REDEFINING EMPLOYER AND THE IMPACT ON GEORGIA'S WORKERS AND SMALL BUSINESS OWNERS

FIELD HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

REDEFINING 'EMPLOYER' AND THE IMPACT ON GEORGIA'S WORKERS AND SMALL BUSINESS OWNERS

Thursday, August 27, 2015
House of Representatives
Subcommittee on
Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:03 a.m., in Live Oak Room and Cypress Room, Coastal Georgia Center, 305 Fahm Street, Savannah, Georgia, Hon. David P. Roe [Chairman of the Subcommittee] presiding.

Present: Representatives Roe, Carter, and Allen.

Staff Present: Janelle Belland, Coalitions and Members Services Coordinator; Christie Herman, Professional Staff Member; Tyler Hernandez, Press Secretary; John Martin, Professional Staff Member; and Eunice Ikene, Minority Labor Policy Associate.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order.

I will first recognize myself for opening remarks.

Good morning, everyone and welcome to today's hearing. I would like to thank our witnesses for joining us, and I would like to thank the staff here at the Coastal Georgia Center for their hospitality.

It is nice to have an opportunity to get out of Washington for a hearing like this, which allows us to hear directly from you about the issues that will have a significant impact on workers and employees in your community and across the country. And I would also like to thank the people here in Savannah for the incredible hospitality you have shown us.

Yesterday, I had a chance to visit the St. Mary's Health Center, a collaboration between Methodists and Catholics—I am a Methodist—it shows that if Methodists and Catholics can make something that nice work, imagine what Methodists and Baptists could do.

[Laughter.]

Chairman ROE. I also visited the Memorial Medical Center, very similar to our medical center at home. And I do not think I am going to have to eat for another week, I ate at the Wilkes Boarding House restaurant yesterday, and I am totally stuffed, and I had a

great dinner last evening. The hospitality has been as expected: Southern and very warm. And thank you for that.

The issue we are discussing today is an effort by a group of unelected bureaucrats in Washington that could fundamentally change the way franchise businesses operate. It is an important issue because there is a lot at stake. Hundreds of thousands of franchise businesses currently operate in the United States. More than 780,000 of them, actually. And they employ nearly 9 million workers. These are small businesses that are independently owned and operated and that help create jobs and provide opportunities for many individuals to pursue the American Dream. Franchise businesses are vitally important to communities like Savannah and the families that live and work in them.

A federal agency known as the National Labor Relations Board is trying to upend the franchise model that has worked well for decades. This is the same federal agency that tried to tell Boeing that they could not open a plant in Charleston, South Carolina, threatening thousands of good paying jobs for South Carolinians.

Now the NLRB is again doing the bidding for big labor by making it easier to organize franchise workers, no matter the cost to working families and to job creators. To that end, the NLRB's General Counsel, Richard Griffin, is pushing the agency to rewrite the rules that determine who is responsible for the decisions affecting the day-to-day operations of a franchise business. Is it the franchisee, the individual that owns and operates the business locally, or is it the franchisor, the entity that enables the small business owner to use an established brand to sell certain goods or services in a particular area?

If Griffin has his way, both will be joint employers and will have equal responsibility for those decisions, which will include hiring, training, wages, and work schedules. And if that happens, there will be serious consequences for workers and employers.

First, let us talk about what it would mean to the franchisees, the small business owners. A change like the one Griffin is pushing will mean less freedom to actually run their businesses. If a franchisor is suddenly responsible for the day-to-day decisions at each franchise, they will assert more control over the business—obviously they will.

That means the franchisees, the small business owners like Mr. Patel, Mr. Weir, and Mr. Salgueiro will have less say over these important decisions and will no longer decide how to run their own businesses. That is just the beginning.

Expanding the joint employer standard will also lead to higher consumer costs for small businesses, lost jobs, more litigation, and fewer opportunities for individuals to pursue the American Dream.

On top of that, the NLRB could extend this radical approach to other businesses like contractors and subcontractors. A change like that would threaten countless businesses in Savannah, throughout Georgia, and across the country.

It is never easy running a successful small business, especially in an economy plagued by the persistent challenges we face today. We do not need an unelected, unaccountable board of bureaucrats, with an activist agenda, changing the rules to favor big labor. That is exactly what the NLRB is trying to do.

As we have seen time and time again with this administration, the Board is bending to the will of the union bosses who want to grow the ranks of dues-paying members. And they are doing it at the expense of hard-working Americans.

I want to thank our witnesses again for being with us today and sharing their personal experiences with the Committee. With your stories and personal experiences, you are helping us determine what will need to be done to address this misguided scheme and put in place policies that encourage—not stifle—economic growth and job creation. I look forward to hearing from each one of you.

And I will state for the record today that we did invite Democratic members of the House to participate and we also invited them to have a Democratic witness, which they did not do.

I now will recognize our host today, Congressman Carter, for his opening remarks. Mr. Carter, you are recognized.

Prepared Statement of Hon. David P. Roe, Chairman, Subcommittee on Health, Employment, Labor, and Pensions

Good morning, everyone, and welcome to today's hearing. I'd like thank our witnesses for joining us, and I'd like to thank the staff here at the Coastal Georgia Center for their hospitality.

It's nice to have the opportunity to get out of Washington for a hearing like this, which allows us to hear directly from you about issues that will have a significant impact on workers and employers in your community and across the country. The issue we're discussing today is an effort by a group of unelected bureaucrats in Washington that could fundamentally change the way franchise businesses operate. It's an important issue because there is a lot at stake.

Hundreds of thousands of franchise businesses currently operate in the United States – more than 780,000 of them actually – and they employ nearly nine million workers. These are small businesses, they are independently owned and managed, and they have helped create jobs and provided opportunities for many individuals to pursue the American Dream. Franchise businesses are vitally important to communities like Savannah and the families that live and work in them.

A federal agency, the National Labor Relations Board, is trying to upend a franchise model that has worked well for decades. This is the same federal agency that tried to tell Boeing they couldn't open a plant in Charleston, South Carolina, threatening thousands of good paying jobs. Now, the NLRB is again doing the bidding of Big Labor by making it easier to organize franchise workers – no matter the cost to working families and job creators.

To that end, the NLRB's general counsel, Richard Griffin, is pushing the agency to rewrite the rules that determine who is responsible for decisions affecting the day-to-day operations of a franchise business. Is it the franchisee – the individual who owns and operates the business locally? Or is it the franchisor – the entity that enables the small business owner to use an established brand to sell certain goods or services in a particular area? If Griffin has his way, both will be "joint employers" and will have equal responsibility for those decisions, which include hiring, training, wages, and work schedules. And if that happens, there will be serious consequences for workers and employers.

First, let's talk about what it would mean for the franchisees, the small business owners. A change like the one Griffin is pushing will mean less freedom to actually run their businesses. If a franchisor is suddenly responsible for the day-to-day decisions at each franchise, they will assert more control over the business. That means the franchisees – small businesses owners like Mr. Patel and Mr. Weir – will have less say over these important decisions and no longer decide how to run their business.

But that's just the beginning. Expanding the joint employer standard will also lead to higher consumer costs, fewer small businesses, lost jobs, more litigation, and fewer opportunities for individuals to pursue the American Dream. And on top of that, the NLRB could extend this radical approach to other businesses, like contractors and subcontractors. A change like that would threaten countless businesses in Savannah, throughout Georgia, and across the country.

It's never easy running a successful small business, especially in an economy plagued by the persistent challenges we face today. We don't need an unelected and

unaccountable board of bureaucrats with an activist agenda changing the rules to favor Big Labor. But that's exactly what the National Labor Relations Board is trying to do. As we've seen time and again under this administration, the board is bending to the will of union bosses who want to grow the ranks of dues-paying members, and they're doing it at the expense of hardworking Americans.

I want to thank our witnesses again for being with us today and sharing their personal experiences with the committee. With your stories and personal experiences, you are helping us determine what needs to be done to address this misguided scheme and put in place policies that encourage – not stifle – economic growth and job creation. I look forward to hearing from each of you, so I'm going to yield to my distinguished colleague and our host today, Congressman Buddy Carter, for his opening remarks.

Mr. CARTER. Thank you, Mr. Chairman, and good morning. And thank all of you all for being here today. This is a very important hearing and the way I like to put this is instead of you coming to Congress, Congress is coming to you. And this is good; we need to do more of this. And I want to thank Chairman Roe, and especially thank my colleague, Congressman Rick Allen, from the Twelfth District here in Georgia for being here as well and making that effort to come down, not too far, but a little bit. But we appreciate it and appreciate you spending some time down here, both of you I think had an opportunity to see what we are so very proud of here in the First Congressional District. I believe that Congressman Allen was able to tour the ports yesterday, and that is certainly an economic engine, not only of Southeast Georgia but really of the Southeastern United States and we are very proud of that and want to do everything we can to help them.

Chairman Roe, thank you for your leadership in this important issue and everything that you do, we appreciate your service very much.

Earlier this year, the National Labor Relations Board announced they were proposing a change to the existing joint employer standard. The new joint employer standard by the NLRB has major implications for every small business community across the country.

Let me interject right now, full disclosure, I am a small business owner. I have a small business that I own, three different stores, three locations. I should say my wife owns them now. One of the things that you have to do when you become a member of Congress is divest yourself of business interests. So let me say that I am married to someone who owns three pharmacies right now, 19 employees. So mine is the quintessential small business. So I just want to make sure that everyone knows, full disclosure, that I am a small business owner.

But again, the new joint employer standard by the NLRB has major implications for every small business community across the country. Essentially the new rule would turn franchisees from small business owners into managers. Now there is a big difference between a small business owner and a manager. I am sure that what we are going to hear today, that these business owners are going to tell us how much they appreciate their managers. I can tell you that I would not be able to be here if it were not for having good managers and good people. However, there is a big, big difference between a manager and a small business owner—I will tell you that as well.

So essentially, the new rule would turn franchisees from small business owners into managers and would result in franchisors limiting their expansion because of undue legal liabilities. From retail stores to financial service providers, almost every business in every community in the country would be affected.

In Savannah, there are countless businesses that run under the franchisee-franchisor model, whether it is a Hilton or a McDonald's, we have got them here in Savannah. With this new rule, Savannah's small businesses would be subjected to legal liabilities that they have never been subject to before, causing many businesses to shut their doors. That is why we are here today. We cannot continue to allow the government to enact rules and regulations that squeeze small businesses until they close their doors.

I look forward to a lively discussion on this issue here today and I yield back the remainder of my time.

Prepared Statement of Hon. Buddy Carter, a Representative in Congress from the state of Georgia

Good morning! I would first like to thank everyone for coming out this morning to learning more about this very important issue to the small business community. Second, I would like to thank Chairman Roe and the other Congressional members for holding this hearing in Savannah, Georgia, and for allowing me to show you around Savannah the last few days. It has been an honor and a privilege.

Earlier this year, the National Labor Relations Board announced that they were proposing to change the existing joint-employer standard. The new joint-employer standard by the NLRB has major implications for every small business community across the country. Essentially, the new rule would turn franchisees from small business owners into managers and would result in franchisors limiting their expansion because of undue legal liabilities. From retail stores to financial service providers, almost every business in every community in the country would be affected.

In Savannah, there are countless businesses that run under the franchisee-franchisor model. Whether it is the Hilton or McDonalds. With this new rule, Savannah small

businesses would be subjected to legal liabilities that they have never been subjected to before, causing many businesses to shut their doors.

That is why we are here today. We can't continue to allow the government to enact rules and regulations that squeeze small businesses until they close their doors.

Chairman ROE. Thank you, Mr. Carter.

I will now recognize Mr. Allen for his opening remarks.

Mr. ALLEN. Good. Thank you, Mr. Chairman. And again, I want to thank you for taking your time and our staff on the Education and the Workforce Committee for putting this hearing together. This is important business, and I want to thank my colleague, Congressman Carter.

I will tell you, we also toured Gulfstream yesterday and I will tell you what, of course a lot of those folks live in the Twelfth District of Georgia. So, I just wanted you to know that. But, boy, everyone has been wonderful. And of course, we were there at the port and I will tell you, you know, I told those businesses and I tell my colleagues, you know, our colleagues in Congress are pretty envious of us down here in the Twelfth District and the First District of Georgia because I am going to tell you what, we are doing some business.

And it is so refreshing to get out and get with these companies and talk about their challenges, as we are going to be talking about the challenges of our small business community here today. That

is the way you learn and that is what we take back to Washington, unlike those who are heading those agencies. You know, apparently they are not listening to the American people, and that is the message we need to take back and, of course, that is the reason for this hearing today.

To tell you real quickly, our districts—obviously we border, I am in Springfield, Georgia. About 20 minutes up the road is the edge of the district and then, of course, to the west is Claxton in Evans County and further south is Appling County.

We also have a number of our staff members. If you would stand, our staff, Congressman Allen's staff, of course, thank you. We have got a great group traveling with us there. And boy, they are keeping me on a tight schedule.

This is an important hearing and, you know, small business creates over 70 percent of the jobs in this country. It is small business that has been under attack, particularly the last six years. And, you know, I tell my friends in the small business community everywhere I go, I say hang in there, hang in there. We are doing the best we can do, and as we listen to this testimony today and we hear about the challenges of our small business community, let us remember their resiliency. Because it is not easy folks—and I have to disclose my wife owns a holding company now that owns a variety of businesses and, you know, I will tell you one group that took on the challenge, I really almost apologized to them about a year ago because I said, you know, I am not sure I did you folks a favor by allowing you to buy this business. It has been tough. You know, we are seeing a little light at the end of the tunnel now, but again, as we continue to see this regulatory assault on our small business community continue, it just gets more and more difficult to say is it worth it? It is worth it, folks. We must get people back to work in this country; it is the small business community that is going to do it.

And again, I thank you, Mr. Chairman, and I yield back the remainder of my time.

Chairman ROE. Thank the gentleman for yielding. And just for the record, this is an official hearing of the U.S. Congress.

Pursuant to Committee Rule 7(c) all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce our distinguished panel. First, Mr. Jeffrey Mintz is a shareholder of Littler Mendelson, P.C. in Atlanta, Georgia. Mr. Mintz is an experienced practitioner before the NLRB and has defended employer positions before the Equal Employment Opportunity Commission, the EEOC, and other state and federal administrative agencies and courts. He is considered a subject-matter expert with respect to representation elections and related NLRB proceedings, and preventative labor relations. He also has extensive experience advising employers facing non-traditional organizing including corporate campaign tactics designed to enhance union leverage so as to achieve labor's objective.

I will now yield to my friend, Mr. Carter, for introductions.

Mr. CARTER. Thank you, Mr. Chairman.

We are very fortunate to have two very influential business leaders in Savannah with us today. First, Kal Patel, who is President of Image Hotels in Savannah. Image Hotels owns and operates eight hotels as licensees of Starwood, Hilton, IHG, and Marriott brands. Mr. Patel has served on the boards of the Asian American Hotel Owners of America and on the Savannah Convention and Visitors Bureau. He was born in India in 1978, and moved to the United States in 1979, and he is a second generation hotel owner. Mr. Patel is a graduate of Savannah State University. Kal, thank you for being with us today.

Also, we are very fortunate to have Alex Salgueiro, who is the President and CEO of the Savannah Restaurants Corporation. Mr. Salgueiro is the President of the Burger Kings, he actually owns and operates numerous Burger Kings throughout the Savannah area. Before starting Savannah Restaurants Corporation, Mr. Salgueiro was a project manager and the area manager with Burger King Corporation from 1971 to 1986. He was born in Havana, Cuba, a place that I had an opportunity to visit earlier this year. And he is a graduate of Florida International University. And by the way, I want to mention that we are glad you are here and that your health is better. We appreciate that, and glad you are doing better. And congratulations, I believe you are opening your store today, reopening on Derene Avenue.

Mr. SALGUEIRO. Open now.

Mr. CARTER. Open now, open this morning. That is great. So thank both of you for being here. And I yield back.

Chairman ROE. I thank the gentleman for yielding.

Mr. Fred Weir is the President and CEO of Meadowbrook Restaurant Corporation in Cumming, Georgia. Currently owns and operates 10 franchise Zaxby restaurants in Georgia and Arkansas. You will be glad to know, full disclosure, had one of your salads before I came down here to Alabama the other day. He is a third generation restaurant operator. Mr. Weir currently serves on the Board of Trustees for Reinhardt University and the Board of Directors of Cherokee County Chamber of Commerce, and CASA, the Court Appointed Special Advocate. And thank you, Mr. Weir, very much for doing that. Many times that is the only advocate these young people have. So that is an incredible thing that you are doing, public service.

I will ask our witnesses to stand and raise your right hand.

[Witnesses sworn.]

Chairman ROE. Let the record reflect the witnesses answered in the affirmative. You may take your seats. Thank you, gentlemen.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. You will have five minutes to give your testimony. When you begin, the light in front of you will turn green. With one minute left, it will turn amber. And then at five minutes, it will turn red. At that point, I will ask you to wrap up your comments. I am not going to cut you off in mid-sentence, but try to keep it around five minutes. And I will also ask the members to do the same thing.

Mr. Mintz, you are recognized for five minutes.

TESTIMONY OF JEFFREY MINTZ, SHAREHOLDER, LITTLER MENDELSON P.C., ATLANTA, GEORGIA

Mr. MINTZ. Thank you. Good morning, Chairman Roe, Representative Carter, Representative Allen. I appreciate the opportunity to provide testimony today. I am going to focus on providing a legal context for subsequent testimony from the franchisees in the room.

Under the current doctrine used by the National Labor Relations Board to determine joint employer status, they use and have used for many years the common law of agency. And the question before the Board has been do two or more businesses share or co-determine the essential terms and conditions of employment of the employees that are the subject of the inquiry. The key is whether or not the second employer, the putative joint employer, meaningfully affects matters regarding the employment. And this is a broad range of things ranging from recruitment to hiring, disciplinary standards, supervision, the wages and benefits that are offered. Effectively, anything and everything that arises out of the employment relationship.

The standard has required direct and immediate control, not just theoretical or hypothetical. And what the Board has done is review the totality of circumstances. No single factor is determinative.

With respect to supervision, limited and routine responsibilities have not been enough. They require, have required, some degree of control over how work is done, not necessarily what or where or when, but how the work itself is to be performed.

The Labor Board had, about a little over a year ago, invited interested parties to file amicus briefs; that is, summaries of rationale and argument, legal argument, as to why the standard should be changed, and if so, how it should be changed. And most commentators in the legal community view that as an invitation signaling a desire to change a well-established standard.

However, they also agree that the "solution" sought—and I use that term "solution" in quotes—the "solution" sought by the Labor Board seems to be coming where there is no apparent problem in the current administration of this component and interpretation of the *National Labor Relations Act*, and I question why they would be using administrative power to change a rule. If a change is warranted at some point in time, which I don't think anybody concedes is necessary, then it should be done via the legislative process as opposed to the administrative process of the Labor Board.

Before the current standard, the Board's approach had been subject to some degree of controversy. And they used conflicting standards which made it difficult for businesses to develop the scope of their business relationships in a manner compliant with the legal precedent. With the current standard, however, businesses have been able to act and strategize and change in accord with this precedent that has been around for in excess of 30 years. And the result I think is clear, it has led to an expansion of franchised businesses and specialized subcontractor employers and jobs that they provide.

So essentially, the business community's perspective is that there is no compelling reason to change the legal standard when the long-standing standard has offered predictability, stability, and a framework for their contractual relationships.

Which takes us to the problem that is going to be answered I think very, very shortly. And that is the case that has prompted much of this debate currently before the Labor Board. It's called BFI and BFI is involving facts that are not unusual or controversial, it's an organizing drive in which a group, a Teamster Local, tried to organize the employees of a subcontractor of BFI's called Leadpoint. Leadpoint has the sole responsibility in this case for recruitment, hiring, discipline, evaluation, and termination. They have their own separate supervision on site. They have separate HR departments. So in effect, there's no role whatsoever that BFI plays in setting wages, administering benefits, scheduling employees, or maintaining their employment efforts.

The "support"—and I use that in quotes—for the joint employer contention is that BFI's contract with Leadpoint was cost-plus, and it had a cap. And I'm sure they capped it at whatever it would have cost BFI to pay for those employees and their wages and benefits had they employed them directly, and there was a financial incentive and benefit for them to subcontract the work to Leadpoint. But the cap doesn't determine what the employees are paid, and despite that, Counsel for the General Counsel has taken the position that BFI and Leadpoint are joint employers.

Why would the Board do this now with this case? Well, his amicus—the General Counsel for the Labor Board's amicus brief says that the current standard has particularly inhibited meaningful bargaining regarding the contingent workforce and non-traditional employment relationships.

General Counsel proposes that the Board move from day-to-day control to operational control at the system-wide level and they want to broaden it to consider the totality of circumstances, which would include indirect or potential control, even if it's unexercised.

With the caveat that the decision that we're talking about here is likely to be issued today or possibly early next week, but many expect it to be today in conjunction with the ending of the term of one of the Republican members of the Labor Board, we are concerned that it's going to lead to a lack of clarity, uncertainty regarding employment status, unwanted second-employer influence over the putative joint employer, and have direct impact upon the franchisor and franchisee relationships, which I will certainly let others in the room testify to.

But in quick summary, the likely consequences of the anticipated change, none of them are welcomed by the employer community, and one commentator has said that it's an attempt to turn hundreds of individually-owned small businesses into one giant union hall. The employer, who does not directly control the terms or conditions, is going to face bargaining obligations under the *National Labor Relations Act*. They are going to be enmeshed in potential industrial disputes on a broader scale. They are going to lose the protections that the *National Labor Relations Act* provides as a secondary or neutral employer, meaning they are subject to picketing and other pressure points applied by the union in play. They are going to be exposed to financial and administrative liability for violations committed by the other employer, again who they do not control. They are going to be subject to corporate campaign tactics, which is where a union uses efforts to embarrass or squeeze an em-

ployer to develop a different, more receptive attitude towards their labor objectives. And there's going to be confusion and uncertainty during the expected requests for review while this is certainly undergoing some form of appeal process.

So there's certainly going to be a negative impact on franchise development, and corporate small business ownership is going to be jeopardized if the new model is used, and the bottom line is there is great legitimate and growing concern among franchisors, franchisees, and small business owners at both the large and the small level. I've been contacted by many clients who you would consider larger employers and they want to know what they should do in anticipation of this dramatic change. I don't know what they're going to do, it's going to depend on a case-by-case assessment, but I do know that they are going to do something and something is not going to bode well for the impacted employers.

Chairman ROE. Thank you, Mr. Mintz. And for the record, BFI is Browning-Ferris Industries, for the record.

Mr. Patel, you're recognized for five minutes.

[The statement of Mr. Mintz follows:]

Written Testimony
Jeffrey M. Mintz, Littler Mendelson, P.C.
jmintz@littler.com

REDEFINING "EMPLOYER" AND THE IMPACT ON GEORGIA'S WORKERS AND SMALL BUSINESS OWNERS

Before the U.S. House of Representatives Committee on Education and the Workforce
Subcommittee on Health, Education, Labor and Pension

August 27, 2015
Savannah, Georgia

I. Executive Summary

Under current and well-established legal precedent, two employers are deemed "joint employers" when the two entities share the ability to control or co-determine employees' essential terms and conditions of employment. To establish a joint employer relationship under this test, there must be evidence that one employer meaningfully affects matters central to the employment relationship of the other. Relevant factors include the right to hire, terminate, discipline, supervise and direct the employees. In applying this test, administrative agencies and courts generally have found that the control exercised by the putative joint employer must be actual, direct, and substantial—not simply theoretical, possible, limited or routine.

Recently, the National Labor Relations Board ("Board" or "NLRB") indicated a willingness to amend the current standard for determining that two employers are joint employers in favor of the standard advocated by the Board's General Counsel, Richard Griffin. Under the General Counsel's proposed standard for re-defining joint employer status, the Board would consider not only the direct ability to control and determine terms and conditions of employment as is now required, but apply a much broader test which examines the "totality of the circumstances." This would include an employer's indirect or potential ability to exercise authority in these areas. For example, under such a test, the Board likely would find joint employer status based upon a contractual—but unexercised—authority to discipline or effectively recommend discipline of another employer's employees.

General Counsel Griffin's proposed standard has been widely criticized. The business community has expressed legitimate concerns about the practical application of such a change in the legal test. The business community is concerned that were the Board to adopt this proposed standard, more employers would qualify as joint employers, putting them at risk for alleged labor and employment law violations of a separate employer and potentially burdening them with collective bargaining responsibilities and obligations under the NLRA. In addition, recently a group of six state attorneys general urged the Board not to adopt the proposed standard, citing the harm it would cause to franchises and other businesses.

Generally, concerns regarding the adoption of the proposed, revised standard focus on the lack of clarity it would provide businesses, leaving them open to significant labor liability as a potential joint employer despite their lack of direct and meaningful control over the employment relationship of the other employer. The "totality of the circumstances" looks to whether one business exercises financial control over the other company such that it implicates employment terms and conditions of the other's employees. If the Board were to find that one business exercised such financial control, then both employers could be liable for violations committed by one of them. Furthermore, under the proposed standard, one employer could be embroiled in a potential union effort to organize the workforce of the other—again, without any real responsibility for or control over the working conditions or environment affecting those employed directly and who are the target of the drive.

The proposed standard certainly create a great deal of uncertainty as to the legal status and scope of employer-employee relationships which now exist and are working effectively, including many franchise structures. An adoption of the proposed standard likely would require the franchise industry to rethink its business model, particularly with regard to how businesses address and respond to concerted activity and labor organizing efforts by its employees and the employees of those with which it has a business relationship. From a labor relations standpoint, were the Board to adopt the proposed standard, it is likely that many businesses would revisit their current relationships and explore substantial changes with regard to the business and which would have employment implications. This may include severing current business relationships so as to eliminate the risk of being found a joint employer under the NLRA and the potential legal implications that would trigger. Alternatively, it may lead to a greater degree of unwarranted and unwanted influence by one employer upon the terms and conditions of employment another has elected to provide.

Congress should be aware that the change encouraged by the Board's General Counsel would be a significant one. Disturbing the well-established standard applied to determine whether a joint employer relationship exists and, more particularly, opting for a broader, ambiguous standard, would require many employers to revisit, analyze and likely revise their current business practices which could negatively impact many other businesses and their employees.

II. Introduction

The NLRB's current General Counsel, Richard Griffin — one of the controversial Board recess appointments later found improper — has urged the Board to significantly revise established precedent regarding the definition of joint employer which employers have used to guide their employment and business relationships for many years. On April 30, 2014, the NLRB invited amicus briefs on whether it should adopt a new joint employer standard in a matter before it. In *Browning-Ferris Industries of California Inc.*, the question before the Board is whether Browning-Ferris should be considered a joint employer with Leadpoint, a staffing services company with which it has a contractual relationship, in a union representation election filed with respect to Leadpoint's employees. Mr. Griffin has advocated adopting a new standard under which an entity

would be a joint employer "if it exercised direct or indirect control over working conditions, had the unexercised potential to control working conditions, or where 'industrial realities' otherwise made it essential to meaningful bargaining."

The Board is expected to issue its decision in *Browning-Ferris* any day. In the meantime, businesses have continued to rely on the established Board precedent regarding joint employer status, while looking forward and preparing for the possibility of a change in the Board's interpretation of the statute that would require a new analysis of—and likely major changes to—how many businesses are run.

III. Background

For over 30 years, the Board has followed the same standard to determine whether two distinct business entities are joint employers under the National Labor Relations Act ("NLRA"). Under that approach, the Board assesses whether the businesses exert such direct and significant control over the same employees such that they share or co-determine those matters governing the essential terms and conditions of employment...." *TLI, Inc.*, 271 NLRB 798, 798 (1984). According to the U.S. Supreme Court, the NLRB's joint employment test is designed to determine whether a putative joint employer "possesses sufficient control over the work of the employees to qualify as a 'joint employer' with [the actual employer]." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). Joint employment occurs when "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." *NLRB v. Browning-Ferris Industries of Pa., Inc.*, 691 F.2d 1117, 1123 (3rd Cir. 1982). Absolute control over the employees of another employer is not required. Rather, the test "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.* (emphasis in original) citing *Cr. Adams Trucking, Inc.*, 262 NLRB No. 67 (1982); *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969); *NLRB v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966).

Prior to 1984, the Board applied a standard that, by many measures, was unclear. The Board itself noted that prior to the *Browning Ferris* decision, the Board's definition of a joint employer relationship was somewhat ambiguous. *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993). In one case, joint employer status was found where the business exerted only "indirect control" over the discipline and wages of the other entity's employees, *Floyd Epperson*, 202 NLRB 23 (1973), whereas in another case, the Board agreed with the administrative law judge that "indirect control over wages and hours" is "insufficient to establish a joint-employer relationship," *Walter B. Cooke, Inc.*, 262 NLRB 626, 641 n.70 (1982). Other cases conflated the joint employer doctrine with the separate "single employer" or "common enterprise" theory, and looked to "industrial realities" even where the entity found to be the joint employer played no role in hiring, firing or directing the employees. *Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968).

The Board's conflicting standards made it difficult for businesses to develop the scope of their business relationships in a manner compliant with legal precedent. When

the Board decided *TLI* and then *Laerco Transp.*, 269 NLRB 324 (1984), the business community was provided with some needed and well-founded clarity.

In *Laerco*, a group of drivers from CTL worked as suppliers to Laerco under a contract. *Id* at 325. CTL made all of the decisions regarding hiring, firing, discipline and discharge. *Id.* CTL handled all of the compensation-related contributions and deductions from the drivers' salaries. *Id.* CTL provided the drivers with all of their benefits. *Id.* Even after drivers were assigned to a Laerco facility, CTL sometimes continued to provide the drivers with job instructions. *Id.*

Laerco supplied the drivers with vehicles and imposed safety regulations on their activities. *Id.* at 324. Laerco established and enforced driver qualifications. *Id.* Laerco occasionally identified issues in the drivers' performance, which were relayed to CTL which ultimately decided upon and oversaw any necessary discipline. *Id.* Laerco did provide the drivers' with daily operational supervision and direction. *Id.* Laerco sometimes corrected minor problems that arose in the workplace, but issues of any significance were relayed to and resolved by CTL. *Id.* at 326.

The Board reviewed the facts of the case and articulated the standard for joint employer status, relying on the *NLRB v. Browning-Ferris Industries* decision:

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment. *[Citing Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) and *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982)] Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

The Board held that the level of control over the drivers exercised by Laerco was not sufficient to establish that Laerco and CTL functioned as joint employers. *Id.* The decision emphasized that to be considered a joint employer, the business needed to exercise supervision beyond that of the "routine" supervision of daily activities that Laerco was providing. In *TLI*, one business, TLI, also provided drivers to a separate business, Crown. *TLI, Inc.* 27 NLRB 798 (1984). Crown directed the drivers regarding delivery assignments. *Id.* at 799. While accidents were reported to Crown, TLI investigated and made findings on the cause of the accident. *Id.* TLI was also responsible for determining and issuing any disciplinary action.

Similar to and relying on the Board's decision in *Laerco*, the Board determined that a business would not be deemed a joint employer unless it exercised "meaningful" supervision and hiring, firing and disciplinary authority. The Board went on to point to the *Browning-Ferris* decision, finding that "[a]lthough Crown may have exercised some control over the drivers, Crown did not affect their terms and conditions of employment to such a degree that it may be deemed a joint employer." *Id.* Because of Crown's lack of "meaningful" daily supervision as well as their lack of influence and authority over hiring, firing, and disciplinary decisions, Crown lacked the sufficient control to support a joint employer finding.

Following the *Laerco* and *TLI* decisions, the Board has continued to apply a consistent and clear test to determine whether an employer meets the status of joint employer. However, in 2014, the NLRB's General Counsel proposed to abandon the current standard and revert back to the ambiguous standard applied by the Board prior to 1984. Below, the current and proposed standards are set forth in further detail, along with the likely effects of a change in the Board's approach.

IV. The Current Standard

The current NLRB standard to determine an employer's status as a joint employer ties employer status to the employer's direct and immediate control over central aspects of the employment relationship. This ensures that joint employer status is only assigned to businesses with actual authority to impact the employment relationship. In further refining and applying the current test, the Board has stated that the control exercised by the putative joint employer must be direct and immediate, actual, not simply theoretical or possible, and substantial rather than limited and routine. *See Id.*; *Airborne Express*, 338 NLRB 597 n.1 (2002); *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 677-78, 687-90 (1993). The question of joint-employer status turns on the facts of each particular case. *Southern California Gas Co.*, 302 NLRB 456, 461 (1991).

To establish joint employer status under this test, the focus is upon the following evidentiary factors as to whether an employer has the ability to directly and immediately control employment terms: hiring, firing, discipline, supervision and direction of the other employer's employees. *Am. Prop. Holding Corp.*, 330 NLRB 1000 (2000). Typically, the Board looks to the actual practice of the parties rather than relying solely on contractual provisions. *Id.* Accordingly, a contractual provision giving the alleged joint employer the authority to approve the second employer's hiring and firing, standing alone, would be insufficient to show the existence of a joint employer relationship under the current test. *TLI, Inc.*, at 798-99.

Additionally, under the current standard, the mere suggestion by one employer to the other to hire individuals is not indicative of a joint employer relationship. *Martiki Coal Corp.*, 315 NLRB 476, 478 (1994) (employer's role in providing employment forms to applicants and making recommendations is insufficient). Similarly, under its current approach, the Board has declined to find a joint employer relationship where the putative joint employer reports misconduct that leads the other employer to terminate an employee. *See Southern California Gas Co.*, 302 NLRB at 462 (affirming ALJ finding

that alleged joint employer did not terminate employee in question but instead indicated that it no longer wanted employee at its facility. The Board concluded that the other employer chose to terminate the employee, noting that the other employer had sole responsibility for resolving any challenge under collective bargaining agreement).

The types of discipline suggestive of a joint employer relationship under the current standard include "issuing written and verbal warnings, and suspending employees." *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1302 (2000), *overruled* on other grounds in *Oakwood Care Ctr.*, 343 NLRB 659 (2004). In *M.B. Sturgis*, the alleged joint employer had the authority to discipline the supplied employees, and supervisors from both employers jointly issued a disciplinary warning to the second employer's employees. The Board concluded that this discipline meaningfully changed the "essential terms and conditions of employment" enough to create a joint employer relationship. *Id.* In contrast, where a supervisor of one employer casually or informally reprimands an employee of another employer without any formal written or verbal discipline, it will not serve to establish a joint employer relationship. *Rawson Contractors*, 302 NLRB 782, 783 (1991) (finding no joint employer relationship where employer's officials could "yell at" drivers and "get on them," but could not issue warnings to drivers or impose any other discipline).

When analyzing whether a joint employment relationship exists under the current test, the Board looks for significant evidence of supervision and direction of another employer's employees. Under this test, evidence of supervision that is "limited and routine" does not support a joint employer finding. *Am. Prop. Holding Corp.*, 330 NLRB at 1001. The Board generally considers 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. *Id.*; *Island Creek Coal Co.*, 279 NLRB 858, 864 (1986); *see, e.g.*, *Teamsters Local 776*, 313 NLRB 1148, 1162 (1994) (holding that two companies were not joint employers where the alleged joint employer exercised only minimal and routine supervision of the other employer's employees and had only limited dispute resolution authority due to the routine nature of the assignments it made).

In contrast, where one employer specifically trains or instructs the employees of another employer regarding how to perform their work, this can be sufficient evidence of a joint employer. *See Am. Prop. Holding Corp.*, at 1001; *Continental Winding Co.*, 305 NLRB 122, 123 (1991) (finding joint employer relationship even though supplier employer alone hired employees supplied to a user employer and set and paid their wages, because user employer exercised sole authority to assign, schedule, and supervise the workplace conditions, and the supervision was significant and more than "routine").

The Board currently considers evidence of administrative control over employees, such as the determination of wage rates, work hours, work assignments and employment tenure as suggestive of joint employer status, even where an employer may not have discretion in supervision, direction or hiring. *CNN America, Inc.*, 361 NLRB No. 47, n.7 (2014). *See e.g. D&F Industries*, 339 NLRB 618, 640 (2003) (basing joint employer status on authority over filling vacancies, wages, and overtime even in the absence of

evidence of control over hiring, discipline and supervision); *Quantum Res. Corp.*, 305 NLRB 759, 760-61 (1991) (finding a joint employer relationship where the employer designated wage rates, pushed through raises, and exercised authority over work hours for employees of second employer).

V. The Proposed, Revised Standard

In the *Browning-Ferris* case currently pending before the Board, the General Counsel has endorsed a broader theory of joint employer status and attendant responsibility. Many expect the Board to issue its decision before Member Harry I. Johnson's term expires on August 27, 2015.

In his *amicus* brief in this case, the General Counsel asserted that companies may effectively control wages by controlling other variables in the business. *See Amicus* Brief at pp. 11-13 (referencing David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 THE ECON. & L. REV. 33, 36-37 (2011)). The General Counsel has proposed a move from the day-to-day control over employment conditions to operational control at the system-wide level. The General Counsel would find joint employment based on direct control, or indirect control or potential control, and when "industrial realities" would render the company a "necessary party to meaningful collective bargaining."

This standard endorsed by the General Counsel would be a significant departure from the one currently applied and is likely to have far-reaching effects. In the franchisee/franchisor context, for example, franchisors have no direct control over a franchisee's employees. However, the General Counsel believes the franchisor can exert significant control over the day-to-day operations of their franchisees simply by dictating the terms of the franchise agreement. *Amicus* Brief at p. 14. In addition to franchise businesses, a revised standard would affect relationships and have potential economic consequence within supply chains, dealer networks and staffing companies.

Under the current standard, an employer's authority to make hiring, firing and disciplinary decisions is a primary factor the Board would consider in the determination as to whether the business is a joint employer. Under the standard advocated by the General Counsel, the Board would make no distinction between actual, exercised control over employees and potential/indirect control over employees. Thus, having the authority to participate in hiring, firing and disciplinary decisions—whether or not the putative joint employer actually utilizes such discretion—would be sufficient to make that employer a necessary party for meaningful bargaining, and therefore a joint employer. *See e.g. Manpower, Inc.*, 164 NLRB 287 (1967) (noting that putative joint employer could request certain specific employees and refuse others even though ultimate hiring and firing decisions were outside their authority); *Jewel Tea Co.*, 162 NLRB 508 (1966) (holding that the right to effectively hire and discharge was sufficient to find joint-employer status even though the power had never been exercised); *Spartan Department Stores*, 140 NLRB 608, 610 (1963) (taking into consideration one employer's contractual right to terminate employees, without looking to actual practice). In addition, the General Counsel has argued that this type of potential control over

employees' working conditions can be based not only on specific contractual provisions but also through the "industrial realities" of the relationship.

Under the current standard, the Board looks to evidence that a business exercised supervision over the employee in determining whether the employer was a joint employer. The level of supervision and direction necessary for a finding of joint employer status under the General Counsel's proposed test would likely include supervision that would be considered limited and routine—and thus not determinative—under the current test. *See e.g. Hamburg Industries*, 193 NLRB 67 (1971) (relying in part on superintendents' supervision and work instructions in joint employer finding); *Greyhound Corp.*, 153 NLRB 1488 (1965), enfd., 368 F.2d 778 (5th Cir. 1966) (looking to detailed instructions in service agreements for performance of tasks as evidence of joint-employer status); *Moderate Income Mgmt. Co.*, 256 NLRB 1193, 1194 (1981) (finding joint employers where property-management company trained the housing project's superintendent).

VI. Potential Effects of Changing the Standard

If the Board changes its existing joint employer standard in *Browning Ferris* endorsed by its General Counsel as most predict it will, the new standard would broaden the application of the joint employer doctrine, rendering a greater number of employers subject to a duty to bargain and liable for unfair labor practices committed by its new "joint employer". This potential for new or increased liability certainly will lead to an evaluation of the value of existing and otherwise mutually beneficial business relationships by many employers.

For example, when joint employer status exists between two entities, both entities may be liable for unfair labor practices related to the unlawful discharge or discipline of an employee under the NLRA. The Board has stated that it will find joint liability for an unfair labor practice where: (1) the non-acting employer knew or should have known that the other employer acted against an employee in violation of the NLRA; and (2) the non-acting employer acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist the unlawful action. *Capitol EMI Music*, 311 NLRB 997 (1993). In such cases, the Board allocates the burden of proof as follows:

> The [NLRB] General Counsel must first show (1) the two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, or should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action.

> Id. at 1000. In addition to unfair labor practice liability, a joint employer can be held jointly and severally liable for other statutory violations committed by the other employer (e.g., claims under Title VII of the Civil Rights Act, the Fair Labor Standards Act, the Family and Medical Leave Act and the Americans with Disabilities Act).

A more broadly applied standard for joint employer status would be expected to result in increased liability for failing to honor terms of a collective bargaining agreement. Joint employer status requires both parties to honor the collective bargaining agreement of the jointly employed staff and bargain with the union over matters impacting their terms and conditions of employment. This duty has been found to specifically encompass the decision to terminate a contract with a service provider who jointly employs the unionized employees, as well as the effects of that decision on the employees. *See, e.g., American Air Filter Co.*, 258 NLRB 49, 53 (1981). Additionally, joint employers are subject to and must respond to relevant information requests from the union.

A business not previously exposed to labor disputes involving the employees of a business with which they engage could become embroiled under the proposed standard. The NLRA generally permits unions to use economic weapons such as strikes, pickets and boycotts at an employer's facilities if it has a labor dispute with the employer. However, the NLRA prohibits unions from using such economic weapons against "neutral" third parties. Where, however, a joint employer relationship exists between the employer directly involved in the labor dispute and a secondary employer, the joint employer is considered an "ally" of the primary employer, and consequently, loses the NLRA protection against union pressure. *See, e.g., Teamsters Local 557*, 338 NLRB 896 (2003) (noting that third party loses its neutrality where it exercises substantial control over the picketers' terms of employment).

VII. Conclusion

Recent agency moves beyond the NLRB endorsed by the Obama administration appear aligned with the Board General Counsel's proposed expansion of joint employer status. The Department of Labor's wage and hour administrator, David Weil, has for years attributed an increase in employment law violations to the "fissuring" of the workforce, which includes franchising and the use of independent contractors. Similarly, the Equal Employment Opportunity Commission submitted an amicus brief in *Browning-Ferris* supporting an expanded definition of joint employer. The EEOC's position is joint employers are "two or more employers that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer." The EEOC urged the Board to adopt that definition.

Regardless of whether proposed standard is "better" or "worse" than the current one, it is clear that a change to the well-established precedent which has governed employer/employer relations across the country certainly would be disruptive and could have significant economic consequence. A standard that makes it more likely the Board

would find a business to be a joint employer will force many prudent employers to analyze their relationships with third party employers and weigh the new risks. There would be significant costs to businesses that, under the proposed standard, would be liable for unfair labor practice violations and labor organization violations for a larger – sometimes exponentially larger – labor pool. And like any departure from a widely accepted and relied upon standard, a significant change would also result in confusion and uncertainty during expected requests for review and legal challenges as employers navigate the new terrain.

TESTIMONY OF KALPESH PATEL, PRESIDENT AND CEO, IMAGE HOTELS, INC., SAVANNAH, GEORGIA

Mr. PATEL. Chairman Roe, Congressman Carter, and Congressman Allen, I would like to thank you and the members of the Subcommittee for the opportunity to testify at this hearing today. I look forward to sharing my story of entrepreneurship and the American Dream.

My name is Kal Patel and I am a small business owner from Pooler, Georgia, and the president and CEO of Image Hotels. I am also a past Board of Director at the Asian American Hotel Owners Association and second generation hotelier, and I am proud to continue the family business.

My family emigrated from India to the United States in 1979 in order to pursue opportunities for entrepreneurship and to improve our station in life.

In 1985, my parents bought the Red Carpet Inn, a 50-room hotel and our first experience with franchising. Franchising provided the consistency of customers, security of a national brand, a larger market share, and tools and resources to help us succeed in growing our business.

While I was growing up, the hotel was not only our family business; it was our way of life. I learned important life lessons about the value of hard work and community service while I was making beds, cleaning rooms, taking out trash, and maintaining the upkeep of the property. Soon, as a teenager, I was learning the financial and managerial aspects of the business, and I became a more active participant in running the operations of our hotel and seeking opportunities for the development of additional properties.

At 17 years old, I started Image Hotels to consolidate our operations and secured an SBA loan to develop my first property, a 50-room Ramada Limited in Port Wentworth, Georgia. I am proud to be a lifelong entrepreneur and job creator and I am grateful for the opportunities my family and I have had to be small business owners.

Today, we own eight properties throughout the Southeast, including Marriott, Hilton, and Choice branded properties, where we employ 275 hardworking Georgians.

Franchising is the preferred model in the lodging industry because it allows hoteliers to control our own businesses. It is for that reason I am here today to discuss the overwhelmingly negative impact a change in the joint employer legal standard for franchise business relationships will have on small businesses and our employees.

The franchise business model has been essential in creating entrepreneurship opportunities for hoteliers, thousands of whom are first and second generation Americans. I fear the prospects for business ownership would be significantly limited if franchising were no longer available to us.

Hotelier franchisees are responsible for undertaking all of the financial risk and directly operating the business. Further, it is the hotel owner and operator who controls staffing decisions.

For their part, my franchisors provide a support system for my business and ensure I maintain a minimum brand standard. However, aside from some general conversations with my management

teams, brand representatives do not interact with my staff and both the franchisee and franchisor prefer it that way.

Franchisees also pay the franchisor a one-time license fee for the use of the flag or brand name and pay royalties based on gross revenue. These specific responsibilities are clearly defined in the franchise agreements I signed with each brand for each hotel but in no way does the agreement create an agency expectation or diminish my independence as a business owner.

As a hotelier, I have come to depend on the franchise-model as the most advantageous means to small business ownership. An expanded joint employer legal standard indicated by the NLRB would compel franchisors to take an active role in staffing decisions due to the newly manufactured potential for liability. Franchisees would lose independence in decision-making and would effectively become employees of the franchisor because they would be forced to follow someone else's directives.

Similarly, as franchisors spend more time and additional resources at my properties, they will likely insist on charging higher royalties and license fees to account for their increased cost and, thus, add financial burdens on my businesses. As brands are coerced into micromanaging my businesses, our contractual agreements outlining our responsibilities will undoubtedly be upset and potentially invalidated.

What I struggle with most is trying to understand the rationale of the NLRB and its General Counsel in seeking to upend a business model that has been exponentially successful for decades. The NLRB's General Counsel has referred to franchising as an outsourcing arrangement where the franchisor inserts an intermediary and merely designates the title of employer onto the franchisee in an effort to evade bargaining with organized labor. This is an absurd and offensive characterization of the life and business my family and I have built over the past 36 years.

Chairman Roe and members of the Committee, I urge you to investigate this issue thoroughly and keep my employees and my story in mind as you review administrative decisions affecting small business owners.

I encourage you and your colleagues to tour hotels in your districts and get to know the proprietors and employees who are eager to serve the guests who come to stay with them. I sincerely appreciate Congressman Carter taking time to visit our Double Tree, last week, at the airport recently and experiencing firsthand the impact of the lodging industry and the franchise model on the lives of our team, our families, and our community here in Southeast Georgia.

I am grateful for the opportunity to speak with you today and I urge you to stand up for us and protect us from oppressive government overreach from bureaucrats in Washington, D.C., who do not understand our businesses, our communities, or our ways of life.

Thank you.

[The statement of Mr. Patel follows:]

Testimony of Kalpesh "Kal" Patel
President and CEO of Image Hotels

Before the House Committee on Education and the Workforce
Health, Education, Labor & Pensions Subcommittee

"Redefining 'Employer' and the Impact on Georgia's Workers
and Small Business Owners"

August 27, 2015

I. Introduction

Chairman Roe, Congressman Carter and Congressman Allen, I would like to thank you and the members of the Subcommittee on Health, Education, Labor & Pensions, for affording me the opportunity to testify at this hearing today. I look forward to sharing my story of entrepreneurship and the American Dream and answering any questions you may have about the tremendous success of the franchise business model in the lodging industry.

My name is Kal Patel and I am a small business owner from Pooler, Georgia, and the president and CEO of Image Hotels. I am second generation hotel owner, or "hotelier" and I am proud to continue in the family business.

My family emigrated from India to the United States in 1979 in order to pursue opportunities for entrepreneurship and to improve our station in life. We arrived at my aunt's home in Bennettsville, South Carolina, and lived with her for a year while learning the hotel business and saving money to start out on our own.

My parents bought their first property, the "North Augusta Motel," a twelve room independent motel and worked every job within in the property to ensure our investment and our livelihood were successful. From there, we moved to Kentucky, where my parents bought their first franchised property, the Red Carpet Inn, a fifty room hotel and our first experience with franchising. Franchising provided the consistency of customers, security of a national brand, a larger market share, and tools and resources to help us succeed in growing our business.

While I was growing up, the hotel was not only our family business, it was our way of life. I learned important life lessons about the value of hard work and community service while I was making beds, cleaning bathrooms, taking out trash and maintaining the upkeep on the property. Soon, as a teenager, I was learning the financial and managerial aspects of the business and I became a more active participant in running the operations of our hotel and seeking opportunities for the development of additional properties.

At seventeen years old, I started Image Hotels to consolidate our operations and secured an SBA 504 loan to develop my first property – a fifty room Ramada Inn in Port Wentworth, Georgia. I am proud to be a lifelong entrepreneur and job creator and I am grateful for the opportunities my family and I have had to be small business owners.

Today, we own eight hotels throughout southeast Georgia, including Marriott, Hilton, Hyatt and Wyndham and Choice branded properties, where we employ 275 hardworking Georgians.

Throughout my life and career, I have seen first-hand, the benefit of the franchise business model to the small business owners – the franchisees. As markets and tastes changed and evolved, and communications became more extensive, customers began to demand the familiarity of a brand name, especially in their lodging preferences. Franchising provided my family and me the opportunity to own and operate our own businesses, while benefiting from the resources available to a national brand.

Franchising is the preferred model in the lodging industry because it allows hoteliers to control our own businesses. I evaluate where to build and determine what type of property will be successful in a given market. I secure the financing and undertake the multi-million dollar risk in investing in the real estate, capital and human resources necessary to operate a successful hotel. I am also the decision maker at my hotels regarding staffing decisions and employee relations. Ultimately, I enjoy the challenge of running my company and seeking opportunities for growth and development.

It is for that reason I am here today to discuss the overwhelmingly negative impact a change in the "joint employer" legal standard for franchise business relationships will have on small businesses and our employees.

I would like to note that I am a past board member the Asian American Hotel Owners Association (AAHOA). AAHOA members own nearly 50% of all hotels in the United States and employ over 600,000 employees, accounting for nearly $10 billion in payroll annually. Approximately 70% of the more than 20,000 properties AAHOA members own are franchised businesses. My story is nearly identical to those of the more than 14,000 small business-owner members of the association nationwide and the over 800 AAHOA members across Georgia.

AAHOA is also a member of the Coalition to Save Local Businesses (CSLB), which is a diverse group of locally owned, independent small businesses, associations and organizations dedicated to protecting all sectors of small business and preserving the current joint employer legal standard at the federal and state levels.

II. The Franchise Relationship

The franchise business model has been essential in creating entrepreneurship opportunities for hoteliers, thousands of whom are first and second generation Americans. I fear the prospects for business ownership would be significantly limited if franchising were no longer available to us.

The franchise model in the lodging industry can provide considerable benefits to franchisees and in many markets, affiliating with a nationally recognized brand can be the difference in determining whether or not a hotel can succeed. Moreover, the franchising model in its current form succeeds for hoteliers, because of the distinct responsibilities of franchisees and franchisors.

Hotelier-franchisees are responsible for identifying a suitable market, applying for a franchise license, securing financing, purchasing land, acquiring insurance, establishing agreements with contractors, passing health and safety inspections, setting prices, determining staffing needs, understanding local laws and regulations, undertaking all of the financial risk, and directly operating the business.

Further, it is the hotel owner and operator who controls staffing decisions. Hoteliers exclusively establish working conditions, staffing needs, wages, promotions, benefits, schedules, evaluation metrics, raises and disciplinary procedures.

For their part, my franchisors provide a support system for my business and offer me tools to succeed and ensure I maintain a minimum brand standard. However, aside from conversations with general managers and my sales team about industry news, condition of my properties and business prospects, brand representatives do not interact with my staff. And both the franchisee and franchisor prefer it that way. I meet formally with a brand representative one a year and otherwise, I am left alone to lead my staff and run my businesses as I see fit.

Franchisees also pay the franchisor a one-time license fee of between $50,000 and $125,000 for use of the "flag" or brand name. The franchisee also pays royalties of between 8-10% of the "top line," or gross revenue.

In contrast, hotel franchisors accept franchise license applications, provide specifications for construction and design, develop and execute national marketing strategies, furnish software and services (such as point of sales systems and reservation portals), set menus for breakfasts, and generally offer guidance to ensure dependable brand quality.

These specific responsibilities are clearly defined in the franchise agreements I sign with each brand, for each hotel. It is this dependability that engenders confidence in both parties and allows the relationship to thrive – but in no way does the agreement create an agency expectation or diminish my independence as a business owner.

III. The Effect of a New Joint Employer Standard

As an hotelier, I have come to depend on the franchise model as the most advantageous means to small business ownership. Consequently, I am deeply concerned that the NLRB's efforts to expand the definition of joint employer status will transfer control of small businesses from independent hotel owners and operators to large corporations. An expanded joint employer legal standard intimated by the NLRB would compel franchisors to take an active role in staffing decisions due to the newly manufactured potential for liability. Franchisees, including the majority of AAHOA members, would lose independence in decision making and would effectively become employees of the franchisor because they would be forced to follow someone else's directives.

A new, essentially coerced partnership arrangement between franchisees and franchisors that would arise based on a new joint employer standard would devastate the industry, because the interests of both parties are particularly distinct. As franchisees, our interests are to ensure our individual properties are as successful as possible. That means growing, maintaining and developing a dedicated workforce. As hotel operators, intimately involved in the daily functions of the hotel, we know our staff members personally and understand their unique importance to the business. In contrast, because most franchisors are big companies with different goals and motives than I have, they value expenditures and investments differently than I do. And it is most likely that my employees and staffs may suffer if new standards impose a new management structure.

As I mentioned earlier, as the small business owner, I determine the staffing decisions, promotions, benefits, schedules and other working conditions based on what is best for my employees and my business. I live and work in the community and I have spent my entire life and career in this business – as a result, I know how to ensure top performance from my team.

Representatives from the brands who are based in Washington, DC, would certainly not understand the culture of our workplace and they would be unable to provide thoughtful input on incentives like promotions and raises or disciplinary actions, for example. However, the proposed new joint employer standard would insert them into the process and they would then have a disproportionate influence on these decisions.

Similarly, as franchisors spend more time and additional resources at my properties, they will likely insist on charging higher royalties and license fees to account for the increased costs and thus add financial burdens on my businesses. Accordingly, as brands are coerced into micromanaging my businesses, our contractual agreements outlining our responsibilities will undoubtedly be upset and potentially invalidated.

Succeeding at business is a monumental task unto itself. It takes years of learning, risk-taking, failing and perseverance to achieve one's goals. Adding exceedingly onerous obstacles and financial burdens on me, while simultaneously wresting my independence and control, creates a hostile climate for business and discourages me from participating in the industry, developing new properties and creating jobs.

What I struggle with most, is trying to understand the rationale of the NLRB and its General Counsel in seeking to upend a business model that has been exceptionally successful for decades. The NLRB's General Counsel has referred to franchising as an "outsourcing arrangement" where the franchisor "inserts an intermediary" and merely "designates" the title of "employer" onto the franchisee in an effort to evade bargaining with organized labor. This is an absurd and offensive characterization of the life and business my family and I have built over the past thirty six years.

If the NLRB rules to create a new joint employer standard by intentionally misrepresenting and trivializing the importance of business owners in creating good jobs for thousands of Georgians, developing a professional workforce and contributing to our local communities, it would truly be a travesty and egregious miscarriage of justice.

IV. Conclusion

Chairman Roe and members of the Committee, I urge you to investigate this issue thoroughly and keep my employees and my story in mind as you review administrative decisions affecting small business owners.

I encourage you and your colleagues to tour hotels in your districts and get to know the proprietors and employees who are eager to serve the guests who come to stay with them. I sincerely appreciate Congressman Carter taking time to visit our Double Tree by the Savannah Airport recently and experiencing firsthand the impact of the lodging industry and the franchise model on the lives of our team, our families and our community here in southeast Georgia.

I am grateful for the opportunity to speak with you today and to represent the thousands of small business owners and employees who have come to realize the American Dream as a result of working in a franchised small business – and I urge you to stand up for us and protect us from

oppressive government overreach from bureaucrats in Washington, DC, who do not understand our businesses, our communities or our way of life.

Thank you.

Chairman ROE. Thank you, Mr. Patel.
Mr. Salgueiro, you are recognized for five minutes.

TESTIMONY OF ALEX SALGUEIRO, PRESIDENT AND CEO, SAVANNAH RESTAURANTS CORPORATION, SAVANNAH, GEORGIA

Mr. SALGUEIRO. Thank you, Chairman Roe, Representative Allen, and Representative Carter for the opportunity to submit my testimony today. My name is Alex Salgueiro and I am Chief Executive Officer of Savannah Restaurants Corporation, owning 10 Burger King restaurants in and around the Savannah, Georgia area. I would like to note that I am a small business owner; my views are my own and may not reflect those of Burger King Corporation or other franchisees within the Burger King brand.

I was born in Havana, Cuba, in 1954. I am the son of a former Cuban governor who fled to the United States after the Cuban revolution. After two years in hiding, my family and I were able to join my father and seek refuge in the United States. As a boy growing up in Miami, Florida, I first became a crew member at a local Burger King, which is the world headquarters city, when I was 14 years old. After years of hard work and dedication, I became a district manager for Burger King Corporation and was tasked with opening the first Burger King restaurants in countries including England, Denmark, Sweden, Panama, Ecuador, Venezuela, and Colombia. After that stint, I then settled in Atlanta, Georgia, where I became the area manager for Burger King Corporation in that area for five years.

My experiences with the Burger King brand helped me to recognize the opportunities available for lower- and middle-class Americans. Through franchising, people can live the American Dream of owning a business, creating jobs and giving back to their community. After 16 years working for the Burger King brand, I decided to leave the corporation and purchase my own Burger King franchise in Savannah, Georgia.

I now own ten Burger King restaurants, employing over 350 individuals in and around the Savannah, Georgia, area. Several years ago, I owned as many as 15 restaurants and employed over 480 individuals, but due to government mandates contained in laws such as the *Patient Protection and Affordable Care Act*, I have been forced to sell or close some of my restaurants, a third of my business, and put some of my employees out of work.

I am here today to talk to you about the impact of yet another likely mandate on my business—the joint employer standard as proposed by the National Labor Relations Board (NLRB). As I understand it, the NLRB would like to expand the standard from requiring direct control to looking at the totality of the circumstances in determining whether franchisors or franchisees should be considered joint employers for labor claims. For the reasons below, and on behalf of a business that is solely owned and run by me, application of the proposed new standard would be devastating to my business, my employees and the franchise model in the United States in general.

The Franchise Model: appreciating the franchise model is essential to understanding that a new joint employer standard would be devastating to all parties involved. As a franchisee, I am required to carry certain trademarks and other identifiers consistent with the Burger King brand. This model provides my business with brand recognition, quality control measures designed to ensure that customers receive a high quality experience no matter what franchise they visit.

That being said, I've signed agreements specifically identifying myself as an independent owner and operator of my Burger King restaurants. I became a franchisee because of the opportunity to be my own boss and hire people from my community. I own my business and I'm in complete control of the hiring, firing, scheduling, and duty assignments of all my employees among many, many, many other responsibilities that I have. In fact, in my 45 years working for both the Corporation and on the franchisee side of the business, I have never been part of any discussion with Burger King Corporation and a franchisee over personnel matters. Franchisor-franchisee discussions have always been limited to non-labor business issues such as advertising, marketing, restaurant operations, and vendor sourcing, just to name a few. The franchise agreement specifically establishes franchisee independence, the cornerstone of the entrepreneurial spirit. By changing the definition of control from indirect to direct, the proposed joint employer language destroys an essential element of the franchise model.

As a franchisee, I also agree to a provision in my franchise agreement that indemnifies Burger King Corporation against claims, demands, losses, obligations, costs, expenses, liabilities, debts, and damages. There's a whole lot of stuff that they're indemnified against, I could go on.

As a result, if Burger King Corporation is treated as a joint employer, labor claims will skyrocket and all legal and financial obligations related to those claims will fall on my shoulders. As a small business owner, the time and cost required to defend those claims against both the corporation and myself will take time away from running my business, drain my resources, and will very likely cause me to go out of business.

To put it plainly, a more broad joint employer standard would destroy the franchise model as we know it. Threatened with increased liability, franchisors will be forced to implement extreme oversight policies in local franchises across the country. And I have worked on that side of the business, so I know what I'm talking about. As a result, franchisors will increase not only corporate oversight efforts, but implement extreme, detailed franchisee and employee policies which will shift franchisees' focus from running their business and providing superior customer service.

As a franchisee, I will be no more than a glorified manager in my own business and in my own restaurant. As the best resource to determine the needs of my local community and workforce, I will have no flexibility in determining the daily operations of my business. Further, increased franchisor oversight will undermine my relationship with my employees and leave me in a constant fear of labor claims. The years of labor and hundreds of thousands of dollars I have invested in my business will result in nothing more

than an income and an employer manual. I will be a glorified manager.

In addition to the oversight described above, a broader joint employer standard will likely cause franchisors to reconsider their corporate structures. A threat of increased liability may lead to increased corporate buyouts in an effort to consolidate franchisor oversight and management. As a result, the new joint employer proposal will likely lead to store closures, job losses, reduced economic activity, and reduced community support. In a brand that is almost 100 percent franchised, thousands of Burger King owners and operators will be forced to sell their business and leave their employees in uncertain futures.

In closing, the new joint employer standard—as proposed by the NLRB—will quickly destroy a successful business model, which has been in place for decades. The current standard, which correctly defines the terms in which an entity should be considered an employer, has been effective for all parties involved and will continue to work for many, many years to come. For those reasons stated above, implementation of a new broader standard will place unprecedented burdens on franchisees. For me, I will likely be forced to either close my restaurants or sell them to the Corporation. Either way, this proposal will likely cause small business owners like me to close their doors and put hundreds of thousands of employees out of work.

My BK franchise has allowed me, and many other minorities like me, to attain the American Dream. Unfortunately, if the new joint employer standard, as proposed, is enacted, it will destroy the ability for many middle class Americans like myself to be able to use franchising to attain the American Dream.

Thank you.

[The statement of Mr. Salgueiro follows:]

Statement on:

To: **U.S. House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions**

By: **Alex Salgueiro, BURGER KING® Franchisee, Savannah, Georgia**

Date: **August 26, 2015**

Chairman Roe, Ranking Member Polis and members of this Committee, thank you for the opportunity to submit my testimony today. My name is Alex Salgueiro and I am the Chief Executive Officer of Savannah Restaurants Corporation owning ten BURGER KING® restaurants in and around Savannah, GA. I would like to note that I am a small business owner; my views are my own and may not reflect those of Burger King Corporation or other franchisees within the BURGER KING brand.

Born in Havana, Cuba in 1954, I am the son of a former Cuban governor who fled to the United States after the Cuban revolution. After two years in hiding, my family and I were able to join my father and seek refuge in the United States. As a boy growing up in Miami, FL, I first became a crew member at a local BURGER KING® restaurant when I was 14 years old. After years of hard work and dedication, I became a district manager for Burger King Corporation and was tasked with opening the first BURGER KING® restaurants in countries including England, Denmark, Sweden, Panama, Ecuador and Venezuela and Columbia. I then settled in Atlanta, GA, where I became an area manager for Burger King Corporation for five years.

My experiences with the BURGER KING® brand helped me recognize the opportunities available for lower and middle class Americans; through franchising, people can live the American dream of owning a business, creating jobs and giving back to the community. After 16 years working for the BURGER KING® brand, I decided to leave the corporation and purchase my own BURGER KING® franchise.

I now own 10 BURGER KING® restaurants, employing over 350 individuals in and around Savannah, GA. Several years ago, I owned as many as 15 restaurants employing over 480 individuals, but due to government mandates contained in laws such as the Affordable Care Act, I was forced to sell or close a third of my businesses and put some of my employees out of work.

I am here today to talk to you about the impact of yet another likely mandate on my business – the joint employer standard as proposed by the National Labor Relations Board (NLRB). As I understand it, the NLRB would like to expand the standard from requiring "direct control" to looking at the "totality of the circumstances" in determining whether franchisors and franchisees should be considered "joint employers" for labor claims. For the reasons below, and on behalf of a business that is solely owned and run by me, application of the proposed new standard would be devastating to my business, my employees and the franchise model in general.

The Franchise Model

Appreciating the franchise model is essential to understanding that a new joint employer standard would be devastating to all parties involved. As a franchisee, I am required to carry certain trademarks and other identifiers consistent with the BURGER KING® brand. This model provides my business with brand recognition and quality control measures designed to ensure that customers receive a high quality experience no matter what franchise they visit.

That being said, I've signed agreements specifically identifying myself as an independent owner and operator of my BURGER KING® restaurants. I became a franchisee because of the opportunity to be my own boss and hire people from the community. I own my businesses and am in complete control of the hiring, firing, scheduling, and duty assignments of my employees among many, many other responsibilities. In fact, in my 45 years working for both the corporation and as a franchisee, I have never been part of any discussions between Burger King Corporation and a franchisee over personnel matters; franchisor-franchisee discussions have always been limited to non-labor business issues such as advertising, marketing, restaurant operations and vendor sourcing to name just a few. The franchise agreement specifically establishes franchisee independence - the cornerstone of the entrepreneurial spirit. By changing the definition of control from "indirect" to "direct", the proposed joint employer language destroys an essential element of the franchise model.

As a franchisee, I also agree to a provision in my franchise agreement which indemnifies Burger King Corporation ("BKC") against

> Claims, demands, losses, obligations, costs, expenses, liabilities, debts or damages, (including but not limited to reasonable attorney's fees) unless resulting from the negligence of BKC. BKC's right to indemnity under this Agreement shall arise and be valid notwithstanding that joint or concurrent liability may be imposed on BKC by statute, ordinance, regulation or other law……[t]his indemnity obligation shall include, but not be limited to, claims related to the employment of Franchisee's employees.[i]

As a result, if Burger King Corporation is treated as a joint employer, labor claims will skyrocket and all legal and financial obligations related to those claims will fall on my shoulders. As a small business owner, the time and cost required to defend claims against both the corporation and myself will take time away from running my business, drain my resources and will very likely cause me to go out of business.

Impact on Franchisees

To put it plainly, a more broad joint employer standard would destroy the franchise model as we know it. Threatened with increased liability, franchisors will be forced to implement extreme oversight policies in local franchises across the country. As a result, franchisors will increase not only corporate oversight efforts, but implement extreme, detailed franchisee and employee policies which will shift franchisees' focus from running their business and providing superior customer service.

As a franchisee, I will be no more than a glorified manager in my own restaurant. As the best resource to determine the needs of my local community and workforce, I will have no flexibility in

determining the daily operations of my business. Further, increased franchisor oversight will undermine my relationship with my employees and leave me in constant fear of labor claims. The years of labor and hundreds of thousands of dollars I have invested in my business will result in nothing more than an income and an employer manual.

Impact on Franchisors

In addition to the oversight described above, a broader joint employer standard will likely cause franchisors to reconsider their corporate structure. A threat of increased liability may lead to increase corporate buy outs in an effort to consolidate franchisor oversight and management. As a result, the new joint employer proposal will likely lead to store closures, job losses, and reduced economic activity and community support. In a brand that is almost 100% franchised, thousands of BURGER KING® owners and operators will be forced to sell their business and leave their employees uncertain of their futures.

The new joint employer standard as proposed by the NLRB will quickly destroy a successful business model which has been in place for decades. The current standard, which correctly defines the terms in which an entity should be considered an employer, has been effective for all parties involved and will continue to work for years to come. For the reasons stated above, implementation of a new, broader standard will place unprecedented burdens on franchisees. For me, I will likely be forced to either close my restaurants or sell them to the corporation. Either way, this proposal will likely cost small business owners like me to close their doors and put hundreds of thousands of employees out of work.

My BK franchise has allowed me, and many other minorities like me, to attain the American Dream. Unfortunately, if the new joint employer standard, as proposed, is enacted, then it will destroy the ability for many middle class minority individuals like myself to be able to use franchising to attain the American Dream.

I thank you for your time and consideration of this very important issue.

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[i] BURGER KING® Franchise Agreement (Entity) Exhibit D (04/2014, as amended 10/2014) BK#2008

Chairman ROE. Thank you, Mr. Salgueiro.
Mr. Weir, you're recognized.

TESTIMONY OF FRED WEIR, PRESIDENT, MEADOWBROOK RESTAURANT CO., INC., CUMMING, GEORGIA

Mr. WEIR. Good morning, Chairman Roe, Congressman Allen, and Congressman Carter. My name is Fred Weir, I own four Zaxby's restaurants here in Georgia. Thank you for inviting me to testify on the new joint employer standard that frightens small business owners like me. This is a proposal that has almost unlimited destructive capability, and it threatens to undermine how I run my business, as well as the jobs of many in our employee family.

I appear before you on behalf of the Coalition to Save Local Businesses and the International Franchise Association. The CSLB is a diverse group of locally owned small businesses like me, as well as associations and organizations that represent small business. The group is dedicated to protecting and strengthening sectors of small business, which are now under attack by the National Labor Relations Board, a regulatory body of five unelected Washington bureaucrats. The Coalition's goal is to maintain the current joint employer legal standard across federal and state statutes.

The IFA is a leading association member of the CSLB, and works to protect, enhance, and promote franchising. In franchising today, there are more than 780,000 establishments across the U.S. that support nearly 8.9 million direct jobs, $890 billion of economic output for the economy and 3 percent of the Gross Domestic Product. IFA members include franchise companies in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law, and other areas.

The new joint employer standard is aimed directly at the destruction of small business in my local community outside Atlanta, of the small business in this state, and in every state across the country. This statement may sound like a pretty good example of hyperbole, except that it is not hyperbole. It is true. It's happening now and only the United States Congress can stop this economic juggernaut.

Mr. Chairman, the title of this hearing is "Redefining Employer." Please forgive me, but saying the joint employer redefines employer like a Category 5 hurricane redefines the shoreline. No, Mr. Chairman, a Category 5 hurricane eradicates the shoreline and everything on it. And this new standard for joint employer proposed by the NLRB is specifically designed to do the same thing: eradicate franchising and irreparably damage every small business built on the franchise model.

Franchising is a method of doing business that has allowed hundreds of thousands of individuals who want to run their own businesses to realize that dream using their own sweat equity combined with someone else's concept. Franchising is a method of doing business that's so successful because it's so repeatable. Franchising provides a pathway to prosperity for entrepreneurs, employees, and communities in every corner of our country. I have seen franchising allow businessmen and women in my community

to create and build businesses that otherwise they would have never had the opportunity to do.

I have been in the restaurant business all my life. I decided to become a Zaxby's franchisee because I recognized the great concept built around unique stores and a very exciting menu of chicken, salads, and desserts that I knew would be successful. As I mentioned, I have four Zaxby's restaurants with 160 employees here in Georgia,and I operate restaurants in other states as well.

I signed a franchise agreement with Zaxby's precisely because I knew I would be the boss of this new business, implementing the Zaxby's concept. I know the restaurant business, I know my community, and I knew that this Zaxby's concept would be successful there. In Cherokee County, where I have my restaurants, I do not distinguish between the success of my restaurants and the success of my employees. My goal in opening up my first franchise was to build something unique and special not only for my own family but for the many teams members that work for us.

It is no exaggeration that I treat all my employees as if they were members of my own family, because in my eyes, they are. Many on our staff have loyally worked for years with the special relationship and culture that we have worked hard to create. This culture is the reason many on our staff have stayed for so long. However, if franchisors and franchisees are defined as joint employers by the NLRB, I might lose control of the business and the many decisions that are made on the local-level by myself and our managers, who know and care for team members. And that would be lost. Please allow me to give you a few examples.

Our staff bring their best to work every day. They know I care about them, and I want them to succeed. When a high school student starts his or her first job at one of our Zaxby's restaurants, I make sure her parents are there at the orientation session. I want the young lady to see the pride in her parents' eyes as she begins her first job and learns what it means to be a part of the community with a higher purpose. I want her to know that her job is not just a place to earn a paycheck, but it's also a community where she will collect a larger dividend of meaning in her life.

Sometimes my employees find themselves in very difficult personal circumstances at home, with a sick parent or child, or with other life challenges. One relatively young employee suddenly had a heart attack, and had used up all of his personal leave time. We made sure he continued to be paid until he could resume a normal schedule.

Another employee, a single mom, suddenly faced her own mother's illness and needed to take time off to care for her. She took the time, and we made sure she continued to take home a paycheck.

We offer scholarships to our employees, young and old, so they can enrich their education. We do these things because we would do them for our own family. We have employees have been with us for years. They stay, not for the money. We all need to be paid, but our employees stay because that's where they want to be. This is where they want to live.

Mr. Chairman, the new joint employer standard from the NLRB would drain the life out of hundreds of thousands of small busi-

nesses that operate under the franchise model. The new standard would force operational changes on the franchisor and the franchisees. Since the NLRB appears determined to change this measure of who controls the business, the balance of control between the franchisor and franchisee will have to change. The franchisor's magnified liability will lead to substantially diminished control by the franchisee.

Decisions that are mine today will be the corporate franchisor's tomorrow. Today's culture of family practices and for caring for community will be replaced tomorrow by the corporate personnel manual. Maybe there's no room for parents at their daughter's orientation. Maybe there's no room in a manual for continuing a paycheck after leave is exhausted. There might not be room in the manual for helping a single mom whose mother is ill. Without any doubt, there will be fewer opportunities for new entrepreneurs who want to start their own businesses, and who would have used the franchise model to do so, but find the joint employer standard has shut down the franchising pathway to prosperity.

The brave new world of a wide-open, nebulous joint employer standard is a bleak and desolate place. It is bleak because it rests entirely on wrong assumptions about how businesses—especially franchise small businesses—operate in towns and communities across this country. It is desolate because it deprives people, the entrepreneurs and risk takers who start businesses and the individuals who find meaningful employment there, of a future and the opportunity for a better life.

This plea is not based on politics either to the right or the left. I know beyond a shadow of a doubt our business has solely been successful because of the amazing people who work for us and the decisions I have been able to make about our business culture. A new joint employer standard would fundamentally alter the way I operate and inhibit our ability to expand and prevent much of this from happening. That does not benefit the hard-working people we have now on our team, and prevents many others from joining our family and growing with us, creating even more jobs. The NLRB needs to leave the joint employer standard as it is.

Mr. Chairman, I ask that this Subcommittee and your colleagues in Congress do everything to stop the NLRB. In fighting back, you will help save local businesses like mine.

Thank you very much for your time.

[The statement of Mr. Weir follows:]

FRED WEIR

PRESIDENT OF MEADOWBROOK RESTAURANT CO., INC.

TESTIMONY BEFORE THE U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR & PENSIONS

"REDEFINING 'EMPLOYER' AND THE IMPACT ON GEORGIA'S WORKERS AND SMALL BUSINESS OWNERS"

SAVANNAH, GEORGIA

AUGUST 27, 2015

Good morning Chairman Roe, Congressman Allen, Congressman Carter, and distinguished members of the Subcommittee. My name is Fred Weir, I own four Zaxby's restaurants here in Georgia. Thank you for inviting me to testify on the new "joint employer" standard that frightens small business owners like me. This is a proposal that has almost unlimited destructive capacity, and it threatens to undermine how I run my business, as well as the jobs of many in our employee family.

I appear before you on behalf of the Coalition to Save Local Businesses (CSLB) and the International Franchise Association (IFA). The CSLB is a diverse group of locally owned small businesses like me, as well as associations and organizations that represent small businesses. The group is dedicated to protecting and strengthening all sectors of small business, which are now under attack by the National Labor Relations Board (NLRB), a regulatory body of five unelected Washington bureaucrats. The Coalition's goal is to maintain the current joint employer legal standard across federal and state statutes.

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The new joint employer standard is aimed directly at the destruction of small businesses in my local community outside Atlanta, of the small businesses in this state, and in every state across the country. This statement may sound like a pretty good example of hyperbole – except that it is not hyperbole. It is true, it is happening now and only the United States Congress can stop this economic juggernaut.

Mr. Chairman, the title of this hearing is "Redefining 'Employer.'" Please forgive me, but saying "joint employer" redefines "employer" is like a Category 5 hurricane "redefines" the shoreline. No, Mr. Chairman, a Category 5 hurricane eradicates the shoreline and everything on it. And the new standard for joint employer proposed by the NLRB is specifically designed to do the same thing: eradicate franchising and irreparably damage every small business built on the franchise model.

Franchising is a method of doing business that has allowed hundreds of thousands of individuals who want to run their own businesses to realize that dream using their own sweat equity combined with someone else's concept. Franchising, as a method of doing business, is so successful because it is so repeatable. Franchising provides a pathway to prosperity for entrepreneurs, employees and communities in every corner of our country. I have seen franchising allow business men and women in my community to create and build businesses that they would otherwise never have had the opportunity to do.

I have been in the restaurant business all my life. I decided to become a Zaxby's franchisee because I recognized a great concept built around unique stores and a very exciting menu of chicken, salads and desserts that I knew would be successful. As I mentioned, I have four Zaxby's restaurants with 160 employees here in Georgia. And I operate other restaurants in other states as well.

I signed a franchise agreement with Zaxby's precisely because I would be the boss of the new business, implementing the Zaxby's concept. I know the restaurant

business, I know my own community, and I knew that the Zaxby's concept would be successful there. In Cherokee County where I have my restaurants, I do not distinguish between the success of my restaurants and the success of my employees. My goal in opening up my first franchise was to build something unique and special not only for my own family but the many team members who work for us.

It is no exaggeration that I treat all of my employees as if they were members of my family; because in my eyes, they are. Many on our staff have loyally worked for years with us because of this special relationship and culture we have worked hard to create. This culture is the reason many on our staff have stayed for so long. However, if franchisors and franchisees are defined as joint employers by the NLRB, I might lose control of the business and many decisions that are made on the local level by myself or managers who know and care for our team members would be lost. Please allow me to give you a few examples.

Our staff bring their best to work every day. They know I care about them and want them to succeed. When a high school student starts her first job at one of my Zaxby's restaurants, I make sure her parents are there at the orientation session. I want that young lady to see the pride in her parents' eyes as she begins her first job and learns what it means to be part of a community with a higher purpose. I want her to know that her job is not just a place to earn a paycheck, but also a community where she will collect the larger dividend of meaning in her life.

Sometimes my employees find themselves in very difficult personal circumstances at home, with a sick parent or child, or with other life challenges. One relatively young employee suddenly had a heart attack, and used up all his leave. We made sure he continued to be paid until he could resume a normal schedule.

Another employee, a single mom, suddenly faced her own mother's illness and needed time to care for her. She took the time, and we made sure she continued to take home a paycheck.

We offer scholarships to our employees, young and old, so they can enrich their education. We do these things because we would do them for our own families. We have employees who have been with us for years. They stay, not for the money. We all need to be paid, but our employees stay because this is where they want to be. This is where they want to live.

Mr. Chairman, the new joint employer proposal from the NLRB would drain the life from the hundreds of thousands of small businesses that operate just like mine. The new standard would force operational changes on the franchisor, and on franchisees. Since the NLRB appears determined to change the measure of who controls the business, the balance of control between franchisor and franchisee will have to change. The franchisor's magnified liability will mean substantially diminished control for the franchisee.

Decisions that are mine today will be the corporate franchisor's tomorrow. Today's culture of family and practices of a caring community will be replaced tomorrow by the corporate personnel manual. Maybe there is no room in the manual for parents at their daughter's orientation. Maybe there is no room in the manual for continuing a paycheck after leave is exhausted. There might not be room in the manual for helping the single mom whose mother is ill. Without any doubt, there will be fewer opportunities for new entrepreneurs who want to try to start their own businesses, and would have used the

franchise model to do so, but who find that the joint employer standard has shut down franchising as a pathway to prosperity.

The brave new world of a wide-open, nebulous joint employer standard is a bleak and desolate place. It is bleak because it rests on entirely wrong assumptions about how businesses, especially franchise small businesses, operate in towns and communities across this country. It is desolate because it deprives people – the entrepreneurs and risk-takers who start businesses and the individuals who find meaningful employment there – it deprives these people of a future and the opportunity for a better life.

This plea is not based on "politics" either to the right or left. I know beyond a shadow of doubt our business has solely been successful because of the amazing people who work for us and the decisions I have been able to make about our business culture. A new joint employer standard would fundamentally alter the way I operate and inhibit my ability to expand and prevent much of this from happening. That does not benefit the hard working people we now have on our team and prevents many others from joining our family and growing with us, creating even more jobs. The NLRB needs to leave the joint employer standard as it is.

Mr. Chairman, I ask that this Subcommittee, and your colleagues in the Congress, do everything you can to stop the NLRB. In fighting back, you will be helping to save local businesses like mine.

Thank you very much.

Chairman ROE. I thank the panel for their testimony and I will now begin the questioning. I recognize myself now for five minutes.

I think, Mr. Patel, I will start with you. You mentioned, when reading your testimony last evening, "What I struggle with most is trying to understand the rationale of the NLRB and its General Counsel in seeking to upend a business model that's been exceptionally successful for decades." Why do you think that is? Because you are correct in that.

Mr. PATEL. Why isn't it? I don't see any other pressure group going to Congress trying to correct it, that it's not successful. The one thing that this does—and to what Mr. Weir said—is building culture in a company. When corporate America or some other agency up North or out West is trying to tell you how to mandate employees, it changes the culture of a company.

I can give you lots of stories within our organization where we have taken a housekeeper or a night auditor to a general manager, the opportunity to go up in a company. The brand or the franchisor applauds that. They do not prohibit that. Now take the reverse, it is going to come back and say I am not motivated to take that night auditor or that housekeeper to graduate them, if I've got standards coming on to me that say you need to do X, Y, and Z.

So this has been successful for decades, I don't see any other group trying to correct that formula, the franchisor and the franchisee.

Chairman ROE. Mr. Weir stated—and as I read your testimony—you compared the joint employer—the new definition to a Category 5 hurricane, that the NLRB wants to destroy the franchise model. I disagree with you, I think basically what it is, is the NLRB is tilting the table in favor of unions.

I grew up in a union household. My dad was a member of the union, and the NLRB is supposed to—I am an old basketball player and the NLRB is supposed to be a fair referee. It is supposed to come in and represent the employer and the employee so they all get a fair shake.

What this particular NLRB is doing is tilting it dramatically in the favor of the unions. And let me just give you an example. This is not the first assault on small businesses that I have seen by the NLRB. One was the ambush elections. The average time it takes to have an election, so that everybody gets all the information on the table, has been 38 days, that is how long it is. Now it can be as little as 11 days.

In my business—I am a small business person. We started a medical practice with four doctors, 12 employees. We now have 100 providers and 450 employees. I could not find Mr. Mintz in 10 days to get representation for my business. I could not find a good labor lawyer where I live in that length of time.

And I think the secret ballot protection, I mean the most sacred thing—I put a uniform on and left this country and served in the Second United States Infantry Division to protect your right to a secret ballot. And that is trying to be taken away from us. And I say this as a joke, my wife swears she voted for me, but I do not know whether she did or did not, because she had a secret ballot. She claims she did, but I do not know for a fact that she did.

[Laughter.]

Chairman ROE. So some days I probably wonder whether she did or did not.

But I could go on and on with this, and I think that is what this is. And you all have very eloquently said and stated that you run your business day to day, you decide what the wages are, what the hours are, all of those things. And the other thing, I know the person who always employed me was the person who signed my paycheck. And I think you sign all the paychecks of your employees, I believe that you do.

Mr. Mintz, I want to get a statement on the record from you. According to recent media reports—yesterday—officials at OSHA have asked regional officials to take into account whether the franchisor controls the workplace safety practices of the franchisee when considering potential violations at the franchise business. Could you make a statement about that, please?

Mr. MINTZ. Chairman Roe, I think that is a move that is consistent with what we are seeing, not just at the National Labor Relations Board, but throughout the administrative agencies that are staffed by appointees, political appointees. And I happen to agree with you with respect to the labor law, the labor law component. I think it is designed—this is designed since labor law was not effectively changed itself, the *Employee Free Choice Act* failed and they are moving to seek to ambush elections and now the expansion to try to enhance unions' ability to organize on a larger scale.

I think the expansion of the joint employer definition by OSHA as well as by the Department of Labor and the EEOC—the common thread running through them is that there are going to be more employers that are subject to potential administrative and financial liability and more employees that will have access to and recourse through the administrative agencies for violations of what they view in the workplace.

Chairman ROE. Let me just state for the record before I yield my time, is that look, you have a right to unionize. In America, that is a right we have that is clearly established in law. But you also have a right to make an informed decision. If you want to have it, fine, vote for it. That is legal in America. And if you do not, you ought to be able to not vote for it. It is also legal to do that. And as I said, it looks to me like the NLRB, and especially with this, is trying to close a billion dollar plant in Charleston, South Carolina. That was astonishing to me, that they tried to do that. And no jobs were lost in Everett, Washington. As a matter of fact, jobs were added at Boeing in Everett.

My time is expired. I yield to Mr. Carter.

Mr. CARTER. Thank you, Mr. Chairman.

I am going to start with Mr. Patel. Mr. Patel, as you mentioned, I had the opportunity and was delighted to visit one of your hotels last week, and I appreciate your hospitality very much. I could not help but notice the relationship between you and your employees. I mean you seemed to take a personal concern and personal interest in your employees.

And I am just wondering, if this rule were to go through, do you see that—I am sure you are not going to change, but because of circumstances—if this rule went through, I am not sure that the franchisees would still have that same relationship.

Mr. PATEL. That bond and that connection. I think, would we give it a valiant effort and try to keep the culture and the etiquette the same? Absolutely. Will law or brand regulations in terms of governing HR allow it to continue? I highly doubt it will. And again, when you're mandated to do things a certain way, it's going to create a separation in that. Above and beyond that, you know, I'll say it for the third time, I'm going to be a manager for those franchisors and that's not the American Dream and it's not allowing us to continue, what I'm going to say, as a true free enterprise system. You're constricting that.

Mr. CARTER. Let me ask you about—you utilize subcontractors?

Mr. PATEL. Yes.

Mr. CARTER. How do you think this is going to impact that portion of it?

Mr. PATEL. Well, trickle-down economics, trickle-down labor market, you know, this is going to create a domino effect in the labor market. So when I get ready to develop or acquire a hotel, we look at the market from a performance standpoint, then you look at the labor market. So if the subcontractor is a franchisee, say U.S. Lawns, a franchise company that does landscape work, if they're doing landscape work for me at one of my hotels, he's going to have the same bureaucratic things that we have to deal with. Right? So, it's going to trickle down in that way.

You know, the other issue is if I'm forced to lay off or let go, then it's going to create a shift in employment. So I think subcontractors will also feel the same pain and, you know, just as I'm their customer, will I get the same service? I doubt it.

Mr. CARTER. Right. You mentioned that you're a second generation hotel owner and you obviously have been successful and you know what it takes to build a business and to keep it successful.

What about future expansion? Do you think this is going to have a negative impact or a positive impact on future expansion?

Mr. PATEL. This would have a definite negative impact. I would probably change my business model completely to where I would probably get out of this business particularly and get out of franchising as a whole. You guys have got to keep one thing in mind: small businesses in general today have a hard time maintaining HR. Just hiring one person, the amount of checks, balances, and assurances we have to go through to stay within the law is very hefty and now we've just added the ACA, which pardon me, I haven't figured it out yet, but I don't think Congress has figured it out. It's horrendous.

And then we add this to that? We are just growing that stack and I'll ask you guys, why would I want to employ more people? Why would I want to employ more people, I do not want to create more jobs, unfortunately, because you're not—Congress or the law is not motivating me to go out and do that.

Mr. CARTER. Thank you, Mr. Patel.

Mr. Salgueiro, you mentioned in your testimony the interaction between the franchisee and the franchisor on non-labor issues, and that obviously exists. But now it is going to be expanded if this rule goes through, and you are essentially, as you said, and as all of you have said, going to end up being just a manager for Burger King.

Mr. SALGUEIRO. Well, if the numbers are correct that there are some 90 million-plus people out of the workforce right now, get ready for that number to explode and go up, because franchisees will want to have much fewer employees than they have now. Over the last 20 years, the average Burger King restaurant used to employ 50 employees and now we employ 25, so it's cut in half. This type of move would actually cut that further. And I can tell you, robotics and American ingenuity is hard at work right now trying to replace every one of those jobs in these kitchens. You know, McDonald's is doing a lot of research, Burger King, they're all putting a lot of money into research.

But it would be—like Mr. Patel said, we have a culture that if you work hard and you do well, there's no limit to how far you can advance, how much you can get paid. You know, our GMs have the power to raise people's salaries, to raise their wages, all they have to do is fill out one form, one page form and their supervisor signs off and it is done. And I can tell you, you take that type of control away where supervisors cannot even pay people what they're worth and the whole thing just self-destructs.

Mr. CARTER. Right, right.

Mr. SALGUEIRO. This is just a move by our government to facilitate unions to get into industries that they don't belong in, that they've tried to be in and they've never been able to crack because there's just no need for unions in our industries. But they're bound and determined that they're going to get there and what they're going to do, they're going to destroy the industries.

Mr. CARTER. Right.

Mr. Weir, every one of you has talked about the relationships with your employees. I know that Zaxby's is a Georgia company and is a community supporter. Zaxby's, as all of you, has been very supportive of the community. Do you see that changing as a result of the franchise—not necessarily Zaxby's franchisor, but just the fact that the small business ownership of it goes away?

Mr. WEIR. I do——

Chairman ROE. Please be brief because he has exceeded his five minutes.

Mr. WEIR. Yes, sir.

I do, in several ways. One, just the sheer economic cost of having to change the model. Obviously we're in business and we commit part of what we have left over after operational expenses to participate in the community and be charitable. I see that being tremendously impacted just by the additional onus of all the regulations and potential liability as well as having a hierarchy of stricter control. Things that we may do and understand on a local level may not be understood at the corporate office in Athens, Georgia, and it quickly washes away. That affects a whole community, it affects organizations like you mentioned with CASA, affects a lot of people in a lot of ways that you'd never see in a larger-level, but at the local-level have a tremendous impact on individual lives.

Mr. CARTER. Right. Thank you, Mr. Weir.

Mr. Chairman, I apologize, I yield back my exceeded time. Thank you.

Chairman ROE. Thank the gentleman for yielding.

Mr. Allen, you are recognized for five minutes.

Mr. ALLEN. Thank you, Mr. Chairman.

Mr. Patel, when you build a hotel, do you own that ground and that building?

Mr. PATEL. Absolutely.

Mr. ALLEN. So you go and you get a loan for that. So you are at risk.

Mr. PATEL. Absolutely.

Mr. ALLEN. Okay. So maybe your hotel brand is maybe domiciled in a state that is a not—Georgia by the way is a right-to-work state. Does everybody understand how that works? But, so maybe your franchise is located in a state that is not a right-to-work state. And so under this rule, if I understand it, and, Mr. Mintz, you come in if I am going down the wrong trail here.

But under this rule, as I understand it, if it is a co-employment agreement, that if that group in New York or wherever, in a state that is not a right-to-work state goes on strike, that in fact, your employees could walk off the job?

Mr. PATEL. I'm assuming they could also have picket signs in front of my hotel. I don't know.

Mr. ALLEN. Okay, so they could shut your business down.

Mr. PATEL. Absolutely.

Mr. ALLEN. Okay. Mr. Mintz, that is against the law in Georgia.

Mr. MINTZ. Well, the federal law, the *National Labor Relations Act*, protects secondary or neutral employers. The problem here, the web that is going to be created is you're going to have links between the two employers that are separate but considered joint employer for purposes of the labor law. And that would enable someone to—some union—to engage in pressure tactics, picketing, and handbilling at Mr. Patel's hotel in Georgia, but it might also allow them to engage in similar conduct at the Marriott headquarters or any other Marriott that's located in Georgia or elsewhere.

Mr. ALLEN. Exactly.

Mr. MINTZ. That's the true problem that's created by this.

Mr. ALLEN. So basically that could put you out of business and put you at risk of losing your business.

Mr. PATEL. Absolutely.

Mr. ALLEN. Okay. Well, that is the seriousness of what we are dealing with here.

The other thing is that, you know, my family's business is the construction industry and of course we use a lot of subcontractors, who are small independent businesses. Mr. Mintz, how would—for example, the way I understand this is, if this applies, that as a general contractor, that basically that labor would answer to me as a joint employer agreement and I could go tell that workforce to go do this or this against the will of the very subcontractor who is contracted to do the job.

Mr. MINTZ. If the general and the sub are considered joint employers, you're going to have influence and attempted control by the general over the sub's employees. And you're also going to have potential liability of the general for anything that the sub did or did not do, consistent or inconsistent with the labor and employment laws. And I think the impact of that is going to be that more and more general contractors or other employers, who use subcontractors—for instance, they are a manufacturing facility and

they use a sub to do their cleaning work—they are going to re-examine the value of that type of relationship. And even though that cleaning is not their core competency, they're going to re-assess whether they'd rather have control and do the work in-house and thereby cut the relationship with the subcontractor out there.

Mr. ALLEN. Mr. Weir, you have restaurants in other states?

Mr. WEIR. Yes, sir.

Mr. ALLEN. Do you have any restaurants in states that are not right-to-work states?

Mr. WEIR. No, sir. We're in all right-to-work states.

Mr. ALLEN. Okay. So of course, Zaxby's is headquartered in Georgia I believe, is it not?

Mr. WEIR. Yes, sir, in Athens.

Mr. ALLEN. Okay. So you would not be faced with say the issue that Mr. Patel would be faced with because of the situation here in Georgia and the ability for you to run your business as you see fit.

Mr. WEIR. Potentially we could, sir. There are Zaxby's restaurants that are now going into states that aren't right-to-work and so if this was an expanded thing and we are all considered as one, the impact could be felt by all of us, is my understanding at least initially here.

Mr. ALLEN. I did not think about that, but that is another issue. Because if you went into a state, for example, that organized a restaurant, then the same rules would then apply to every restaurant.

Mr. WEIR. It seems that is what they're wanting to do.

Mr. ALLEN. Is that correct, Mr. Mintz?

Mr. MINTZ. Well, it would depend on how the Labor Board defines the bargaining unit, which might be different than the scope of the employer's practices. That depends on how much interchange there is between one group of employees and another group of employees.

Mr. ALLEN. I yield back the time I do not have, Mr. Chairman.

Chairman ROE. I think we will go ahead with a second round, if it is okay with everyone, to ask a couple more questions.

One, on subcontractor, I am not in a franchised medical practice, but if I were, I subcontract out environmental services. We have a huge office building and we subcontract that out. With this ruling, I would then be in charge of the people coming in to clean my office up. I have never done that, I have had the subcontractors—I have a contract with them what I expect in the contract to do. So this absolutely changes the relationship between, as you pointed out, Mr. Allen, clearly.

The other thing that was brought up and I think by Mr. Patel, was the cost of regulations. I am going to mention right now, as we know, it costs a lot to send your kids to school and it pains me to say that I have a friend at Vanderbilt, being a UT graduate, but I do. And the chancellor there is a friend of mine. He came to my office the other day and this was not just Vanderbilt, but he had a study with the University of Maryland, two-year colleges, small Christian colleges, for-profit colleges, about 20 of them. He found that Vanderbilt University, just complying with government regulations, added $11,000 per student per year to their tuition. Unbelievable. And that is going on with—I heard Mr. Salgueiro talk

about complying with the ACA regulations, which we still do not—and I have read that bill in detail—and we still are trying to figure out what it really means, as you just said. We are not sure, as Mr. Patel said, what it means.

I think I want to get something on the record here. Mr. Mintz, you said this as clearly as anybody, in your first two paragraphs of your summary, "Under current and well-established legal precedent, two employers are deemed 'joint employers'"—and this is decades old now—"when two entitles share the ability to control or codetermine employees' essential terms and conditions of employment." Which would be hours of work, hiring, firing, what you do.

I just heard three owners say that absolutely is not what happens. So under current law, the NLRB, along with the General Counsel, is totally changing a business model that affects 780,000 franchisees and almost 9 million employees. That is what is about to happen. It is a very big deal.

Mr. Mintz, did I understate that or overstate that, or did I state it correctly?

Mr. MINTZ. You stated it correctly. We're moving, the Labor Board, or the General Counsel for the Labor Board, would have the standard moved from direct control, which is the current requirement, to potential or indirect control. And then they also consider the industrial realities test, whether it's necessary to have the larger secondary employer at the table because of the economic relationship with the other.

Chairman ROE. Well, I think it has become clear to me. We held this hearing in Mobile, Alabama, two days ago and I have heard from similar business owners very similar commentary. And I think we know the end result of this, it is not good for employees and it is not going to be good for employers and business development. And you have already heard, because of what has happened with the ACA, Mr. Salgueiro has had to reduce the number shops and stores that he has open right now.

I will now yield to Mr. Carter.

Mr. CARTER. Thank you, Mr. Chairman.

Mr. Mintz, we understand what impact this is going to have on these types of businesses, the franchisees, and franchisors. What about, are there any others that we are not seeing, are there any other industries that we typically would not think that this would impact that perhaps it would impact?

Mr. MINTZ. I think it's about as broad as you can paint that picture of potential impact. I just used one example of the manufacturing facility that has a contractor that does cleaning work. A facility might have drivers that they use for your local deliveries or over-the-road deliveries. Depending upon the contractual relationship and how that is structured, the General Counsel would use that even unexercised authority or control to find the two entities joint employers. And I think what is going to happen is that the one employer is going to look at the value of maintaining that and the risks of maintaining that and then reconsider whether or not he needs to have that relationship and that exposure or whether he wants to take that work back in.

So I think anybody that functions as a subcontractor to another employer is at risk. Could be cafeteria service, any type of sec-

ondary but required function at the main employer's job site or within his business.

Mr. CARTER. Right.

Mr. Weir, you made a comment that I thought was interesting. You said that the franchisor's liability is going to increase. Therefore, as you would expect and as anyone would expect, the franchisor's control over the business itself would have to increase. That is only natural, correct?

Mr. WEIR. Yes, very much so.

Mr. CARTER. And this is where the ultimate problem comes in: if the franchisor, if their responsibility is increased, they are naturally going to have to have more control over that.

Mr. WEIR. Very much so.

Mr. CARTER. Which in this situation means that the small business owners have less control over it.

Mr. WEIR. It does. And my fear with that as well is when that model changes like that, what is the incentive for the franchisor to franchise. You suddenly just have a bunch of corporate stores. You take away a lot of the entrepreneurial spirit of people who are able to grow things much faster than a corporate chain would. And so you have a huge economic stagnation created from that.

Mr. CARTER. Mr. Mintz, that being the case, what gives here? What is the NLRB thinking? I mean what ultimately is their goal?

Mr. MINTZ. I think they're ultimately trying to expand the scope of people that are covered by it, and I frankly think that the General Counsel and his political allies are interested in expanding the collective bargaining relationships because of the deep trouble that organized labor finds itself in. It represents such a small percentage of the American workforce and it's dwindling and they're looking for some administrative vehicle to try to pump those numbers up.

Mr. CARTER. Right.

Again, I want to thank all of you for being here. This is invaluable, thank you.

Mr. Chairman, I yield back.

Chairman ROE. Mr. Allen, you are recognized.

Mr. ALLEN. Mr. Patel, you touched little bit on what I am hearing from all in the small business community: compliance requirements. Does it, and has it, affected your ability to reinvest in your business and grow your business?

Mr. PATEL. Yes. So to give you an example, on my drive over here, I mentioned to two of the people I was with, you know, we are very selective on where we invest. Before, it was more freelance to where let's just do it. So we've already constricted ourselves to be more conservative on where we invest. So today, you know, I have eight properties, it could have easily been 10, which would have yielded maybe 50 more jobs. And we want—I want to go to sleep good at night, I don't want to have to worry. So yeah, we're more conservative today.

You know, Silicon Valley has a new adjective out, it's called "disrupt," I'm sure guys know what it means and the story behind it. So Air B&B is a disrupter to the hotel universe today. If this passes, this will be a disrupt or a disrupter to the franchisee-franchisor model. And even though I haven't talked to franchisors

about it in detail, I promise you they equally probably do not want to get involved in telling Mr. Salgueiro or Mr. Weir or Mr. Patel, this is your schedule for your upcoming week. They don't want to be involved, they don't know my labor market the way I know it.

Mr. ALLEN. Mr. Salgueiro, from the standpoint of compliance and this continued threat by the federal government on the small business community, is it, in your opinion, keeping you from expanding your enterprise?

Mr. SALGUEIRO. Already the numerous compliances that are on top of all of us are just earth-shattering. We spend countless hours and thousands of dollars. Just take the ACA, there are these new forms that have to be filed here by December that, you know, you have to get a lawyer to fill them out because if you don't fill them out, you're going to be fined and you're going to be fined per employee. And in my case, that could be, you know, half a million dollars, it could be three quarters of a million dollars, and I'm out of business.

So we're already spending just an inordinate amount of time trying to react to all the compliance issues, you know, with E–Verify, with ADA, and just countless others that I will not mention right now.

I just opened a restaurant today, I can tell you I would have been opened probably 10 days ago, but there's a lot of inspections you've got, there's a lot of hoops you have to go through, federal, state, and local. And you know, we don't mind doing it, but it's incredible when they tell you to rip out the whole wiring because it's low voltage and it should be burial cable and those types of mundane regulations that no one ever told you about.

But there's no doubt, this will negatively affect all franchise businesses in America and franchising has been in America now for over 50 to 60 years, it has been the most successful way for people to open their own business and to get in business and to leave the middle class and to be able to give back to their communities and their states and their country.

Mr. ALLEN. Mr. Weir, how about you? Is the federal government keeping you from growing your business and hiring more folks?

Mr. WEIR. Very much so, and just a lot of the stuff that we still don't know certainly scares us and causes us to really rethink just how big we want to get. And it does, it hampers us. You know, and the crazy thing with it, when you look at the franchising model in America, there's no other model that's created more millionaires and created the American Dream for more people, regular people. These aren't people that already had something and expanded on it. They were often regular people. And I could give you countless stories of people in our organization or within the Zaxby's brand who started out as very regular folks, team members, assistant managers, who have gone on to be able to own their own business and live out the American Dream.

And to use a politically correct term, it's the ultimate redistributor of wealth. You take a model where everyone shares in the profits and even someone who is an employee has the opportunity, much like Mr. Salgueiro, to see opportunity and to start out to build something, and that's replicable so that people that are work-

ing for him now, in 10 or 20 years, can do the same thing. For the life of me, I don't see why you would want to prevent that.

Mr. ALLEN. Well, I want to thank all of you for your courageous testimony this morning. I mean, we love this country and we want to make this country better. And one of the problems, Mr. Chairman, we have in this country today is jobs. We have got to put people back to work. And I want to thank you for helping us do just that, because this goes on the record, we will carry it back to Washington, and I promise you we will do everything we can to help you create jobs.

Thank you.

Chairman ROE. I thank the gentleman for yielding.

I will now ask Mr. Carter if he has any closing remarks.

Mr. CARTER. Thank you, Mr. Chairman.

Again, I want to thank you, Mr. Chairman, for your leadership in Congress and particularly on this issue, and for coming down here. Again, as I said in the opening, instead of you going to Congress, Congress is coming to you. We need more of this, and we want more of this. We want to hear from you. You know, the best thing the government can do is get out of the way. And quite often, we are the problem; we are getting in the way.

So, I thank all of you for your testimony, thank all of you for attending, and thank you, Congressman Allen, I appreciate you being here as well.

Again, we are here to help—I know, we are from the government, and we are here to help. I know the irony in that.

[Laughter.]

Mr. ALLEN. You did not have to say that.

Mr. CARTER. I know. But truthfully, we do want to help you. You are the backbone of our economy.

Thank you, and I yield, Mr. Chairman.

Chairman ROE. I thank the gentleman for yielding.

Mr. Allen, do you have any closing remarks?

Mr. ALLEN. I just again would like to say thank you to our panel for their courageous testimony here today.

You know, all I want to encourage you folks to do is hang in there. You know, we are fighting a good fight.

Mr. Chairman, thank you. Thank you for coming down here in God's country. Like I said, our colleagues in the United States Congress are very envious of us down here in Georgia and that is because of what you are doing. You are sticking in there, you are taking risks to create jobs and we deeply appreciate that. Please keep it up, and we are going to do everything we can to try to keep the federal government off your back.

Chairman ROE. I thank you.

And I want to thank again our panel. You all did a tremendous job here today. I too am a small business owner, went out 30-something years ago, hung a shingle up, started my medical practice, and we grew it. The biggest asset you have in your business are your employees, no doubt about it. The worst day of my life is when my nurse decided to stop and go somewhere else. As a matter of fact, it got so bad I married one, my nurse, I did not want to lose her.

Anyway, you know, I see the over-reach of government and the cost of regulations and so forth. I mentioned at Vanderbilt. We did a field hearing—I have done these around the country and it is great to do it in a part of the country where I understand everybody, that is also good. When I go up north, it is little harder for me to understand them and them me.

But there was an agency that went into a surface mine and gave—a surface mine now—and gave an MSHA violation for a two-pronged toaster in the office. That is past ridiculous when that happens. And that is just somebody checking a box to maintain a job. That does not add anything to benefitsafety, it does not add anything. Look, we do need some rules and regulations and safety in places. I toured a number of factories last week, unbelievable the difference in the factories in this country today than there were when my dad worked in a factory from World War II on until he passed. So it is much safer, a much better work environment because for that factory, for my office, for your businesses, the single most important asset you have are the people working for you, no doubt about it. And we have had employees in our office that have been with us almost 40 years so we try to create a work environment because I understand how important those folks are.

I think this is just another assault by the federal government on small business. And look, our problem—we have a deficit in Washington, D.C. Let me tell you who can fix the deficit, I am looking at it right here. Business can fix the deficit. We raise the GDP from two to three, three and a half percent, the deficit goes away, jobs get created, people get to work, and we have more money coming into the federal government. We will solve the problem in doing that.

And Mr. Salgueiro, you mentioned about filling out that form—welcome to Medicare. I have been dealing with that for almost 40 years. If you think you have a problem filling forms out, you should try to be on the Medicare side.

I want to thank the people here at the Coastal Georgia Center and certainly the incredible hospitality you all have shown us in South Georgia. It would be a privilege for me to come back here again.

With no further comments, the meeting is adjourned.

[Whereupon, at 11:25 a.m., the Subcommittee was adjourned.]

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