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Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., as a single employer and/or joint employers *and* Dakota Upshaw *and* David Newcomb *and* Ron Senteras *and* Austin Hovendon *and* Nicole Pinnick. Cases 25–CA–163189, 25–CA–163208, 25–CA–163297, 25–CA–163317, 25–CA–163373, 25–CA–163376, 25–CA–163398, 25–CA–163414, 25–CA–164941, and 25–CA–164945

December 14, 2017

DECISION AND ORDER[1]

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE, MCFERRAN, KAPLAN, AND EMANUEL

This case involves a judge's finding that two entities—Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) and Brandt Construction Co. (Brandt)—are collectively joint employers and/or a single employer for purposes of the National Labor Relations Act (NLRA or Act). Five Hy-Brand employees and two Brandt employees were discharged after they engaged in work stoppages based on concerns involving wages, benefits, and workplace safety. We agree that the work stoppages constituted protected concerted activity under Section 7 of the Act, and the discharges constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the Act.

We agree with the judge that Hy-Brand and Brandt are joint employers, but we disagree with the legal standard the judge applied to reach that finding. The judge applied the standard adopted by a Board majority in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (Browning-Ferris)*.[2] In *Browning-Ferris*, the Board majority held that, even when two entities have *never* exercised joint control over essential terms and conditions of employment, and even when any joint control is not "direct and immediate," the two entities will still be joint employers based on the mere existence of "reserved" joint control,[3] or based on indirect control[4] or control that is "limited and routine."[5] We find

[1] On November 14, 2016, Administrative Law Judge Robert A. Ringler issued the attached decision. Respondent Hy-Brand Industrial Contractors, Limited (Hy-Brand) and Respondent Brandt Construction Company (Brandt) (collectively the Respondents) jointly filed exceptions and supporting, answering, and reply briefs. The General Counsel filed a limited cross-exception and supporting and answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified below.

The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondents argue that the judge improperly limited certain testimony and erroneously excluded documents from evidence. Even assuming the judge erred in these rulings, we find that the additional evidence would not affect our disposition of this case.

The General Counsel seeks a make-whole remedy that would include consequential damages incurred by the discriminatees as a result of the Respondents' unfair labor practices. The relief sought would require a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See, e.g., *Laborers International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

There are no exceptions to the judge's application of *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), regarding the appropriate treatment of search-for-work and interim employment expenses. Accordingly, we do not revisit that issue here.

[2] 362 NLRB No. 186 (2015), petition for review docketed *Browning-Ferris Indus. of Cal. v. NLRB*, No. 16-1028 (D.C. Cir. filed Jan. 20, 2016).

[3] Prior to the Board majority's decision in *Browning-Ferris*, joint-employer status turned on whether two entities *exercised* joint control over essential employment terms, and evidence that an entity had "reserved" the right to exercise such control would *not* result in joint-employer status. See, e.g., *Flagstaff Medical Center*, 357 NLRB 659, 667 (2011) (citing *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007)), enfd. in part 715 F.3d 928 (D.C. Cir. 2013).

[4] Prior to *Browning-Ferris*, the Board—applying common law principles—held that the "essential element" when evaluating joint-employer status "was whether the putative joint employer's control over employment matters is *direct and immediate*." *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002) (emphasis added) (citing *TLI, Inc.*, 271 NLRB 798 (1984)); see also *Summit Express, Inc.*, 350 NLRB 592, 592 fn. 3 (2007). Proof that a putative joint employer *indirectly* affected the terms and conditions of employment of another employer's employees was insufficient prior to *Browning-Ferris*. An example of indirect control would be an agreement between a supplier employer (a business that supplies labor to other businesses) and a user employer (a business that uses the labor supplied by a supplier employer) specifying a maximum total amount of reimbursable labor costs. See *CNN America, Inc.*, 361 NLRB 439, 472 (2014) (Member Miscimarra, concurring in part and dissenting in part). The contractual maximum for reimbursable labor costs, codetermined by the user and supplier, would not directly establish the wage rates or fringe benefits of the supplier's employees, but it would have an indirect effect on the supplier employees' wages and/or benefits when the supplier employer sets or negotiates them.

[5] Before *Browning-Ferris*, the Board held that joint-employer status would not result from control that was "limited and routine." See, e.g., *AM Property Holding Corp*., 350 NLRB 998, 1001 (2007), order modified 352 NLRB 279 (2008), supplemented 355 NLRB 721 (2010), enfd. in relevant part sub nom. *SEIU Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011). Supervision was found "limited and routine" where a su-

that the *Browning-Ferris* standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations.[6] Accordingly, we overrule *Browning-Ferris* and return to the principles governing joint-employer status that existed prior to that decision. See, e.g., *Airborne Express*, 338 NLRB 597 (2002); *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. sub nom. *General Teamsters Local Union No. 26 v. NLRB*, 772 F.2d 894 (3d Cir. 1985); and *Laerco Transportation*, 269 NLRB 324 (1984); see also *Browning-Ferris*, 362 NLRB No. 186, slip op. at 21–50 (dissenting opinion of Members Miscimarra and Johnson). By overruling *Browning-Ferris*, we also make the Board's treatment of joint-employer status consistent with the holdings of numerous Federal and state courts.[7]

Because we find that Hy-Brand and Brandt are joint employers, we do not reach or pass on whether, in the alternative, they constitute a single employer.[8]

I. OVERVIEW

The National Labor Relations Act (Act) establishes a comprehensive set of rules for labor relations in this country, and a primary function of the Board is to foster compliance with those rules by employees, unions, and employers. To comply with these rules as they have grown and evolved over the last eight decades, substantial planning is required. This is especially true in regard to collective bargaining, a process that is central to the Act. The Act's bargaining obligations are formidable—as they should be—and violations can result in significant liability. When it comes to the duty to bargain, resort to strikes or picketing, and even the basic question of "who is bound by this collective-bargaining agreement," there is no more important issue than correctly identifying who is the employer. Changing the test for identifying the employer, therefore, has dramatic implications for labor relations policy and its effect on the economy.

In *Browning-Ferris*, a Board majority rewrote the decades-old test for determining who is the employer. More specifically, the majority redefined and expanded the test that makes two separate and independent entities a "joint employer" of certain employees. This change subjected countless entities to unprecedented new joint bargaining obligations that most may not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have hereto-

pervisor's instructions consisted primarily of telling employees what work to perform, or where and when to perform it, but not how to perform it. *G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992); see also *AT&T v. NLRB*, 67 F.3d 446 (2d Cir. 1995) ("Limited and routine supervision, without an ability to hire, fire, or discipline, cannot justify a finding of joint employer status.") (citing *TLI*, 271 NLRB at 799).

[6] See *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (A "basic policy of the Act [is] to achieve stability of labor relations.").

[7] See, e.g., *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) ("A finding of the right to control employment requires . . . a comprehensive and immediate level of 'day-to-day' authority over employment decisions.") (quoting *Vernon v. State*, 116 Cal. App. 4th 114, 10 Cal. Rptr. 3d 121, 132 (2004)); *Gulino v. N.Y. State Educ. Dep't,* 460 F.3d 361, 379 (2d Cir. 2006) (employment relationship must involve a "level of control that is direct, obvious and concrete, not merely indirect or abstract"); *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 442–443 (2d Cir. 2011) ("'An essential element' of any joint employer determination is 'sufficient evidence of immediate control over the employees.'") (quoting *Clinton's Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1984)); *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991) (same); *Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275, 1280 (8th Cir. 1980) (holding that the Board erred in finding a joint-employer relationship, distinguishing cases "where the companies share direct supervision of the employees involved and control hiring, firing, and disciplining"); see also *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689–690 (1951) (holding that contractor's supervision over subcontractor's work "did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other," emphasizing that "[t]he business relationship between independent contractors is too well established in the law to be overridden without clear language doing so").

[8] The Board and the courts have distinguished between joint-employer status on the one hand, and single-employer status on the other. The hallmark characteristic of joint-employer status is the presence of two employer entities that are separate but deemed to be joint employers because they jointly control essential employment terms. A finding that two entities are joint employers "*assumes in the first instance that [the] companies are 'what they appear to be'—independent legal entities* that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'" *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc*., 691 F.2d 1117, 1122 (3d Cir. 1982) (emphasis added) (quoting *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966)). Thus, "the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment." Id. at 1123 (emphasis in original). By contrast, single-employer status arises when two entities—though supposedly distinct—are shown to be a single enterprise based on (i) common ownership, (ii) common management, (iii) interrelated operations, and (iv) centralized control of labor relations; of these factors, common ownership is typically afforded the least weight, and centralized control over labor relations the most weight. See *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc*., 380 U.S. 255 (1965) (per curiam); *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976) (per curiam).

fore been unlawful secondary strikes, boycotts, and picketing.

The *Browning-Ferris* majority was driven by a desire to ensure that collective bargaining is not foreclosed by business relationships that allegedly deny employees the right to bargain with employers that share control over essential terms and conditions of their employment. However well-intentioned the majority's decision in *Browning-Ferris* might have been, there are five major problems with that decision.

First, the *Browning-Ferris* test exceeds the Board's statutory authority. From the *Browning-Ferris* majority's perspective, the change their decision wrought in the joint-employer analysis was a necessary adaptation of Board law to reflect changes in the national economy. In making that change, they purported to operate within the limits of traditional common law principles, and they claimed to be returning to the law applied by the Board prior to 1984. In actuality, however, the *Browning-Ferris* majority relied on theories of "economic realities" and "statutory purpose" that extended the definitions of "employee" and "employer" far beyond the common law limits that Congress and the Supreme Court have stated must apply.[9] The *Browning-Ferris* decision represented a further expansion of changes in the law made in *FedEx*,[10] which revised the Board's longstanding definition of independent contractor status in a way that will predictably extend the Act's coverage to many individuals previously considered to be excluded from that coverage as independent contractors, and in *CNN*,[11] which imposed after-the-fact joint-employer obligations contrary to the parties' 20-year bargaining history, applicable collective-bargaining agreements (CBAs), relevant services contracts, and the Board's own prior union certifications.

Second, the *Browning-Ferris* majority's rationale for overhauling the Act's definition of "employer"—i.e., to protect bargaining from limitations resulting from the absence from the table of third parties that indirectly affect employment-related issues—relied in substantial part on the notion that present conditions are unique to our modern economy and represent a radical departure from simpler times when labor negotiations were unaffected by the direct employer's commercial dealings with other entities. However, such an economy has not existed in this country for more than 200 years.[12] Many forms of subcontracting, outsourcing, and temporary or contingent employment date back to long before the 1935 passage of the Act. Congress was obviously aware of the existence of third-party business relationships in 1935, when it limited bargaining obligations to the "employer"; in 1947, when it limited the definition of "employee" and "employer" to their common law agency meaning; and in 1947 and 1959, when Congress strengthened secondary boycott protection afforded to third parties who, notwithstanding their dealings with the employer, could not lawfully be required to suffer picketing and other forms of economic coercion based on their dealings with that employer.[13] This is not mere conjecture; it is the inescapable conclusion that follows from Supreme Court precedent recognizing that the Act did not confer "employer" status on third parties merely because commercial relationships made them interdependent with an employer and its employees.[14]

Third, courts have afforded the Board deference in this context merely as to its drawing of factual distinctions when applying the common law agency standard.[15]

[9] The common law agency principles are also known as "master-servant" principles in the older cases and literature, and these terms are used interchangeably both in the doctrine and here.

[10] *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017).

[11] *CNN America, Inc*., 361 NLRB 439 (2014), enf. denied in relevant part 865 F.3d 740 (D.C. Cir. 2017). In refusing to affirm the Board's joint-employer finding in *CNN*, the D.C. Circuit found that the Board had failed to grapple with its precedents requiring a putative joint employer to have exercised "direct and immediate" control over another employer's employees' essential terms and conditions of employment. 865 F.3d at 749–751.

[12] If the *Browning-Ferris* majority desired to return to a time when labor-management relations were insulated from third-party business relationships and competitive pressures, they would need to go back to our country's origins. The work of labor economists John R. Commons and Selig Perlman, who are perhaps the two most authoritative historians of the American labor movement, indicates that unions expanded and contracted during the first centuries of economic development in the United States, and the transition to national markets, combined with unprecedented business competition, caused extensive labor-management instability. See 1 John R. Commons, HISTORY OF LABOUR IN THE UNITED STATES 25–30 (1918); Selig Perlman, A HISTORY OF TRADE UNIONISM IN THE UNITED STATES 36–41 (1922); see also Philip S. Foner, THE HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: FROM COLONIAL TIMES TO THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR 338–340 (1947).

[13] See, e.g., Sec. 8(b)(4), 8(e).

[14] See, e.g., *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692 (holding that construction industry general contractors have no employer relationship with the employees of subcontractors, notwithstanding the general contractor's responsibility for the entire project). In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), an employer contracted out its maintenance work and "merely replaced existing employees with those of an independent contractor." Even though the subcontractor's employees continued "to do the same work under similar conditions of employment" and the "maintenance work still had to be performed in the plant," id. at 213, *Fibreboard ceased being the "employer."* Indeed, the premise of *Fibreboard* and similar decisions is that the outsourcing of work may "quite clearly imperil job security, or indeed terminate employment entirely" for employees of the contracting employer. Id. at 223 (Stewart, J., concurring).

[15] The Supreme Court's decision in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), speaks directly to the Board's authority to make factu-

However, the *Browning-Ferris* majority mistakenly interpreted this as a grant of authority to modify the agency standard itself. It is not, and the change wrought in *Browning-Ferris* is solely within the province of Congress, not the Board. This was not the first time the Board overstepped its limits in this area. Thus, in *Yellow Taxi Co. v. NLRB*,[16] Judge MacKinnon of the D.C. Circuit denounced the Board majority's "thinly veiled defiance" of controlling precedent regarding the "common law rules of agency," adding that "[n]o court can overlook an agency's defiant refusal to follow well established law." 721 F.2d at 382. The judge further observed:

> [T]he Board here is acting in an area where it is called upon to apply common law principles that have been established since 1800 and where the application of that law under the National Labor Relations Act has been declared by Congress and settled by the courts, including the Supreme Court, for some 36 years. In this area, there is no dispute as to the governing principles of law; what is involved is the application of law to facts. "[S]uch a determination of pure agency law involve[s] no special administrative expertise that a court does not possess." *NLRB v. United Ins. Co. of America*, supra, 390 U.S. at 260.

Id. at 383 fn. 39. To be specific, we understand the common law standard as codified by the Act to require direct control over one or more essential terms and conditions of employment to constitute an entity the joint employer of another entity's employees. Our fundamental disagreement with the *Browning-Ferris* test is not that it treats indicia of indirect, and even potential, control to be probative of joint-employer status, but that it makes such indicia potentially dispositive without any evidence of direct control in even a single area. Under the common law, in our view, evidence of indirect control or contractually-reserved authority is probative only to the extent that it supplements and reinforces evidence of direct control.[17]

Fourth, *Browning-Ferris* abandoned a longstanding test that provided certainty and predictability, replacing it with a vague and ill-defined standard that would have resulted in the imposition of unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, based solely on a never-exercised right to exercise "indirect" control over what the Board later decides is an "essential" employment term, to be determined in litigation on a case-by-case basis. Thus, the *Browning-Ferris* test deprived employees, unions, and employers of certainty and predictability regarding the identity of the "employer." Just like the test of employee status rejected by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 530 U.S. 318, 326 (1992), the *Browning-Ferris* joint-employer standard constituted "an approach infected with circularity and unable to furnish predictable results." This confusion and disarray threatened to cause substantial instability in bargaining relationships, and it may have and certainly would have resulted in substantial burdens, expense, and liability for innumerable parties, including employees, employers, unions, and countless entities that were cast into legal limbo, with consequent delay, risk, and litigation expense.[18]

Fifth, to the extent that the *Browning-Ferris* majority sought to correct a perceived inequality of bargaining leverage resulting from complex business relationships involving entities that do not participate in collective bargaining, the inequality addressed therein was the wrong target, and expanding collective bargaining to an employer's business partners was the wrong remedy. As noted above, the inequality targeted by the *Browning-Ferris* joint-employer test is a fixture of our economy. Business entities enter into a variety of relationships, and they have different interests and varying degrees of leverage in their dealings with one another. There are contractually more powerful business entities and less powerful business entities, and all pursue their own interests. The Board would need a clear congressional command—and none exists here—before undertaking an attempt to reshape this aspect of economic reality. The Act does not redress imbalances of power between businesses, even if those imbalances have some derivative effect on employees. As Justice Stewart observed 50 years ago:

> [I]t surely does not follow that every decision which may affect job security is a subject of compulsory col-

al distinctions in applying the common law agency standard. The determination of whether two entities are joint employers, said the Court, "is essentially a factual issue." Id. at 481.

[16] 721 F.2d 366 (D.C. Cir. 1983). See also *NLRB v. Town & Country Electric, 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.").

[17] Our dissenting colleagues do not cite any court decision finding that a company was a joint employer of another employer's employees based solely on the *indirect* effect of its business relationship on those workers' wages, hours, and other working conditions, much less a sufficient body of cases that one could say rises to the level of the common law. Nor does the dissent cite a body of cases finding that a company was a joint employer based solely on the existence of a contract clause reserving some *never-exercised* authority to the putative joint employer over the workers' terms and conditions of employment.

[18] See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679, 684–686 (1981), and other cases discussed in Part VI, subpart B of this opinion, emphasizing the need for certainty, predictability and stability.

> lective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. at 223 (Stewart, J., concurring); see also *First National Maintenance Corp. v. NLRB*, 452 U.S. at 676 (In adopting the NLRA, Congress "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."). Dragging third parties into collective bargaining wherever there is some interdependence between or among those parties and an employer is much more likely to thwart labor peace than advance it.

Indeed, on matters of economic power and relative inequality, the Board is not vested with "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970). Therefore, we are certainly not vested with general authority to shape national economic policy by balancing the competing interests of different business enterprises.

The Act encourages collective bargaining, but only between a labor organization and an employer regarding the terms and conditions of employment of the employer's employees. *Browning-Ferris* extended this purpose far beyond what Congress intended. In this respect, *Browning-Ferris* fosters substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the "employer" side of the table. Indeed, even the commencement of good-faith bargaining could have been delayed by disputes over whether the correct "employer" parties were present. This predictable outcome is irreconcilable with the Act's overriding policy to "*eliminate* the causes of certain substantial obstructions to the free flow of commerce."[19]

In sum, the *Browning-Ferris* majority opinion did not represent a "return to the traditional test used by the Board," as the majority claimed even as they admitted that the Board had never before described or articulated the test they announced. Rather, the *Browning-Ferris* joint-employer test fundamentally altered the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act. In addition, because the commerce data applicable to joint employers is combined for jurisdictional purposes,[20] the Act's coverage was extended to small businesses whose separate operations and employees had not, until *Browning-Ferris* issued, been subject to Board jurisdiction. As explained in detail below, we believe the *Browning-Ferris* majority impermissibly exceeded the Board's statutory authority, misread and departed from prior case law, and subverted traditional common law agency principles. The result was a new test that confused the definition of a joint employer and threatened to produce wide-ranging instability in bargaining relationships. It did violence as well to other requirements imposed by the Act, notably including the secondary-boycott protection that Congress affords to neutral employers. For all these reasons, we return today to pre-*Browning-Ferris* precedent. Thus, a finding of joint-employer status shall once again require proof that putative joint employer entities have *exercised* joint control over essential employment terms (rather than merely having "reserved" the right to exercise control), the control must be "direct and immediate" (rather than indirect), and joint-employer status will not result from control that is "limited and routine."

II. THE JOINT-EMPLOYER TEST PRIOR TO *BROWNING-FERRIS*

The Act does not expressly define who is an employer, whether joint or sole. In relevant part, Section 2(2) of the Act states only that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly." In cases decided prior to 1984, both the Board and the courts occasionally confused resolution of the issue whether two entities were joint employers by, among other things, blurring the distinction between the test for determining single-employer status and the test for determining joint-employer status.[21] In two cases decided in 1984—*Laerco Transportation*[22] and *TLI, Inc.*[23]—the Board clarified the law by expressly adopting the joint-employer standard announced by the Court of Appeals for the Third Circuit in *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1124

[19] NLRA Sec. 1 (emphasis added).

[20] *Valentine Properties*, 319 NLRB 8 (1995).

[21] See, e.g., *Parklane Hosiery*, 203 NLRB 597 (1973), amended 207 NLRB 991 (1973).

[22] 269 NLRB 324.

[23] 271 NLRB 798.

(3d Cir. 1982): "The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." Applying this test as to "essential terms" in both *Laerco* and *TLI*, the Board stated it would focus on whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[24]

Both *TLI* and *Laerco* were cases applying the joint-employer test to the relationship between a company supplying labor to a company using that labor. The Board found that evidence of the user employer's actual but "limited and routine" supervision and direction of the supplier employer's employees would not suffice to establish joint-employer status.[25] Subsequently, in *AM Property Holding Corp.*, 350 NLRB at 1001, the Board further explained that it has "generally found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work."

In *Airborne Express*, 338 NLRB at 597 fn. 1, the Board explained that under the joint-employer test, "[t]he essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate."[26] Consistent with this standard, in *AM Property* the Board found that a contractual provision giving the user company (AM) the right to approve hires by the supplier company (PBS) to work at AM's office building was not, standing alone, sufficient to make AM a joint employer of those employees. Instead, "[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."[27]

The *AM Property* distinction between potential or reserved authority and the actual exercise of authority is a commonplace, well-established fixture in Board jurisprudence. For example, in the Board's single-employer test, we have repeatedly required proof that "one of the entities exercises actual or active control [as distinguished from potential control] over the day-to-day operations or labor relations of the other."[28] In other contexts where a party bears the burden of proving that an entity falls within a particular statutory definition, the Board has repeatedly endorsed this evidentiary distinction, giving weight only to the actual exercise of authority or control.[29]

As discussed in Section IV below, the pre-*Browning-Ferris* test, which we restore today, is fully consistent with the common law agency principles that the Board must apply in determining joint-employer status. Further, as an administrative law judge has accurately summarized, the test reflects a common-sense, practical understanding of the nature of contractual relationships in our modern economy: "An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control is not, in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees."[30]

[24] *Laerco*, 269 NLRB at 325; *TLI*, 271 NLRB at 798.

[25] *Laerco*, 269 NLRB at 326; *TLI*, 271 NLRB at 799. *Laerco* and *TLI* were decided by different three-member panels of a Board then comprised of four sitting members. As such, they collectively represented the unanimous opinion of the full Board at that time.

[26] We note that, although concurring Member Liebman advocated revisiting the joint-employer standard represented by *TLI*, she agreed with the majority in *Airborne* that Board decisions applying this precedent "have required that the joint employer's control over these matters be direct and immediate." 338 NLRB at 597 fn. 1. Thus, the *Browning-Ferris* majority was mistaken in asserting that the requirement of "direct and immediate control" stated in *Airborne* was a new addition to the joint-employer test. Further, as we shall later explain, there is ample precedent in the common law for this requirement predating 1984.

[27] 350 NLRB at 1000.

[28] *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001). See also, e.g., *Dow Chemical Company*, 326 NLRB 288 (1998); *Gerace Construction, Inc.*, 193 NLRB 645 (1971); *Los Angeles Newspaper Guild, Local 69*, 185 NLRB 303, 304 (1970).

[29] E.g., *FedEx Home Delivery*, 361 NLRB 610 ("The Board has been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial autonomy, and those that are circumscribed or effectively blocked by the employer."); *Pacific Lutheran University*, 361 NLRB 1404, 1427 (2014) ("In order for decisions in a particular policy area to be attributed to the faculty, the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations."); *Lucky Cab*, 360 NLRB 271, 273 (2014) ("We reject, therefore, the judge's reliance on 'paper authority' set forth in the handbook, in light of the contrary evidence of the road supervisors' actual practice. *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000), enfg. in relevant part 327 NLRB 253 (1998) (no authority to discipline, despite statement in job description, where the alleged supervisors did not actually discipline or recommend discipline).").

[30] *Southern California Gas*, 302 NLRB 456, 461 (1991).

III. THE *BROWNING-FERRIS* JOINT-EMPLOYER TEST

The *Browning-Ferris* majority expressly overruled *TLI*, *Laerco*, *Airborne Express*, *AM Property,* and related precedent and purported to return to a joint-employer test that allegedly applied prior to this line of precedent. Their analysis began in a manner that was consistent with prior precedent: "The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." 362 NLRB No. 186, slip op. at 15. The "share or codetermine" language is the general statement of the joint-employer test in the Third Circuit's 1982 *Browning-Ferris* decision that was adopted and applied by the Board in both *TLI* and *Laerco*.

The *Browning-Ferris* majority went on to adopt *TLI*'s and *Laerco*'s description of essential terms and conditions of employment as "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction." Id. (emphasis in *Browning-Ferris*). If this was the extent of the majority's holding in *Browning-Ferris*, there would have been no need for that majority to overrule precedent.

However, the *Browning-Ferris* majority made clear that its new test expanded joint-employer status far beyond anything that had existed under then-current precedent and, contrary to the majority's claim, under precedent predating *TLI* and *Laerco*. In a two-step progression, the first of which misleadingly depicted the limits of common law, the *Browning-Ferris* majority removed all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding. "We will no longer require," they announced,

> that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.

362 NLRB No. 186, slip op. at 15–16. Moreover, the *Browning-Ferris* test evaluated the exercise of control by construing "share or codetermine" broadly:

> In some cases (or as to certain issues) employers may engage in genuinely *shared decision-making*, e.g., they *confer or collaborate* to set a term of employment. . . . Alternatively, employers may exercise *comprehensive authority* over different terms and conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. . . . Or employers *may affect different components of the same term*, e.g. one employer *defines and assigns work tasks*, while the other supervises *how those tasks are carried out*. . . . Finally, one employer may *retain the contractual right to set a term or condition of employment*.

Id., slip op. at 15 fn. 80 (emphasis added).

The *Browning-Ferris* majority conceded that "it is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining." Id., slip op. at 16. However, the majority failed to provide any guidance as to what degree of control, under what circumstances, would be insufficient to establish joint-employer status.

Several conclusions follow from the *Browning-Ferris* majority's reasoning and the decision to overrule prior Board precedent regarding joint-employer status.

First, under *Browning-Ferris*, the Board in any particular case could find joint-employer status based on evidence involving virtually any aspect of employment, and the Board could decide to give dispositive weight to an entity's "reserved" or "indirect" control over *any* essential term and condition of employment of another entity's employees.

Second, there was no requirement that control over any essential employment term be "direct and immediate" in order to be probative and potentially determinative of joint-employer status. Under *Browning-Ferris*, indirect control, even a power reserved by contract but never exercised, would be considered and could suffice, *standing alone*, to find joint-employer status.

Finally, while the *Browning-Ferris* majority purported to base its standard on the common law and sufficient control "to permit meaningful collective bargaining," id., slip op. at 16, it was possible that even the occasional limited and routine discussion or collaboration about a single essential term of employment would have sufficed to establish joint-employer status under the *Browning-Ferris* standard. The *Browning-Ferris* majority repeatedly stated that almost every aspect of a business relationship could be *probative*, but it provided no significant guidance as to what may or should be *determinative*.

The *Browning-Ferris* test represented a major departure from precedent. When applied, it placed the Board in the position of passing on details regarding business relationships that have no direct bearing on what actually occurs in the workplace, and which may be unknown to

employees or even the employer entities themselves. Nor is there any discernible limit on the *Browning-Ferris* majority's open-ended, multifactor standard, which is an analytical grab bag from which any scrap of evidence—regarding indirect control or incidental collaboration as to any aspect of work—could suffice to prove that multiple entities collectively comprise a joint employer, whether they numbered two or two dozen.

IV. *BROWNING-FERRIS* DISTORTED THE COMMON LAW AGENCY TEST AND ADOPTED THE CONGRESSIONALLY-REJECTED "ECONOMIC REALITY" AND "BARGAINING INEQUALITY" THEORIES.

A. The Implicit Reliance of Browning-Ferris on Economic Reality and Statutory Purpose Theory Directly Contravened Congressional Intent.

The threshold problem—an insurmountable one—with *Browning-Ferris*'s reformulated joint-employer test was that it far exceeded the limits of the Board's statutory authority.[31] Indeed, it was the third in a series of cases in which the Board tested or exceeded those limits by dramatically expanding "employer" and "employee" status.

In *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017), the majority claimed to be applying the common law when it broadened the Act's definition of "employee," which (based on language added in 1947 as part of the Taft-Hartley amendments) explicitly excludes any "independent contractor."[32] In altering the analysis for distinguishing employees from independent contractors, the majority distorted the common-law test to emphasize the perceived economic dependency of the putative employee on the putative employer. Member Johnson's dissent explained that the majority's treatment of "employee" and "independent contractor" status in *FedEx* was contrary to the Act and its legislative history, and the majority's factual findings were contrary to the record. Unsurprisingly, the D.C. Circuit rejected the Board's decision.

In *CNN America, Inc*., 361 NLRB 439 (2014), enf. denied in relevant part 865 F.3d 740 (D.C. Cir. 2017), the majority found that a client, CNN, was a joint employer of technical employees supplied by a contractor, TVS, although CNN undisputedly had no direct role in hiring, firing, disciplining, discharging, promoting, or evaluating TVS' employees, and CNN's "employer" status was contrary to collective-bargaining agreements between TVS and the union that represented TVS' employees, the services agreement entered into between CNN and TVS, two decades of bargaining history and CBAs (all identifying the contractor as the only employer), and prior union certifications by the Board. The Board majority in *CNN*, though ostensibly applying the traditional joint-employer test, relied on factors similar to those later emphasized by the *Browning-Ferris* majority (e.g., finding that CNN's services agreement gave it "considerable authority" over "staffing levels"). Then-Member Miscimarra's dissent in *CNN* explained that the Board and the courts had long dealt with situations where contractor employees work at client locations, with substantial interaction between the client and contracting employer, without conferring joint-employer status on the client. *CNN America, Inc*., slip op. at 28, 31–32 (citing *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692; *Fibreboard Paper Products Corp. v. NLRB*, supra, 379 U.S. at 203 (other citations omitted)). Once again, the D.C. Circuit denied enforcement of the Board's decision in relevant part, sharply criticizing the *CNN* Board majority for "casually ignor[ing]" the longstanding direct-and-immediate-control standard for determining joint-employer status and for its "silence in the face of inconvenient precedent." *NLRB v. CNN America*, 865 F.3d at 751 (internal quotations omitted).

In *Browning-Ferris*, the majority abandoned the veiled attempt to remake joint-employer law, which had been strained beyond its rational breaking point in *CNN*. Instead, similar to what was done in *FedEx* for the definition of a statutory employee, the majority announced a new test of joint-employer status that, notwithstanding adamant disclaimers, effectively resurrected and relied, at least in substantial part, on intertwined theories of "economic realities" and "statutory purpose" endorsed by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), which Congress expressly rejected in the Taft-Hartley Amendments of 1947. In *Hearst*, the Court applied the same rationale for the definitions of employee *and* employer under the original Wagner Act:

> To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper 'physical conduct in the performance of the service.' On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the

[31] The *Browning-Ferris* majority cited the following passage from *American Trucking Assns. v. Atchison, T. & S.F. Ry. Co*., 387 U.S. 397, 416 (1967), purporting to justify the change in the joint-employer standard: "[Regulatory agencies] are supposed, *within the limits of the law and of fair and prudent administration*, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." 362 NLRB No. 186, slip op. at 1 (emphasis added). As hereafter discussed, the change in the joint-employer standard was neither within the limits of the law nor representative of fair and prudent administration.

[32] Sec. 2(3).

> containers designated 'employee' and 'employer' which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that 'employers and employees not in proximate relationship may be drawn into common controversies by economic forces, and that the very disputes sought to be avoided might involve 'employees (who) are at times brought into an economic relationship with employers who are not their employers.' In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.[33]

In reaction to *Hearst*, Congress expressly excluded "independent contractors" from the Act's definition of a statutory employee in the Taft-Hartley Amendments of 1947. The purpose of this revision was manifest in the legislative history of the Amendments and repeatedly acknowledged thereafter by the Supreme Court, which stated in one case that

> [in *Hearst*] the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in s 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. . . . Thus there is no doubt that we should apply the common law agency test here in distinguishing an employee from an independent contractor.[34]

The *Browning-Ferris* majority nevertheless clung to the notion that economic and policy considerations may determine the definition of employee and employer. Even assuming that may be true in some cases *not* dealing with the right to control under the common law,[35] the Supreme Court squarely rejected reliance on these considerations in *Darden*, stating that

> *Hearst* and *Silk*, which interpreted "employee" for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read "employee," which neither statute helpfully defined, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning. . . . To be sure, Congress did not, strictly speaking, "overrule" our interpretation of those statutes, since the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law. But a principle of statutory construction can endure just so many legislative revisitations, and *Reid*'s presumption that Congress means an agency law definition for "employee" unless it clearly indicates otherwise signaled our abandonment of *Silk*'s emphasis on construing that term "'in the light of the mischief to be corrected and the end to be attained.'"

503 U.S. at 324–325 (footnote and citations omitted).

Accordingly, the inescapable conclusion to be drawn from the Taft-Hartley legislation repudiating the *Hearst* opinion is that Congress must have intended that common law agency principles, rather than the *Browning-Ferris* majority's much more expansive policy-based "economic realities" and "statutory purpose" approach, govern the definition of employer as well as employee under the Act. Even if Congress had not been so clear, "it is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless a statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)). Thus, the *Browning-Ferris* majority's joint-employer test is invalid because it does not comport with common law agency principles.

Notwithstanding the legislative repudiation of *Hearst*, the majority in *Browning-Ferris* expanded the definition of employer by redefining the joint-employer doctrine in unstated—but unmistakable—reliance on the rationale of *Hearst*.[36] The majority there was motivated by a policy

[33] 322 U.S. at 128–129. See also *United States v. Silk*, 331 U.S. 704 (1947), applying the same "economic realities" and "statutory purpose" theories to the definition of "employee" under the Social Security Act.

[34] *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). See also *Boire v. Greyhound*, supra, 376 U.S. at 481 fn. 10; *Nationwide Mutual Insurance Co. v. Darden*, supra, 503 U.S. at 324.

[35] See, e.g., *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971).

[36] An unacknowledged antecedent for the joint-employer theory adopted in *Browning-Ferris* was the concurring opinion of then-Member Liebman in *Airborne Express*, supra, 338 NLRB at 597–599, who contended that "[g]iven business trends driven by accelerating competition, highlighted by this case, the Board's joint-employer doctrine may no longer fit economic realities." See also *AM Property*

concern that an imbalance of leverage in commercial dealings between undisputed employers and third-party entities prevents "meaningful bargaining" over each term and condition of employment and is therefore in conflict with the statutory policy of encouraging collective bargaining. That approach reflected a desire to ensure that third parties with "deep pockets" become participants in existing or new bargaining relationships, and that they would also be directly exposed to strikes, boycotts and other economic weapons, based on the most limited and indirect signs of potential control.[37] Whether that was good or bad policy—and we think it was bad for numerous reasons discussed below—this fundamental balancing of interests has already been done by Congress. And the simple fact is that Congress has forbidden the Board from applying an economic realities or statutory purpose rationale in defining employer and joint-employer status under the Act.

B. The Browning-Ferris Test Does Not Comport with Common Law Agency Principles.

The *Browning-Ferris* majority did not acknowledge the Congressional rejection of *Hearst*'s economic realities theory for defining "employee" and "employer" under the Act. Neither did they acknowledge their implicit reliance on this theory in announcing a new joint-employer test. Instead, they attempted to persuade that their test of joint-employer status was consistent with common-law agency's master-servant doctrine. Their attempt failed.

The "touchstone" at common law is whether the putative employer sufficiently controls or has the right to control putative employees. See *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448–449 (2003); Restatement (Second) of Agency §§ 2, 220 (1958). Without attribution, the *Browning-Ferris* majority asserted that the common law considers as potentially dispositive not only direct control, but also indirect control and even reserved control that has never been exercised. 362 NLRB No. 186, slip op. at 15–16. They jettisoned the joint-employer test's requirement of evidence that the putative employer's control be direct and immediate. Id. As explained below, however, "control" under common-law principles *requires* some direct and immediate control even where indirect-control factors are deemed probative. The Act, with its incorporation of the common law, does not allow the Board to broaden the standard to include indirect control or an inchoate right to exercise control, *standing alone*, as a dispositive factor, which the *Browning-Ferris* majority did.

Long before Congress anchored "employer" in the common law, courts applying those principles focused on discerning whether the putative master had control over the details of the work (master) or only the results to be achieved (not master). See, e.g., *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 522 (1889) ("[T]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done'" (quoting *Railroad Co. v. Hanning*, 82 U.S. 649, 657 (1872).). Further, the Supreme Court, for more than a century, has adhered to the proposition that "under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services."[38] Lower courts as well implicitly limited their analysis to looking for direct and immediate control. See, e.g., *Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan*, 179 F.2d 882 (8th Cir. 1950) (attaching no importance to indirect control in finding real estate agents were not employees), cert. denied 340 U.S. 823 (1950); *Glenn v. Standard Oil Co.*, 148 F.2d 51 (6th Cir. 1945) (attaching no importance to indirect control in finding operators of Standard Oil's bulk distribution plants were not employees); *Spillson v. Smith*, 147 F.2d 727 (7th Cir. 1945) (attaching no importance to indirect control in finding the musicians of an orchestra were the employees of its leader, not of the restaurant where they played).

As courts undoubtedly realized, anyone contracting for services, master or not, inevitably will exert and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure that the benefit of the bargain is obtained. For example, in a case apply-

Holding Co., supra, 350 NLRB at 1012 (Member Liebman, concurring in part and dissenting in part).

[37] See Michael Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 Boston College L. Rev. 329, 348 (1998) ("[I]f workers are to be assured the opportunity to utilize collective bargaining leverage to extract a greater share of the returns from their labor, they must be able to bargain with the firms that provide the capital."); see also Craig Becker, *Labor Law Outside the Employment Relation*, 74 Texas L. Rev. 1527 (1996) ("At bottom, my intent is to inquire how the principles of labor law might be freed from the limits of outmoded definitions of the employment relationship. That effort involves questioning the sanctity of the doctrine of privity of contract *as well as departing from the common-law paradigm of master-servant as foundations for rights and duties in the workplace*. Above all, it requires rethinking the nature of power at stake in labor relations so as to bring legal doctrine in line with contemporary economic realities.") (emphasis added).

[38] *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963), citing and applying the analysis in *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909). See also *Kelly v. Southern Pacific Co.*, 419 U.S. 318, 329–330 (1974), cited with approval in *Community for Creative Non-Violence v. Reid*, 490 U.S. at 739–740, and in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 323.

ing common-law principles and finding, under the Social Security Act, that a production company was not the employer of the performers in vaudeville acts, Judge Learned Hand wrote that

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

Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717–718 (2d Cir. 1943).

The Supreme Court subsequently addressed the same point in construing the scope of the Act's prohibition of coercive secondary activity against neutral construction employers by unions:

> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor *or make the employees of one the employees of the other*. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.[39]

To aid in applying this well-established common law for employer-employee relationships, the Supreme Court largely adopted the Restatement (Second) of Agency § 220's nonexhaustive list of factors to be considered. *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751–752; see also *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 323–324. The *Reid* Court wrote:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751–752. These factors provide useful indicia of the putative employer's direct and immediate control, or its right to exercise such control.

The comments to Section 220 of the Restatement clarify that the listed factors are not concerned with indirect control. Comment j, on the duration of the relationship, provides: "If the time of employment is short, the worker is less apt to subject himself to *control as to details* and the job is more likely to be considered his job than the job of the one employing him" (emphasis added). Comment k, on the source of the instrumentalities and tools, states it is understandable that the owner would regulate such instrumentalities because "if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will *follow the direction of the owner in their use*" (emphasis added). Comment *l*, on the location of work, states that although the putative employer's control of the location of work usually raises an inference of employer status, "[i]f . . . the rules are made only for the general policing of the premises, as where a number of separate groups of workmen are employed in erecting a building, mere conformity to such regulations does not indicate that the workmen are" employees of the entity that controls the property.

More recently, courts applying the common law have continued to make it unmistakably clear that employer status requires sufficient proof of direct and immediate control. For example, in finding that the New York State Education Department (SED) was not the employer of teachers under Title VII, the Court of Appeals for the Second Circuit wrote: "[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* factors countenance a relationship where the level of control is direct, obvious, and concrete, *not merely indirect or abstract*. . . . Plaintiffs in this case could not establish a master-servant relationship under the *Reid* test. [The SED] does have some control over New York City school teachers—e.g., it controls basic curriculum and credentialing requirements—but

[39] *NLRB v. Denver Building and Construction Trades Council*, supra, 341 U.S. at 689–690 (1951) (emphasis added).

SED does not exercise the workaday supervision necessary to an employment relationship." *Gulino v. N.Y. State Education Department*, 460 F.3d 361, 379 (2d Cir. 2006) (emphasis added), cert. denied 554 U.S. 917 (2008). Similarly, the Court of Appeals for the Ninth Circuit, applying common-law principles, found that Wal-Mart was not the joint employer of its suppliers' employees where Wal-Mart did not have the right to an "immediate level of 'day-to-day' control" over those employees. *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)). A few years later, the Supreme Court of California used similar language in finding a franchisor not liable under the California Fair Employment and Housing Act for a franchisee supervisor's harassment of an employee: "[T]raditional common law principles of agency and respondeat superior supply the proper analytical framework . . . . This standard requires 'a comprehensive and immediate level of "day-to-day" authority' over matters such as hiring, firing, direction, supervision, and discipline of the employee." *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 740 (Cal. 2014) (quoting *Vernon*, supra).[40]

Contrary to the *Browning-Ferris* majority's characterization, the above-quoted language from *Gulino* and *Wal-Mart* cannot be dismissed as meaningless statements made "in cases where there was little if any relevant evidence of control of any sort." 362 NLRB No. 186, slip op. at 17 fn. 94. This statement begged the question why either court felt the need to specifically mention the absence of immediate control. While *Patterson* was decided under a California statute, the *Browning-Ferris* majority failed to acknowledge that the court's opinion there was founded on "traditional common law principles of agency and respondeat superior."[41] The salient point is that the cases we cite indicate that evidence of direct and immediate control is essential to a finding of joint-employer status under the common law. By contrast, the *Browning-Ferris* majority did not and could not cite a single judicial opinion that even implicitly affirms its concededly novel two-step alternative common law test or the proposition that a finding of a joint-employer relationship under the common law can be based solely on indirect control.

In re *Enterprise Rent-A-Car Wage & Employment Practices Litigation*, 683 F.3d 462, 468–469 (3d Cir. 2012), provides a useful contrast between the common law test of joint-employer status and the economic realities test that Congress authorized by the unique language of the Fair Labor Standards Act (FLSA), but rejected in the Taft-Hartley Amendments of the NLRA. With respect to the economic realities test, the Third Circuit stated:

> When determining whether someone is an employee under the FLSA, "economic reality rather than technical concepts is to be the test of employment." *Goldberg v. Whitaker House Co-op., Inc.,* 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) (internal quotation marks omitted). Under this theory, the FLSA defines employer "expansively," *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), and with "striking breadth." *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947). The Supreme Court has even gone so far as to acknowledge that the FLSA's definition of an employer is "the broadest def-

[40] In *TLI*, supra, 271 NLRB at 798, the Board stated that "there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." We read that passage to provide a nonexclusive list of direct-and-immediate-control factors to consider, and hereafter we discuss cases decided after *TLI* that did examine factors other than those enumerated in that case. However, evidence of control over the specific factors referred to in *TLI* is usually most relevant to the joint-employer analysis. It is no coincidence that the Supreme Court of California used a similar list in *Patterson*, as did the Ninth Circuit in *EEOC v. Pacific Maritime Association*, 351 F.3d 1270 (9th Cir. 2003). Discussing the Supreme Court's *Clackamas* decision in this Title VII case, the Ninth Circuit stated:

> The Supreme Court seems to suggest that the sine qua non of determining whether one is an employer is that an "employer can hire and fire employees, can assign tasks to employees and supervise their performance." Logically, before a person or entity can be a joint employer, it must possess the attributes of an employer to some degree. Numerous courts have considered the key to joint employment to be the right to hire, supervise and fire employees.

Id. at 1277. The Board's task is to weigh all of the incidents of the relationship to determine the sufficiency of the control, and that analysis necessarily includes qualitative assessments of the general significance of specific factors. The *Browning-Ferris* test discarded this safeguard against overinclusion in favor of finding any sporadic evidence or tangential effect on working conditions to be potentially sufficient to prove joint-employer status.

[41] The *Browning-Ferris* majority also distinguished *Patterson* on the ground that it involved "the particularized features of franchisor/franchisee relationships, none of which are applicable here." 362 NLRB No. 186, slip op. at 17 fn. 94. As we state elsewhere in this decision, prior to *Browning-Ferris* the Board had maintained a unitary joint-employer test for all types of employer relationships. The suggestion that the test would vary from one type of relationship to another was unprecedented and certainly had no foundation in the common law. Moreover, before the Board's decision in *Browning-Ferris* even issued, the General Counsel had already thrown this distinction overboard in the *McDonald's* litigation, in which the theory of the General Counsel's case is that McDonald's USA, LLC is a joint employer of its franchisees' employees under the joint-employer standard the Board subsequently embraced in *Browning-Ferris*. See *McDonald's USA, LLC*, 362 NLRB No. 168, slip op. at 2 fn. 1 (2015) (Members Miscimarra and Johnson, concurring in part and dissenting in part).

> inition that has ever been included in any one act." *United States v. Rosenwasser,* 323 U.S. 360, 363 n. 3, 65 S.Ct. 295, 89 L.Ed. 301 (1945).[42]

The issue in *Enterprise* was whether the district court had erred in granting summary judgment against the plaintiff employees' claim that the parent company of their wholly owned rental car subsidiary was their joint employer with shared liability for alleged overtime wage violations. The district court had relied on a traditional common law test. However, the Third Circuit held that

> [b]ecause of the uniqueness of the FLSA, a determination of joint employment "must be based on a consideration of the total employment situation and the economic realities of the work relationship." A simple application of the [district court's] test would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient *indirect* control as well. We therefore conclude that while the factors outlined today in [that test] are instructive they cannot, without amplification, serve as the test for determining joint employment under the FLSA.[43]

It is readily apparent from the distinctions underscored by the *Enterprise* court that the new joint-employer test announced in *Browning-Ferris* was rooted in "economic realities" and "statutory purpose" theory, not in the common law of agency. Indeed, the *Browning-Ferris* definition of employer equals or exceeds the "striking breadth" of the FLSA standard, and it cannot stand in the face of express Congressional disapproval.

The *Browning-Ferris* majority's explication of its joint-employer test erased any doubt that the test they invented was the analytical stepchild of *Hearst*, rather than being founded in common law. The *Browning-Ferris* majority posited that as the first step of a joint-employer analysis, it must be determined whether an employment relationship exists at all between the alleged joint employer and an employee. 362 NLRB No. 186, slip op. at 11–12. In short, they did no more than acknowledge the obvious: an entity with no control whatsoever over a person performing services in that entity's affairs cannot possibly be that person's employer. But the *Browning-Ferris* majority incorrectly set this "zero control" state as the *outer limit* of common law master-servant agency. That is, if there is *some* type of control (including indirect or contractually reserved control) over *any* aspect of the performance of services, then the common law would allegedly permit finding an employment relationship. Of course, if that were true, it would obliterate the common law concept of an independent contractor—embedded in the Act in the 1947 Taft-Hartley amendments—and erase the distinction at common law between servant and nonemployee agent. The *Browning-Ferris* majority seemed vaguely to recognize this, but in deciding whether to find that a separate business is a joint employer with an undisputed employer of an undisputed employee, the majority nevertheless looked to whether it would serve the purposes of the Act to expand the joint-employer definition in order to serve the Act's policy of "encouraging the practice and procedure of collective bargaining" (in the words of Section 1 of the Act). Id., slip op. at 1–2. In their view, it was necessary to do so because the direct and immediate control standard "serve[s] to significantly and unjustifiably narrow the circumstances where a joint employment relationship can be found—leav[ing] the Board's joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes." Id., slip op. at 1.

Compare the *Browning-Ferris* majority's reasoning set forth above to the following passages from *Hearst* concerning the test for determining whether newsboys were employees or independent contractors under the Wagner Act:

> Congress 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

[42] Id. at 467–468; see also *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017) ("The Supreme Court has explained that the 'striking breadth' of these [FLSA] definitions [of 'employer' and 'employee'] brings within the FLSA's ambit workers 'who might not qualify as [employees] under a strict application of traditional agency law principles' or under other federal statutes.") (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 326).

[43] Id. at 469 (quoting *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)). The court nevertheless affirmed the grant of summary judgment, finding insufficient proof that the parent company was a joint employer even under the expansive FLSA standard. It is not clear whether the same evidence considered under the *Browning-Ferris* majority's test would have led to the same result.

> 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. 124–127 (footnotes omitted). The only significant difference between the majority's reasoning in *Browning-Ferris* and the Supreme Court's reasoning in *Hearst* is that the Court at least candidly recognized that the "intermediate region" into which it extended the Wagner Act's definition of covered employees was *beyond* the scope of common law, while the *Browning-Ferris* majority disingenuously claimed that the intermediate region into which they extended the definition of joint employer stayed well within the limits of that law. Clearly, it does not. We believe the Board's traditional joint-employer test accurately reflects common law. Moreover, we disagree with any suggestion that the *Browning-Ferris* test constitutes an appropriate way under common law to advance the statutory goal of promoting collective bargaining. Indeed, as we discuss below in Section VI, we find the *Browning-Ferris* test is more likely to destabilize collective bargaining than to promote it.

V. OTHER PROBLEMS WITH THE *BROWNING-FERRIS* STANDARD

A. The Browning-Ferris Majority's Alleged Return to the Alleged "Traditional Standard" Relies on a Selective Misreading of Precedent Before and After TLI and Laerco.

The *Browning-Ferris* majority stated that the *TLI* and *Laerco* decisions "significantly and unjustifiably narrow[ed]" what they deemed to be the Board's "traditional" joint-employer standard. 362 NLRB No. 186, slip op. at 1. This standard allegedly encompassed far more factors, including those related to indirect control and reserved contractual control, and more comprehensively analyzed employment relationships to determine whether an entity was a joint employer. However, in selecting only the few cases allegedly supporting this view of traditional practice, the *Browning-Ferris* majority neglected other cases where the Board found no joint-employer relationship, despite the presence of the supposedly "traditional" "indirect control" factors that the *Browning-Ferris* majority claimed served to justify a finding of such a relationship. Contrary to the *Browning-Ferris* majority, the Board's prior cases did not manifest an intention to apply a broad analytical framework in which indirect control played a determinative role in joint-employer cases. We agree that the Board has traditionally carried out a fact-intensive assessment of whether a putative employer exercised sufficient control over, or retained the right to control, the employees at issue. We disagree, however, with the notion that prior to *TLI* and *Laerco* the Board, as a rule, gave much probative weight to evidence of "indirect control," or that such evidence, standing alone, was routinely determinative.[44] We will now turn to a discussion of these factors of "indirect control."

The following sentence is emblematic of the *Browning-Ferris* majority's attempt to prove too much by the citation of the older cases:

> [T]he Board's joint-employer decisions found it probative that employers retained the contractual power to reject or terminate workers; set wage rates; set working hours; approve overtime; dictate the number of workers to be supplied; determine "the manner and method of work performance"; "inspect and approve work"; and terminate the contractual agreement itself at will.

362 NLRB No. 186, slip op. at 9 (footnotes omitted).

The foregoing statement included footnote citations to precedent allegedly showing that "the Board typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status." Id. (emphasis in original). According to the *Browning-Ferris* majority, the Board "did not [historically] require that this right be exercised, or that it be exercised in any particular manner." Id. They failed to mention, however, that in many of the cases cited in their decision, there was evidence that the contractual rights *were exercised*, and there was other evidence of direct control over employees' work. The majority's statement also fails to account for all the Board cases that reach the contrary result with similar contractual provisions. Thus, we can paraphrase the *Browning-Ferris* majority's statement, with appropriate citations, that during the period preceding *TLI* and *Laerco*, the Board found *no* joint-employer status where putative "employers retained the

[44] Apart from our disagreement with the *Browning-Ferris* majority's characterization of the joint-employer tests that existed prior to 1984, we note that in one major respect *TLI* and *Laerco* undisputedly broadened the circumstances in which a joint-employer relationship could be found. That is, by adopting the Third Circuit's *Browning-Ferris* joint-employer test, the Board made clear that the more restrictive single-employer test, requiring a showing of a less than arms-length relationship between employers, did not apply.

contractual power to reject or terminate workers;[45] set wage rates;[46] set working hours;[47] approve overtime;[48] determine 'the manner and method of work performance';[49] 'inspect and approve work,'[50] and terminate the contractual agreement itself at will."[51] Additionally, prior to *TLI* and *Laerco* the Board found that employers who conferred over the number of employees needed and the hours to be worked were not joint employers.[52]

The *Browning-Ferris* majority also stated that prior to *TLI* and *Laerco* "the Board gave weight to a putative joint employer's 'indirect' exercise of control over workers' terms and conditions of employment," 362 NLRB No. 186, slip op. at 9 (citing *Floyd Epperson*, 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974)). However, it is readily apparent that, while the Board in *Floyd Epperson* noted anecdotal evidence of the employer's indirect control over wages and discipline, its joint-employer finding was primarily based on evidence of direct and immediate supervision of the employees involved.[53] Similarly, in *Fidelity Maint. & Constr. Co.*, supra, 173 NLRB at 1037, the Board emphasized *direct control*, saying that "the determinative factor in an owner contractor situation is whether the owner exercises or has the right to exercise sufficient *direct control* over the labor relations policies of the contractor, or over the wages, hours and working conditions" (emphasis added). Likewise, in *The John Breuner Co.*, 248 NLRB at 989, the Board affirmed without comment the administrative law judge's observation that in prior truck delivery cases in which the Board found joint-employer status, "there have always been supporting findings that the retailer or distributor by its supervisors, *directly supervised and controlled* the employees of his trucking contractor in the performance of their work" (emphasis added). Thus, contrary to the *Browning-Ferris* majority, *Epperson* and like precedent support the proposition that findings of joint-employer status in cases prior to *TLI* and *Laerco* that mention evidence of indirect control nevertheless turn on sufficient proof of direct control.

The *Browning-Ferris* majority also contended that "[c]ontractual arrangements under which the user employer reimbursed the supplier for workers' wages or imposed limits on wages were also viewed as tending to show joint-employer status." 362 NLRB No. 186, slip op. at 9 (citing *Hamburg Industries*, 193 NLRB 67 (1971)). *Hamburg* involved a typical cost-plus contract where the user employer reimbursed the supplier employer for wages and then paid an additional fee. The Board has cited this factor in cases where it found joint-employer status. However, in numerous cases, the Board has also found that this factor did *not* establish joint-employer status.[54] In any event, as explained in a subsequent case, the facts in *Hamburg* clearly demonstrated that the disputed employer exercised significant direct and immediate control of essential terms. Specifically, "one employer, a manpower supplier, furnished another employer's entire work force, including first-level supervisors. That work force was subject to virtually complete control of the second employer. The second employer determined which tasks were to be performed and how they were to be performed. He also, in practice, set the wage rates."[55] Again, before *TLI* and *Laerco*, there was no established rule that cost-plus contracts should be given determinative weight in finding joint-employer status.

In sum, the precedent cited by the *Browning-Ferris* majority fell well short of showing that prior to *TLI* and *Laerco* there was a consistently applied "traditional joint-employer test" remotely equivalent to the one they announced. The indirect control factors cited by the *Browning-Ferris* majority existed in many cases where the Board declined to find joint-employer status and thus were not frequently, much less routinely, determinative of that status. Evidence of direct and immediate control was far more often referenced as determinative in finding such status.[56] The interpretive key to different outcomes

[45] *Cabot Corp.*, 223 NLRB 1388, 1390 fn. 10 (1976), affd. sub nom. *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977); *Hychem Constructors, Inc.*, 169 NLRB 274, 276 (1968); *Westinghouse Elec. Corp.*, 163 NLRB 914 (1967); *Space Servs. Int'l Corp.*, 156 NLRB 1227, 1232 (1966).

[46] *Cabot*, supra; *Hychem*, supra at fn. 4; *Fidelity Maintenance and Constr. Co.*, 173 NLRB 1032, 1037 (1968).

[47] *Tilden, S. G., Inc.*, 172 NLRB 752 (1968).

[48] *Hychem,* supra at 276.

[49] *Tilden, S. G., Inc.*, supra.

[50] *Cabot*, supra at 1392; *Westinghouse*, supra at 915.

[51] *Space Servs.*, supra at fn. 23.

[52] *The John Breuner Co.*, 248 NLRB 983, 989 (1980); *Furniture Distribution Center*, 234 NLRB 751, 751–752 (1978).

[53] 202 NLRB at 23 ("United establishes the work schedule of the drivers, has the authority to make changes in the drivers' assignments, selects routes for the drivers, and generally supervises the drivers in the course of their employment.").

[54] See *Hychem*, supra at 276 (referring to controls under a cost-plus contract as a "right to police reimbursable expenses under its cost-plus contract," and finding such controls "do not warrant the conclusion that [user] has hereby forged an employment relationship"); *Westinghouse*, supra at 915 (cost-plus contract; no joint-employer finding); *Space Services*, supra at 1232 (same); *Cabot*, supra at 1389 ("[C]ost plus contracts merely insured that Cabot obtain a satisfactory work product at cost and protected it against unnecessary charges being incurred."); *International House*, supra at 914 (cost-plus "purely arms length dealing"); *John Breuner*, supra at 988 (cost-plus insufficient to find joint-employer status).

[55] *Cabot*, supra, 223 NLRB at 1391 fn. 11.

[56] We recognize that dictum in *Airborne Freight* stated that "approximately 20 years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative joint em-

in this body of precedent is not a markedly different legal test. It is simply that "minor differences in the underlying facts might justify different findings on the joint-employer issue." *North Am. Soccer League v. NLRB (NASL)*, 613 F.2d 1379, 1382 (5th Cir. 1980), cert. denied 449 U.S. 899 (1980); see also *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 fn. 1 (6th Cir. 1985) (distinguishing *TLI* and *Laerco* by noting that a slight difference between two cases can tilt one toward a joint-employer finding, and the court was not deciding those other cases).

B. There Is No Judicial Precedent Adverse to the Board's "Direct and Immediate Control" Standard or Supportive of the Browning-Ferris Standard.

It is reasonable to assume that if *TLI, Laerco*, and their progeny departed abruptly from Board precedent without explanation, reviewing courts would have had the opportunity to criticize those decisions and would certainly have done so. After all, the Supreme Court and various appellate courts have warned the Board against such unexplained changes. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 375 (1998) ("The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application . . . and effective review of the law by the courts."); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 799 (1990) (Blackmun, J., dissenting) (finding the Board had departed from prior standard "without explanation"); *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) (stating that when "the Board has not been consistent in its choice of standard . . . . the Board is not entitled to the normal deference we owe it"); *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) ("Requiring an adequate explanation of apparent departures from precedent thus not only serves the purpose of ensuring like treatment under like circumstances, but also facilitates judicial review of agency action in a manner that protects the agency's predominant role in applying the authority delegated to it by Congress."). As the D.C. Circuit noted in *LeMoyne-Owen*, courts are *duty-bound* to strike down Board decisions that lack explanation or otherwise reflect that the Board was arbitrary and capricious in its exercise of statutory authority.

In this context, the Board's direct and immediate control standard has been consistently applied and upheld throughout the last 30 years. Although some courts have varied as to the particulars of a joint-employer test, many courts have expressly approved or applied the Board's test, and none have directly criticized that test or reversed a Board decision based on application of that test.

Significantly, two of the four Board decisions expressly overruled by the *Browning-Ferris* majority were reviewed by a court of appeals, and both decisions were upheld. The decision in *TLI* was reviewed by a panel of the Third Circuit—the court that authored the original *Browning-Ferris* decision—and summarily affirmed in an unpublished decision.[57] Likewise, the decision in *AM Property* was reviewed and affirmed in relevant part by a panel of the Second Circuit.[58] In accord with its own precedents, which predate *TLI* and *Laerco*, the Second Circuit endorsed the Board's pre-*Browning-Ferris* standard, holding that '"an essential element' of any joint-employer determination is 'sufficient evidence of immediate control over the employees.'"[59] The court specifically supported the Board's finding that "limited and routine" supervision is insufficient to establish joint-employer status:

> The cases the Board relied on broadly support the proposition that 'limited and routine' supervision, *G. Wes Ltd.*, 309 N.L.R.B. at 226, consisting of 'directions of where to do a job rather than how to do the job and the manner in which to perform the work,' *Island Creek Coal*, 279 N.L.R.B. at 864, is typically insufficient to create a joint employer relationship. See also *Local 254, Serv. Emps. Intern. Union, AFL–CIO*, 324 N.L.R.B. 743, 746–49 (1997) (no joint employer relationship where employer regularly directed maintenance employees to perform specific tasks at particular times but did not instruct employees how to perform their work); *S. Cal. Gas Co.*, 302 N.L.R.B. 456, 461–62 (1991) (employer's direction of porters and janitors insufficient to establish joint employer relationship where employer did not, inter alia, affect wages or benefits, or hire or fire employees).

Id. at 443.

Thus, the Second Circuit has expressly endorsed the Board's "direct and immediate control" standard for analyzing joint-employer allegations. In an earlier case, the Second Circuit observed that other courts of appeals have varying standards for determining joint-employer status,

ployer's *indirect* control over matters relating to the employment relationship." 338 NLRB at 597 fn. 1 (emphasis in original). For the reasons just stated, we find this dictum to be a mistaken characterization of precedent.

[57] *General Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985).

[58] *Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011), affirming in relevant part, enforcing in part and denying in part on other grounds 350 NLRB 998.

[59] Id. at 443 (quoting *Clinton's Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985)).

but the court saw "no need to select among these approaches or to devise an alternative test, because we find that an essential element under *any* determination of joint-employer status in a sub-contracting case is distinctly lacking in the instant case—*some evidence of immediate supervision or control of the employees.*"[60]

It is most noteworthy that, in addition to the absence of any circuit court precedent in conflict with the Board's "direct and immediate control" test of joint-employer status, there also is no circuit court precedent that supports the *Browning-Ferris* two-step test. That test, which lacked any requirement that an alleged joint employer's control be significant or substantial, much less direct and immediate, most closely resembled a single Board decision's bizarre distortion of dictum from an Eighth Circuit opinion in a case called *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (1954).

In *New Madrid*, the court denied enforcement of a Board order to the extent that it relied on a finding that a company remained a co-employer after selling its business to an individual, Jones. Finding no substantial evidence to support the Board's finding, the court found, among other things, that provisions in the contract of sale did not demonstrate that New Madrid retained control over Jones' operations. In particular, the court stated that the contract did not "either expressly or by implication, purport to give New Madrid any voice whatsoever in the selecting or discharging of Jones' employees, in the fixing of wages for such employees, or in any other element of labor relations, conditions and policies in the plant purchaser's business." Id. at 913.

Thereafter, in *Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966), a Board panel affirmed an administrative law judge's finding that a cement company was the joint employer of the employees of a company that leased trucks and drivers to the cement company. In doing so, the Board focused on the power the parties' lease and operating agreements gave to the cement company. For example, the cement company retained the power to control the disbursement of funds it furnished to the truck leasing company for the drivers' wages. In a footnote citation to *New Madrid*, the Board converted the aforementioned dictum from negative to positive, incorrectly claiming that the court's test of co-ownership was whether a contract gave the putative joint employer "any voice whatsoever" over terms and conditions of employment of another employer's employees.[61] This was not then and is not now the joint-employer test of the Eighth Circuit[62] or any other court of appeals. It was not then the Board's joint-employer test, and it has not been the test since *Hoskins Ready-Mix*. Until *Browning-Ferris*, that is.

Of course, the Board is free to go its own way and determine its own standards, but only within the statutory framework and with adequate explanation of the reasons for departing from long-established precedent. The *Browning-Ferris* majority claimed that 30 years ago the Board departed without explanation from prior precedent by drastically restricting its test in a way that denies many workers their Section 7 rights. However, the absence of any judicial criticism of the "direct and immediate control" test undermines this claim. It is simply impossible that all the courts of appeals would have missed this train wreck, had there been one.

VI. THE *BROWNING-FERRIS* TEST WAS IMPERMISSIBLY VAGUE AND OVERBROAD, FOSTERING LEGAL UNCERTAINTY AND LABOR RELATIONS INSTABILITY.

A. Browning-Ferris Provided No Guidance as to When and How Parties May Contract for the Performance of Work Without Being Deemed Joint Employers.

Multi-factor tests, like the common-law agency standard that the Board must apply, are vulnerable to an analysis that can be impermissibly unpredictable and results-oriented. As then-Judge Roberts remarked about the standard for determining whether college faculty are managerial employees under the Act under *NLRB v. Yeshiva University*:[63]

> The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication. The open-ended rough-and-tumble of factors on which *Yeshiva* launched the Board and higher education can lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why. . . . In the absence of an explanation, the totality of the circumstances can become simply a cloak for agency whim—or worse.[64]

Browning-Ferris' multi-factor test, under which any degree of indirect or contractually reserved control over a single employment term is probative of and may suffice to estab-

[60] *International House v. NLRB*, 676 F.2d 906, 913 (2d Cir. 1982) (emphasis added); see also *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991) ("[T]he essential element is immediate control over the employees.").

[61] Id. at 1493 fn. 2.

[62] The Eighth Circuit applies a four-factor test similar to a single-employer analysis. E.g., *Industrial Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981).

[63] 444 U.S. 672 (1980).

[64] *LeMoyne-Owen College v. NLRB*, supra, 357 F.3d at 61 (citations and quotations omitted).

lish joint-employer status, lacks the required explanation of "which factors are significant and which less so, and why." The *Browning-Ferris* majority provided no meaningful guidelines as to the test's future application. Further, they acknowledged no legitimate grounds for parties in a business relationship to insulate themselves from joint-employer status under the Act.

The *Browning-Ferris* test stands in marked contrast to the prior, longstanding test, under which evidence of direct and immediate control of essential terms of employment was required, thereby establishing a clearly discernible and rational line between what does and does not constitute a joint-employer relationship under the Act. As the D.C. Circuit has observed, the "direct and immediate control" test recognizes that "[s]ignificant limits . . . exist upon what actions by an employer count as control over the means and manner of performance. Most important, employer efforts to monitor, evaluate, and improve the results or ends of the worker's performances do not make the worker an employee. Such global oversight, as opposed to control over the manner and means of performance (and especially the details of that performance), is fully compatible with the relationship between a company and an independent contractor."[65]

By comparison, the *Browning-Ferris* test treats as probative of joint-employer status all evidence of indirect control of such factors as determining the place of work, defining the work to be performed and how quickly it needs to be done, prescribing the hours when work will be performed, setting minimum qualifications for the individuals the contractor furnishes to perform the work and reserving the right to reject an individual (even though the contractor may assign the rejected employee to a different job), inspecting the contractor's work, giving results-oriented feedback to the contractor that the contractor's supervisors use in directing the contractor's employees, agreeing to a price for the contractor's services that happens to be in the form of a cost-plus formula, and reserving the right to cancel the arrangement. Accordingly, under the *Browning-Ferris* test, *a homeowner hiring a plumbing company for bathroom renovations could well be deemed a joint employer of the plumbing company's employees!* By adopting such an overbroad, all-encompassing and highly variable test, the *Browning-Ferris* majority extended the Act's definition of "employer" well beyond its common-law meaning, and beyond its ordinary meaning as well. Cf. *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, supra, 404 U.S. at 168 (1971) (admonishing the Board for extending "employee" beyond its ordinary meaning by attempting to include retirees within its scope).

The expansive nature of the *Browning-Ferris* test was demonstrated by the evidence the *Browning-Ferris* majority relied on to find joint-employer status in that case, which involved a "cost-plus" arrangement common in user-supplier contracts:[66] (1) a few contract provisions that indirectly affected the otherwise unfettered right of Leadpoint (the supplier employer) to hire its own employees; (2) reports made by BFI representatives to Leadpoint of two incidents that understandably resulted in discipline, one where a Leadpoint employee was observed passing a "pint of whiskey" at the BFI jobsite, and another where a Leadpoint employee "destroyed" a drop box; (3) one contractually established pay rate ceiling restriction for Leadpoint employees, obviously stemming from the cost-plus nature of the contract; (4) BFI's control of its own facility's hours and production lines; (5) a recordkeeping requirement for Leadpoint employee hours (again, obviously stemming from the cost-plus nature of the contract); (6) a single pre-shift meeting to

[65] *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) (citations omitted).

[66] The Board and the courts have uniformly concluded that cost-plus arrangements do not automatically render the contracting client an "employer" of the vendor's employees. Accordingly, the *Browning-Ferris* majority conceded that a cost-plus "arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship." 362 NLRB No. 186, slip op. at 19. Indeed, the Board and the courts have uniformly concluded that nothing in cost-plus arrangements necessarily renders the contracting client an "employer" of the vendor's employees. In *Fibreboard*, for example, the contracting client (Fibreboard) arranged for employees of the contractor (Fluor) "to do the same [maintenance] work under similar conditions of employment," and Fibreboard committed to pay the "costs of the operation plus a fixed fee." 379 U.S. at 206–207. As noted previously (see fn. 14, supra), Fibreboard was clearly treated as a distinct entity having no employment relationship with the subcontractor's employees, even though the reasons underlying the subcontracting decision were almost *exclusively* employment-related. Indeed, the Supreme Court noted that Fibreboard "was induced to contract out the work by assurances from independent contractors that *economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments*." Id. at 213 (emphasis added).

The *Browning-Ferris* majority nevertheless attempted to distinguish the facts of *Browning-Ferris* based on an "apparent requirement of BFI approval over . . . pay increases" for the supplier employer's employees. 362 NLRB No. 186, slip op. at 19. In this respect—notwithstanding their acknowledgment that a cost-plus contract "is not necessarily sufficient to create a joint-employer relationship"—the *Browning-Ferris* majority in principle conferred "employer" status on every client-user that enters into a cost-plus arrangement with a supplier of labor, since few, if any, clients will give a blank check to supplier-employers regarding the supplier's employees' wages when the full cost will be charged to the client. This is but one illustration of the multitude of ways that the *Browning-Ferris* majority failed to adapt the Act to the "complexities of industrial life," which is one of the Board's most important responsibilities. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

advise Leadpoint supervisors what lines will be running and what tasks they are supposed to do on those lines; (7) monitoring of productivity; (8) establishment of one type of generally applicable production assignment scheme for Leadpoint; and (9) "on occasion" addressing Leadpoint employees directly about productivity. 362 NLRB No. 186, slip op. at 18–19. That is all there was, and the Regional Director correctly decided under then-extant law that it was not enough to show BFI was the joint employer of Leadpoint's employees.

The evidence relied on by the *Browning-Ferris* majority amounted to a collection of general contract terms and business practices common to most contracting entities (discussed below), plus a few actions by BFI that had some routine impact on Leadpoint employees. It would be difficult to find any two entities engaged in an arm's-length contractual relationship involving work performed on the client's premises that lack this type of interaction. Again, we suppose that our colleagues do not intend that every business relationship necessarily entails joint-employer status, but the facts relied upon in *Browning-Ferris* demonstrated the expansive, near-limitless nature of the standard created in that case.

There is a further fundamental problem with *Browning-Ferris*' joint-employer test. The majority there stated that their goal was to extend the protection of Section 7 to a large number of employees they felt had been left unprotected because they work on a contingent or temporary basis. According to them, the number of workers so employed had dramatically risen since *TLI* and *Laerco* were decided and would predictably continue to rise. 362 NLRB No. 186, slip op. at 11. Further, the *Browning-Ferris* majority asserted that "[t]he Board's current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers' terms and conditions of employment of the user." Id., slip op. at 14–15.

Thus, not only was the *Browning-Ferris* majority's *legal* justification for a new joint-employer test impermissibly based on economic reality theory, as previously discussed, but its *factual* justification was flawed as well. The majority there focused on facts limited to a particular type of business model—the user/supplier relationship involving the use of contingent employees—but they relied on these facts to justify a change in the statutory definition of employer, or joint employer, for *all* types of business relationships between two or more entities.

The number of contractual relationships potentially encompassed by the *Browning-Ferris* standard was vast, including contractual relationships involving

- insurance companies that require employers to take certain actions with their employees in order to comply with policy requirements for safety, security, health, etc.;
- franchisors (see below);
- banks or other lenders whose financing terms may require certain performance measurements;
- any company that negotiates specific quality or product requirements;
- any company that grants access to its facilities for a contractor to perform services there, and then regulates the contractor's access to the property for the duration of the contract;
- any company that is concerned about the quality of contracted services;
- consumers or small businesses who dictate times, manner, and some methods of performance of contractors.

Our point is not that the *Browning-Ferris* majority intended to make all players in the economy, no matter how small, necessary parties at the bargaining table (although, as discussed below, they may well have become targets of economic protest in support of union bargaining demands or other union causes), but that the *Browning-Ferris* standard foreshadowed the extension of obligations under the Act to a substantial group of business entities without any predictable limitations.[67] This kind of vague and overbroad government regulation is necessarily arbitrary and capricious. "In the absence of an explanation, the 'totality of the circumstances' can become simply a cloak for agency whim—or worse." *LeMoyne-Owen Coll. v. NLRB*, supra, 357 F.3d at 61.

Browning-Ferris effected a sweeping change in the law without any substantive discussion of significant adverse consequences raised by the parties and amici in that case. The *Browning-Ferris* majority professed to limit themselves to the issue of joint bargaining obligations in the user-supplier context, with a disclaimer that their decision "does not modify any other legal doctrine . . . or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act." 362 NLRB No. 186, slip op. at 20 fn. 120. However, such a disclaimer could not possibly have been valid because applying different tests in other circumstances would mark an unprecedented and unwarranted break from the unitary joint-employer test under the Act,

[67] The *Browning-Ferris* majority correctly stated that "the annals of Board precedent contain no cases that implicate the consumer services purchased by unsuspecting homeowners or lenders." But there was no guarantee that what is past is prologue under *Browning-Ferris*' impermissibly expansive test.

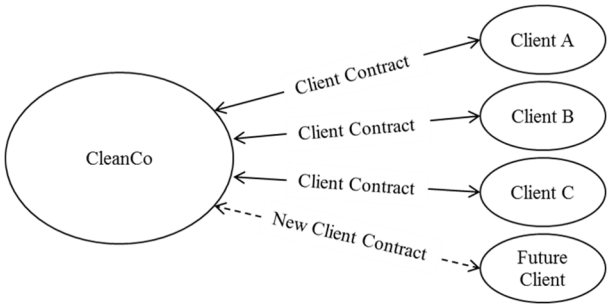
which has applied to *all* types of business relationships, each of which was affected by changing the joint-employer test. In our view, the adverse consequences that logically flow from the *Browning-Ferris* standard warrant a return to the "direct and immediate control" standard.

B. Browning-Ferris Destabilized Bargaining Relationships and Created Unresolvable Legal Uncertainty.

Browning-Ferris greatly expanded the joint-employer test without grappling with its practical implications for real-world collective-bargaining relationships. The majority there purported to be following the command in Section 1 of the Act to "encourag[e] the practice and procedure of collective bargaining." Congress did not mean, however, to blindly expand collective-bargaining obligations whether or not they are appropriate. The Act aims to "achiev[e] industrial peace by promoting *stable* collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (emphasis added). Indeed, one of the Board's primary responsibilities under the Act is to foster labor relations stability. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (A "basic policy of the Act [is] to achieve stability of labor relations."). And the Supreme Court has stressed the need to provide "certainty beforehand" to employers and unions alike. Employers must have the ability to "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and a union similarly must be able to discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 678–679, 684–686.

Collective bargaining was intended by Congress to be a process that could conceivably produce agreements. One of the key analytical problems in widening the net of "who must bargain" is that, at some point, agreements predictably will *not* be achievable because different parties involuntarily thrown together as negotiators under the *Browning-Ferris* test will predictably have widely divergent interests. *Browning-Ferris*' marked expansion of bargaining obligations to other business entities threatened to destabilize existing bargaining relationships and complicate new ones. Even if one takes an extremely simplistic user-supplier scenario, the *Browning-Ferris* standard, which made many clients an "employer" of contractor employees while making contractors an "employer" jointly with their clients, stood to produce bargaining relationships and problems unlike any that have existed in the Board's history, which could not have been contemplated or intended by Congress.

Consider the following diagram, which depicts a single cleaning company named "CleanCo" that has cleaning contracts with three clients. CleanCo employees work at each client's facilities in circumstances similar to *Browning-Ferris*, and CleanCo periodically adds future clients.



Assuming circumstances like those presented in *Browning-Ferris*, the *Browning-Ferris* majority would find that CleanCo and Client A are a joint employer at Client A's location, CleanCo and Client B are a joint employer at Client B's location, and CleanCo and Client C are a joint employer at Client C's location. Such a scenario—involving a single vendor and only three clients, each with only one location—potentially gives rise to all of the following problems under the *Browning-Ferris* test.

1. Union Organizing Directed at CleanCo. If CleanCo employees are currently unrepresented and a union seeks to organize them, this gives rise to the following issues and problems:

- *What Bargaining Unit(s)?* Although CleanCo directly controls all traditional indicia of employer status, the *Browning-Ferris* test established that three different entities—Clients A, B, and C—are joint employers of potentially overlapping groups of different CleanCo employees. It is unclear whether a single bargaining unit consisting of all CleanCo employees could be deemed appropriate, given the distinct role that the *Browning-Ferris* test requires each client to play in bargaining.
- *What "Employer" Participates in NLRB Election Proceedings?* If the union files a representation petition with the Board, the Act requires the Board to afford "due notice" and to conduct an "appropriate hearing" that involves the "employer." Section 9(c)(1). Currently, the Board has no means of identifying,

much less providing "due notice" and affording the right of participation to, "employer" entities like Clients A, B, and C, even though they would inherit bargaining obligations if CleanCo employees select the union.

- *Who Does the Bargaining?* If the union wins an election involving all CleanCo employees, the *Browning-Ferris* test would require participation in bargaining by CleanCo *and* Clients A, B, and C. Here, *Browning-Ferris* provided that each party "will be required to bargain only with respect to *such terms and conditions which it possesses the authority to control*." 362 NLRB No. 186, slip op. at 16 (emphasis added). However, because the *Browning-Ferris* standard is so broad—including direct control, indirect control, and contractually reserved control, even if never exercised in fact—nobody could ever reasonably know who is responsible for bargaining what.[68]
- *CleanCo-Client Bargaining Disagreements.* The *Browning-Ferris* standard failed to address how "employers" such as Clients A, B, and C, plus employer CleanCo, can formulate coherent proposals and provide meaningful responses to union demands, when they will undoubtedly disagree among themselves regarding many if not most matters that are the subject of collective bargaining. Here, the *Browning-Ferris* majority disregarded the fact that CleanCo's client contracts will typically have resulted from difficult negotiations with Clients A, B, and C. Therefore, the joint bargaining contemplated by the *Browning-Ferris* majority would involve significant disagreements between and among the employer entities (Clean Co and Clients A, B, and C), with no available process for resolving such disputes.[69]
- *Forced Disclosure to Clients of CleanCo Confidential Information*. The most contentious issue between CleanCo and Clients A, B, and C is likely to involve the amounts charged by CleanCo for its services, which predictably could vary substantially between Clients A, B, and C depending on their respective leverage, their varying needs for CleanCo's services, the duration of their respective client contracts (i.e., short term or long term), and other factors. If a union successfully organizes all CleanCo employees, the resulting bargaining would almost certainly require the disclosure of sensitive CleanCo financial information to Clients A, B, and C, which would likely enmesh the "employer" parties in disagreements with one another, separate and apart from those arising in collective bargaining between the union and the "employers."

  We have already found, in prior cases, that this information is sensitive and is not necessary to employees' exercise of rights under the Act. See, e.g., *Flex Frac Logistics*, 360 NLRB 1004, 1004 (2014) (detailing disruption occurring when contractor, which "was particularly concerned to maintain the confidentiality of the rates it charges its clients," had those rates disclosed to clients by employee), enfd. 746 F.3d 205 (5th Cir. 2017). *Browning-Ferris* essentially guaranteed such disruption.
- *How Many Labor Contracts?* If a single union organizes all CleanCo employees, the above problems might be avoided if CleanCo engages in three separate sets of bargaining—devoted to Client A, Client B, and Client C, respectively—resulting in three separate labor contracts. However, this would be inconsistent with the CleanCo bargaining unit if it encompassed all CleanCo employees, and CleanCo would violate the Act if it insisted on changing the scope of the bargaining unit, which under well-established Board law is a nonmandatory subject of bargaining.
- *What Contract Duration(s)?* If a union represented all CleanCo employees, and if the Board certified the employees assigned to each client location as separate bargaining units, then presumably there would be separate negotiations, and separate resulting CBAs, covering the CleanCo employees assigned to Client A, Client B, and Client C, respectively. In this case, however, the duration of each CBA might vary, depending on each side's bargaining leverage, and a further complication would arise where CBA termination dates varied from one client location to another.

[68] We discuss this aspect of the "authority problem" in more detail below.

[69] We also discuss this aspect of the "authority problem" in more detail below.

- *Do Client Contracts Control CBAs, or Do CBAs Control Client Contracts?* Regardless of whether the CleanCo CBAs have termination dates that coincide with the expiration of CleanCo's client contracts, the *Browning-Ferris* test left unanswered whether CleanCo and Clients A, B, and C could renegotiate their client contracts, or whether joint bargaining obligations and the CBAs would effectively trump any potential client contract renegotiations, even though this would be contrary to the Supreme Court's indication that Congress, in adopting the NLRA, "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." *First National Maintenance*, supra, 452 U.S. at 676. Likewise, similar to what the majority held in *CNN* (see discussion infra), the *Browning-Ferris* majority would have imposed their new joint-employer bargaining obligations on Clients A, B, and C, even if the client contracts explicitly identified CleanCo as the sole employer and stated that CleanCo had sole and exclusive responsibility for collective bargaining.
- *New Clients (Possibly with Their Own Union Obligations).* If a union represented all CleanCo employees, and if (under the *Browning-Ferris* test) all CleanCo clients were deemed joint employers with CleanCo, what happens when Clean Co obtains new clients that previously had cleaning work performed by in-house employees or a predecessor contractor, and those in-house or contractor employees were unrepresented or represented by a different union? If, based on CleanCo's existing union commitments, CleanCo refused to hire the employees who formerly did the new client's cleaning work, the refusal could constitute antiunion discrimination in violation of Sec. 8(a)(3). On the other hand, if CleanCo hired the new client's former employees (or the former employees of a predecessor contractor), then CleanCo could run afoul of its existing union obligations. See *Whitewood Maintenance Co.*, 292 NLRB 1159, 1168–1169 (1989), enfd. 928 F.2d 1426 (5th Cir. 1991). Alternatively, this situation could require further Board proceedings for resolution.[70]
- *Potential Board Jurisdiction Over Some Entities and Not Others.* The Board does not have jurisdiction over governmental employers and employees, over railways or airlines that are subject to the Railway Labor Act, or over some religiously-affiliated educational institutions or certain enterprises operated by Indian tribes. If CleanCo is subject to the NLRA, but Client A, B, or C falls within one or more of the exempt categories identified above, the *Browning-Ferris* standard would give rise to complex questions about whether the Board may lack jurisdiction over one or more particular "joint" employers.

2. Union Organizing Directed at Client(s). If two different unions, rather than targeting CleanCo, engage in organizing directed at Client A and Client B, respectively, with Client C remaining nonunion, this gives rise to additional issues and problems:

- *All of the Above Issues and Problems.* If the CleanCo employees at Client A are organized by one union, and if the CleanCo employees at Client B are organized by a different union, then the *Browning-Ferris* test would make CleanCo and Client A the joint employer of the CleanCo/Client A employees, and CleanCo and Client B the joint employer of the CleanCo/Client B employees. In both cases, joint-employer status (which, under *Browning-Ferris*, could be based solely on indirect or reserved authority) would give rise to *all* of the above problems and issues, in addition to those described below.
- *Employee Interchange and Multi-Location Assignments.* If different unions represent the employees of CleanCo/Client A and CleanCo/Client B, and if CleanCo/Client C employees are nonunion, this would create substantial potential problems and potential conflicting liabilities regarding CleanCo employees assigned to work at all three client locations or transferred from one client's facility to another. This is a common situation, arising, for example, where one CleanCo client simply is unhappy

[70] Such a resolution might result, for example, from a unit clarification petition seeking to add the new employees to the bargaining unit without an election under the Board's accretion doctrine, or jurisdictional dispute proceedings pursuant to Sec. 10(k) of the Act.

with the productivity or attitude of an assigned employee.[71]

- *Strikes and Picketing – "Neutral" Secondary Boycott Protection Eliminated.* Sections 8(b)(4) and 8(e) of the Act protect neutral parties from being subjected to secondary picketing and other threats, coercion, and restraint that have an object of forcing one employer to cease doing business with another. Therefore, if the CleanCo/Client A and CleanCo/Client B employees were involved in a labor dispute, under the Board's traditional joint-employer standard Clients A and B (as non-employers) would be neutral parties protected from secondary union activity (assuming no direct and immediate control of CleanCo employees' employment terms by Clients A and B). Under the *Browning-Ferris* standard, however, Clients A and B would be employers right along with CleanCo and thus subject to picketing.
- *Renegotiating or Terminating Client Contracts.* It is well established that "an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees."[72] However, to the extent that CleanCo and Clients A, B, and C are joint employers, then any client's termination of CleanCo's services based on union-related considerations would create a risk that the Board would find—as it did in *CNN*, supra—that the contract termination constituted antiunion discrimination in violation of Section 8(a)(3). *CNN*, supra, slip op. at 40–42 (Member Miscimarra, concurring in part and dissenting in part).

3. Existing CleanCo-Union and/or Existing Client-Union Relationships. Additional issues and problems result from the impact of the *Browning-Ferris* joint-employer test on existing union relationships and CBAs:

- *All of the Above Issues and Problems.* Under the *Browning-Ferris* test, it is clear that existing collective-bargaining agreements and union relationships involving CleanCo, with no mention of Clients A or B, do not prevent Clients A and B from having joint-employer status with CleanCo, which would give rise to all of the issues and problems described above. Again, in *CNN*, discussed infra, the Board majority found that the client, CNN, was a joint employer, even though any bargaining between CNN and the unions representing employees of contractor TVS would have been at odds with applicable labor contracts, prior Board certifications, the services agreements between CNN and its vendor (TVS), and 20 years of bargaining history in which the employer-party was always TVS (or one of its predecessor contractors), not CNN.
- *Existing CleanCo CBA: Prospective Four-Party Bargaining.* If CleanCo was party to an existing company-wide collective-bargaining agreement in which CleanCo was identified as the only employer, the *Browning-Ferris* test imposed an obligation to bargain on *all* joint-employer entities—i.e., CleanCo and Clients A, B, and C—even though such bargaining would depart from express CBA language and the past practice of CleanCo and the union.
- *"Mandatory" Arbitration, Yet Never Agreed To?* If CleanCo had an existing company-wide CBA, *Browning-Ferris*' imposition of employer status on Clients A, B, and C would not necessarily bind them to the terms of the existing CleanCo CBA. This would mean that, even though a particular grievance may pertain to essential employment terms that, according to the *Browning-Ferris* majority, Clients A, B, and C have the right to "share or codetermine," the CBA's grievance arbitration procedure would not necessarily bind Clients A, B, and C, since they had never agreed to submit to the procedure.[73]
- *Benefit Fund Contributions and Liabilities – Who Pays?* Many existing collective-

[71] The potential problems caused by multi-location assignments or employee interchange between locations could arise, for example, from CBA provisions restricting such assignments or transfers, from union-security provisions in different CBAs requiring dues payments based on a person's employment without regard to where they were employed, or from conflicting wage rates and benefits applicable at each location. Although these issues might depend on what particular CBA or other policies were in effect, they would obviously cause significant burdens and potential confusion for the employees and each entity considered a joint employer under the *Browning-Ferris* standard.

[72] *Plumbers Local 447 (Malbaff Landscape Construction)*, 172 NLRB 128, 129 (1968). See also *Computer Associates International, Inc.*, 324 NLRB 285, 286 (1997) ("[F]inding a violation of Section 8(a)(3) on the basis of an employer's decision to substitute one independent contractor for another because of the union or nonunion status of the latter's employees is inconsistent with both the language of Section 8(a)(3) . . . and with legislative policies underlying Section 8(b) of the Act aimed at protecting the autonomy of employers in their selection of independent contractors with whom to do business.").

[73] See *AT&T Technologies Inc. v. CWA*, 475 U.S. 643, 648 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582; *Steelworkers v. American Mfg. Co.*, 363 U.S. at 570–571; *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374 (1974).

bargaining agreements contain provisions regarding benefit fund contributions and benefit liabilities. If such provisions were contained in the CleanCo CBA, then Clients A, B, and C—when participating in the new four-way bargaining described above—would predictably be confronted with demands to assume liability for such provisions. Although the *Browning-Ferris* test suggests that each of Clients A, B, and C "will be required to bargain only with respect to such terms and conditions which it possesses the authority to control," 362 NLRB No. 186, slip op. at 16, it appears clear that they would face economic demands and potentially be subject to a strike based on a refusal to agree to such demands.

- *Joint Bargaining Versus "Add-On" CBAs.* If CleanCo employees assigned to Clients A, B, or C were organized for the first time by one or more unions, the *Browning-Ferris* standard clearly imposes a new mandatory bargaining obligation on all joint-employer entities. Although an existing collective-bargaining agreement generally suspends a party's obligation to bargain for the agreement's term, the *Browning-Ferris* test, as noted above, imposes an independent duty to bargain on *every* joint employer "with respect to such terms and conditions which it possesses the authority to control," which may result in separate sets of negotiations and potential "add-on" CBAs that deviate from the existing union agreements.

The foregoing represents only some of the complications created by the *Browning-Ferris* standard. And the example is obviously simplistic because it relates only to *one* service company, which has only *three* clients—and in the real world, by comparison, many businesses, large and small, rely on services provided by large numbers of separate vendors, and many service companies have dozens or hundreds of separate clients. The only thing that is clear is that the *Browning-Ferris* standard does not promote stable collective-bargaining relationships.

Moreover, how exactly are user and supplier employers to allocate the bargaining responsibilities for a single term of employment that they are deemed to codetermine under the *Browning-Ferris* joint-employer standard, one by direct control and the other by indirect control? How does one know who has authority at all over a term and condition of employment under *Browning-Ferris*' vague formulation? What if two putative employer entities get into a dispute over whether one has authority over a certain term or condition of employment? What if the putative employers are competitors? Taking the diagram above, what if Client A and Client B are competitors and have no economic interest in the other client coming to a good-faith agreement with CleanCo on how much it pays employees working for the other client? Does it make sense for the law to attempt to create such an interest? What if there are too many entities to come to an agreement? How does bargaining work in this circumstance?

Moreover, the *Browning-Ferris* standard threatened to place employers in situations where they were virtually certain to violate the Act. Again, the *Browning-Ferris* majority stated that "a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control." 362 NLRB No. 186, slip op. at 16. This was intended to temper the impact of the *Browning-Ferris* standard, but it only made matters worse. By parceling out bargaining over different employment terms to different "employers," the *Browning-Ferris* majority assumed that issues addressed in collective bargaining are severable, as if the resolution of one issue does not depend on the resolution of others. This is not how contract negotiations work. Indeed, the Board has denounced this type of segmented issue-by-issue negotiating, when unilaterally undertaken by a party, as unlawful "fragmented bargaining."[74]

Further, when multiple entities control different employment terms, the fragmented bargaining *Browning-Ferris* contemplated gave rise to the following dilemma. Section 8(a)(5) requires an employer to bargain in good faith regarding the terms and conditions of employment of its employees, but Section 8(a)(2) makes such bargaining unlawful if the union lacks majority support among the employer's employees. Under *Browning-Ferris*, a putative joint employer risked violating Section 8(a)(5) if it failed or refused to bargain over a particular

[74] See, e.g., *E.I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 fn. 1 (1991) ("What we find unlawful in the Respondent's conduct was its adamant insistence throughout the entire course of negotiations that its site service operator and technical assistant proposals were not part of the overall contract negotiations, and, therefore, had to be bargained about totally separately not only from each other but from all the other collective bargaining agreement proposals. We find this evinced fragmented bargaining in contravention of the Respondents duty to bargain in good faith."); see also *NLRB v. Patent Trader*, 415 F.2d 190, 198 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (2d Cir. 1970) (When a party "removes from the area of bargaining . . . [the] most fundamental terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.)," it has "reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises with the result of rigidly and unreasonably fragmenting the negotiations."). At the very least, an astonishing degree of cooperation among multiple "employers"—employers who cannot be assumed to share common goals in collective bargaining—would be necessary under *Browning-Ferris* to avoid fragmented bargaining.

mandatory bargaining subject it believed it did not control, if it was later determined that it *did* exercise sufficient control to require that entity to bargain regarding the subject. On the other hand, that same entity risked violating Section 8(a)(2) if it bargained over a particular employment term, if it was later determined that the entity lacked sufficient control over that term to make it an "employer" of the unit employees as to that term.

Moreover, while it is well established that the burden to prove joint-employer status rests on the General Counsel,[75] if multiple entities arguably constitute a joint employer, and one entity is alleged to have unlawfully failed to bargain over particular terms of employment, the *Browning-Ferris* standard effectively placed the burden of proof on that entity to establish that it did not control those particular employment terms. In sum, *Browning-Ferris* gave rise to unresolved questions as to (i) which entities are the "employer," (ii) which entities must or must not engage in bargaining over particular employment terms, and even (iii) what party—the putative joint employer or the General Counsel—bears the burden of proof regarding this assortment of issues.

This scenario was made all the worse by the fact that years of Board litigation would have been necessary before parties would learn whether (i) they unlawfully failed to participate in bargaining with another employer and its employees' union, or (ii) they unlawfully injected themselves into such bargaining because their commercial relationship with that employer was insufficient to make them a joint employer. Nor is the Board permitted to engage in the economic analysis needed to sort out the plethora of arm's-length, company-to-company relationships affected by the *Browning-Ferris* joint-employer test. The Board's Division of Economic Research was abolished 75 years ago, and Section 4(a) of the Act—adopted by Congress in 1947—prohibits the Board from having any agency personnel engage in "economic analysis."[76] Additionally, the Board lacks the authority to impose labor contract terms on parties,[77] and nothing in the Act authorizes the Board to impose requirements on companies regarding how they must arrange or rearrange themselves.

The extensive changes adopted in *Browning-Ferris* were unsupported by any adequate showing that existing law was deficient or contrary to Congressional mandate as reflected in the Act. The *Browning-Ferris* majority cited no evidence showing that employees in contingent or comparable employment situations have been unable to bargain with their undisputed employer. The *Browning-Ferris* majority used the phrase "meaningful bargaining" numerous times, but the majority's premise was that bargaining fails to be "meaningful" whenever the employer's business relationships influence matters under negotiation. One does not establish that the Section 7 rights of employees of supplier employers have been denied merely by citing a large number of employees whose terms and conditions of employment might be affected in some way by a user entity, plus Board cases finding that the user entity was not a joint employer of the supplier's employees and thus had no duty to bargain with the union representing those employees. How do we know that employees have been unable to engage in "meaningful bargaining" with the supplier employer? Under the *Browning-Ferris* test, it is possible to find that "meaningful bargaining" cannot take place with a supplier employer alone if a user entity possesses but never exercises contractually reserved control over even a single "essential" aspect of employment. Such a definition of meaningful bargaining has never been the law, and it cannot be reconciled with business practices that have been in existence since long before the Act.

In addition, it is difficult, if not impossible, to reconcile *Browning-Ferris*' reasoning with the Board's rationale in *Management Training*, 317 NLRB 1355 (1995), which addressed whether to assert discretionary jurisdiction over a private employer contracting for business with an exempt governmental entity. The Board in *Management Training* modified prior caselaw and held that it would no longer decline to assert jurisdiction in circumstances where the private employer lacks control of what had been deemed essential terms of employment. It reasoned that "[b]ecause of commercial relationships with other parties, an inability to pay due to financial constraints, and competitive considerations which circumscribe the ability of the employer to grant particular demands, the fact is that employers are frequently confronted with demands concerning matters *which they cannot control as a practical matter or because they have made a contractual relationship with private parties* or public entities." Id. at 1359 (emphasis added). Quite obviously, under *Management Training* the Board

[75] See, e.g., *Hobbs & Oberg Mining Co.*, 297 NLRB 575, 586 (1990) (General Counsel's burden to prove joint-employer status), enfd. 940 F.2d 1538 (10th Cir. 1991), cert. denied 503 U.S. 959 (1992).

[76] Sec. 4(a) states in part: "Nothing in this Act shall be construed to authorize the Board to appoint individuals . . . for economic analysis." This language was added to the NLRA as part of the Labor Management Relations Act (LMRA), 61 Stat. 136, Sec. 101 (amending NLRA Sec. 4(a)) (1947). The enactment of Sec. 4(a) occurred after the Board abolished its Division of Economic Research in 1940. See 93 Cong. Rec. 6661, reprinted in 2 LMRA Hist. 1577 (June 6, 1947) (analysis of H.R. 3020). See generally John E. Higgins, Jr., *Labor Czars–Commissars–Keeping Women in the Kitchen–The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941, 951–952 (1998).

[77] Sec. 8(d); *H.K. Porter Co. v. NLRB*, 397 U.S. at 99.

believes that employees and their exclusive bargaining representative can still engage in meaningful bargaining under the Act even with an employer that lacks control over a substantial number of essential terms of employment that are controlled "as a practical matter" by another entity.

C. Browning-Ferris Dramatically Changed Labor Law Sales and Successorship Principles and Discouraged Efforts to Rescue Failing Companies and Preserve Employment.

Browning-Ferris' expansion of the definition of employer also altered the landscape of successorship law under the Act. It is well established that successor employers,[78] although they must recognize and bargain with the union representing the predecessor's employees in certain circumstances, are not obligated to adopt the predecessor's collective-bargaining agreement and have the right to unilaterally set different initial terms and conditions of employment.[79] *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287–288, 294–295 (1972). This rule "careful[ly] safeguards the rightful prerogative of owners independently to rearrange their businesses." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 40 (internal quotations omitted). But the policy concerns underlying the rule of *Burns* run deeper than that:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

Burns, 406 U.S. at 287–288.

Under the expansive *Browning-Ferris* joint-employer standard, many user employers would be deemed joint employers of their supplier employers' employees. Rebidding contracts has been a common feature of the user- and supplier-employer market. Predictably under *Browning-Ferris*, it would have been less common because deeming the user employer to be a joint employer would make terminating or rebidding the contract with the supplier employer much more difficult. The user employer would often have a duty to bargain over the decision to lay off the employees or to subcontract those jobs to another supplier employer. See *Fibreboard Paper Products Corp. v. NLRB*, supra, 379 U.S. at 215 (1964); *CNN,* supra, 361 NLRB 439, 455. Assuming the user employer does contract with a new supplier employer that would otherwise be a *Burns* successor able to set its own initial employment terms, the user employer, under the *Browning-Ferris* standard, would likely have been deemed a joint employer with the new supplier employer as well. That user employer's ongoing bargaining obligation spanning the two supplier employers would prevent the new supplier employer from setting different terms and conditions of employment than its predecessor had. See *Whitewood Maintenance Co.*, supra, 292 NLRB at 1168–1169 (contractor that substituted one subcontractor for another jointly employed both the old and new subcontractors' employees, so the new subcontractor could not set its own initial terms).

Similarly, when a predecessor's union-represented employees apply for employment with a successor, the successor cannot lawfully extend recognition to the union unless and until it has hired a "substantial and representative complement" of employees.[80] In *CNN*, supra, two unions represented employees of CNN's contractor, TVS, continuing a 20-year history in which unionized contractors supplied technical employees to CNN, where only the contractor, not CNN, was considered the "employer." When CNN decided to stop using contractor employees and to directly hire its own technical workforce, CNN as a successor would have violated the Act if it recognized and bargained with the TVS unions before

[78] An employer is a successor of its predecessor under the Act when there is "substantial continuity between the enterprises," the successor hired as a majority of its employees the predecessor's employees, and the bargaining unit is still appropriate. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–52 (1987).

[79] There is a limited exception to this general rule when "'it is perfectly clear that the new employer plans to retain all of the employees in the unit,'" unless the successor "clearly announce[s] its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974) (quoting *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 294–295 (1972)), enfd. 529 F.2d 516 (4th Cir. 1975). However, a so-called "perfectly clear" successor employer is still not bound by the predecessor's labor contract. It must only adhere to terms established by the contract while negotiating new terms with the incumbent union.

[80] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 47–48.

hiring former employees of TVS as a "substantial and representative complement" of its own technical workforce. However, the *CNN* majority's expansive joint-employer finding converted CNN into an "employer" of TVS' employees before it hired *any* of its own technical employees. Based on this joint-employer finding, the Board majority determined that CNN—before it decided to terminate its relationship with TVS, and thus even before it notified TVS that it was terminating the relationship—was required to notify the TVS *unions* and engage in bargaining with them over *whether* CNN might terminate the TVS relationship and hire its own workforce.

Then-Member Miscimarra, in his *CNN* dissent, stated that employer status "does not arise as the result of spontaneous combustion," and he explained that the joint-employer finding the majority applied to CNN before it hired its own workforce was irreconcilable with the parties' understandings and existing agreements:

> Nothing in such a scenario would promote stable bargaining relationships. Rather, CNN's actions—taken as an "employer" of the TVS technical personnel—would have directly contradicted the then-existing TVS-NABET collective-bargaining agreements (which identified TVS, not CNN, as the employer). CNN's actions would have violated the CNN-TVS Agreements, which stated . . . that TVS employees "are not employees of [CNN], and shall not be so treated at any time". . . . Finally, CNN's actions would have exhibited a total disregard for the elaborate body of law regarding "successorship" and related business changes that has been the subject of nearly a dozen Supreme Court cases and innumerable Board decisions.[81]

The Board majority in *CNN*, although ostensibly applying the traditional joint-employer test, relied on factors similar to those subsequently embraced by the *Browning-Ferris* majority. Thus, the damage inflicted on successorship law by the *CNN* decision was exacerbated by *Browning-Ferris*. That decision, if not overruled, would injure the nation's economy by hindering the ability of user employers to freely terminate or rebid client contracts and of new supplier employers to set different initial employment terms. Simply put, the *Browning-Ferris* standard sent a message to user employers to *never contract with unionized supplier firms in the first place* to avoid being trapped in client contracts that cannot be terminated without bargaining with the union to agreement or impasse. On the other side, *Browning-Ferris* injured competition within the supplier-employer market: potential bidders for contracts where the incumbent supplier employer is unionized could not freely compete with the incumbent supplier on labor costs, as the new supplier employer would likely be tied to the same terms. The *Browning-Ferris* majority thus applied the Act in a manner directly contrary to the policies underlying the successorship doctrine as articulated by the Supreme Court in *Burns*.

D. Browning-Ferris Threatened Existing Franchising Arrangements in Contravention of Board Precedent and Trademark Law Requirements.

Of the thousands of business entities with various contracting arrangements that suddenly found themselves to be joint employers under the *Browning-Ferris* standard, franchisors stand out. According to the International Franchise Association (IFA), "in 2012 there were 750,000 franchise establishments in the United States employing 8.1 million workers, generating a direct economic output of $769 billion. These businesses account for approximately 3.4 percent of America's gross domestic product."[82]

For many years, the Board has generally not held franchisors to be joint employers with their franchisees, regardless of the degree of indirect control retained.[83] The *Browning-Ferris* majority did not mention, much less discuss, the potential impact of its new standard on franchising relations, but it was almost certainly momentous and hugely disruptive. Indeed, absent any discussion, *Browning-Ferris* left open whether the majority there even agreed with the General Counsel's position that the Board should continue to exempt franchisors from joint-employer status to the extent their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand. See, e.g., *Love's Barbeque Restaurant*, 245 NLRB 78, 120 (1978) (franchisor not a joint employer where franchisees were required to prepare and cook food a certain way because, among other things, the franchisor established the requirements to "keep the quality and good will of [the franchisor's] name from being eroded") (internal quotations and citations omitted), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981). Given the

[81] *CNN America*, supra, slip op. at 38–39 (Member Miscimarra, concurring in part and dissenting in part) (footnote and emphasis omitted).

[82] Amicus Br. of IFA in *Browning-Ferris* at 1.

[83] See, e.g., *Speedee 7-Eleven*, 170 NLRB 1332 (1968) (franchisor not a joint employer despite a policy manual that described "in meticulous detail virtually every action to be taken by the franchisee in the conduct of his store"); *Tilden, S. G., Inc.*, 172 NLRB 752 (1968) (franchisor not a joint employer, even though the franchise agreement dictated "many elements of the business relationship," because the franchisor did not "exercise direct control over the labor relations of [the franchisee]").

breadth of the *Browning-Ferris* test and its supporting rationale, there was reason for concern that a Board applying *Browning-Ferris* would have deemed a franchisor with this type of indirect control a joint employer of its franchisees' employees.

The *Browning-Ferris* test appears to require specific analysis of whether the franchisor shares or codetermines the manner and method of performing the work. However, in many if not most instances, franchisor operational control has nothing to do with labor policy but rather compliance with federal statutory requirements to maintain trademark protections. "It is required that the owner of the mark should set up the standards or conditions which must be met before another is permitted to use the certification mark and the owner should permit the use of the mark by others only when they meet those standards or conditions." *State of Fla. v. Real Juices, Inc.*, 330 F. Supp. 428, 432 (M.D. Fla. 1971). As one court explained:

> Without the requirement of control, the right of a trademark owner to license his mark separately from the business in connection with which it has been used would create the danger that products bearing the same trademark might be of diverse qualities. If the licensor is not compelled to take some reasonable steps to prevent misuses of his trademark in the hands of others the public will be deprived of its most effective protection against misleading uses of a trademark. The public is hardly in a position to uncover deceptive uses of a trademark before they occur and will be at best slow to detect them after they happen. Thus, unless the licensor exercises supervision and control over the operations of its licensees the risk that the public will be unwittingly deceived will be increased and this is precisely what the Act is in part designed to prevent. Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees.

Stanfield v. Osborne Indus., Inc., 839 F. Supp. 1499, 1504 (D. Kan. 1993), affd. 52 F.3d 867 (10th Cir. 1995), abrogated on other grounds by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). If a franchisor fails to maintain sufficient control over its marks, it is considered to have engaged in "naked franchising" and thereby to have abandoned the mark.[84] "The critical question in determining whether a licensing program is controlled sufficiently by the licensor to protect his mark is whether the licensees' operations are policed adequately to guarantee the quality of the products sold under the mark." *General Motors Corp. v. Gibson Chem. & Oil Corp.*, 786 F.2d 105, 110 (2d Cir. 1986). The necessity of the franchisor to police the "manner and method" of the franchisee is paramount. "'The purpose of the Lanham Act . . . is to ensure the integrity of registered trademarks, not to create a federal law of agency.' The scope of a licensor's duty of supervision of a licensee who has been granted use of a trademark must be commensurate with this limited goal." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018 (9th Cir. 1985) (quoting *Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1327 (7th Cir. 1979)).

These cases demonstrate that one important aspect of the franchising relationship is the franchisee's ability to reap the benefits of manifesting to the customer the appearance of a seamless enterprise through the use and maintenance of the franchisor's trademark. Federal franchise law recognizes this benefit and requires that the franchisor protect the mark by maintaining enough control over the franchisee to protect consumers. However, even though franchise law requires some degree of oversight and control by the franchisor over its franchisees, it was never the intent of Congress to make franchisors joint employers of their franchisees' employees. The *Browning-Ferris* joint-employer standard threatened to do just that whenever a franchisor complies with the requirements of another Federal statute that is totally unrelated to labor relations. The Board has been repeatedly reminded that it "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that [we] may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). Rather than providing a "careful accommodation of one statutory scheme to another," the *Browning-Ferris* decision placed "excessive emphasis upon [the Board's] immediate task." Id.

[84] Id.; see 15 U.S.C. § 1064(5)(A). See also *Barcamerica International USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002) ("It is well-established that '[a] trademark owner may grant a license and remain protected provided quality control of the goods and services sold under the trademark by the licensee is maintained.' *Moore Bus. Forms, Inc. v. Ryu*, 960 F.2d 486, 489 (5th Cir.1992). But '[u]ncontrolled or "naked" licensing may result in the trademark ceasing to function as a symbol of quality and controlled source.' *McCarthy on Trademarks and Unfair Competition* § 18:48, at 18-79 (4th ed. 2001). Consequently, where the licensor fails to exercise adequate quality control over the licensee, 'a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark.' *Moore*, 960 F.2d at 489.").

E. Browning-Ferris Undermined Parent-Subsidiary Relationships in Contravention of Board Precedent.

In most areas of the law, it is widely recognized that parent and subsidiary corporations are separate entities. The Board, which has developed sophisticated legal doctrines for the purpose of detecting when ostensibly separate companies are in truth either created to evade obligations under the Act (the alter-ego doctrine) or are so integrated that they function as one (the single-employer doctrine), has recognized this principle repeatedly. For example, in *Dow Chemical*, 326 NLRB 288 (1998), a bipartisan Board majority reaffirmed the longstanding rule under the single-employer doctrine that typical parents and subsidiaries are not considered a single employer for collective-bargaining purposes. See also, e.g., *Western Union*, 224 NLRB 274 (1976), affd. sub nom. *United Telegraph Workers v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978), cert. denied 439 U.S. 827 (1978). Indeed, the presumption of separateness for purposes of the Act is so strong that it also extends to unincorporated divisions that are operated independently from the company as a whole. See, e.g., *Los Angeles Newspaper Guild, Local 69 (Hearst Corporation)*, 185 NLRB 303, 304 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971). The Board honors the separateness of parents and subsidiaries even as it recognizes that a subsidiary is, of course, under the potential control of its parent. In other words, potential control is not enough to find that a parent is the same employer with its subsidiary for purposes of labor law:

> Common ownership by itself indicates only *potential* control over the subsidiary by the parent entity; a single-employer relationship will be found only if one of the companies exercises *actual* or *active* control over the day-to-day operations or labor relations of the other.

Dow, 326 NLRB at 288 (emphasis in original). The *Browning-Ferris* majority turned this principle on its head, and its wholesale adoption of the "potential control" standard risked treating parents and subsidiaries as joint employers. To our reckoning, no Board had ever taken this leap before. Indeed, the *Browning-Ferris* test—which applied to admittedly separate and independent companies—embraced a more onerous "control" standard than the one the Board applies to determine whether two apparently separate companies are *actually integrated* with one another. This made no sense.

Whatever the logical contradictions in *Browning-Ferris*, the result was serious. The standard adopted there threatened to sweep every parent and affiliate company in America into being the joint employer of its subsidiary's employees, with the concomitant bargaining obligations, the loss of secondary-employer protection from union strikes (discussed below), and all the other deleterious results mentioned above. Before upending decades of labor law precedent and probably centuries of precedent in corporate law, the Board needed a mandate from Congress rather than purporting to "find" it in our decisional law. Of course there is no such mandate, which further supports our decision today to restore the "direct and immediate control" standard. If Congress had wanted the Board to turn the world of corporate identity upside down, it would have expressly told us so.

VII. *BROWNING-FERRIS* CONFLICTS WITH CONGRESSIONAL INTENT TO INSULATE NEUTRAL EMPLOYERS FROM SECONDARY ECONOMIC COERCION.

Not only did the *Browning-Ferris* test impermissibly expand and confuse bargaining obligations under Sections 8(a)(5) and 8(d), it also did violence to other provisions of the Act that depend on a determination of who is, and who is not, the "employer." Chief among them is Section 8(b)(4)(ii)(B), which prohibits secondary economic protest activity, such as strikes, boycotts, and picketing. That section of the Act "prohibits labor organizations from threatening, coercing, or restraining a neutral employer with the object of forcing a cessation of business between the neutral employer and the employer with whom a union has a dispute," but it does not prohibit striking or picketing the primary employer, i.e., the employer with whom the union does have a dispute. *Teamsters Local 560 (County Concrete)*, 360 NLRB 1067, 1067 (2014). In enacting Section 8(b)(4)(ii)(B), Congress intended to "preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and . . . [to] shield[] unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692.

An entity that is a joint employer with the employer involved in a labor dispute is equally subject to union economic protest activities. See *Teamsters Local 688 (Fair Mercantile)*, 211 NLRB 496, 496–497 (1974) (union's picketing of a retailer did not violate Section 8(b)(4)(ii)(B) because retailer was the joint employer of employees of a delivery contractor with which the union had a labor dispute). To put this in practical terms, before *Browning-Ferris* a union in a labor dispute with a supplier employer typically could not picket a user entity in order to urge that entity's customers to cease doing business with the user, with the object of forcing the user to cease doing business with the supplier employer.[85]

[85] Of course, the user- and supplier-employer scenario often raises common situs issues as addressed in *Sailors Union (Moore Dry Dock)*,

Likewise, a union with a labor dispute with one franchisee typically could not picket the franchisor and all of its other franchisees.

Browning-Ferris' expansion of the joint-employer doctrine swept many more entities into primary-employer status as to labor disputes that are not directly their own. As a result, unions were enabled to picket or apply other coercive pressure to either or both of the joint employers as they chose. This limited the Act's secondary-boycott prohibitions in a manner Congress could not have intended. The targeted joint employer may not have direct control or even *any* control over the particular terms or conditions of employment that are the genesis of the labor dispute. Moreover, the economic consequences of this contraction of secondary-boycott protection are far reaching. For example, a union could picket all of the user entity's facilities even though the supplier employer only provides services at one. Further, assuming that a franchisor exerts similar indirect control over each franchisee, a union could picket the franchisor and all franchisees even though its dispute only involves the employees of one franchisee.[86]

It does not end there. As previously stated, numerous contractual provisions relied upon by the *Browning-Ferris* majority are typically included in a residential renovation contract—i.e., the contractor's employees cannot start work before a certain hour, they must finish work by a certain hour, they cannot use the bathrooms in the house, they have to park their vehicles in certain locations, and so forth. Suppose that the annual revenues of the company with whom John and Jane Homeowners' contract meet the Board's discretionary standard for asserting jurisdiction, not at all an unlikely possibility. Then suppose that a union initiates an area standards wage protest against this contractor. One day, the Homeowners open their front door to discover pickets patrolling the sidewalk in front of their house. In the joint-employer world of *Browning-Ferris*, the Homeowners are a lawful target for this protest activity. Unions may not have any interest in bringing the homeowners to the bargaining table, but they may be more than eager to maximize economic injury to the primary employer by expanding the cease-doing-business pressure to as many clients of that employer as possible. Congress did not intend that every entity with some degree of economic relationship with the employer-disputant be thrown into its labor dispute. The Act is supposed to encourage labor peace, and to this end Congress enacted Sections 8(b)(4) and 8(e) to prevent the very type of limitless economic warfare the *Browning-Ferris* decision fomented.

The *Browning-Ferris* majority's expansive definition of joint-employer status posed particular questions about its applicability to common situs work in the construction industry. As previously stated, the Supreme Court has held that the fact "the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other."[87] The breadth of the *Browning-Ferris* majority test and its holding that "reserved" control, by itself, may result in joint-employer status cannot be reconciled with the Supreme Court's decision—more than 50 years ago—that a general contractor in the construction industry is not an "employer" of subcontractor employees, even though general contractors obviously have "reserved" control over most if not all work performed by subcontractor employees on construction projects.[88]

VIII. THE JOINT-EMPLOYER QUESTION PRESENTED IN THIS CASE

"The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). The Board considers the following factors when determining whether retroactive application would cause manifest injustice: "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines, and any particular injustice to the losing party under the retroactive application of the change of law." *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993) (citing *NLRB v. Bufco Corp.*, 899 F.2d 608, 609 (7th Cir. 1990)). After

92 NLRB 547 (1950), and its progeny, but explicitly targeting the secondary employer is blatantly unlawful.

[86] Going back to the CleanCo diagram above for an example, Client A likely has no control over what goes on at the premises of Client C. More importantly, there is no underlying economic relationship between the two that could supply even a remotely rational foundation for the Act to allow economic weapons like strikes, picketing, etc. at Client A to convince it to use its obviously non-existent "power" over Client C in a labor dispute involving CleanCo employees posted at Client C.

[87] *Denver Building Trades*, 341 U.S. at 692.

[88] There is a further question. *Denver Building Trades* involved a situation in which a subcontractor was the primary employer target of protest, and the general contractor was the neutral employer. In *Markwell & Hartz*, the Board applied the same principles of separateness and neutrality when the general contractor was the primary employer in a labor dispute, thereby finding all subcontractors at the common situs to be neutrals. *Building & Construction Trades Council (Markwell & Hartz)*, 155 NLRB 319 (1965), enfd. 387 F.2d 79 (5th Cir. 1967). The breadth of the *Browning-Ferris* test threatened to undermine this decision as well.

consideration of these factors, we find that retroactive application in this case and in all pending cases would not result in manifest injustice. First, there has been no showing that Brandt and/or Hy-Brand relied on *Browning-Ferris* when structuring or maintaining their relationship.[89] Second, retroactive application here would further the purposes of the Act and the incorporated common law by ensuring that Brandt, Hy-Brand, and employers in other pending cases that present a joint-employer issue are not held jointly and severally liable based only on proof of joint control that is reserved, indirect, and/or "limited and routine." Finally, we find that retroactive application of the restored joint-employer standard will not result in any particular injustice to the losing parties, here Brandt and Hy-Brand, because the restored standard places a heavier burden of proof on the General Counsel than the *Browning-Ferris* standard we overrule today.

Applying the joint-employer standard that existed prior to *Browning-Ferris*, we find that the record establishes that Brandt and Hy-Brand constitute a joint employer, which means they are jointly and severally liable for remedying the unfair labor practices committed in the instant case. Substantial evidence supports a finding that the two entities *exercised* joint control over essential employment terms involving Brandt and Hy-Brand employees, the control was direct and immediate, and it was not limited and routine. Terence Brandt, who served as the Corporate Secretary for both companies, was directly involved in the decisions at both companies to discharge all seven of the discriminatees. Moreover, he identified himself as an official of Brandt when he signed letters effectively informing two of the Hy-Brand strikers that their employment had been terminated. Also, Terence Brandt is the primary individual making hiring decisions at Brandt, and he also hired Randy Sackville to be Hy-Brand's General Manager. Employees of both companies participate in the same 401(k) and health benefit plans, and they are covered by the same workers compensation policy. Hy-Brand employees and Brandt employees attend common mandatory training sessions and an annual corporate meeting where common employment policies are reviewed. Such common employment policies, drafted by Terence Brandt and Brandt Human Resources Director Lisa Coyne, include an equal employment opportunity policy, a workplace harassment policy, an FMLA policy, and a drug-free workplace policy. Thus, the record establishes that the joint control described above was actually exercised, not merely reserved, and that it had a direct and immediate impact on Brandt and Hy-Brand employees.

[89] While the General Counsel may have relied on *Browning-Ferris* when litigating this case, the General Counsel prevails, for the reasons stated below, under the standard that we restore today.

IX. RESPONSE TO THE DISSENT

One would never guess that two short years ago, our dissenting colleagues were part of the Board majority that, in *Browning-Ferris*, implemented sweeping changes in the Board's joint-employer doctrine. Then, our dissenting colleagues had no reluctance to overrule then-existing Board law based on their conclusion that it was "out of step with changing economic circumstances," including the "recent dramatic growth in contingent employment relationships."[90] In *Browning-Ferris*, our dissenting colleagues announced they had "decided to revisit and to revise the Board's joint-employer standard."[91] Quoting the Supreme Court, our colleagues emphasized that federal regulatory agencies "'are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.'"[92] Now, our colleagues raise an array of objections, most of which are contradicted by their own actions when deciding *Browning-Ferris*.

Most of our colleagues' contentions have been effectively addressed above. However, several additional points are relevant here.

First, there is no merit in the claim that the Board, in the instant case, has failed to satisfy requirements set forth in the Administrative Procedures Act, nor has the Board failed to engage in "reasoned decisionmaking." Our colleagues quote *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998), where the Supreme Court stated: "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Id. We agree with the Court's statement, as indeed we must. However, we disagree with our dissenting colleagues' suggestion that the Board's decision in the instant case fails the "logical and rational" test. Obviously, a decision reflecting the views of a Board majority does not become "illogical" or "irrational" merely because dissenting members disagree with the outcome. If this were the standard, then *Browning-Ferris* itself failed the "logical and rational" test, based on the dissenting views of Chairman (then-Member) Miscimarra and former Member Johnson in that case.

[90] *Browning-Ferris*, supra fn. 2, 362 NLRB No. 186, slip op. at 1.

[91] Id., slip op. at 1–2.

[92] Id., slip op. at 1 (footnote omitted) (quoting *American Trucking Assns. v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967)). See also *UGL-UNICCO Service Co.*, 357 NLRB 801, 801 (2011) (quoting *American Trucking Assns.*, supra, and revising Board's successor-bar doctrine).

See *Browning-Ferris*, supra fn. 2, 362 NLRB No. 186, slip op. at 21–49 (Members Miscimarra and Johnson, dissenting).[93]

Second, there is no greater merit in our dissenting colleagues' objection that the joint-employer issue is not appropriately before the Board. Here, our colleagues claim that we are straining to address and reverse *Browning-Ferris* and that we should avoid resolving the joint-employer issue here until judicial appeals in *Browning-Ferris* have been exhausted. These arguments are unpersuasive. In the instant case, the administrative law judge squarely found that Respondents Brandt and Hy-Brand were joint employers. And regarding that issue, the judge cited a single case: the Board's 2015 decision in *Browning-Ferris*.[94] Indeed, the judge focused specifically on the *changes* in joint-employer doctrine effectuated by *Browning-Ferris*. Thus, he explained: "The Board *does not require actual control* over essential terms and conditions of employment; it is sufficient that the alleged joint employer has the *authority* to do so." Moreover, the judge pointed out that in *Browning-Ferris*, "the Board *overruled prior precedent* to the extent those cases held that mere authority to control employees' terms and conditions of employment was an inadequate indicia of joint employer status unless the authority was exercised directly and immediately and not in a limited and routine manner." And there is no question that the Respondents filed exceptions to the judge's joint-employer finding. Of course, it is no surprise that our dissenting colleagues argue in favor of deciding this case on a basis that would prevent the Board from overruling *Browning-Ferris*: they were part of the *Browning-Ferris* majority that erroneously, in our view, overturned then-existing legal principles. However, the Board is presented here with the question of whether the judge correctly concluded, based on *Browning-Ferris*, that the Respondents are joint employers. Therefore, we have the responsibility and obligation to address this question, and in doing so, to determine whether *Browning-Ferris* correctly stated the applicable standard. We have concluded that it did not, based on the common law and sound policy reasons outlined at length above.[95]

Third, there is no merit in our dissenting colleagues' protest that we cannot or should not overrule *Browning-Ferris* in this case without inviting *amicus* briefing. The Board has broad discretion with respect to whether to invite briefing prior to adjudicating a major issue. As we

[93] The NLRB functions in a manner that is very different from the U.S. Department of Labor because the two agencies enforce different statutes and have different structures, procedures, and practices. This renders immaterial our dissenting colleagues' reliance on comments by Secretary of Labor Alexander Acosta concerning "public debate, discussion, and comment" regarding joint-employer status.

[94] When addressing the joint-employer issue in the instant case, the judge stated: "In *BFI/Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 15 (2015), the Board described the following joint employer test: 'The Board may find that two entities . . . are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment'" (footnotes omitted; paragraph structure modified).

[95] Equally without merit is our colleagues' position that the Board should refrain from resolving the joint-employer issue in this case, and from overruling *Browning-Ferris*, because appeals have not been exhausted in the *Browning-Ferris* case. For several reasons, this contention is without merit. First, the parties in the instant case and other parties affected by the *Browning-Ferris* decision are entitled to the prompt resolution of the joint-employer issue presented here, without regard to pending appeals in other cases. Second, even if the *Browning-Ferris* decision were upheld by a court of appeals, this would not render inappropriate the Board's independent assessment of the joint-employer issue here and in other cases. Indeed, in the *Murphy Oil* litigation, the Board decided that class-action waiver agreements constitute unlawful interference with protected rights in violation of Section 7 of the Act; the Board's position was rejected by the Fifth Circuit; and the Board continued to find similar violations in dozens of other cases and to defend the Board's position in the courts (even in cases appealed to the Fifth Circuit). See, e.g., *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S. Ct. 809 (2017). Third, for obvious reasons, there is no doctrine that precludes the Board from deciding cases whenever prior decisions involving similar issues are pending appeal. Because of the large number of Board cases that involve the same issues and legal principles, such a principle would impede the timely adjudication of cases by the Board, given the frequency with which losing parties seek review in the courts of appeals. Finally, the Board has the discretion to direct the General Counsel to request courts of appeals to remand pending cases to the Board; such requests have been granted; and subsequent Board decisions reversing the original Board ruling have been enforced. See, e.g., *Milwaukee Spring Div. of Illinois Coil Spring Co.*, 265 NLRB 206 (1982), remanded 718 F.2d 1102 (7th Cir. 1983), reversed on reconsideration 268 NLRB 601 (1984), affd. 765 F.2d 175 (D.C. Cir. 1985).

The Board's resolution of the joint-employer issue in the instant case is materially different from *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016), where our dissenting colleagues unnecessarily overruled existing law to find a petitioned-for bargaining unit appropriate despite unrebutted evidence that the bargaining unit had ceased to exist more than 3 years before the Board issued its decision. The Board majority there refrained from ruling on a motion to dismiss the representation case as moot and instead elected to decide the legal issue. The *Miller & Anderson* majority reinstated the election petition and remanded the case to the Regional Director to determine whether any employees existed who could vote in the election—again, despite unrebutted evidence that made it almost certain none did. (No hearing was ever held, and 14 days after the Board's decision, the Region granted the Petitioner's request to withdraw its election petition.) In this context, Chairman (then-Member) Miscimarra dissented, based in part on the absence of a case or controversy, and he objected that the Board majority "decided an election case . . . when the available evidence makes it virtually certain that no election will ever take place." Id., slip op. at 23 (Member Miscimarra, dissenting). By comparison, in the instant case, the questions presented undeniably have an immediate impact on the Respondents and other parties. Indeed, our colleagues do not argue that the instant case need not be resolved; they simply disagree with the outcome.

recently stated, "[n]either the Act, the Board's Rules, nor the Administrative Procedures Act requires the Board to invite amicus briefing before reconsidering precedent." *UPMC*, 365 NLRB No. 153, slip op. at 10 (2017). Additionally, the issue we decide today was the subject of amicus briefing when the Board decided *Browning-Ferris*. Further, we respectfully disagree with our dissenting colleagues' contention that the Board maintains a "longstanding practice of notifying the public and the parties that a reversal of precedent was under consideration, and soliciting briefs from them." In the past decade, the Board has freely overruled or disregarded established precedent in numerous cases without supplemental briefing. See, e.g., *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing). Obviously, our dissenting colleagues have no blanket commitment to "public participation" in agency policymaking. Just this past week, Members Pearce and McFerran dissented from a request for information that merely asked interested members of the public whether the Board's extensive rewriting of its representation-case procedures should be retained, modified, or rescinded.[96]

Fourth, the Board clearly has the authority to resolve issues based on legal standards that have not been expressly raised or challenged by the parties. When the Board decides cases, it performs an appellate function.[97] And the Supreme Court has instructed that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991).[98] Likewise, there is no principle of law that requires the Board to resolve this case by addressing the judge's single-employer finding rather than his joint-employer finding. Clearly, our colleagues would prefer that the Board only address the single-employer issue because our resolution of the joint-employer issue requires the Board to pass on *Browning-Ferris*, which we now overrule. In any event, the Board has concluded it is appropriate to resolve the joint-employer issue, and that makes it unnecessary to reach or pass on the question of single-employer status.

In sum, the Board has the responsibility to decide all matters that are properly before it, based on our "special function of applying the general provisions of the Act to the complexities of industrial life."[99] In the present case, the question of joint-employer liability is directly presented to us. In addressing that issue, we have the authority and the obligation to apply the law as we believe it should be, regardless of whether any party has directly challenged *Browning-Ferris*. For the reasons explained above, the Board has concluded that the common law and numerous policy considerations favor abandoning the *Browning-Ferris* joint-employer standard. In its place, based on the same considerations, we reinstate the joint-employer standard that existed prior to the *Browning-Ferris* decision.

X. CONCLUSION

The Board is not Congress. It can only exercise the authority Congress has given it. The *Browning-Ferris* majority announced a new test of joint-employer status based on policies and economic interests Congress has expressly prohibited the Board from considering. That alone is reason enough to overrule *Browning-Ferris*. At least as troubling from an institutional perspective, however, was the nature of the *Browning-Ferris* test. That test created uncertainty where certainty is needed. It provided no real standard for determining in advance when entities in a business relationship will be viewed as

[96] See 82 FR 58783 (2017) (NLRB Notice and Request for Information, Representation-Case Procedures) (dissenting views of Members Pearce and McFerran).

[97] In typical unfair labor practice cases, the Board engages in appellate review of decisions and orders of the Agency's administrative law judges, and in typical representation cases, the Board engages in appellate review of decisions by Regional Directors.

[98] In *Dish Network Corp.*, 359 NLRB 311, 312 (2012), Member Pearce expressly endorsed the applicability of the *Kemper Financial Services* rationale to the Board's adjudicatory authority. Although *Dish Network* was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), based on the absence of a quorum of validly appointed Board members who decided the case, we agree with Member Pearce that the description in *Kemper Financial Services* appropriately explains the scope of the Board's authority.

[99] *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963).

independent and when they will be viewed as joint employers.

Moreover, as noted previously, the uncertainty created by *Browning-Ferris*' vague standard created an unreasonable risk that (i) parties would discover after the fact, following years of litigation, that they were unlawfully absent from negotiations in which they were legally required to participate; and (ii) other parties would discover that they unlawfully injected themselves into collective bargaining involving another employer and its union(s), based on a relationship that turned out to be insufficient to result in joint-employer status. The *Browning-Ferris* majority essentially said that the Board would look at every aspect of a business relationship on a case-by-case basis and then decide the joint-employer question after the fact. As the dissenters in *Browning-Ferris* put it, the Board owed a greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that "we'll see how it floats."

Accordingly, for all the reasons set forth above, we return today to a standard that has served labor law and collective bargaining well, a standard that is understandable and rooted in the real world. It recognizes joint-employer status in circumstances that make sense and would foster stable bargaining relationships. Indeed, in the Board's treatment of joint-employer status as turning on whether joint control is exercised (rather than merely reserved), whether such control has a "direct and immediate" impact on employment terms (rather than a merely indirect impact), and whether such control is not merely "limited and routine," there have still been many cases where two or more employers were found to exercise sufficient control over a common group of employees to warrant joint bargaining obligations and shared liability for unfair labor practices.[100] Our quarrel with *Browning-Ferris* stems not from any disagreement about the general concept of joint-employer status but rather from its imposition of a test that we firmly believe cannot be reconciled with the common law agency standard the Board is compelled to apply, based on a statute the Board is duty-bound to enforce.

The Supreme Court has cautioned that a Federal agency must explain itself when departing from an interpretation of well-established rules that have governed business practices for long periods, even when the rules are of the agency's own making. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court reviewed a new interpretation promulgated by the Department of Labor, under which pharmaceutical sales representatives would no longer be considered outside salesmen exempt from the overtime provisions of the Fair Labor Standards Act (FLSA). The Court emphasized that its usual deference to such an agency action was not warranted because of the "potentially massive" economic implications of the new interpretation "for conduct that occurred well before that interpretation was announced,"[101] and because deference "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[102] The Court also noted that DOL's "longstanding practice" of exempting "detailers" went back to the beginning of the FLSA, and that there were currently 90,000 detailers working for pharmaceutical companies with the understanding that they were exempt outside sales representatives.[103]

Because the DOL's new interpretation would have been so disruptive to the regulated industry, the Court could not simply defer to it:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.
>
> Accordingly, whatever the general merits of . . . deference, it is unwarranted here. We instead accord the Department's interpretation a measure of deference proportional to the "'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *United States v. Mead Corp.,* 533 U.S. 218, 228, 121 S.Ct. 2164, 150

[100] The *Browning-Ferris* majority faulted the dissenters for making "no real effort to address" the issues they raised. We believe the criticism was unfair, but the pre-*Browning-Ferris* framework we return to today already supplies the answer. Economic interdependence and indirect influence *work both ways*, and unions enjoy great flexibility when dealing with employers that are interdependent with other entities. As long as the union respects secondary boycott principles, leverage applied to the undisputed employer is likely to affect the employer's suppliers, vendors, and other parties having closely aligned economic interests, which predictably may lead to meaningful discussions and changes across the various entities. Such discussions are likely to occur even "without the intervention of the Board enforcing a statutory requirement to bargain," and there is an "important difference" between such discussions being "permitted" as opposed to making them "mandatory." *First National Maintenance v. NLRB*, 452 U.S. at 681 fn. 19, 683.

[101] Id. at 2167.

[102] Id. (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

[103] Id. at 2167–2168.

L.Ed.2d 292 (2001) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).[104]

What the *Browning-Ferris* majority did was far broader in scope than DOL's invalidated interpretive change. Instead of overturning one discrete, longstanding agency interpretation that affected a statutory exemption for a single category of employer, the Board substantially altered its interpretation of joint-employer status across the entire spectrum of private business relationships subject to our jurisdiction. Our return to the principles of the *TLI* and *Laerco* is based in part on our grave concern regarding the impact of *Browning-Ferris*' reformulation of the joint-employer standard on a much broader body of law, affecting multiple doctrines central to the Act that have been developed and refined through decades of work by bipartisan Boards, the courts, and Congress. As in *Christopher*, the *Browning-Ferris* majority gave insufficient consideration to the "potentially massive" economic implications of its new joint-employer standard, and it required innumerable parties to "divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding."

For the reasons stated above, we overrule *Browning-Ferris* and restore the joint-employer standard that existed prior to the *Browning-Ferris* decision. Thus, a finding of joint-employer status requires proof that the alleged joint-employer entities have actually *exercised* joint control over essential employment terms (rather than merely having "reserved" the right to exercise control), the control must be "direct and immediate" (rather than indirect), and joint-employer status will not result from control that is "limited and routine."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Hy-Brand Industrial Contractors, Ltd., Muscatine, Iowa, and Brandt Construction Co., Milan, Illinois, a joint employer, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the introductory paragraph of the recommended Order.

Respondent, a joint employer consisting of Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) of Muscatine, Iowa, and Brandt Construction Co. (Brandt) of Milan, Illinois, its officers, agents, successors, and assigns, shall

2. Substitute the following for paragraph 2(a).

"2a. Within 14 days from the date of this Order, offer Dakota Upshaw, Cole Hinkhouse, Austin Hovendon, Alezzandro Campbell, David Newcomb, Ron Senteras, and Nicole Pinnick full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 14, 2017

Philip A. Miscimarra, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS PEARCE and MCFERRAN, dissenting.

Today, the majority resurrects a restrictive joint-employer standard under the National Labor Relations Act, adopting point for point the dissent in *BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015). The majority reflexively reverses precedent even though:

(1) this case should easily be decided without reaching the joint-employer issue at all, by correctly finding that the Respondents are a single employer;

(2) the adoption of a new joint-employer standard concededly makes no difference to whether the Respondents here are, in fact, joint employers;

(3) no party in this case has asked the Board to reconsider *BFI* (and, to the contrary, the parties cite and apply *BFI* as the applicable standard);

(4) breaking with established practice, the Board has failed to give notice that it was considering a change in the law and has failed to provide interested persons with an opportunity to file briefs on the issue; and

(5) the United States Court of Appeals for the District of Columbia Circuit is currently reviewing *BFI*.

To say that the majority is reaching out—and rushing—to reverse *BFI* is an understatement.

Today's decision represents a failure to engage in the reasoned decisionmaking required of administrative agencies by the Administrative Procedure Act. This case

[104] Id. at 2168–2169.

is not a proper vehicle for reconsidering the joint-employer standard to begin with, and the majority's failure to permit public participation only worsens matters. Not surprisingly, a deeply flawed process leads to a deeply flawed result. The majority starts with a willful misunderstanding of the joint-employer standard adopted in *BFI* and ends by reverting to a standard that, before today, the Board had never even attempted to justify in terms of the common-law principles that must guide us. As we will explain, the resurrected standard not only is impossible to reconcile with the common law of agency, it also violates the explicit policy of the National Labor Relations Act: to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. §151. Today's decision is an unfortunate and unwarranted step backward.

I.

There is no genuine occasion here to revisit the Board's joint-employer standard.[1] The material facts underscore the simplicity of this case—and the arbitrary process that has led to today's decision. Charles Brandt and his three sons owned two ostensibly separate construction businesses – Brandt, which performed public works and other construction projects and employed 140 employees; and Hy-Brand, which erected steel warehouses and other structures and employed 10 employees. All four principals had the same ownership interest and played the same management role in both entities. Vice President Terence Brandt oversaw all major decisions for Brandt and Hy-Brand, including firing decisions. The entities maintained identical workplace rules, shared a single payroll and benefit administrator, and provided the same benefits. In addition, the evidence indicates that certain operations were interrelated; specifically, Brandt and Hy-Brand employees testified that they had worked together, shared equipment, and performed construction services for the other entity.

Between July and November 2015, five Hy-Brand employees and two Brandt employees went on strike to protest unsafe working conditions and substandard wages and benefits. Terence Brandt personally made the decision to fire all seven employees in retaliation for their actions.

On those facts, this should be a simple case. There is no dispute over the unlawful act that was committed: the discharge of seven employees who engaged in a protected work stoppage. Nor is there any real question about the legal status of the actors here: nominally separate companies that were commonly owned and managed by the Brandt family, which exercised centralized control over labor policy and personnel decisions. As found by the judge, decades of Board law make clear that, in the situation described, Brandt and Hy-Brand should be liable as a single employer.[2] The two entities shared: (1) common ownership; (2) common management; (3) interrelated operations; and (4) common control of labor relations. It is particularly significant that the Brandt family exercised centralized control over labor relations, as evinced by Terence Brandt's significant control over employment matters at both entities and his direct participation in the unfair labor practices.[3] By any measure, this has all the hallmarks of a single, integrated enterprise, characterized by the "absence of an arm's-length relationship among seemingly independent companies."[4] In sum, all the elements of an easy case are here.

Moreover, this is a case that merited quick disposition. The timely resolution of allegations such as these—involving the permanent loss of employment—is "most central to achievement of the Agency's mission," and for good reasons. See NLRB Casehandling Manual Part One, Sec. 11740.1. The Board has explained that "[t]he discharge of employees because of union activity is one of the most flagrant means by which an employer can hope to dissuade employees . . . because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work." *Mid-East Consolidation Warehouse*, 247 NLRB 552, 560 (1980). Accordingly, such cases are considered to have an "exceptional impact" on the public and are subject to the most stringent case-processing goals. See NLRB Casehandling

[1] To recall the words of our majority colleague in an earlier case (misplaced there, but apt here):

> [T]he importance of an issue does not warrant the issuance of a decision in the absence of an actual case or controversy. Moreover . . . the issues presented here will undoubtedly arise in another case . . . and the existence of an evidentiary record in such a case would predictably render any resulting Board decision more concrete and, hopefully, more understandable.

Miller & Anderson Inc., 364 NLRB No. 39, slip op. at 23 (2016) (Member Miscimarra, dissenting). The majority incorrectly characterizes *Miller & Anderson* as involving unrebutted evidence that the representation issue presented there was moot. In fact, while one of the employers did move to dismiss the petition as moot, the petitioner contested that motion and offered to test the employer's factual claims at hearing. The Board appropriately found that the motion to dismiss raised material factual issues warranting a hearing and remanded the case to the Regional Director to resolve those issues. 364 NLRB No. 39, slip op. at 14 fn. 40 (2016).

[2] See, e.g., *Overton Markets, Inc.*, 142 NLRB 615 (1963); *Blumenfeld Theaters Circuit*, 240 NLRB 206 (1979), enfd. mem. 626 F.2d 865 (9th Cir. 1980); *Truck & Dock Services*, 272 NLRB 592, 592 fn. 2 (1984); *Alexander Bistritzky*, 323 NLRB 524, 524–525 (1997); *Spurlino Materials, LLC*, 357 NLRB 1510 (2011), enfd. 805 F.3d 1131 (D.C. Cir. 2015).

[3] See *Rogan Brothers Sanitation, Inc.*, 362 NLRB No. 61 (2015), slip op. at 5–6, enfd. 651 Fed.Appx. 34 (2nd Cir. 2016).

[4] *Bolivar-Tees, Inc.*, 349 NLRB 720, 720 (2007), enfd. 551 F.3d 722 (8th Cir. 2008).

Manual (Part One) Unfair Labor Practice Proceedings Sec. 11740.1. Had the Board simply voted to adopt the judge's decision—while disclaiming reliance on his alternative finding of joint-employer status—an Order requiring reinstatement could have issued well before now.

Instead, the newly-constituted majority invents an opportunity to overrule the Board's 2-year-old joint-employer standard. It is indisputable, however, that this case is missing the foundational element of a joint-employer claim—namely separate and independent employers.

In *BFI*, the Board reiterated its endorsement of the Third Circuit's careful distinguishing of the joint-employer doctrine from the single-employer doctrine. 362 NLRB No. 186, slip op. at 9–10. The court had explained many years ago that:

> a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be"- *independent legal entities* that have merely "historically chosen to handle jointly . . . important aspects of their employer-employee relationship." . . . . The basis of the finding is simply that one employer while contracting in good faith with an *otherwise independent company*, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the "joint employer" concept recognizes that the business entities involved *are in fact separate* but that they share or co-determine those matters governing the essential terms and conditions of employment.

NLRB v. Browning Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1122–1123 (1982) (emphasis added, internal citations omitted).[5] For reasons that should be very obvious, applying the joint-employer test to a single, integrated employer is illogical: it is absurd to ask whether an organization shares or codetermines essential terms and conditions of employment *with itself*. Yet this is exactly what the majority does here—in a single paragraph of analysis that includes no reference to joint-employer principles and cites no case law.

Likewise, the key tenets of *BFI* that the majority purports to overrule – namely those relating to the significance of reserved, indirect, and routine control (all of which are discussed in detail below) – have no application in this case. There is no allegation or evidence that, pursuant to a contract, Brandt reserved the right to exercise control over Hy-Brand employees, or vice versa. Nor is there any allegation or evidence that Brandt exercised control over Hy-Brand employees indirectly or through an intermediary, such as a Hy-Brand supervisor.[6] Again, the entire record underscores that the Brandt family directly controlled both entities as a single employer.

So, this is a single-employer case, not a joint-employer case.[7] Yet the majority insists that this case must be resolved under joint-employer principles.[8] This makes sense, of course, only in light of the majority's overriding goal to reverse *BFI*. Significantly, even the parties

[5] Oddly, the majority devotes a lengthy footnote (which cites the same Third Circuit case) to delineating the legal distinction between single employer and joint employer relationships. It then proceeds to willfully ignore this distinction.

[6] Even assuming that the majority is correct in applying joint-employer precedent (which it is not), there is no allegation that Brandt's control over Hy-Brand was anything other than direct and immediate. Accordingly, this case does not implicate the doctrinal changes effected by *BFI*, and a finding that Brandt and Hy-Brand are joint employers would not require that precedent to be overruled.

In addition to unnecessarily reaching the joint employer doctrine, the majority then misapplies it under any understanding. The majority finds Brandt and Hy-Brand to be joint employers of all seven discharged employees, five of whom were employed by Hy-Brand and two of whom were employed by Brandt. But the entirety of the majority's analysis focuses on Brandt's control over Hy-Brand employees and includes no evidence indicating why Hy-Brand, the smaller entity, would be a joint employer of Brandt's employees. Perhaps unsurprisingly, the majority's analysis reads like an application of single-employer precedent, wherein both nominally separate entities would be the employer of all the discharged employees.

[7] Accordingly, we would adopt the judge's finding that Brandt and Hy-Brand are liable for the discharges as a single employer, without needing to pass on the judge's joint-employer finding.

[8] The majority states that "there is no principle of law that requires the Board to resolve this case by addressing the judge's single-employer finding rather than his joint-employer finding." But there is certainly a principle requiring that the correct legal analysis be applied to the facts at hand. It is indisputable that this case presents a single-employer scenario, and that the joint-employer analysis the majority purports to apply simply does not fit the facts. The "share or co-determine" inquiry only makes sense when there are two separate and independent employers—and not a single employing entity, as in this case.

The majority also asserts that "our colleagues would prefer that the Board only address the single-employer issue because our resolution of the joint-employer issue requires the Board to pass on *Browning-Ferris* . . ." In our view, however, any sound and proper analysis of this case would begin by asking whether Hy-Brand and Brandt constitute a single employer. This is because a single-employer finding would essentially render a joint-employer finding to be both unnecessary and nonsensical. Tellingly, the majority bypasses the single-employer inquiry completely and without explanation.

Finally, the majority contrasts its decision here with *Miller & Anderson*, supra, in which the Board revisited representation precedent—improperly, in the majority's view—where one party claimed that the petitioned-for unit no longer existed and the controversy was thus rendered moot. Even accepting the majority's characterization of that decision (which, as previously explained, we do not), the majority here does exactly what it accuses the *Miller & Anderson* Board of doing. Although a live controversy surely exists in this case, it is not one that implicates the joint-employer precedent that the majority overrules. Accordingly, and contrary to the majority, we disagree with its resolution of this case under an inapplicable theory.

and the judge recognized that this is really a single-employer case. [9]

II.

To make matters worse, the majority's procedural course disregards basic principles of reasoned decisionmaking as well as longstanding Agency norms in favor of public participation. As the Supreme Court has made clear, the Board's adjudication in cases like this one is subject to the requirement of the Administrative Procedure Act that an agency engage in "reasoned decisionmaking." *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Id. The majority's decision here fails on both counts.

First, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). But the majority's decision bears little relationship to the facts, which, as explained, do not fairly present a genuine joint-employer issue.

Equally troubling is the majority's disregard for established Agency norms favoring public participation in the decision-making process. As in other recent decisions,[10] the majority once again arbitrarily dispenses with the Board's longstanding practice of notifying the public and the parties that a reversal of precedent was under consideration, and soliciting briefs from them.[11] (None of the

[9] The record makes clear that, throughout the course of litigation, the General Counsel's primary theory of the case was single employer. Tellingly, moreover, the judge's legal analysis focused almost exclusively on the single-employer issue, with only a perfunctory joint-employer paragraph that largely restated his single-employer rationale. Likewise, even the Respondent's 31-page exceptions brief devotes only a single, citation-free paragraph to contesting the judge's joint-employer finding.

[10] *The Boeing Company*, 365 NLRB No. 154 (2017) (Member McFerran dissenting); *UPMC*, 365 NLRB No. 153 (2017) (Member McFerran dissenting).

[11] See, e.g., *Temple University Hospital, Inc.*, Case No. 04–RC–162716, Order Granting Review in Part and Invitation to File Briefs (filed Dec. 29, 2016), available at https://apps.nlrb.gov/link/document.aspx/09031d45822fb922 (whether the Board should exercise its discretion to decline jurisdiction over the employer); *Postal Service*, 364 NLRB No. 116 (2016) (whether the Board may continue to permit administrative law judges to issue a "consent order," incorporating the terms proposed by a respondent to settle an unfair labor practice case, to which no other party has agreed, over the objection of the General Counsel); *King Soopers, Inc.*, 364 NLRB No. 93 (2016) (whether the Board should revise its treatment of search-for-work and interim employment expenses as part of the make-whole remedy for unlawfully discharged employees), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017); *Columbia University*, 364 NLRB No. 90 (2016) (whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), in which it held that graduate assistants who perform services at a university in connection with their studies are not statutory employees under the National Labor Relations Act); *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016) (whether the Board should adhere to its decision in *Oakwood Care Center*, 343 NLRB 659 (2004), which disallowed inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers); *Service Workers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015) (whether the Board should reconsider its rule that, in the absence of a valid union-security clause, a union may not charge nonmembers a fee for processing grievances); *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (whether the Board should adhere to its existing joint employer standard or adopt a new standard); *Northwestern University*, 362 NLRB No. 167 (2015) (whether the Board should find grant-in-aid scholarship football players are employees under the NLRA); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (whether the Board should adopt a rule that employees who are permitted to use their employer's email for work purposes have the right to use it for Section 7 activity, subject only to the need to maintain production and discipline); *Pacific Lutheran University*, 361 NLRB 1404 (2014) (whether a religiously-affiliated university is subject to the Board's jurisdiction, and whether certain university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managerial employees); *Latino Express, Inc.*, 361 NLRB 1171 (2014) (whether, in awarding backpay, the Board should routinely require the respondent to: (1) submit documentation to the Social Security Administration so that backpay is allocated to the appropriate calendar quarters, and (2) pay for any excess Federal and state income taxes owed as a result of receiving a lump-sum payment); *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014) (whether the Board should change the standard for determining when the Board should defer to an arbitration award), rev. denied sub nom *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017); *New York University*, Case No. 02–RC–023481, Notice and Invitation to File Briefs (filed June 22, 2012), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3252/ntc_02-rc-23481_nyu_and_polytechnic_notice___invitation.pdf (whether graduate student assistants who perform services at a university in connection with their studies are or are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act); *Point Park University*, Case No. 06–RC–012276, Notice and Invitation to File Briefs (filed May 22, 2012), available at https://apps.nlrb.gov/link/document.aspx/09031d4580a0ee7d (whether university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managers); *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) (whether mandatory arbitration agreements that preclude employees from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial, violate the NLRA), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013); *Hawaii Tribune-Herald*, Case No. 37–CA–007043, Notice and Invitation to File Briefs (filed March 2, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/stephensmediainvite.pdf (whether the Respondent had a duty to provide the Union with a statement provided to it by an employee or any other statements that it obtained in the course of its investigation of another employee's alleged misconduct); *Chicago Mathematics and Science Academy Charter School, Inc.*, Case No. 13–RM–001768,

cases cited by the majority diminish the fact that inviting briefs has become an established Board norm—and the majority tellingly cites no recent case in which the Board refused to seek briefing over objections from a member.[12]) The Board followed this very process before deciding *BFI*—providing notice in May 2014 that the joint-employer standard was to be revisited, disseminating a set of questions, soliciting briefs, and reviewing those submissions as part of the decision-making process. The *BFI* decision, in turn, benefited from the insights of key stakeholders, including employer interest groups, labor unions, workplace safety advocates, academics, Federal agencies, and our own General Counsel.[13] Secretary of Labor Alexander Acosta, speaking of his own agency's interpretation of the joint-employer standard under the Fair Labor Standards Act, recently observed:

> [A]s a matter of public policy[,] public debate, discussion, and comment are good. Perhaps the joint-employer doctrine is good policy; perhaps not. It is certainly not the type of policy change we want to make without public input. . . . Congress entrusts policy decisions to an agency's discretion on the condition

Notice and Invitation to File Briefs (filed January 10, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/chicago_mathematics_brief.pdf (whether an Illinois charter school should fall under the jurisdiction of the NLRB or the Illinois Educational Labor Relations Board); *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (what constitutes an appropriate bargaining unit), enfd. sub nom *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *Roundy's Inc.*, Case No. 30–CA–017185, Notice and Invitation to File Briefs (filed November 12, 2010), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/roundys_notice_and_invitation.pdf (what standard the Board should apply to define discrimination in cases alleging unlawful employer discrimination in nonemployee access); *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (what duties a successor employer has toward an incumbent union); *Lamons Gasket Co.*, 357 NLRB 739 (2011) (whether, and how long, employees and other unions should have to file for an election following an employer's voluntary recognition of a union); *J. Picini Flooring*, 356 NLRB 11 (2010) (whether Board-ordered remedial notices should be posted electronically and, if so, what legal standard should apply and at what stage of the proceedings any necessary factual showing should be required); *Kentucky River Medical Center*, 356 NLRB 6 (2010) (whether the Board should routinely order compound interest on backpay and other monetary awards in backpay cases and if so, what the standard period for compounding should be); *Long Island Head Start Child Development Services*, 354 NLRB No. 82 (2009) (two-member Board decision) (whether the Board should find contract termination based on bargaining even in the absence of any contractually-required notice); *Register Guard*, 351 NLRB 1110 (2007) (whether employees have a Section 7 right to use their employer's email system to communicate with one another, what standard should govern that determination, and whether an employer violates the Act if it permits other nonwork-related emails but prohibits emails on Section 7 matters), enfd. in part and remanded in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Can-Am Plumbing, Inc.*, 350 NLRB 947 (2007) (whether the job targeting program at issue violated the Davis-Bacon Act), enfd. 340 Fed.Appx. 354 (9th Cir. 2009); *Dana Corp.*, 351 NLRB 434 (2007) (whether the Board should modify its recognition bar doctrine as articulated in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), *Smith's Food & Drug Centers.*, 320 NLRB 844 (1996), and *Seattle Mariners*, 335 NLRB 563 (2001)); *Alyeska Pipeline Service Co.*, 348 NLRB 779 (2006) (whether a systemwide presumption is warranted in the circumstances of the instant case); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) (seeking comment relating to (1) the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act; and (2) an appropriate test for determining unit placement of employees who take turns or "rotate" as supervisors), see also *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Golden Crest Heath Center*, 348 NLRB 727 (2006); *Firstline Transportation Security*, 347 NLRB 447 (2006) (whether the Board should assert jurisdiction over the employer, a private company contracting with the Transportation Security Administration).

[12] The majority asserts that there are "numerous" cases where the Board "has freely overruled or disregarded established precedent . . . without supplemental briefing." But the six decisions the majority cites are easily distinguishable from this one.

First, in all six cases—*E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015); *Pressroom Cleaners*, 361 NLRB 643 (2014); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014)—a party explicitly and publicly asked the Board to overrule precedent. (The General Counsel asked the Board to revisit or overrule precedent in *Fresh & Easy*, *Lincoln Lutheran*, *Loomis*, *Graymont*, and *Du Pont*; in *Pressroom Cleaners*, the Charging Party asked the Board to overrule precedent.)

Additionally, in *Loomis* and *Lincoln Lutheran*, amicus briefs were actually filed requesting, respectively, that the Board reverse or adhere to extant Board precedent.

Further, *Du Pont* and *Lincoln Lutheran* were the culmination of long-running discussions of the precedent they ultimately overruled. In *Du Pont*, the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit for the express purpose of deciding between two conflicting branches of precedent. See *E.I. Du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). *Lincoln Lutheran*, in turn, was the culmination of a 15-year dialogue with the United States Court of Appeals for the Ninth Circuit about *Bethlehem Steel.* See *WKYC-TV, Inc.*, 359 NLRB 286, 286 (2012) (discussing history).

Finally, as already pointed out, in none of these cases did the Board refuse to request briefing over the objection of one or more Board members.

These six cases stand in sharp relief from the instant case where no party has asked us to revisit or overrule precedent and there has been no long-running dialogue with a Federal court of appeals; indeed, neither the parties nor the public could have anticipated that the Board was planning to overrule precedent in this case.

[13] Remarkably, the majority points to the fact that the *BFI* Board invited briefing as a reason *not* to do so here. But our assumption should be that public participation is desirable, unless there are legitimate and compelling reasons to think otherwise. No party to this case, and no member of the public, has addressed the merits of the Board's decision in *BFI* and its specific rationale, as opposed to its mere application to the facts presented in this case. Nor has there been an opportunity for the public to address the impact of the application of the *BFI* standard to the decision of specific cases and controversies. The better course here would be to give interested persons (including those who did not file briefs in *BFI*) the opportunity to address the Board.

> that the agency receive the public's input on substantive policy.

Alexander Acosta, Remarks to the Federalist Society (Sept. 15, 2017), as reported in Bureau of National Affairs, *Daily Labor Report* (Oct. 23, 2017).

The majority's unwillingness to let the parties and the public participate here is particularly curious given its characterization of the Board's joint-employer jurisprudence as having "dramatic implications for labor relations policy and . . . the economy." Surely, hearing from the parties and the public would inform the majority of the precise nature of those "dramatic implications" and what role, if any, the *BFI* standard has played in relation to those implications. For their part, the parties and the public surely will share our surprise in finding that this case—in which single-employer status was, at all times, the primary issue—has been misappropriated as a vehicle to overrule joint-employer precedent.

They may equally wonder why they were denied an opportunity for briefing in light of the questions that the majority leaves unanswered: What is the justification for overruling *BFI* after just 2 years, and why in this case? Even a cursory glance at today's decision reveals that the majority's policy basis for overruling *BFI* is entirely speculative: pages upon pages bemoaning the changes supposedly wrought by *BFI* and their potential catastrophic effects, but no real-world examples or even remotely plausible hypotheticals. It is reasonable to infer that our colleagues do not want to engage the public for fear of what they might learn—namely, that none of the predicted effects of *BFI* have actually come to pass.

Of course, the reality is that, after a mere 2 years, any accounting of *BFI*'s effects would be premature; indeed, before it was overruled today, *BFI* has been applied by the Board in only one other Board decision.[14] The complete absence of relevant experience under *BFI* underscores the essentially reflexive nature of today's exercise. That reflex is only confirmed by the majority's decision to cast aside the customary benchmarks of reasoned Board review: the assessment of case law, the evaluation of evidence, even drafting an original opinion. And the majority is even unwilling to wait for a decision from the United States Court of Appeals for the District of Columbia Circuit, before which *BFI* was argued earlier this year.[15] Absent explanation, we are left to speculate why today's decision was carried out with such unfortunate urgency.

III.

The process by which the majority has reached its decision is indefensible—and, as we explain now, the result of that process is no better. The majority errs in failing to adhere to the joint-employer standard adopted in *BFI*. That standard, as we will explain, has a required foundation in the common law of agency that the joint-employer standard resurrected today demonstrably lacks. And unlike the majority's test, the *BFI* standard actually serves the policies of the National Labor Relations Act. First, we will review what *BFI* actually was—a measured, common-law based restoration of earlier Board precedent. Second, we will demonstrate why the *BFI* approach represented the best reading of the common law, and why the majority's approach cannot be reconciled with agency principles. Finally, we will explain why the majority's depiction of *BFI*'s practical consequences is wildly off base and why the majority's approach is contrary to the goals of Federal labor law.

A.

In *BFI*, decided in 2015, the Board sought to address the difficult question of how best to "encourag[e] the practice and procedure of collective bargaining" (in the Act's words) when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer. As a starting point, the *BFI* Board described the specific legal and policy shortcomings in the Board's existing jurisprudence. First, the *BFI* Board noted that the Board's joint-employer standard had become increasingly restrictive over the past 30 years—a change in the law that had not been explained or squared with earlier, more expansive precedent.[16] (In fact, before *BFI*, the Board's joint-employer doctrine had never been clearly or comprehensively explained at all.) Specifically, beginning in the mid-1980's, the Board had implicitly repudiated its traditional reliance on a putative employer's reserved control and indirect control as indicia of joint-employer status; it instead focused exclusive-

[14] *Retro Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70 (2016).

[15] The majority rejects any suggestion that the Board not reach out to decide the joint-employer issue in this case while the U.S. Court of Appeals for the District of Columbia Circuit considers *BFI* on review. But a commitment to reasoned administrative decisionmaking counsels waiting for the court's decision (whatever its resolution) and the guidance it would represent. If the court holds that the standard adopted in *BFI* is permissible under the National Labor Relations Act, then the Board would face a choice between adhering to a judicially-approved, permissible standard (i.e., *BFI*) and adopting an alternative standard (whether the test endorsed by the majority today or some other standard). That the majority chooses not to await the court—and even raises the possibility of pretermitting the court's decision by seeking a remand of *BFI*—is troubling. As with the refusal to issue a notice and invitation to file briefs, proceeding without the benefit of the District of Columbia Circuit's decision suggests a Board uninterested in considering alternative views of the law – even those of a reviewing court.

[16] 362 NLRB No. 186, slip op. at 8–11.

ly on actual control and required the exercise of that control to be direct, immediate, and not "limited and routine."[17] See, e.g. *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d. Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984). Second, the *BFI* Board observed that, over the same period, the diversity of workplace arrangements had expanded significantly, particularly those involving staffing and subcontracting arrangements, or contingent employment.[18] The immediate impetus for *BFI* was thus twofold: putting the Board's joint-employer jurisprudence on solid legal footing, while fulfilling the Board's primary responsibility of "applying the general provisions of the Act to the complexities of industrial life."[19]

The Board's holding in *BFI* comprised several key components. First, the Board returned to its traditional joint-employer test, as endorsed by the Third Circuit in *NLRB v. Browning-Ferris*:

> The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.[20]

"Central to both of these inquiries," the *BFI* Board observed, "is the existence, extent, and object of the putative joint employer's control."[21] Second, the Board reaffirmed that its joint-employer standard was informed by the common-law concept of control, as required by the Act and the Supreme Court's interpretation of the statute.[22] Finally, the Board held that it would no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner.[23] Accordingly, the Board held that the *right* to control, in the common-law sense, was probative of joint-employer status, as was the *exercise* of control, whether direct or indirect.[24]

Properly understood then, *BFI* was essentially a modest and limited holding, with clear constraints built into the majority's formulation of the joint-employer standard. With respect to those constraints, the Board first explained that the existence of a common-law employment relationship was necessary, but not sufficient, to find joint-employer status.[25] Accordingly, even where the common law permitted the Board to find joint employer status in a particular case, the Board would still determine whether it would serve the purposes of the National Labor Relations Act to do so, taking into account the policies of the statute.[26] For instance, the Board explained that, in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.[27] Second, the Board made clear that, as a rule, a joint employer would be required to bargain only with respect to those terms and conditions which it possessed the authority to control.[28] Finally, the Board emphasized that joint-employment inquiries would take into account "all of the incidents" of the parties' relationship, in accordance with Supreme Court precedent.[29]

The Board's decision in *BFI* belies the current majority's repeated and false assertion that *BFI* created a license to find joint-employer status based on only the slightest, most tangential evidence of control.[30] That assertion, of course, echoes much of the *BFI* dissent, which focused on the allegedly far-reaching, novel, and destabilizing nature of the decision. But, again, the standard announced in *BFI* was hardly a radical or unprecedented departure. In fact, it was not even new: it was a common-law based restoration of the Board's traditional standard that, with court approval, had been applied for decades. Indeed, a leading scholar of labor law recognized the decision for what it was: "nothing more than a narrowly crafted opinion that reinstates a prior definition of the joint employment relationship for purposes of collective bargaining under the regulatory umbrella of the National Labor Relations Act (NLRA)."[31]

[17] Id., slip op. at 10–11.

[18] Id., slip op. at 11.

[19] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979), quoting *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963).

[20] 362 NLRB No. 186, slip op. at 15.

[21] Id., slip op. at 2.

[22] Id., slip op. at 15.

[23] Id., slip op. at 15–16. To this end, the Board overruled previous Board decisions to the extent that they were inconsistent with this principle.

[24] Id.

[25] Id., slip op. at 12.

[26] Id.

[27] Id., slip op. at 16.

[28] Id.

[29] Id., citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).

[30] Significantly, the *BFI* Board's joint-employer holding was based on a full assessment of the facts that revealed multiple examples of reserved, direct, and indirect control over employees.

[31] *H.R. 3459, "Protecting Local Business Opportunity Act": Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Education and the Workforce*, 114th Cong. 43- 44 (2015) (testimony of Michael C. Harper, Professor of Law and Barreca Labor Relations Scholar, Boston University School of Law), *available at* https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CHRG (explaining that BFI was a "narrow and limited decision because it is tethered to judicial and Board precedents that existed for several decades prior to the mid-1980s cases"). See also Howard Yale Lederman, *The National Labor Relations Board's Redefined Joint*

B.

The *BFI* Board took care to ensure and explain that the standard it was reestablishing was well grounded in settled common-law agency principles. By contrast, the current majority's standard—the pre-*BFI* standard espoused in *TLI* and *Laerco*, but never before explained with reference to the common law—plainly violates those principles.

To be sure, all Board members seem to agree here that the Board's joint-employer standard must be consistent with the general common-law agency principles that apply to employment-status issues under the National Labor Relations Act.[32] But today, the majority resurrects the pre-*BFI* standard, echoing the *BFI* dissenters' claims that *BFI* represented "a distortion of common law" that was "contrary to the Act" while, in contrast, the old standard "is fully consistent with the common law agency principles that the Board must apply." [Majority op. at 7.] As the Board explained in *BFI*, and we elaborate below, the majority's assertions about the *BFI* standard are demonstrably wrong. Compounding its error, the majority reinstates three control-related restrictions that demonstrably are not mandated by the common law—just the opposite. The Supreme Court has observed that the "Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, [may] render[] its interpretation [of the National Labor Relations Act] unreasonable."[33] This is such a case.

There should be no dispute about what common-law agency principles are or where to look for them. In establishing a Federal rule of agency under those Federal statutes whose terms are interpreted under the common law, the Supreme Court relies on the "general common law of agency, rather than on the law of any particular State."[34] The Court has explained that "[i]n determining whether a hired party is an employee under the general common law of agency," the Court has "traditionally looked for guidance to the Restatement of Agency."[35] The *BFI* Board looked to the Restatement as well—and found no support for the restrictions imposed by the pre-*BFI* joint-employer standard: that an employment relationship requires (1) that the employer's control actually be exercised; (2) that the control be "direct and immediate;" and (3) that the control is not "limited and routine."[36]

Instead of carefully examining controlling principles and prior precedent (as *BFI* did) and formulating a joint-employer standard based on the common law of agency, today's majority recycles tangentially relevant authorities and arguments from the *BFI dissent*, as if this suffices to justify the return to a standard that the Board had never even attempted to explain adequately. The majority's approach—invoking the common law persistently, while baselessly insisting that *BFI* was not faithful to it—is understandable (if unforgivable), because a good-faith examination of agency principles would lead to a result that the majority cannot accept: that its three control-related restrictions cannot withstand careful scrutiny.

1. Right to control

The Board's decision in *BFI* was firmly and explicitly grounded in common-law agency principles, in contrast to the restrictive joint-employer standard that *BFI* replaced. To begin, consider the issue of the putative employer's *right to control* the work. The *BFI* Board, quoting Sections (2) and 220(1) of the *Restatement (Second) of Agency* (1958), explained that "[u]nder common-law principles, the *right* to control is probative of an employment relationship – whether or not that right is exercised" and observed, correctly, that the Board's "joint-employer decisions requiring the *exercise* of control impermissibly ignore this principle."[37]

The majority, conversely, endorses those old decisions under which—in the majority's words (emphasis in original)—"joint-employer status turned on whether two entities *exercised* joint control over essential employment terms, and evidence that an entity had 'reserved' the right to exercise such control would *not* result in joint-employer status." [Majority op. at 2 fn. 3.] These decisions, and the majority's endorsement of them, cannot be reconciled with common law agency principles.

Start with the *Restatement (Second) of Agency*, which the Supreme Court repeatedly has used for a guide. It is beyond dispute that the Restatement recognizes that the

Employer Standard is Justified and Necessary, 96-May Mich. B. J. 30 (2017).

[32] *NLRB v. United Insurance Co. of America*, 390 U.S. at 256. In *United Insurance*, the Court addressed the standard for "differentiating 'employee' from 'independent contractor' as those terms are used in the [National Labor Relations] Act," concluding that Congress intended "to have the Board and the courts apply general agency principles" and the "common law agency test." Id.

[33] *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995), citing *United Insurance*, supra, 390 U.S. at 256.

[34] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (interpreting phrase "work prepared by an employee within the scope of his employment" under Copyright Act of 1976). See also *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322–324 (1992) (reaffirming approach of *Community for Creative Non-Violence* in construing meaning of "employee" under Employee Retirement Income Security Act).

[35] *Reid*, 490 U.S. at 752 fn. 31 (collecting cases). The Court there cited Sec. 220(2) of the Restatement (Second) of Agency (1958). See also *Darden*, 503 U.S. at 324 (citing same Restatement provision).

[36] 362 NLRB No. 186, slip op. at 13–15.

[37] 362 NLRB No. 186, slip op. at 13 (emphasis added).

right to control, and not merely the *exercise* of control, is probative of an employment relationship. Section 220(1) defines a "servant" as a "person employed to perform services . . . who with respect to the physical conduct in the performance of the services is subject to the other's control *or right to control*." The key phrase, of course, is "subject to the other's . . . right to control." If the actual exercise of control were essential, the Restatement would be phrased quite differently. Section 220(2), in turn, identifies as a relevant factor in determining the existence of an employment relationship "the extent of control which, *by the agreement*, the master *may* exercise over the details of the work." Again, the Restatement here refers plainly to reserved authority: the right to control as defined by any agreement covering the relevant work.

In *Reid*, supra, the Supreme Court drew on the Restatement and observed that "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's *right to control* the manner and means by which the product is accomplished."[38] In *Darden*, the Court reiterated its statement in *Reid*.[39] Remarkably, even while insisting that the right to control is *not* probative, the majority cites authority to the contrary, including the Restatement, a modern Supreme Court decision,[40] and an old decision from the Court observing that the "relation of master and servant exists whenever the employer *retains the right* to direct the manner in which the business shall be done."[41]

Well before the National Labor Relations Act was amended by the Taft-Hartley Act in 1947 to incorporate common-law agency principles, it was black-letter law that "[i]n every case which turns upon the nature of the relationship between the employer and the person employed, the essential question to be determined is not whether the former actually exercised control over the details of the work, but whether he had a right to exercise that control."[42] Cases supporting that proposition are far too numerous to cite, but a sample from the Federal courts of appeals, decided in the 1940s, is illustrative.[43] Not surprisingly, then, the Board's first cases to address the common-law distinction between employees and independent contractors after the Taft-Hartley amendments also focused on the putative employer's right to control, not the exercise of that right.[44] Against this backdrop, the Board clearly acted well within the mainstream of the controlling common law when it subsequently gave determinative weight to reserved control in joint-employer cases like *Jewel Tea Co.*[45] and *Value Village*.[46] The

[38] 490 U.S. at 751 (emphasis added).

[39] 503 U.S. at 323.

[40] *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). The issue in *Wells* was whether a shareholder-director of a professional corporation was an employee under the Americans with Disabilities Act. The Court, citing *Reid* and *Darden*, looked to the common law and to the Restatement as reflecting the controlling standard. Id. at 444–448.

[41] *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889) (emphasis added).

[42] *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226 at §7 & fn. 1 (1922).

[43] See, e.g., *Grace v. Magruder*, 148 F.2d 679, 681 (D.C. Cir. 1945) (in distinguishing independent contractors from employees, "it is the right to control, not control or supervision itself, which is most important"), cert. denied, 326 U.S. 720 (1945); *NLRB v. Nu-Car Carriers*, 189 F.2d 756, 757, 759 (3d Cir. 1951) (emphasis added) (applying the "conventional, common law test of the right to control" "[t]he test for determining whether the employer-employee relationship exists is *right to control, not the actual exercise of control*. However, the evidence as to what the parties actually did in this case merely strengthens the conclusion"), enfg. *Nu-Car Carriers*, 88 NLRB 75 (1950), cert. denied, 342 U.S. 919 (1952); *Birmingham v. Bartels*, 157 F.2d 295, 300 (8th Cir. 1946) (citation and internal quotation marks omitted) ("It is not necessary that the employer actually shall direct the manner in which the services are performed, but it is sufficient if he has the right to do so."), revd. on other grounds, 332 U.S. 126 (1947); *Cimorelli v. New York Cent. R. Co.*, 148 F.2d 575, 578 (6th Cir. 1945) ("The fact of actual interference or exercise of control by the employer is not material. If the existence of the right or authority to interfere or control appears, the contractor cannot be independent."); *Williams v. U.S.*, 126 F.2d 129, 132 (7th Cir. 1942) ("The test usually employed for determining the distinction between an independent contractor and an employee is found in the nature and the amount of control reserved by the person for whom the work is done . . . . it is the right and not the exercise of control which is the determining element."), cert. denied, 317 U.S. 655 (1942); *Jones v. Goodson*, 121 F.2d 176, 179 (10th Cir. 1941) ("[I]t is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.").

[44] See, e.g., *Vaughn Bros.*, 94 NLRB 382, 383 (1951) ("Under this [common-law] test an employment relationship exists where the person for whom the services are performed reserves the right, even though not exercised, to control the manner and means by which the result is accomplished."); *Alaska Salmon Industry, Inc. (Seattle Wash)*, 81 NLRB 1335, 1338 (1949) ("[A]n employee relationship . . . is found to exist where the person for whom the services are performed reserves the right (even if not exercised) to control the manner and means by which the result is accomplished."); *San Marcos Telephone Co.*, 81 NLRB 314, 317 (1949) ("Under [common-law] doctrine, an employee relationship, rather than that of an independent contractor, exists where the person for whom the services are performed reserves the right (even if not exercised) to control the manner and means by which the result is accomplished."); *Steinberg and Co.*, 78 NLRB 211, 220–221, 223 (1948) ("Under [common-law] doctrine it has been generally recognized that an employer-employee relationship exists where the person for whom the services are performed reserves the right to control the manner and means by which the result is accomplished."), enf. denied 182 F.2d 850 (5th Cir. 1950).

[45] 162 NLRB 508, 510 (1966) (finding that licensor was joint employer, based on license agreements, and observing that licensor's failure to exercise control was "not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control").

[46] 161 NLRB 603, 607 (1966) ("Since the power to control is present by virtue of the operating agreement, whether or not exercised, we find

Board's later, more restrictive analysis in joint-employer cases did not cite, and could not have cited, any parallel narrowing of common-law doctrine by the courts over the same period. To the contrary, state and Federal courts applying the common-law test in determining the existence of an employment relationship continue to give determinative weight to reserved control.[47]

Before today, the Board had never held—including in the decisions resurrected by the majority—that reliance on a putative joint employer's reserved right of control was improper because it was inconsistent with common-law agency principles. Indeed, the majority-endorsed decisions did not even purport to apply common-law doctrine. Neither in *TLI* or *Laerco*, nor in their progeny, did the Board ever explain the control-related restrictions it imposed on the joint-employer standard as deriving from, much less required by, the common law. The majority here simply chooses to pretend that agency doctrine has been something other than what it ever was. It fails to cite a single decision applying common-law agency principles that holds that a reserved right of control is *not* probative of the existence of an employment relationship. Any such decision, moreover, would be contrary to the Restatement (which guides the Supreme Court, as shown) and to the great weight of precedent.

With respect to the issue of reserved control, then, it is today's decision—and not *BFI*—that violates common-law agency principles.

2. Indirect control

The *BFI* Board observed that in many workplace arrangements involving more than one employing entity, "employees' working conditions are a byproduct of two layers of control," one direct and one indirect.[48] Here, too, the Board's consideration of indirect control was supported by the common law. The Restatement observes that the "control needed to establish the relation of master and servant may be very attenuated"—in other words, *not* "immediate" (as the majority demands).[49] And, the Restatement clearly reflects that control may be *indirect*, as illustrated by the subservant doctrine addressing cases in which one employer's control is or may be exercised indirectly, while a second employer directly controls the employee.[50] The subservant doctrine has been applied by the Federal courts in cases arising under statutes that incorporate the common-law standard for determining employment relationships[51]—including cases under the National Labor Relations Act.[52]

The majority insists that the "comments to Section 220 of the Restatement clarify that the listed factors [considered in determining the existence of an employment relationship] are not concerned with indirect control." But the factors that the majority points to (duration of the relationship, source of the instrumentalities and tools, location of the work) do not directly involve the question of control—in contrast to factor (a), the "extent of control which, by the agreement, the master may exercise over the details of the work"—and nothing in the Restatement comments even hints that indirect control is

it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record").

[47] Again, the cases are too numerous to cite. For a sample, see *Williams v. JaniKing of Philadelphia, Inc.*, 837 F.3d 314, 320–321 (3d Cir. 2016) ("[in] distinguishing between employee and independent contractor status in many different contexts. . . . the right to control, rather than actual control, is the most important of the factors."); *Langfitt v. Federal Marine Terminals, Inc.*, 647 F.3d 1116, 1121 (11th Cir. 2011) (citing *NLRB v. Steinberg*, 182 F.2d 850, 857) (5th Cir. 1950)) ("Significantly, [under the common law test] it is the right and not the actual exercise of control that is the determining element of employment."); *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 172 (Cal. 2014) ("Significantly, what matters under the common law is not how much control a hirer *exercises,* but how much control the hirer retains the *right* to exercise."); *Anthony v. Okie Dokie Inc.*, 976 A.2d 901, 906 (D.C. 2009) ("The determinative factor 'is whether the employer has the *right* to control and direct the servant in the performance of his work and the manner in which the work is to be done . . . and not the actual exercise of control or supervision.'"); *JFC Temps, Inc. v. W.C.A.B. (Lindsay)*, 680 A.2d 862, 864 (Pa. 1996) ("The entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised.").

[48] *BFI*, 362 NLRB No. 186, slip op. at 14–15.

[49] *Restatement (Second) of Agency* §220(1), comment d (1958).

[50] See *Restatement (Second) of Agency*, §5 ("Subagents and Subservants") (1958); Warren A. Seavey, *Subagents and Subservants*, 68 Harv. L. Rev. 658, 669 (1955) (in subservant situation, the "employing servant . . . is in the position of a master to those whom he employs but they are also in the position of servants to the master in charge of the entire enterprise"). Comment e to *Restatement* §5(2) observes that:

> Illustrations of the subservant relation include that between the mine owner and the assistant of a miner who furnishes his own tools and assistants, the latter, however, being subject to the general mine discipline; the relation between the owner of a building and an employee of a janitor; the relation between the employees of a branch manager of a corporation where the branch manager is free to control and pay his assistants, but where all are subject to control by the corporation as to their conduct.

[51] See, e.g., *Schmidt v. Burlington Northern & Santa Fe Railway Co.*, 605 F. 3d 686, 689–690 (9th Cir. 2010) (applying Federal Employers' Liability Act and finding evidence sufficient to establish employment relationship between railroad line and employee of railroad-car maintenance-and-repair company). Cf. *Williamson v. Consolidated Rail Corp*., 926 F.2d 1344, 1350 (3d. Cir. 1991) (observing that use of subservant doctrine is unnecessary where there is evidence of direct control). See generally *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 325 (1974) (recognizing subservant doctrine for purposes of Federal Employers' Liability Act).

[52] *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 818–819 (3d. Cir. 1985) (upholding Board's determination that newspaper was statutory employer of mailroom employees, although second employer operated mailroom), cert. denied, 474 U.S. 1081 (1986).

immaterial or that only directly exercised control can establish an employment relationship.

3. Limited and routine

Common law agency doctrine also fully supported the *BFI* Board's decision not to continue the "limited and routine" control requirement imposed by the *TLI-Laerco* line of cases—to the extent that the requirement is meaningful at all. By contrast, the current majority's decision to resurrect this restriction lacks any apparent basis in the common law.

Certainly there may be instances where evidence of control will be too limited to establish an employment relationship. But the notion that "routine" control is not probative of an employment relationship is nonsensical. If an entity routinely exercises control "over the details of the work,"[53] it is more likely—not less—to be a common-law employer, and the fact that control might be "routine" in the sense of not requiring special skill to exercise is immaterial to the agency inquiry.[54]

In sum, a careful examination of applicable common-law agency principles makes clear that in rejecting the control-related restrictions on joint employment that the Board had imposed without explanation, the *BFI* Board adopted an approach not only consistent with common-law principles, but also fully informed by them. Not surprisingly then, like the dissenters in *BFI*, the majority here does not (and cannot) explain how it is that the common law supposedly requires that control be exercised in a particular way, when it does not require that control be exercised at all.[55] Nor does the majority acknowledge the subservant doctrine reflected in the Restatement, despite its obvious parallels with joint-employer situations arising in Board cases. This failure speaks volumes, especially given the extraordinary length and vehemence of the majority opinion.

Having failed to articulate any common-law based justification for reinstating the pre-*BFI* joint-employer standard, the majority is reduced to effectively embracing that rejected standard and then struggling to find authority that supports resurrecting it. This is not reasoned decisionmaking, even if *BFI* were somehow contrary to the common law of agency (which it emphatically is not).[56] In any case, the authority on which the majority relies, both to attack *BFI* and to support the resurrected joint-employer standard, provides no solid foundation for the majority's position.[57]

As the *BFI* Board explained,[58] the single Supreme Court decision to address the Board's approach to the joint-employer issue, *Boire v. Greyhound Corp.*, [59] dates to an era when the Board took a significantly more inclusive view than today's majority adopts. On review, the Court expressed no disapproval, observing instead that the question presented was "essentially a factual issue" for the Board to determine.[60] The majority—while wrongly neglecting Supreme Court decisions that focus on the Restatement as the source of common-law agency principles—points to no decision by the Court that either

[53] *Restatement (Second) of Agency* §220(2)(a) (1958).

[54] If control of the worker does not require skill, then presumably the worker himself is not skilled – and thus more likely to be an employee, not an independent contractor. See *Restatement (Second) of Agency* §220(2)(d) & comment i (1958). The old joint-employer test's reference to "routine" control as being immaterial may simply be an unconscious echo of the Act's definition of a "supervisor"—supervisors are excluded from statutory coverage, in contrast to "employees"—which refers to certain "authority" as establishing supervisory status, provided that the "exercise of such authority is not of a merely *routine* or clerical nature, but requires the use of independent judgment." Sec. 2(11), 29 U.S.C. §152(11) (emphasis added). This formulation has no bearing on the existence of a common-law employment relationship between a statutory employer and a statutory employee.

[55] The majority doggedly and incorrectly insists that the common law does not permit finding an employer-employee relationship based on the existence of reserved or indirect control absent evidence of direct control. Despite the overwhelming body of judicial opinion to the contrary spanning more than a century—a sampling of which we cite elsewhere in this opinion— the majority claims this body of law somehow fails to "rise[] to the level of the common law." See also *NLRB v. Deaton Inc.*, 502 F.2d 1221, 1224 (5th Cir. 1974) (citing *NLRB v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983, 986 (7th Cir. 1948), enfg. 73 NLRB 1463 (1947), cert. denied 335 U.S. 845 (1948)) ("numerous decisions have stressed that a company's right to control, even if not exercised, makes workers employees."), enfg. 203 NLRB 1099 (1973), cert. denied 422 U.S. 1047 (1975); *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1027 (6th Cir. 1974) (citing *NLRB v. A.S. Abell Co.*, 327 F.2d 1, 4 (4th Cir. 1964)) ("It is the right to control, not its exercise, that determines an employee relationship"), enfg. 200 NLRB 841 (1972), cert. denied 419 U.S. 828 (1974); *Madix v. Hochgreve Brewing Co.*, 143 N.W. 189, 190 (Wis. 1913) (citing *Atlantic Transport Co. v. Coneys*, 82 F. 177, 178 (2d Cir. 1897); *Pickens & Plummer v. Diecker & Bro.*, 21 Ohio St. 212, 215 (1871); *Hardaker v. Idle District Council*, L. R. 1 Q. B. Div. 335, [1895–1899] All ER Rep 311 (judgment by Rigby, LJ)). The majority implies, without explicitly saying, that judicial opinions describing common-law employment relationships outside the specific context of a joint-employer analysis are irrelevant. But surely if the common law controls at all—and we all agree that it does—what controls is the common definition of "employer" and "employee," not some special definition applicable only to joint employers and ascertainable only by the current Board majority. The majority's willful refusal to acknowledge the common law's clear emphasis on the *existence* of control—whether that control is exercised directly, indirectly, or not at all—underscores the fundamentally arbitrary character of its decision today.

[56] Put somewhat differently, reversing *BFI* does not automatically make the pre-*BFI* standard a reasonable substitute for the standard adopted in *BFI*. The resurrected standard must still be defended on its own terms. We have shown, however, that it cannot be reconciled with the common law of agency.

[57] See *BFI*, 362 NLRB No. 186, slip op. at 17 & fn. 94 (addressing decisions cited by the dissenters there and the majority here).

[58] 362 NLRB No. 186, slip op. at 8–9.

[59] 376 U.S. 473 (1964).

[60] Id. at 481.

supports the joint-employer standard resurrected today or undercuts the standard adopted in *BFI*. As noted above, the 1889 *Singer* decision,[61] cited by the majority, actually supports the proposition that reserved authority can establish the control necessary to establish an employment relationship. Supreme Court decisions involving the "loaned-servant" doctrine, also cited by the majority, have no bearing on the joint-employer issue in cases like this one.[62] And the same is true of the cited decision involving the Court's analysis of a secondary-boycott issue under the National Labor Relations Act.[63]

The majority points to no decision, meanwhile, in which the joint-employer standard it resurrects today was upheld by a Federal appellate court in the face of an actual challenge that the standard was inconsistent with common-law agency principles. The majority cites Second Circuit cases as endorsing the requirements that control be "direct and immediate" and not "limited and routine" in affirming Board decisions. But there is no indication in those decisions that the court's view reflected its understanding of common-law agency doctrine or was based on a careful review of that doctrine. Nor was the court's "endorsement" much more than a determination that the Board had adhered to its own precedent in applying "direct and immediate" restrictions and not "limited and routine" restrictions.[64]

Meanwhile, those cited cases in which Federal appellate courts have invoked the common law, and have referred to the lack of direct and immediate control by the putative employer, involve situations far removed from the sort of joint-employer situations confronted by the Board and far more attenuated theories of control than *BFI* advanced. In *Gulino*,[65] a Title VII case, the Second Circuit rejected the argument that New York's state education department was the employer of New York City school teachers, based on the control of curriculum and credentialing. In *Wal-Mart*,[66] the Ninth Circuit rejected the argument that Wal-Mart was the joint employer of its foreign suppliers' employees, based primarily on a code of conduct included in Wal-Mart's supply contracts specifying basic labor standards that those suppliers promised to meet. Neither *Gulino*, nor *Wal-Mart* speaks to the issues involved in this case.[67]

The majority cites various decisions in which, according to the majority, the courts have "implicitly limited their analysis to looking for direct and immediate control." As the *BFI* Board correctly observed, however, "none of these decisions hold, even implicitly, that the existence of indirect control would not be probative of employer status."[68] And, as already explained, the Restatement not only fails to support the proposition that the indirect control is immaterial, it affirmatively addresses situations (i.e., those covered by the subservant

[61] 132 U.S. at 522.

[62] As the majority-cited decision in *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963), makes clear, the "loaned servant" doctrine involves the principle that "when the nominal employer furnishes a third party 'with men to do the work, *and places them under his exclusive control* in the performance of it, (then) those men become pro hac vice the servants of him to whom they are furnished.'" Id. at 6 (emphasis added; citation omitted). In that context, where the issue is which entity is liable for the negligence of the servant, "immediate control and supervision is critical in determining for whom the servants are performing services." Id. In the joint-employer context, of course, neither employing entity has "exclusive control" of the worker; rather, control is shared, and the services are performed for both entities.

[63] The issue in *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951), was whether (as the Board had found) a labor union violated Sec. 8(b)(4)(A) of the Act "by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a certain subcontractor on the project." Id. at 677. The relevant statutory language prohibits a strike "where an object thereof is . . . forcing or requiring . . . any employer or other person … to cease doing business with any other person." Id. at 677 fn. 1 (citing 29 U.S.C. §158(b)(4)(A), current version at 29 U.S.C. §158(b)(4)(i)(B)). The Court agreed with the Board's conclusion that the general contractor and the subcontractor were "doing business" with each other. Id. at 690.

It was in that context that the Court observed that "the fact that the contractor and the subcontractor were engaged on the same construction project, and that the contactor 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 other," such that the "doing business" element could not be satisfied. Id. at 689–690. The Court's decision in no way implicated the common-law test for an employment relationship or the Board's joint-employer standard. As a general matter, to say that a general contractor and a subcontractor are independent entities (e.g., not a "single employer") is not to say that they can *never* be joint employers, *if* it is proven that the general contractor retains or exercises a sufficient degree of control over the subcontractor's workers to satisfy the common-law test of an employment relationship.

[64] See *Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (rejecting union's assertion that in applying joint-employer standard, Board "articulated a 'new rule that represents a significant departure from settled law' and is inconsistent with agency precedent").

[65] *Gulino v. N.Y. State Education Dept.*, 460 F.3d 361 (2d Cir. 2006), cert. denied 554 U.S. 917 (2008).

[66] *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680 (9th Cir. 2009).

[67] *Wal-Mart* involved claims filed under California state law and removed to Federal court based on diversity jurisdiction. Id. at 680. In cases—unlike *Wal-Mart*—that *do* raise a plausible claim that a common-law employment relationship exists, California state courts have long adhered to the generally accepted proposition that the retained right to control, not the exercise of control, is dispositive. See, e.g., *Ayala v. Antelope Valley Newspapers, Inc.*, above; *Hillen v. Industrial Accident Commission*, 250 P. 570, 581 (Cal. 1926) (citations omitted) ("It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent.").

[68] *BFI*, supra, 362 NLRB No. 186, slip op. at 17 fn. 94 (emphasis omitted).

doctrine) in which indirect control provides the basis for finding an employment relationship.

Finally, as did the *BFI* dissenters, the majority insists that *BFI*—despite everything that the Board there plainly said and carefully explained—is not predicated on common-law agency principles at all, but rather is somehow secretly based on the "economic realities" test reflected in the Supreme Court's *Hearst* decision,[69] and subsequently rejected by Congress in the 1947 Taft-Hartley Amendments to the Act. As stated in *BFI*,[70] the majority's assertion is recklessly false at a minimum—and it confirms that its decision today is anything but an exercise in reasoned decisionmaking.

C.

The majority's incorrect assertion that *BFI* was improperly based on "economic realities" is particularly ironic, given that the majority devotes the rest of its decision to deploring the supposed real-world consequences of the *BFI* test. Here, the majority presents a nearly interminable parade of horribles and hypotheticals. In the majority's account, *BFI*, among other things, severely destabilized bargaining relationships, imposed "unprecedented bargaining obligations on multiple entities in a wide variety of business relationships," created pervasive uncertainty as to when bargaining obligations would accrue, and extended coverage of the National Labor Relations Act to small businesses that were not previously subject to Board jurisdiction. This is nonsense. And, as we have already made clear, the majority presents no evidence that any of these scenarios have come to pass since *BFI* was decided. At the same time, the majority's refusal to solicit briefing—the most logical way to collect feedback about *BFI* from interested parties—makes the majority's irresponsibly speculative assessments impossible to take seriously. The majority's decision is long on rhetoric, but short on reality.

At center, many of the majority's fears—that bargaining would become unreasonably fragmented and complex, for example—evince a fundamental discomfort with the joint-employer concept itself, which has been recognized by the Board and the courts for decades. The hypotheticals presented by the majority merely exaggerate the challenges that theoretically could arise if and when multiple employers (who had voluntarily entered into business relationships with each other) were required to engage in collective bargaining. As the *BFI* Board correctly noted, employers and unions have long managed to navigate these types of challenges, and none of the disasters forecast here have materialized.[71] At an even deeper level, the majority's opinion reveals a troubling lack of commitment to the institution of collective bargaining—the mechanism at the heart of the statute and one that has proven sufficiently flexible to deal with the obstacles posed by multiparty negotiations.

Tellingly absent from the majority's endless recitation of potential hardships for employers is any mention of the concern that should undoubtedly be foremost: ensuring that the statutory promise of collective bargaining extends to as many workplaces and working arrangements as the Act contemplates. The majority argues again and again that the pre-*BFI* standard it resurrects is necessary to ensure predictable results. But, for the reasons discussed, that supposed predictability comes at the expense of the goals of the statute. Indeed, over the course of its lengthy decision, the majority makes no genuine effort to address the challenging issue that *BFI* presented: how best to "encourag[e] the practice and procedure of collective bargaining" when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer. The predictability that the majority achieves here is a one-sided assurance to employers that, by retaining a nominal distance from the supervision of workers, they can exert control and still avoid statutory bargaining obligations.[72]

IV.

The issue of joint employment under the National Labor Relations Act is undeniably important. The Board should address this issue with care and with the full benefit of public participation. And it did so—in *BFI*. It is no overstatement to say that the Board's decision in *BFI* was the most fully explicated joint-employer decision in the history of the Board. The standard it adopted was firmly grounded in the common law, while tailored to the aims of the National Labor Relations Act. Today's reflexive reversal of *BFI*, in contrast, reflects neither a grasp of common-law agency principles, nor a commitment to the policy of Federal labor law. The majority has simply failed to engage in reasoned decision-making, in favor of reaching a desired result as quickly as possible. Because we cannot join such an unfortunate exercise, we dissent.

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[69] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

[70] 362 NLRB No. 186, slip op. at 17.

[71] 362 NLRB No. 186, slip op. at 20.

[72] Contrary to the majority, *BFI* did not modify any other precedent under the Act, including the secondary boycott doctrine, or change the way that the Board's joint-employer doctrine interacted with other rules and restrictions under the Act. 362 NLRB No. 186, slip op. at 20 fn. 120. Finally, and contrary to the majority's assertion, *BFI* did not "fundamentally alter[] the law" governing various legal arrangements between entities, including lessor-lessee, parent-subsidiary, franchisor-franchisee, and contractor-consumer relationships. Id. None of those scenarios were before the Board in *BFI.*

Dated, Washington, D.C. December 14, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for participating in a strike or engaging in any other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Dakota Upshaw, Cole Hinkhouse, Austin Hovendon, Alezzandro Campbell, David Newcomb, Ron Senteras and Nicole Pinnick full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make these employees whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate them for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of these employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

HY-BRAND INDUSTRIAL CONTRACTORS, LTD. AND BRANDT CONSTRUCTION CO., SINGLE AND JOINT EMPLOYERS

The Board's decision can be found at www.nlrb.gov/case/25-CA-163189 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Fredric Roberson and *Patricia McGruder, Esqs.,* for the General Counsel.

James Faul, Esq. (Hartnett, Gladney Hetterman, L.L.C.), for the Charging Parties.

Stanley E. Niew and *David A. Courtright, Esqs. (Law Offices of Stanley E. Niew, P.C.),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Davenport, Iowa from July 12 to 14, 2016. The complaint alleged that Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) and Brandt Construction Co. (Brandt) are single and/or joint employers (collectively called the Respondent), and terminated Dakota Upshaw, Cole Hinkhouse, Austin Hovendon, Alezzandro Campbell, David Newcomb, Ron Senteras, and Nicole Pinnick in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the witnesses' demeanors, and after considering post-hearing briefs, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

At all material times, Hy-Brand, a corporation located in Muscatine, Iowa, has performed construction services as a general contractor. Annually, it provided services valued in excess of $50,000 to clientele located outside of Iowa. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Brandt, a corporation located in Milan, Illinois, has performed construction services as a highway builder. Annually, it provided services valued in excess of $50,000 to clientele located outside of Illinois. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Brandt performs public works and other construction projects.[2] It is a family business, which is owned by Charles Brandt and his 3 sons, Terrance, Todd, and Trent. It employs 140 employees, who act as laborers, operators, ironworkers, carpenters, masons and drivers. Terrance Brandt (i.e. the eldest son) oversees all major decisions, and supervises Human Resources Director Lisa Coyne, Safety Director Anna Copeland, and Comptroller Kelly Bisbee.

Hy-Brand erects steel warehouses and other structures, and employs about 10 ironworkers, carpenters, and masons. These workers are supervised by General Manager Randy Sackville and Superintendent Mike Thurman. Sackville reports to Terrence Brandt.

B. Comparing Operations

1. Management and Ownership

The following chart is descriptive:

Individual	Brandt	Hy-Brand
Charles W. Brandt	President (50% interest)	Same role and interest
Terrence L. Brandt	Vice-President (25.5% interest)	Same role and interest
Todd L. Brandt	Secretary(12.5% interest)	Same role and interest
Trent L. Brandt	Treasurer (12% interest)	Same role and interest

(GC Exh. 2.)

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

[2] Its projects include: asphalt and concrete paving of interstate roads and municipal airports; new and rehabilitative structural concrete work; water line and sewer construction; and railway construction.

2. Labor Policy and Control

a. Workplace Rules

Both entities maintain these identical workplace rules: Equal Employment Opportunity (EEO policy); Workplace Harassment (harassment policy); Family and Medical Leave Act (FMLA policy); and Drug Free Workplace (the Drug policy). (GC Exhs. 3–10.) These policies were drafted by Terrence Brandt and Brandt's Coyne. Brandt and Hy-Brand employees are also subject to common safety and mobile phone rules. Hy-Brand has its own safety manual (GC Exh. 11), which was drafted by Hy-Brand's Sackville and Brandt's Copeland.

b. Payroll and Benefit Administration

Brandt's Coyne processes payroll and direct deposit, handles health, life, and dental insurance benefits, and maintains W-2 and tax records for both entities. Terrence and Todd Brandt authorize direct deposit releases for both entities.

c. Annual Meeting

Hy-Brand and Brandt employees jointly attend an annual meeting, which is led by the Brandt family. (GC Exhs. 12–14.) Common employment, benefit, safety, labor relations, and training policies are reviewed at this meeting. (GC Exh. 13.)

d. Hiring and Firing

Terrence Brandt makes firing decisions for both entities. (GC Exhs. 16, 18) (Hy-Brand); (GC Exh. 20) (Brandt). Hy-Brand's Sackville independently makes hiring decisions, although he is managed by Terrence Brandt, who is empowered to reverse his decisions.

e. Common Benefits

Employees of both entities receive identical 401K, health, dental and life insurance benefits, and are covered under the same workers compensation policy. Hy-Brand reimburses Brandt for such benefits. (R. Exh. 32.)

f. Safety Servicing

Brandt's Copeland provides safety services to Hy-Brand. She visits jobsites, provides training, and cites deficiencies. (R. Exh. 36; Tr. 327.)

3. Interrelated Operations

a. Personnel

Certain operations are interrelated. Hy-Brand's Upshaw testified that he worked alongside Brandt employees on several projects, where he dually reported to Brandt and Hy-Brand managers. He recalled sharing a scissor lift with Brandt's Adam Warren on a GSTC warehouse project in 2015,[3] and related that Brandt and Hy-Brand workers performed the same work (i.e., rigging and steel erection) at this jobsite. Hy-Brand's Hinkhouse and Hovendon, and Brandt's Senteras, provided similar testimony regarding the GSTC jobsite.[4] Senteras added that he also worked with Hy-Brand personnel at the Marquis

[3] All dates are in 2015, unless otherwise indicated.

[4] Hy-Brand's Newcomb indicated that, at the GTSC job, Brandt operated a crane, while Hy-Brand worked the roof.

Energy plant and John Deere warehouse jobsites. No examples were offered of employees transferring between entities.

b. Equipment

Hy-Brand's Upshaw recalled using Brandt equipment (e.g., a telehandler and skid steer). Hy-Brand rented large-scale equipment and rolling stock (e.g., cranes) from Brandt.

c. Services and Billing

Hy-Brand performs construction services for Brandt, and then bills Brandt for such services. (R. Exh. 21.) The opposite is also true. (R. Exh. 22; GC Exhs. 26–32.)

C. Discharges

1. Upshaw, Hovendon, Campbell and Hinkhouse

On July 8, Upshaw, Hovendon, and Campbell submitted letters to Hy-Brand announcing their decision to strike over unsafe working conditions, and substandard wages and benefits; they also asked to meet over their grievances.[5] (GC Exhs. 15, 17.) Their letters did not describe an intention to resign. Thereafter, they began their strike and left the jobsite.[6] Although Hinkhouse did not submit a strike letter, he simultaneously joined the strike and stated his intention to strike to his supervisor, Larry Wendt.[7] Upshaw, Hovendon, Campbell, and Hinkhouse, who each possessed strong demeanors and were highly consistent, testified that their sole intent was to strike, i.e. not resign.[8] On July 10, Terrence Brandt notified the employees that they had quit, and terminated their employment. (GC Exhs. 16, 18, 23; R. Exh. 8A.)

2. Newcomb

Newcomb testified about the safety concerns that he had, while he was employed at Hy-Brand (e.g., the absence of a safety spotter and insufficient safety gear). He stated that, consequently, he told Hy-Brand supervisor Andrew Campbell that he was joining the strike on July 23. He also credibly denied resigning. On July 30, Terrence Brandt advised him that he had quit. (GC Exh. 24.)

3. Senteras

On October 12, Senteras joined the strike. (GC Exh. 19.) He credibly stated that he did not resign. On October 12, Terrence Brandt advised him that he had resigned. (GC Exh. 20.)

4. Pinnick

On November 18, Pinnick joined the strike. (GC Exh. 21.) On November 19, she received a similar discharge letter. (GC Exh. 22.) In a November 25 letter, she advised Terence Brandt that she did not resign, was striking, and requested a meeting. (R. Exh. 9A.) He did not reply.

5. Terrence Brandt's Contentions

Terrence Brandt averred that the workers were not fired, were not classified as resignations, and he knew that it was unlawful to fire strikers. (Tr. 517.) He said that only Hinkhouse was fired because he never tendered a strike letter.

6. Credibility Resolution

Terrence Brandt's claim that the strikers were neither fired nor handled as resignations is incredible. This testimony is irreparably contradicted by his letters, which repeatedly described their resignations. His letters omitted any discussion of the strike or their connected employment rights. I find, accordingly, that he fired the strikers, and falsely stated that they had quit.

III. ANALYSIS

A. Single Employer Status[9]

Brandt and Hy-Brand are a single employer. In *Cimato Brothers, Inc.*, 352 NLRB 797, 798 (2008), the Board held:

> In determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. No single factor is controlling, and not all need be present. Rather, single-employer status ultimately depends on all the circumstances. It is characterized by the absence of an arm's-length relationship among seemingly independent companies.

This inquiry assesses whether nominally "separate corporations are not what they appear to be, [and] that in truth they are but divisions or departments of a single enterprise." *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960). Centralized control of labor relations is, generally, considered to be the most important factor in this analysis. See, e.g., *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1337 (1988). "[C]ommon ownership, while significant, is not determinative in the absence of centralized control over labor relations." *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001).

1. Common Ownership and Management

Common ownership and management favors single employer status. Both entities have the same owners in identical percentages, with common presidents, vice-presidents, secretaries, treasurers, safety officers, and human resources officials.

2. Central Control of Labor Relations

This factor heavily supports single employer status. First, Hy-Brand lacks a human resources department and delegates this key labor relations function to Brandt, which administers payroll, tax, and direct deposit matters for both entities. Second, both entities are subject to identical EEO, harassment, FMLA, drug, safety and cell phone polices. Third, both entities offer identical health, life, dental, and retirement benefits, which are administered by Brandt. All workers are covered under the same workers compensation insurance policy. Fourth, all employees attend an annual meeting, which addresses several common employment issues. Additionally, Terrence Brandt makes firing decisions at both entities, and Copeland

[5] Campbell's strike letter was not produced.

[6] The strike was unaccompanied by picketing; it solely involved withheld labor.

[7] Wendt was never called to rebut such testimony, which has been credited.

[8] Such testimony was consistent with their strike letters and other undisputed record evidence.

[9] This allegation is listed under complaint par. 3.

provides safety consulting services to both entities.

3. Interrelationship of Operations

This factor favors single employer status. Employees of both entities work together on certain projects, and periodically share equipment. Brandt rents equipment and machinery to Hy-Brand, and receives reimbursement. Hy-Brand performs construction services for Brandt, and vice versa, and then bills the other entity. No evidence was presented, which established that these arrangements were arms-length deals involving a market rate of compensation.

4.Conclusion

Respondent is a single employer. All factors were satisfied; there is a clear lack of an arm's-length relationship.

B. Joint-Employer Status[10]

Respondent is also a joint employer, on the basis of much of the same evidence that prompted a single employer finding. In *BFI/Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 15 (2015), the Board described the following joint employer test:

> The Board may find that two entities …are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. [citations and footnotes omitted].

The Board does not require actual control over essential terms and conditions of employment; it is sufficient that the alleged joint employer has the authority to do so.[11] Terms of employment such as hiring, firing, disciplining, supervising and directing employees as well as wages and hours are examined to determine whether such authority exists. Other examples include dictating the number of workers, controlling scheduling, seniority and overtime, assigning work, and determining the manner and method of work. Id.; see also, *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 5 (2016).

Respondent is a joint employer; employees' essential terms and conditions of employment are jointly governed. Both entities share payroll, tax, overtime, timesheets, and direct deposit duties. They administer identical workplace policies and rules covering EEO, harassment, FMLA, drug, safety, workers compensation, and cell phone issues. They share in the administration of several identical benefits, including health, life, dental, and retirement benefits. Day-to-day safety issues are jointly administered by Copeland, who services both Brandt and Hy-Brand. Joint governance is reinforced at annual meetings. Finally, VP Terrence Brandt makes firing decisions at both entities and is unequivocally empowered to make all key personnel decisions, even though he delegates many ministerial tasks to lower level supervision.

[10] This allegation is listed under complaint par. 4.

[11] Thus, the Board overruled prior precedent to the extent those cases held that mere authority to control employees' terms and conditions of employment was an inadequate indicia of joint employer status unless the authority was exercised directly and immediately and not in a limited and routine manner. *BFI*, supra, slip op. at 16.

C. Discharge Allegations[12]

Respondent unlawfully discharged Upshaw, Hinkhouse, Hovendon, Campbell, Newcomb, Senteras, and Pinnick (collectively called the strikers). They were fired for engaging in a work stoppage, and were intentionally mislabeled as resignations. Respondent failed to show that they abandoned their employment before their firings.

1. Legal Precedent

In *Atlantic Scaffolding Co.*, 356 NLRB 835 (2011), the Board held as follows:

> [W]hen an employer asserts that employees were discharged because they would not return to work after commencing a work stoppage, the assertion suggests that the discharge was for engaging in the work stoppage itself…. In order to show that employees truly abandoned their jobs, an employer must present "unequivocal evidence of intent to permanently sever [the] employment relationship." ….
>
> Where …employees are terminated for engaging in a protected concerted work stoppage, *Wright Line* is not the appropriate analysis, as the existence of the 8(a)(1) violation does not turn on the employer's motive…. Rather, when the conduct for which the employees are discharged constitutes protected concerted activity, "the only issue is whether [that] conduct lost the protection of the Act because … [it] crossed over the line separating protected and unprotected activity."

Id. at 838 (citations omitted).

2. Analysis

The strikers engaged in protected activity, when they conducted a work stoppage regarding safety, wages and benefits. The essence of their work stoppage was repeatedly communicated in their strike letters.[13] (GC Exhs. 15, 17, 19, 21, 22.)

Respondent did not show that they had quit, as asserted in their termination letters. The strikers credibly testified that they did not resign, and such testimony was consistent with their strike letters. Respondent, as a result, fell vastly short of proving that they "unequivocal[ly] . . . intend[ed] to permanently sever [their] employment relationship." *L.B. & B. Associates, Inc.*, 346 NLRB 1025, 1029 (2006), enfd. 232 Fed. Appx. 270 (4th Cir. 2007). Respondent similarly failed to show that the strikers lost the protection of the Act by engaging in misconduct. See *Atlantic Scaffolding Co.*, supra 356 NLRB at 836. There was no showing in this regard.

In sum, the record clearly shows that the Respondent fired the strikers because they participated in a protected, concerted work stoppage. Any claims that they had quit or lost the Act's protection was a sham. Their discharges, therefore, violated the Act.

CONCLUSIONS OF LAW

1. Brandt and Hy-Brand, which collectively comprise the Respondent, are single and joint employers, and are jointly and severally liable for the violations found herein.

[12] These allegations are listed under complaint pars. 6 and 7.

[13] Knowledge of the strike was also conceded by Terrence Brandt.

2. Brandt and Hy-Brand are individually, and as single and joint employers, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent violated Section 8(a)(1) by discharging Upshaw, Hinkhouse, Hovendon, Campbell, Newcomb, Senteras, and Pinnick for participating in a work stoppage.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act's policies. It must offer the strikers full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. It must also make them whole for any loss of earnings and other benefits suffered as a result of their discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), it shall compensate them for their search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. It is further ordered to compensate the strikers for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). It is must also remove from its files any references to these unlawful discharges, and within 3 days thereafter to notify the strikers in writing that this has been done and that their discipline will not be used against them in any way. It shall also post the attached notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[14]

ORDER

Respondent, a single and joint employer, which consists, inter alia, of Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) of Muscatine, Iowa, and Brandt Construction Co. (Brandt) of Milan, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Firing or otherwise discriminating against its employees for participating in a work stoppage or engaging in any other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Upshaw, Hinkhouse, Hovendon, Campbell, Newcomb, Senteras and Pinnick full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make these employees whole for loss of earnings and other benefits suffered due to the discrimination against them, as set forth in this decision's remedy section.

(c) Compensate these employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to these unlawful discharges, and within 3 days thereafter, notify the strikers in writing that this has been done and that their discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by Region 25, post at its Milan, Illinois and Muscatine, Iowa facilities copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since July 10, 2015.

g. Within 21 days after service by the Region, file with the

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C. November 14, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against you for participating in a strike or engaging in any other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL within 14 days from the date of the Board's Order, offer Upshaw, Hinkhouse, Hovendon, Campbell, Newcomb, Senteras, and Pinnick full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make these employees whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate them for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for these employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of these employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

HY-BRAND INDUSTRIAL CONTRACTORS, LTD. AND BRANDT CONSTRUCTION CO., SINGLE AND JOINT EMPLOYERS

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-163189 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.