 361, 379 (2d Cir. 2006) (no joint-employer status in the absence of direct, immediate control: "[The common-law standard] focuses largely on the extent to which the alleged master has 'control' over the day-to-day activities of the alleged 'servant.' The *Reid* [*supra*] factors countenance a relationship where the level of control is direct, obvious, and concrete, not merely indirect or abstract.").[2]

[2] Some courts addressing joint-employment under common law standards have applied an even more focused analysis, holding that joint-employer liability is appropriate only where a putative joint employer exercised control over the specific term or condition of employment at issue in the case. Using this approach, in *Wu v. DunkinDonuts, Inc.*, 105 F. Supp. 2d 83, 87 (E.D.N.Y. 2000), the District Court for the Eastern District of New York observed that in assessing joint employer liability, "courts determine whether the franchisor controls the day-to-day operations of the franchisee, and more specifically whether the franchisor exercises *a considerable degree of control of the instrumentality at issue in a given case.*" (emphasis added). In *Wu*, the court focused its examination on the specific term and condition of employment relevant to the harm suffered, specifically, the extent to which the franchisor controlled the store's security, the failure of which was alleged to have caused an attack upon its franchisee's employee. The court readily concluded that because the franchisor did not require any specific security or equipment, but rather merely suggested that security was important and offered equipment for franchisees, it could not be held vicariously liable. The California Supreme Court took a similar, instrumentality-based approach in *Patterson v. Domino's Pizza, LLC,* 333 P. 3d 723 (Cal. 2014), in determining whether franchisor Domino's could be held vicariously liable for harassing behavior by a franchisee's employee. The *Domino's* Court declined to find a joint employment or agency relationship relating to the particular fact in issue, and found persuasive the facts that Domino's had no right to establish a sexual harassment policy or training for the franchisee's employees; that there was no means by which franchise employees could report harassment to Domino's; and that the franchisee had implemented its own anti-harassment training and

The proposed rule, however, ignores this wealth of precedent. Indeed, it does not cite a single instance in which the Board or a court has found that the mere existence of a reserved, unexercised right of control was, standing alone, sufficient to support a joint-employer finding. Rather, it simply asserts that the Board "is not aware of" any judicial decision or authority suggesting that the contractually reserved right of control is, in and of itself, *insufficient* to establish joint-employer status. 87 Fed. Reg. at 54650 (emphasis added). In so doing, the Board has turned the question on its head.

By ignoring established common-law limits, moreover, the Proposed Rule threatens to swallow other doctrines of joint and several liability under the NLRA. For example, "two nominally separate entities" may be considered a "single employer" under the NLRA where they are "actually part of a single integrated enterprise"—even if only one of them oversees the day-to-day aspects of the employment relationship. *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982). Unlike in the joint employment context, both entities need not "exert significant control over the same employees" to be considered single employers. *Painting Co. v. NLRB*, 298 F.3d 492, 500 (6th Cir. 2002). But almost every entity in a "single integrated enterprise" would have the right to control the same employees. Thus, by permitting a finding of joint employment based on the *right of control* alone—rather than the *exercise* of control—the proposed rule displaces the single employer doctrine. That result cannot be reconciled with the well-established rule that "[t]he 'joint employer' and 'single employer' concepts are distinct." *Browning-Ferris*, 691 F.2d at 1122; *compare Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (discussing "single employment" under the NLRA), *with Boire v.*

policies. In light of such facts, the court concluded, no public policy would be served by holding liable a party that "could not have prevented the misconduct and corrected its effects." 33 P.3d at 742. The Chamber submits that this is the precise sort of "legal scaffolding" the *BFI* Court had in mind in its remand of *Browning-Ferris* to the Board.

Greyhound Corp., 376 U.S. 473, 476 (1964) (discussing the standard for "joint employment" under the NLRA).

2. The Proposed Rule Fails to Consider the Restatement of Employment Law.

One of the reasons the Proposed Rule goes astray is that it relies extensively and exclusively on the Restatements of *Agency*, while ignoring the Restatement of Employment Law. But the latter Restatement, which specifically addresses the joint-employer doctrine, is more relevant than the Restatements of Agency, which primarily focus on assigning liability in tort and contract, and which do not address joint employment at all.

The Restatement of Employment Law, like the cases applying the common law, rejects the definition of joint employer in the proposed rule. The Restatement of Employment Law provides that "[a]n individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers *each control or supervise such rendering of services*." Restatement of Employment Law § 1.04(b) (emphasis added); *see id.* cmt. a. ("joint employment" involves "situations where individuals provide services to more than one employer that, at least in combination, *exercise control*"). Under the proposed rule, however, reserved or indirect control alone—even if unexercised—may be enough to render an entity a joint employer.

The Restatement illustrates why the Board's approach is wrong. In the section addressing joint employment, the Restatement of Employment Law gives the following illustration:

> A is a driver of a large concrete-mixer truck owned and operated by the P corporation. The R construction company rents the truck for a particular project. P assigns A to operate the truck in accord with P's mechanical and safety specifications while it is used on R's project. R's supervisors tell A what work they want the truck to accomplish. A's compensation is set by P and is paid by P. If dissatisfied with A, R can request that P assign another driver. Only P can discharge A.

Id. § 1.04 illus. 5. The Restatement of Employment Law states that in this scenario "A is an employee of P *but not R*." *Id.* (emphasis added). That is true even though R has the *indirect* power to terminate an employee of P: "If dissatisfied with A, R can request that P assign another driver." Moreover, R's direct control is "limited and routine"—R's supervisors merely "tell A what work they want the truck to accomplish," as opposed to directing A on how to perform the work. Under the proposed rule, however, R may well be considered a joint employer simply because it has indirect control over some aspects of A's employment. That cannot be squared with the common law of employment as set forth in the most clearly applicable Restatement.

3. The Proposed Rule Fails to Explain What Kind of Indirect Control Bears Directly on Joint-Employment Status.

As discussed above, the proposed rule makes no serious effort to distinguish between the reserved or indirect control that bears directly on a putative joint employer relationship, and that which is necessarily and routinely a feature of almost all business-to-business contracting relationships. The proposed rule instead provides only that a "very generalized cap on contract costs," or an "advance description of the tasks to be performed under the contract," will "generally" (but presumably not always) be irrelevant to a joint-employer analysis. *See* 87 Fed. Reg. at 54651. It makes no effort to set forth, either in discussion or by way of example, the many routine and commonplace provisions within an arm's length business-to-business contractual agreement which will not bear on joint-employer status. If among the goals of the proposed rule is to provide a clear and accessible joint-employer standard to the regulated community, here it fails completely, leaving employers with no guidance as to what the Board will or will not look to in its examination of a joint-employer relationship between the contracting parties.

Accordingly, and in response to the Board's specific request for examples of such "routine" contractual provisions which should have no bearing on a purported joint-employer relationship, the Chamber offers the following non-exhaustive list:

- Provisions requiring that a contractor follow the host employer's lockout/tagout or confined spaces procedures, confusion over which can lead to serious injury or death.

- Provisions requiring that a contractor follow the host employer's disciplinary steps, thus avoiding the perception of favoritism and thus resentment among persons working together.

- Provisions requiring that a contractor follow the host employer's safety program generally.

- Provisions requiring that the contractor follow the task schedule laid down by the host employer, which are necessary to assure that a necessary previous step is taken before further work is performed.

- Provisions requiring that the contractor's employees evacuate an area or site when ordered by the host or higher-tier employer.

- Provisions requiring the contractor's employees abide by the client's Drug and Alcohol-Free Workplace Policy, EEO & nondiscrimination policy, or harassment prohibition policy.

- Provisions encouraging suppliers to promote diversity and inclusion or that set goals for the use of diverse subcontractors.

- Provisions requiring the contractor's employees to sign nondisclosure agreements and abide by the client's information and data security policy in order to protect the client's intellectual property and confidential proprietary information.

- Provisions requiring the contractor to abide by social corporate responsibility codes of conduct promoting workforce practices in alignment with globally accepted labor and human rights standards.

- Provisions requiring the contractor to comply with legal requirements such as pay reporting, privacy standards, environmental standards, etc. to ensure compliance with federal, state, and local laws.

- Provisions in cost plus or time and materials construction contracts designed to facilitate budget tracking that require a contractor to list all job positions intended

to be used on the project, the anticipated phase of the project the job positions will be utilized, and the anticipated number of labor hours on each phase of the project.

- Provisions requiring customer ratification of Key Personnel (*e.g.*, contractor senior account representative or project superintendent responsible for interfacing with the client company).

- Provisions generally requiring that the contractor provide services during designated periods of time and in designated locations.

- Provisions requiring franchise operators to maintain certain operational standards so as to preserve the franchisor's brand and trademarks (discussed further *infra* section VI.B).

If the Board proceeds to a final rule in this matter, it should expressly recognize that these examples (and others like them) should *not* be relevant to or probative of joint-employer status. The Board should likewise expressly provide that contract terms which are required by federal, state, or local statutes or regulations should not be considered indicia of joint employment, but rather as routine components of a business-to-business contract. This accords with existing Board precedent. *See, e.g.*, *Aldworth Co.*, 338 NLRB 137, 139 (2002) ("[A]ctions taken pursuant to government statutes and regulations are not indicative of joint employer status."). It would likewise comport with the recommendation of the Small Business Administration to the Board in this rulemaking. *See* Comment of U.S. Small Business Administration Office of Advocacy on Standard for Determining Joint-Employer Status (November 29, 2022) at 4 ("[C]ontract terms to abide by federal requirements should be considered routine components of a company-to-company contract…"). Finally, any final rule should make clear that an employer's ability to audit for compliance with its contractual agreements, including audits to ensure compliance with health and safety, data security, financial reporting, recordkeeping, privacy, and myriad other contractual provisions required by federal, state, and local regulatory bodies are permissible and will not be

assessed by the Board as indicia of joint employment. If the Board cannot provide such clarifying guidance in a final rule, the proposed rule should be withdrawn.

By failing to specify what elements of routine business-to-business contracting the Board will consider probative of joint-employer status (or, more importantly, which elements of such contracts do *not* have bearing on the joint-employer analysis), the Board has instead propounded a proposed rule which potentially reaches far beyond the "common law principles of agency." Put more simply, by extending the joint-employer standard to its theoretical extreme, and offering no meaningful limitations whatsoever in the proposed rule, the Board is "coloring outside the lines" of the common law.

IV. The Proposed Rule Is Arbitrary and Capricious in Violation of the Administrative Procedure Act.

The Administrative Procedure Act (APA) prohibits an agency from acting in an arbitrary and capricious manner in promulgating its regulations. *See* 5 U.S.C. 706(2)(A). If an agency's action is arbitrary and capricious, the court must find the action unlawful and vacate the rule. *Texas v. Biden*, 20 F.4th 928, 988 (5th Cir. 2021). The arbitrary-and-capricious standard requires that an action be reasonable and reasonably explained. *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, __ U.S. __, 141 S. Ct. 1150, 1158 (2021); *accord Texas*, 20 F.4th at 988-89. Under the APA, an agency action is arbitrary and capricious if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983); *accord Sierra Club v. U.S. Envtl. Prot. Agency*, 939 F.3d 649, 663-64 (5th Cir.

2019) (citations omitted). Agencies are "free to change their existing policies," but, when doing so, must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citation omitted). "[T]he agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC*, 579 U.S. at 222 (citation omitted)); *see also Texas*, 20 F.4th at 991 ("When a 'new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy,' the agency must provide 'a more detailed justification' than usual to avoid arbitrariness and capriciousness.").

Assessed against these standards, the proposed rule cannot be sustained under the APA. The NPRM is impermissibly vague, providing no meaningful guidance to the regulated community. As detailed above, it conflicts with the common law principles it purports to adopt, and is inconsistent with long-standing Board precedent. The costs of the proposed rule are dramatically understated, and the Board has failed to demonstrate why it is necessary, and to sufficiently explore less-burdensome alternatives. It should be withdrawn unless and until the Board is able to justify the broad changes in well-settled law it proposes with a legal or factual record supporting such change.

A. The Proposed Rule Provides No Guidance on Which Common-Law Principles It Incorporates, and Creates New Uncertainties.

The Proposed Rule's vague new standard creates indeterminacy and uncertainty by purporting to create new joint employer requirements, while simultaneously incorporating the "common law" generally. In multiple places, it purports to incorporate "common-law agency principles" without further guidance. *See, e.g.*, 87 Fed. Reg. 172, at 54663 ("Whether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment is determined under common-law agency principles."). But

the common law is simply "[t]he body of law derived from judicial decisions." Black's Law Dictionary 334 (10th ed. 2014); *see Field v. Mans*, 516 U.S. 59, 70 n.9 (1995) (rule is characterized as "common law" rule if it reflects "the dominant consensus of common-law jurisdictions"). When it repeatedly invokes "common-law agency principles," without more, the proposed rule offers no greater certainty or predictability than adjudicating joint-employer questions on a case-by-case basis.

The determination of joint-employer status on an individualized basis, guided only by the various holdings of numerous courts (none of which have applied the proposed rule's standard, let alone held that the reserved right of control alone can be dispositive of joint-employer status) is, definitionally, the antithesis of a "definite, readily available standard." As indicated above (*see supra*, note 2) courts often differ as to the scope of common law principles, and ascertaining the common law "consensus" not always a straightforward task. Insofar as the proposed rule compounds, rather than addresses, an "important aspect of the [purported] problem," it cannot stand under the APA. *Cf. Coalition for Workforce Innovation et al. v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346, at *19 (E.D. Texas, March 14, 2022) (where stated desire of rescission of rule was "to provide clarity," Department of Labor's failure to address inconsistencies and lack of coherence in law prior to rulemaking rendered rescission invalid under APA).

Indeed, the proposed rule provides regulated parties with significantly less clarity as to how the Board will apply its joint-employer analysis, leaving employers in a significantly less clear position than under the 2020 Final Rule, or even the *Browning-Ferris* standard itself. It does so in at least three ways:

- First, as discussed in detail above, the proposed rule abandons the only limiting principle of the *Browning-Ferris* joint-employer standard: the requirement that an employer exercise or reserve the right to control terms and conditions of employment in a manner that permits meaningful bargaining.

- Second, in contrast to the 2020 Final Rule, which provided an exclusive and detailed list of those terms and conditions of employment the Board would examine to determine joint-employer status, the proposed rule adopts a non-exhaustive and overly broad list of the factors the Board may in any case examine, ranging from the discrete (wages, hiring and discharge) to the nearly boundless (any "work rules and directions governing the manner, means, or method of work performance").

- Finally, the proposed rule eliminates the concrete examples provided in the 2020 Final Rule regarding the application of the joint-employer standard in a series of fact-specific contexts, absent any evidence that these examples were not useful to employers and others examining their potential status as joint employers under the Act.

By providing no meaningful standard, adding various vague new requirements, and eliminating the few limitations and benchmarks contained in existing regulations and prior Board and court precedent, the Board has failed to "consider an important aspect of the problem" and has acted arbitrarily and capriciously in derogation of its obligations under the APA.

B. The Board Has Demonstrated No Legal or Factual Change Justifying the Proposed Rule and Failed to Explore Obvious and Reasonable Alternatives to the Proposed Rule as Required Under the APA.

In the proposed rule, the Board has not demonstrated any material legal or factual change since the 2020 Final Rule became effective that justifies its rescission or modification. Indeed, it would be impossible for the Board to do so, since the standard adopted in the 2020 Final Rule has yet to be applied by the Board or considered by any reviewing court in a single case.

Particularly in a matter where, as the Board proposes to do here, "an agency rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___ U.S. ___, 140 S. Ct. 1891, 1913 (2020) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 51); *accord Texas*, 20 F.4th at 992. Although an agency is not required to "consider all policy alternatives," *Dep't of Homeland Sec.*, 140 S. Ct. at 1913 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 51),

if it fails to contemplate alternatives reasonably within the contours of the pre-existing rule, the agency fails to "consider important aspects of the problem before [it]," *see id.* This omission alone causes agency action to be arbitrary and capricious. *Id.; Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43.

The Board does not appear to have explored in any meaningful way, as required by the APA, alternatives to the proposed rule that might provide the "readily available standard" the NPRM purports to adopt. Rather than take what would appear to be the most direct approach to solving a perceived "problem," the Board appears to have contemplated only two "alternatives" to the proposed rule: (1) doing nothing and allowing the 2020 Final Rule to remain in place, or (2) adopting exemptions for certain small entities. The Board does not contend that it considered other alternatives, such as simply repealing the 2020 Final Rule, or modifying it insofar as the Board considers it in its current form to be inadequate (for example, the Board might have explored the option broadening the list of terms and conditions of employment which may be indicia of joint employment, if it believed the 2020 Final Rule to be too limited in this regard).

In the absence of any demonstrated failure or shortcoming in the 2020 Final Rule, allowing it to remain in place and examine its application through subsequent caselaw (which presumably would highlight any deficiencies in the standard) would have well-served the Board's stated goal. If application of that rule by the Board and courts proves to be underinclusive or otherwise not in line with the requirements of the Act, the Board would have a legal and factual basis on which to modify it. Indeed, this was the very approach recommended in 2018, during the rulemaking that led to the 2020 Final Rule, by then-Member McFerran, who indicated her view that rather than adopt a new and untested rule, "the best way to end uncertainty over the Board's joint-employer

standard would be to adhere to existing law, not to upend it." *Proposed Rule: The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46688 (Sept. 14, 2018).[3]

Via the proposed rule, the Board does not merely offer an explanation that "runs counter to the evidence" before it, *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43, it undertakes to dramatically recast a standard in a novel and unprecedented way, absent *any* evidence that the existing standard or that which preceded it is insufficient. The proposed rule fails to set forth in any meaningful way a factual or legal basis for the reversal of its prior position, or to point to any material change since adoption of the 2020 Final Rule sufficient to meet the heightened standard the APA requires in these circumstances. *See Texas*, 20 F.4th at 998-99. In light of these facts, the Chamber respectfully urges that the Board withdraw its premature effort to redraft a standard that has yet to be shown to be flawed, underinclusive, or otherwise in need of refinement at this time.

C. The Board's Economic Analysis Understates the Proposed Rule's Costs in Violation of the APA.

The Board erred in its analysis of the proposed rule's familiarization costs, the only cost impact category that the Board's economic analysis considers. It further erred in failing to address whether the imposition of the proposed new rule may, in fact, impose one-time or on-going cost burdens beyond the initial familiarization cost component.

1. The Board's Analysis of the Familiarization Costs of the Proposed Rule Omits Key Components and Understates its Costs.

The economic analysis section of the proposed rule regarding definition of joint-employer status directly addresses only the potential cost impact of the rule on small entities. This is an analysis required under the Regulatory Flexibility Act, and it focuses on the cost burden imposed

[3] Nor would limited exceptions for "small entities" address the underlying flaws in the proposed rule, and the plain fact that in most if not all instances, it will be larger employers upon which the proposed rule will impose joint-employer status.

by the regulation on the typical affected small business or other entity: Is the cost burden imposed on a typical small business of sufficient magnitude to affect the financial viability of the small entity? The Board's analysis recognizes only one category of regulatory cost burden: familiarization cost. Familiarization cost is the time and value of time that employers will need to expend in the initial year of the new rule to read and learn what the rule requires and how that may be different from the previous policy.

Because the Board only addresses familiarization cost from the perspective of the Regulatory Flexibility Act, the calculation is presented in the context of the cost imposed on a single representative business entity. The Board estimates that this typical business will incur only a one-time familiarization cost of no more than $151.57, and the Board concludes that this is not a substantial burden in relation to the revenues of the typical small business.

The Board does not calculate the next logical step of multiplying the $151.57 per business entity amount by the total number of affected businesses and presenting the resulting aggregate economic impact. This is a calculation step that is required under the terms of the Congressional Review Act ("CRA") in order to report to the U.S. Government Accountability Office whether or not the regulation is a "major" economic impact rulemaking and, therefore, subject to possible congressional review and revocation. The CRA defines a major rulemaking as one that, *inter alia*, has "an annual effect on the economy of $100,000,000 or more."[4]

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[4] 5 U.S.C.§ 801(a)(1)(A) at https://www.govinfo.gov/app/details/USCODE-2011-title5/USCODE-2011-title5-partI-chap8-sec801. *See also* U.S. GAO summary at https://sgp.fas.org/crs/misc/R45248.pdf. NLRB is not listed among the exceptions to covered agencies listed at https://www.govinfo.gov/content/pkg/USCODE-2011-title5/html/USCODE-2011-title5-partI-chap5.htm section 551. The CRA also requires that the agency submit its economic analysis to the Office of Management and Budget's Office of Information and Regulatory Affairs for confirmation of the major rule or non-major rule determination. The Board does not seem to have complied with this requirement for OIRA review. The CRA requirement regarding OIRA review is distinct form the question of whether or not the NLRB as an "independent" agency is exempt from OIRA review under Executive Order 12866. The CRA gives OIRA authority to review the major rule determinations of all agencies, whether "executive" or "independent."

The Board's omission is simple to correct. In the preamble of the proposed rule at 87 FR 54659, the Board correctly cites data from the Small Business Administration's Office of Advocacy that there were 6,102,412 private business firms with employees in 2019, and of these 6,081,544 were small businesses with fewer than 500 employees.[5] Multiplying the Board's own estimate of $151.57 familiarization cost per business by 6,102,412 total businesses, the aggregate national familiarization cost burden of the proposed Joint Employer rule will be $924,576,442—well in excess of the major rule threshold specified in the CRA. This means that if this regulation is finalized, the NLRB must report it to GAO and delay its implementation pending congressional review as required by the CRA, where it would be potentially subject to a congressional revocation resolution.[6]

Apart from this mathematical failing, the Board's analysis of familiarization costs contains numerous flawed assumptions unsupported by empirical evidence:

- The assumption of one hour of review by a human resources specialist and also one hour by an in-house attorney is not supported by empirical evidence. It is likely that the actual time for familiarization review and the number of managers and professionals involved in the review would be greater;

- The necessity for more familiarization review time and involvement by more managers and professionals is especially likely for the 20,868 business firms with 500 or more employees;

- The hourly costs for human resource professionals and lawyers used by the Board for its calculation of the $151.57 per business familiarization cost do not reflect the full opportunity cost of lost overhead and profit contribution entailed by diversion of labor from normal productive activity to the regulatory familiarization task;

[5] 87 Fed. Reg. 54659. The Board recognizes that there are a small number of firms for which it does not have jurisdiction, but the agency cannot specify how many and assumes that the number is not significant. *See* 87 Fed. Reg. 54660 n. 98.

[6] If revoked, the Board would be prohibited from proposing a substantially similar regulation in the future, and the previously promulgated 2020 Final Rule could not be replaced by the Board with a similar standard unless specifically authorized by Congressional action.

- The Board failed to consider the likelihood that businesses would need to call upon the specialized expertise of outside attorneys and management consultants at costs likely in excess of $300 per hour.

These considerations suggest that the actual familiarization cost resulting from this rulemaking are far higher than estimated, but refining the computation is unnecessary, because application of the Board's own low cost per employer is sufficient to make clear that the burden the proposed rule would impose is in excess of any economic benefits to workers that could possibly result.

The Board promulgated the 2020 Final Rule so as to clarify the definition of joint-employer status. The Board has not undertaken the effort to study objectively and empirically the effects of the 2020 rule; it thus can provide no evidence for its assertion that operation of the existing rule will cause relative harm to anyone. Moreover, the Board's economic analysis fails to acknowledge or account for the cost of reliance by employers on the current rule, insofar as they have structured business relationships based on that rule. Finally, the Board has not offered any experiential or empirical basis for the Board's assertion that the proposed revised rule will provide any measurable benefit to anyone. To propose to replace the 2020 Final Rule now without having assessed its actual effects and to impose on employers and employees burdensome familiarization costs is a waste of scarce time and resources of both employers and employees.

2. The Board Fails to Account for Both One-Time and Ongoing Compliance Costs.

The Board argues that no compliance cost beyond initial familiarization cost will be imposed by the proposed new rule because the Board alleges that no employer will be required to take any action—either to avoid joint-employer status or to embrace it. As other commenters have already informed the Board, this conclusion is incorrect. *See*, *e.g.*, Comment of U.S. Small

Business Administration Office of Advocacy on Standard for Determining Joint-Employer Status (November 29, 2022) at 5 (noting concern that Board has underestimated compliance costs of rule and encouraging Board to reassess same).

The Board's own discussion in the proposed rule preamble makes clear that the intended effect of the new rule is to make a finding of joint-employer status more likely than the Board believes would be the case under the existing rule. Employers who have chosen to adopt a stance to avoid joint-employer status based on the 2020 Final Rule would find that under the proposed rule, the achievement of that same choice would entail changes to existing policies, procedures, and contracts in the future compared to the present rule. The Board's proposal has the effect of increasing the "price" for an employer to choose to minimize its risk of joint-employer status.

Such changes would entail on-going effects in terms of management monitoring effort and possibly reduced operational productivity. They are also likely to lead employers to discontinue certain contracting relationships altogether, or to resort to other, less optimal, business arrangements. The increased likelihood of disputes and litigation costs in light of the vagueness and uncertainty the proposed rule will create is also a factor the Board fails to consider. These considerations suggest that replacement of the current rule with the proposed new rule may entail significant continuing annual cost burdens on the economy that the Board has failed to consider, again in violation of the APA.

V. The Proposed Rule Exceeds the Scope of the Agency's Authority and Violates the Clear Intent of Congress.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In light of the "economic and political significance" of the proposed rule, which could turn hundreds of thousands of employers into "joint employers" of the employees of the

companies with which they do business, a reviewing court is likely to find "reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. Environmental Protection Agency*, --- U.S. ---, 142 S. Ct. 2587, 2608 (2022). *See also NFIB v. OSHA*, --- U.S. --, 142 S. Ct. 661, 665 (2022) (OSHA regulation mandating COVID-19 vaccination was beyond scope of agency's authority in the absence of an express direction from Congress: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.") (citing *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U. S. ___, ___, 141 S. Ct. 2485, 2489 (2021) (per curiam) (internal quotation marks omitted)). Plainly, the proposed rule—which would potentially impose joint-employer status on a wide swath of businesses across innumerable industries—represents a matter of "vast economic and political significance."

There is little reason to think Congress assigned such decisions to the NLRB. For one thing, the Board majority admitted that the NLRA's "test for joint-employer status is determined by the common law of agency." 87 Fed. Reg. 172, at 54644 (Sept. 7, 2022). As discussed above, courts have only found joint-employer status under the NLRA where two or more entities actually exercised direct control over at least some essential terms and conditions of employment. This consistent understanding tracked the universal view that Congress did not intend to confer in the Board the power to define the employment relationship beyond the traditional boundaries of the common law as courts have applied it to the NLRA. *See Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) ("In some cases, there may be a question about whether the Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, renders its interpretation unreasonable"). Notwithstanding these boundaries, the proposed rule extends the employment relationship to a class of entities never before considered to fall within

the ambit of the NLRA. Thus, the proposed rule would fundamentally revise the NLRA by expanding the Board's authority beyond the common law and in a manner that is contrary to established agency practice. It is not plausible that Congress gave the Board the authority to adopt on its own such a regulatory scheme.

That conclusion finds further support in the legislative history of the NLRA. By purporting to fashion a rule that may respond to "changing circumstances in the workplace over time," the proposed rule effectively adopts an "economic realities" test for defining the employment relationship under the NLRA—a test focused on a worker's economic dependence rather than the common-law test of control. 87 Fed. Reg. at 54647. But Congress rejected the applicability of the "economic realities" test to the NLRA when it enacted the Taft-Hartley Act 75 years ago. The Board cannot undo via rulemaking that which Congress has expressly rejected by way of statute.

As brief background, in the Supreme Court's *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) decision, the Court addressed the question of whether subject "newsboys" were employees of newspaper publishers under the NLRA. The *Hearst* Court rejected common law agency principles, and held that the newsboys were covered under the Act, by analyzing the indirect "economic realities" aspects of their work. These "economic realities" factors included the newsboys' reliance on their earnings for their livelihoods and the publishers' influence over the supply of newspapers. *See* 322 U.S. at 131. As the Court noted at the time:

> Congress [in the Wagner Act] had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment. . . . Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But

> intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight . . . Unless the common law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.

322 U.S. at 124-47 (footnotes omitted).

Three years later, by way of the Taft-Hartley Act of 1947, Congress rejected the Court's holding in *Hearst*, expressly excluding "independent contractors" from the Act's definition of "employee," and rejecting the *Hearst* Court's conclusion that employee status under the Act "is to be determined ….. by underlying economic facts." 322 U.S. at 129. Indeed, the legislative history of Taft-Hartley makes clear not only that Congress intended that the definition of "employee" was to be that which was rooted in the common law, it was intended to limit its application to where an employee was subject to direct control. *See* H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) ("[Employee], according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire…[and who] work for wages or salaries *under direct supervision*.") (emphasis added).

The Board's proposed rule exceeds the bounds of the common law to which Congress expressly confined it. As such, it repeats and compounds the earlier error of *Browning-Ferris*, in which the Board majority tacitly adopted an analysis akin to the *Hearst* "economic realities" test. There, the Board grounded its holding in policy concerns that an alleged imbalance of power thwarted bargaining between employers and third-party contractors. *See generally Browning-Ferris*, 362 NLRB at 1624-26 (Members Miscimarra and Johnson dissenting) (examining at length Board's reliance on "intertwined theories of 'economic realities' and 'statutory purposes' adopted

in *Hearst* and rejected by Congress). Moreover, in adopting this "economic dependency" argument, the Board turns a blind eye to a simple, practical fact: namely, that businesses are generally free to contract with as many (or as few) other companies as they choose. By suggesting that the employees of an entity which obtains all of its contracts from a single source are economically dependent on—and thus joint employees of—that sole source contractor ignores the lawful choice which their employer made with respect to its business model (rather than, for example, pursuing numerous contracts from multiple contractors). Given the unmistakable intent of Congress in rejecting this view of "economic realities," the proposed rule exceeds the authority of the Board, and should be withdrawn.

VI. The Proposed Rule Is Untenable as a Practical Matter, and Will Create Havoc in the Collective Bargaining Process in Contravention of the Purposes of the Act.

The proposed rule's vagueness and utter lack of guidance not only renders it legally insufficient—as a practical matter, it is likely to have a devastating impact on employers, unions, and perhaps most importantly, employees. Moreover, it raises a host of unanswered questions, and offers stakeholders in various segments not even the suggestion of an answer.

A. The Practical Impact of the Proposed Rule on Collective Bargaining, Liability, and Secondary Activity Raises Significant Concerns.

The proposed rule wholly fails to explain how increasing the number of bargaining parties at any given table will foster the process of collective bargaining, or will more likely result in successful attainment of a contract. To the contrary, "no bargaining table is big enough to seat all of the entitles that will be potential joint employers." *Browning-Ferris*, 362 NLRB at 1619 (Members Miscimarra and Johnson dissenting). At least under the *Browning-Ferris* standard, when joint-employer status was premised on "reserved" or "indirect" control (whether exercised or not), the burden of proof still fell on the party alleging joint employment to satisfy not only the

control factor, but to show that the alleged joint employer possessed control over "essential terms and conditions" of employment "sufficient … to permit meaningful bargaining." 362 NLRB at 1600.

The proposed rule, by contrast, does not require *any* showing of "sufficient" control to "permit meaningful bargaining." But it hardly needs saying that it would be totally unworkable for an entity to be forced to the bargaining table when it has only limited rights of control or indirect control over just one or few (but certainly not all) terms and conditions of employment for another entity's employees. For example, the proposed rule could force a contractor to bargain alongside each of its suppliers simply because the contractor puts some parameters around how work should be performed. Unless the contractor and its suppliers have an equal say in the kinds of terms and conditions of employment typically found in collective bargaining agreements, they could not both meaningfully participate in bargaining. If anything, such an arrangement could create business conflicts that allow contractors who compete with their suppliers to insist on terms that favor the contractor by increasing the supplier's labor costs or reducing their flexibility.

Congress contemplated these kinds of conflicts by limiting collective bargaining to the parties who have direct control over the subjects of bargaining—the employer and the labor union representing its employees. The Act predicates bargaining under the Act on a bilateral model—one employer negotiating with representatives of organized labor over the terms and conditions of employment of the members of the bargaining unit they represent. Indeed, throughout most of history of the Act, except in limited circumstances not generally relevant to the joint-employer analysis, the Board has held that employers cannot be required to bargain on a multi-employer basis (although they may, subject to certain restrictions, be free to do so). This is hardly surprising, given that "joint employers" at a bargaining table may have interests that are not in alignment, if

not directly in contradiction to one another. By way of the simplest example, assume that a business and its vendor have an arms-length business relationship: the vendor wants to maximize its profit, while the business seeks to minimize its costs. The union, in turn, seeks higher wages for its members performing under the subject contract. Out of the box, those on the "employer" side of the table are directly at odds at one another, as each wishes the other to absorb the cost of higher wages.

Multiply this scenario out across the range of contractors a large employer will engage, and the near-certain outcome is chaos. For a large employer that contracts out for its janitorial services, IT, landscaping, security, and onsite cafeteria, is likely to retain some degree of control over how and when services are provided within each contract. Under the proposed rule, is that employer expected to bargain side-by-side with every contractor with whom it does business? In the same vein, these supplier contractors likely do business with dozens if not hundreds of other employers. Does the proposed rule contemplate that number of negotiations between the union, the contractor, and each employer by whom it is engaged? The instability and inconsistency of these numerous bargaining obligations are likely to significantly protract and delay, if not thwart completely, the prospect of arriving at a collective bargaining agreement amenable to all parties.

As a legal matter, the proposed rule's extension of bargaining requirements to innumerable new parties flies in the face of the Act's salutary purpose of "achieving industrial peace by promoting stable collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). As a practical matter, it does not consider the tumult into which such unwarranted expansion will throw collective bargaining in countless instances. In that light, the proposed rule most assuredly does not, as it purports to do, reflect the Act's "public policy of 'encouraging the

practice and procedure of collective bargaining." 87 FR at 54645. This approach should be rejected.

B. The Proposed Rule Provides No Guidance to a Host of Unanswered Questions or Its Practical Application Across a Range of Industries.

The proposed rule not only fails to contemplate its impact on the collective bargaining process, it offers literally no guidance in its practical application to a host of business models, employment scenarios, and complex commercial relationship. Below are just a few instances where the proposed rule provides no meaningful guidance to employers, or worse, raises questions to which it supplies no answer.

- *Franchising*. The devastating financial and operational impact the Board's *Browning-Ferris* standard had on the franchise industry is explained in detail in the comments submitted by the International Franchise Association ("IFA") and others. The Chamber associates itself with these concerns, notably the demonstrated cost of the *Browning-Ferris* standard on the franchise businesses model, which was estimated in an economic analysis commissioned by IFA to be as high as $33.3 billion per year, and up to 376,000 lost job opportunities. The proposed rule makes no effort to address the fact that, as a matter of federal trademark law (and cognate state laws), a franchisor is required to retain control over certain elements of its franchisees so as to retain its status as a franchise. This control is designed to ensure that franchises operate consistently and maintain brand standards for the benefit of the franchisor, its franchisee network, and, most important, the consuming public. The proposed rule makes no effort to distinguish these required contractual controls from other indicia of joint employment, or to otherwise acknowledge the unique federal regulatory scheme under which franchises operate. If the Board proceeds to a final rule in this matter, the Chamber strongly urges the Board to address these concerns and make clear

that control required to be retained by franchisors to protect brand standards and to maintain their franchise status under the law will *not* be construed by the Board as indicia of joint employment.

- *Transportation Services.* The proposed rule threatens the ability of trucking companies, retailers, and other businesses to contract with other businesses for transportation services. Providers of transportation services are a burgeoning and ever vital component of the U.S. supply chain. Under the proposed rule, common features of arms-length transportation services contracts will now be probative of a joint employer relationship. For example, customers' appearance standards; customer-imposed requirements relating to the availability of freight/parcels and scheduling of deliveries/pickups; safety standards; and compliance with applicable legal standards, among others, will likely be probative of a joint employment finding against the customer of the transportation provider under the proposed rule. If adopted in its current form, the proposed rule will impose the risk of joint employer liability on users of contracted pickup, delivery and transportation service providers, and negatively impact an industry that is critical to the nation's supply chain.
- *Construction.* The proposed rule provides no guidance to employers in the construction industry, where an overreaching standard could cause tremendous operational and economic havoc. The construction industry commonly includes specialized employers engaged in working together on specific projects, ranging from owners, developers, and design firms to managers, general contractors, subcontractors, and staffing agencies. While their operations may overlap, each of these employers typically remain separate entities employing their own workforces. Multi-employer worksites are especially common in the industry, where a general contractor or construction manager coordinates the work of

multiple subcontractors, often in multiple tiers, who labor on the project either sequentially or in a specified sequence. Of necessity, a general contractor must exercise a certain amount of control over subcontractors and their employees to ensure safe, efficient, and productive completion of the project. The Supreme Court has expressly recognized that these multiple entities retain separate employer status, notwithstanding their close interaction and coordination by a general contractor. *See NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689-90 (1951) ("[T]he fact that [a] contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor *or make the employees of one the employees of the othe*r. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.") (emphasis added). The proposed rule offers no recognition of the Supreme Court's *Denver Building* holding, and indeed, offers no practical guidance at all to employers in the construction industry as to how this model of business is expected to comply with the proposed standard under the Act. Any final rule must do so, and recognize the clear lines around the industry which the Court has drawn.

- *Staffing and Contingent Employment Agencies*. The proposed rule makes no effort to explain how it will be applied to employers in the staffing and contingent employment agency context. By definition, a staffing agency will almost certainly exercise certain aspects of control over the employees it sends to client companies (such as, for example, wages and work assignments). Conversely, the client company will exercise (or retain the right to exercise) control over certain elements of how a job done by a temporary employee is to be performed. The proposed rule provides no guidance as to whether and how these

complementary sets of control will be assessed in making a joint-employer assessment, or how bargaining and other requirements imposed by joint-employer status will be apportioned between the two entities. Indeed, an extreme reading of the proposed rule could suggest that in all instances all client companies of staffing and contingent agencies are joint employers of the workers they are supplied by these companies. Moreover, assuming that a staffing company's temporary worker may work for numerous client companies in any given period of time, the rule provides no guidance as to whether and how bargaining obligations will extend to the agency *vis-à-vis* the dozens (if not more) clients to whom it may supply a given worker or workers. We urge that in any final rule the Board provide concrete guidance as to the liability and bargaining obligations of these respective entities, and specify how, in practice, the standard is expected to be applied consistent with the common law.

- *Hospitals and Health Care Delivery.* The potentially devastating impact of the proposed rule on hospitals and other health care facilities, and in turn on patient care, cannot be overstated. It is particularly troubling in the current environment, where the COVID-19 pandemic has stressed the capacity of hospitals and other health care facilities to a near-breaking point. This historic labor shortage has meant that many hospitals have come to increasingly rely on contracted labor, such as travel nurses (often employed by highly-specialized industry staffing firms), to fill short- or longer-term gaps in staffing so as to guarantee the safe delivery of critical care.

  The proposed rule's focus on reserved and indirect control could render hospitals joint employers of all their contract staff, particularly because hospitals' health-related mission requires them to superintend all who work for them. For example, hospital-specific

regulatory requirements obligate them to impose certain conditions of employment (*e.g.*, masking, vaccination, licensure, eligibility to participate in federally funded healthcare programs) on all workers. Similarly, hospitals themselves choose to create specific policies necessary to ensure patient safety, such as policies concerning documentation and medication administration. Most, if not all, of a hospital's contracts with a vendor, staffing agency, or other contract labor provider require the vendor's employees to, in turn, comply with these various rules. The proposed rule will dis-incentivize and make it more difficult, risky, and expensive for hospitals to staff themselves as needed, in the face of historic challenges in finding adequate staffing, and would exacerbate the existing staffing crisis because it impedes hospitals' use of a tool—contracted labor—that they have always needed, and which is now even more critical as they grapple with the worst staffing shortage in memory.

The Board has repeatedly and consistently carved out specific rules for hospitals.[7] Most notably, in 1989 the Board adopted its health care rule, under which it established the "eight appropriate bargaining units" for acute care hospitals. 29 CFR §103.30. The Board promulgated that rule specifically to address congressional admonitions to avoid the proliferation of bargaining units in the hospital setting. The proposed rule, by contrast, with its emphasis on reserved and indirect control, contravenes that admonition and the purpose of the Board's health care rule by potentially increasing both the number of bargaining units present at a hospital, but also the number of employers.

[7] For example, the Board has permitted hospitals to promulgate and enforce more stringent solicitation and distribution rules, *see St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976)l; provided specific guidance about the supervisory status of charge nurses, *see Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); created a unique notification period for termination and modification of a collective bargaining agreement, 29 U.S.C. §158(d); and carved out specific notice requirements for work stoppages designed to allow hospitals sufficient time to plan for and ensure continuity of care if a strike occurs, 29 U.S.C. §158(g).

- *Insurance Agents*. In the insurance industry, independent contractor agents and their team members sell insurance products offered by and in accordance with the terms set by insurance agency. This, in many instances, entails some degree of control exercised or reserved by the agency. It is unclear whether and under what circumstances these independent agents—and the staff they employ to support them—could be deemed joint employees of the insurance agencies themselves. Similarly, most often in crisis situations such as natural disasters, vendors will hire claims assessors and others whose obligations end when the disaster issues are resolved. It is unclear whether these workers will be considered to be joint employees of the insurance agents that engage them and the insurance agencies themselves. The proposed rule offers no insight as to how any of these issues will play out as a practical matter.
- *Not-For-Profit Motor Clubs.* American drivers depend on emergency roadside assistance to help them in times of trouble. Not-for-profit motor clubs have been providing this service for over a hundred years, and it has given the motoring public peace of mind and encouraged travel and tourism.

  For the overwhelming majority of these calls for assistance (85%), not-for-profit motor clubs arrange with local service technicians to provide roadside assistance to their members; the clubs provide the roadside location to the technicians who provide the roadside service. This arrangement with not-for-profit motor clubs has worked for the benefit of motorists and local service providers for decades and ensures service to a vast, geographically dispersed membership. There has never been any question that roadside service technicians employed by their respective companies are employees of the companies only, not also joint employees of these not-for-profit motor clubs

The broad definitions in the new proposed rule could result in the unintended consequence of making a not-for-profit motor club a joint employer, merely by continuing to coordinate roadside assistance for its members. This is likely to lead to unintended consequences for not-for-profit motor clubs' roadside assistance, which helps millions of stranded motorists a year by connecting them with drivers employed by roadside service companies.

- *Cable TV Installers.* Employers in this industry use contractors to address fluctuating volumes of work that result from seasonal demands and emergency conditions, most commonly weather events such as hurricanes or even just typical thunderstorms. Utilizing such contractor forces to supplement employees when necessary avoids annual cycles of hiring and layoffs, both in call center and field technician environments. It also allows the employer to address specialized technical needs that are intermittent and do not call for a full time workforce to be trained in a rarely used area of expertise. Requiring the employer to negotiate over the terms and conditions of such individuals would address their work only on short term, intermittent projects that may or may not represent what work they perform for their regular employer throughout the year.
- *Real Estate Investment Trusts*. In many industries, including hospitality, gaming, and telecommunications it has become common for companies to spin off their real estate holdings into tax-favored "real estate investment trusts" ("REIT"s). Under such an arrangement, an REIT owns real estate on which a facility or facilities sit, but leases it back to the company. As a condition of maintaining favorable tax status, REITs are subject to numerous restrictions as to their investments, distributions, and the day-to-day business operations of their lessor companies. Nonetheless, REITs typically retain some reserved right of control and contractual oversight with respect the properties it owns. Are these

oversight and rights of control relevant to the joint-employer analysis, even where the REIT is statutorily limited in the operational activities in which they can engage? Or are these the sort of routine commercial arrangements the *BFI* Court indicated are not indicia of joint- employer status? The proposed rule offers absolutely no guidance or insight on this question.

- *Multiemployer Pension Plans*. Yet more numerous unanswered questions arise in the context of multiemployer pension plans. The failing state of many of the nation's largest multiemployer plans is well documented, and while legislation passed by Congress in 2021 improved the situation slightly for some plans, many are still dangerously near to insolvency. Provisions of collective bargaining agreements that require contributions to multiemployer pension plans are mandatory subjects of bargaining. As a result, many collective bargaining agreements mandate such contributions. Under ERISA, an employer that withdraws from a multiemployer plan is assessed withdrawal liability – a pro rata share of the plan's unfunded benefits, which can often exceed millions of dollars, even if an employer has contributed to the plan on behalf of a small number of employees. And under ERISA's "last man standing" rule for multiemployer plans, the last remaining participant in a plan is liable for the remainder of the plan's unfunded liabilities. If a non-participating employer is found to be a joint employer of employees of a participating employer that withdraws from a multiemployer fund, is that non-participating employer liable for some or all of the participating employer's withdrawal liability? In what proportion? Under the proposed rule, retirement benefits are plainly an "essential term and condition" of employment for the participating employer's employees. Does the non-participating employer's obligations as a joint-employer depend on whether it has control over the issue

of retirement benefits? If an employer is found to be a joint-employer because it has control over, *e.g.*, hiring, discharge, and discipline, is it a joint employer over terms and conditions of employment that it does not control (whether directly, indirectly, actually, or where no control is reserved, exercised, or unexercised)? Proposed section 103.40(f) notes that control over matters that are immaterial to the existence of an employment relationship is not relevant to a joint-employer analysis. Is the converse true? Is an employer shielded from a joint-employer liability arising from a term and condition of employment over which it has no control?

These are but a few "real world" examples of significant issues the NPRM raises by proposing an expansive and virtually unlimited joint-employer standard while failing to provide any meaningful or concrete guidance. We are confident that commenters will provide the Board via the rulemaking procedure with myriad others.

VII. Conclusion

For all of the foregoing reasons, the Chamber respectfully urges the Board to abandon its attempt via rulemaking to restore and expand the deeply-flawed *Browning-Ferris* standard. We instead urge that the Board retain the current rule adopted in 2020 unless and until factual or legal circumstances demonstrate a compelling need for its revision.

Sincerely,

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